

REPORTS
OF
Cases Argued and Determined
IN THE
COURT of CLAIMS
OF THE
STATE OF ILLINOIS

VOLUME 48

Containing cases in which opinions were filed and
orders of dismissal entered, without opinion
for: Fiscal Year 1996—July 1, 1995-June 30, 1996

SPRINGFIELD, ILLINOIS
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PREFACE

The opinions of the Court of Claims reported herein are published by authority of the provisions of Section 18 of the Court of Claims Act, 705 ILCS 505/1 *et seq.*, formerly Ill. Rev. Stat. 1991, ch. 37, par. 439.1 *et seq.*

The Court of Claims has exclusive jurisdiction to hear and determine the following matters: (a) all claims against the State of Illinois founded upon any law of the State, or upon any regulation thereunder by an executive or administrative officer or agency, other than claims arising under the Workers' Compensation Act or the Workers' Occupational Diseases Act, or claims for certain expenses in civil litigation, (b) all claims against the State founded upon any contract entered into with the State, (c) all claims against the State for time unjustly served in prisons of this State where the persons imprisoned shall receive a pardon from the Governor stating that such pardon is issued on the grounds of innocence of the crime for which they were imprisoned, (d) all claims against the State in cases sounding in tort, (e) all claims for recoupment made by the State against any Claimant, (f) certain claims to compel replacement of a lost or destroyed State warrant, (g) certain claims based on torts by escaped inmates of State institutions, (h) certain representation and indemnification cases, (i) all claims pursuant to the Law Enforcement Officers, Civil Defense Workers, Civil Air Patrol Members, Paramedics, Firemen & State Employees Compensation Act, (j) all claims pursuant to the Illinois National Guardsman's Compensation Act, and (k) all claims pursuant to the Crime Victims Compensation Act.

A large number of claims contained in this volume have not been reported in full due to quantity and general similarity of content. These claims have been listed according to the type of claim or disposition. The categories they fall within include: claims in which orders of awards or orders of dismissal were entered without opinions, claims based on lapsed appropriations, certain State employees' back salary claims, prisoners and inmates-missing property claims, claims in which orders and opinions of denial were entered without opinions, refund cases, medical vendor claims, Law Enforcement Officers, Civil Defense Workers, Civil Air Patrol Members, Paramedics, Firemen & State Employees Compensation Act claims and certain claims based on the Crime Victims Compensation Act. However, any claim which is of the nature of any of the above categories, but which also may have value as precedent, has been reported in full.

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Judge - February 26, 1987—January 15, 1993

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May 1, 1991—

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January 14, 1991—

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Springfield, Illinois
March 1, 1995—

CASES ARGUED AND DETERMINED
IN THE COURT OF CLAIMS
OF THE STATE OF ILLINOIS
REPORTED OPINIONS

FISCAL YEAR 1996

(July 1, 1995 through June 30, 1996)

(No. 80-CC-0867—Claim denied.)

MOHAWK MEDICAL CENTER, INC., Claimant, *v.*
THE STATE OF ILLINOIS, Respondent.

Opinion filed September 20, 1995.

SHELDON A. HARRIS, for Claimant.

JIM RYAN, Attorney General (CARA LE FEVOUR SMITH,
Assistant Attorney General, of counsel), for Respondent.

STATUTES—*Dangerous Drug Abuse Act—treatment of addicts—licensing requirements.* Section 14 of the Dangerous Drug Abuse Act prohibits any person from maintaining a facility or providing services for the treatment of addicts and abusers of dangerous drugs without first obtaining a license from the Illinois Dangerous Drug Abuse Commission.

PUBLIC AID CODE—*violations of Federal or State law—termination of vendor participation in Medical Assistance Program.* Pursuant to the Public Aid Code, a violation of Federal or State law by an owner or officer of a corporate vendor participating in the Medical Assistance Program is grounds for terminating the vendor's participation in the program.

SAME—*vendor's refusal to provide information to Department of Public Aid—termination of MAP eligibility.* The Public Aid Code provides that a medical vendor's participation in the MAP program can be terminated if the vendor fails to furnish information requested by the Department of Public Aid regarding payments for providing goods or services, or fails to furnish all information required by the department in connection with the rendering of services or supplies to public aid recipients by the vendor, his agent, employer or employee.

EXHAUSTION OF REMEDIES—*failure to exhaust administrative remedies rendered claim subject to dismissal.* To prevail in the Court of Claims, a Claimant must exhaust all other remedies and sources of recovery, and the Claimant pharmacy's failure to exhaust its remedies by appearing at an administrative hearing rendered its claim subject to dismissal.

VENDOR PAYMENT CLAIMS—*pharmacy's refusal to submit to audit and obtain license under Dangerous Drug Abuse Act—claim denied.* A claim by a pharmacy seeking payments for medical services rendered to Medical Assistance Program recipients was denied, since the Claimant's participation in the program had been terminated because the Claimant was treating narcotic addicts without the Dangerous Drug Abuse Commission license required by State law, and it willfully concealed material facts by refusing to submit to an audit of the invoices for which it sought payment.

OPINION

FREDERICK, J.

The Claimant, Mohawk Medical Center, Inc., filed its claim in the Court of Claims on December 6, 1979. The Claimant seeks One Hundred Three Thousand Nine Hundred Ninety-Seven & 49/100 Dollars (\$103,997.49) from the Illinois Department of Public Aid as a participant in the State's Medicaid program for claims that were disallowed by the department. This cause and the claim of Francisco Roque, M.D. (80-CC-0035) were consolidated for trial.

On May 16, 1987, the Respondent filed a consolidated department report. A first amendment to the consolidated department report was filed on May 30, 1990. Pursuant to section 790.140 of the Court of Claims Regulations (74 Ill. Adm. Code 790.140), the departmental report and amendment thereto are considered to be *prima*

facie evidence of the facts set forth therein. (*Memorial Medical Center v. State* (1988), 40 Ill. Ct. Cl. 73.) The record indicates copies of the original report and amendment were sent to Claimant's counsel as required. Also, pursuant to our regulations as stated in Court of Claims Regulations (74 Ill. Adm. Code 790.20), it is our practice to follow the Illinois Code of Civil Procedure except as provided in our rules. This is an important distinction as it affects the weight we give to requests to admit and department reports. Our rule on the *prima facie* evidentiary value of department reports is a specific rule in this Court and as such supersedes the Illinois Code of Civil Procedure in regards to requests to admit where there are conflicts. The *prima facie* facts established by the departmental report and the facts established by the testimony, exhibits and Requests to Admit are that Claimant, Mohawk Medical Center, Inc., seeks vendor payments totaling \$103,997.49 pursuant to section 11—13 of the Public Aid Code (Ill. Rev. Stat. 1979, ch. 23, par. 11—13, now 305 ILCS 5/11—13) for medical services which it alleges were invoiced to the Illinois Department of Public Aid ("IDPA") during 1978. The identity of such medical services was not indicated in Claimant's complaint. Subsequently, in response to Respondent's discovery requests, Claimant produced copies of IDPA-form drug invoices, representing total gross billings (before reduction to IDPA's maximum-payment ceilings for the drugs and other pharmacy items invoiced) of \$101,376.54. Claimant designated the services identified on these invoices as the intended subject of its claim in this proceeding.

Claimant, Mohawk Medical Center, Inc. (hereinafter referred to as "Mohawk"), is an Illinois corporation. Its sole shareholder and "administrator" is Alan Hartzman. Mohawk operated a facility at 832 West Madison Street in Chicago in 1977 and early 1978. The facility consisted

of a number of physicians' offices and a pharmacy, located within a single building.

Mohawk refused to identify the names of certain of its employees who performed their occupational duties within their building. Mr. Hartzman has identified Mr. Everett McCollough as the pharmacist who operated Mohawk's pharmacy. Mohawk's drug invoices (DPA form 215) produced by Mohawk as representing the goods which are the subject of this lawsuit identify the physicians who prescribed said goods (drug and other medical items) as follows: Timothy D. Brandt, Eng June Chang, Sidney Fabian, Calvin Irwin Lewis, Sinisa Momir Princevac, Francisco T. Roque, Ben Irwin Smaller and Zinod Savalal Zazeri. Mr. Hartzman has not supplied any other information to identify the names and professional credentials of these individuals or any other employees of Mohawk.

Dr. Roque had previously testified that, at all times relevant to this claim, he practiced at Mohawk as an employee of Mohawk. In his deposition, Dr. Roque stated that he was not salaried, and was unable to recall what arrangements he had with Mr. Hartzman concerning payment of compensation for his services at Mohawk.

IDPA staff were alerted in 1977 to possible MAP-participation violations by Mohawk and its physicians by the substantial number of drug invoices and physician statements for medical services received from the facility and its physicians which indicated that the IDPA recipients, whom they were treating, were drug addicts or abusers and that questionable medical practices may have been utilized in the treatment of such patients' illnesses.

An on-site review was conducted at Mohawk's facility on January 11, 1978, by an IDPA physician-consultant and a registered nurse, the latter being an employee of the department's Professional Standards Unit. The reviewers

inspected the medical records prepared by Mohawk physicians Roque, Lewis and Smaller, who were then still employed and practicing at the facility. The review team reported the following findings concerning Mohawk and its physicians and pharmacy:

1. Large numbers of patients are seen daily at Mohawk for minimal care.
2. Multiple prescriptions are given to patients during a visit.
3. Patients seen at Mohawk are receiving no specific treatment or service except for continuing or perpetuating a drug habit or dependency.

Based on the on-site reviewers' report, copies of medical records reviewed during the review, and the personal testimony of Dr. Timothy Brandt (former Mohawk physician), the State Medical Advisory Committee recommended at its January 14, 1978, meeting that Drs. Brandt, Chin, Lewis, Roque and Smaller be terminated as MAP-participants and that future invoices from Mohawk be disallowed and payment of them be denied by IDPA.

IDPA staff then attempted to initiate an audit of the business and medical records of Mohawk Pharmacy, the drug-dispensing portion of the Mohawk facility business. On March 21, 1978, an IDPA staff member telephoned Mr. Hartzman, informed him of the department's intention to conduct an audit of the pharmacy's records, and asked that Mr. Hartzman agree to a date for the audit to begin. Mr. Hartzman would not set a date until he had first discussed the matter with his attorney. He stated he would call the IDPA representative back that afternoon but did not do so.

On March 23, 1978, the IDPA representative again phoned Mr. Hartzman who responded that all matters

would have to be handled through his attorney. The representative then called David Blumenfeld, Mr. Hartzman's attorney. Mr. Blumenfeld responded that as the pharmacy had not received an IDPA payment on its drug invoices since mid-December, 1977, the status of the pharmacy would have to be clarified before Mohawk would allow the proposed audit of its records to proceed. Mr. Blumenfeld would not agree to set a date either for an initial interview (the first step in the audit procedure) or for the conduct of an audit of Mohawk's pharmacy records.

The IDPA representative reports having driven past the Mohawk facility on March 29, 1978, and observed that the facility was boarded up and apparently closed. IDPA's Bureau of Program Integrity staff received no communication from Mr. Hartzman or Mr. Blumenfeld concerning the proposed audit following the March 23, 1978, phone conversation.

On April 10, 1978, IDPA served upon Mr. Hartzman, as Mohawk's administrator, and upon Attorney Blumenfeld, Mohawk's registered agent, its notice of intent to terminate and right to hearing as then provided in section 12—4.25 of the Public Aid Code (Ill. Rev. Stat. 1979, ch. 23, par. 12—4.25, added by Public Act 80—2, eff. Dec. 1, 1977). The effect of this notice was to terminate Mohawk's status as a participant in IDPA's MAP. The stated grounds for termination were (a) that Mohawk and its employees had provided care and treatment to addicts without any of them having obtained the required Dangerous Drug Abuse Commission (IDDC) licenses to conduct such activities; and (b) that the pharmacy had refused to allow IDPA to conduct an audit of its records. All claims-processing activities by IDPA, with respect to invoices received from Mohawk, were suspended effective April 10, 1978, in accordance with statute.

On or about July 13, 1978, IDPA issued its final administrative decision which included Hearing Officer Marilyn Kuhr's memorandum of findings following the hearing held on Mohawk's administrative appeal.

On or about August 8, 1978, Mohawk commenced a Cook County Circuit Court action (Docket No. 78-L-15824) entitled Complaint for Declaratory Judgment, Injunction, Writ of Certiorari, Judicial Review of Administrative Proceedings and for Other Relief. The circuit court upheld IDPA's termination decision, ruling that it was not contrary to the manifest weight of the evidence presented. That judgment was affirmed by the First District Appellate Court in *Mohawk Medical Center, Inc. v. Quern*, filed June 4, 1988. 84 Ill. App. 3d 1026.

As a condition of its continuing entitlement to receive "FFP" (Federal financial participation, or Federal matching funds) in the costs of operating IDPA's Medical Assistance Program (MAP), the department is obligated to administer Illinois' program in compliance with Federal statutes and regulations. The Federal-State cooperative endeavor is reflected in a State plan, an agreement between the State and the Federal Department of Health and Human Services (DHHS, formerly DHEW), the terms of which are prescribed by Federal statute. See, e.g., 24 USCA, Sec. 1396a, *et seq.*, and compare section 12—4.5 of the Public Aid Code, Ill. Rev. Stat. 1979, ch. 23, par. 12—4.5.

All states' Medicaid plans are required to:

"* * * provide for agreements with every person or institution providing services under the State plan under which such person or institution agrees (A) to keep such records as are necessary to disclose fully the extent of the services provided to individuals receiving assistance under the State plan, and (B) to furnish the State agency (IDPA) or the Secretary [of HHS] with such information, regarding any payments claimed by such person or institution for providing services under the State plan, as the State agency or the Secretary may from time to time request." 42 USCA, sec. 1396a(27), amended Jan. 2, 1968, by Public Law 90—248.

The same provider (medical vendor) requirement was, in 1977, the subject of Federal regulation, section 450.21 of Title 42, Code of Federal Regulations (CFR), which provided that each State's Medicaid plan must require that:

“Every person or institution [i.e. every medical vendor] providing services under the State plan [must agree] (a) [t]o keep such records as are necessary fully to disclose the extent of the [medical] services provided to individuals receiving assistance under the State plan; and (b) [t]o furnish the State agency [here, IDPA] with such information, regarding any payments claimed by such [vendor] for providing services under the State plan, as the State agency may from time to time request.” 34 FR 14649, Sept. 20, 1969; redesignated at 42 FR 52827, Sept. 30, 1977.

By Federal law, this required State-plan provision is one of the many terms and conditions which a vendor agrees to, upon the vendor's request to be enrolled to participate in IDPA's MAP. Mohawk Medical Center, Inc., a retail drug store located at 832 W. Madison St., Chicago, Illinois, submitted to IDPA its MAP enrollment application in December, 1976, bearing the signature of Al Hartzman as owner or corporate officer. In so doing, Mr. Hartzman and Mohawk agreed to comply with all applicable Federal and State laws and regulations, and to comply also with the participation requirements explained in IDPA's *MAP Handbook for Pharmacies*, issued in January, 1977, to all participating pharmacy-vendors.

Page 30 of the *Handbook for Pharmacies*, Topic 148 is entitled “Audits” and explains that “[a]ll services for which charges are made to [IDPA] are subject to audit”; and that one of the purposes of such audits is to enable IDPA to monitor MAP-participating health care facilities and services as required by Federal regulations and State law. Such audits may relate to all of the vendor's services charged (invoiced) for payment by IDPA and may address all such charged services, whether or not previously paid by the department. If an audit reveals that the vendor has submitted incorrect charges, and thus that incorrect

payments were made by IDPA, the vendor must make restitution through recoupment procedures. A necessary implication of this agreed condition of the vendor's participation is the department's right to audit its records also as they relate to suspended IDPA invoices which the vendor has submitted for payment, i.e. those invoices which IDPA has received from the vendor but not yet paid.

IDPA Professional Standards review staff had been allowed some access to certain physicians' medical charts for certain patients during their January 1978, visit to the Mohawk facility. That review-visit had focused upon the nature and quality of "treatment" which such patients were receiving from Mohawk's physicians. The audit, proposed to begin in March, 1978, was intended to review the Mohawk's pharmacy's records, as those records related to the drug invoices, both paid and unpaid, which Mohawk had submitted to IDPA, for goods dispensed during the period beginning with its MAP-enrollment (December 1976) through its MAP-termination in April of 1978. The proposed audit would have addressed the pharmacy's back-up records (script written by Mohawk's physicians, records of drugs and other items actually dispensed independent of Mohawk's DPA-form drug invoice billings), records of Mohawk's wholesale purchases of drugs and related pharmacy items, any available inventory records of drugs and items in stock, etc. Such audit would thus have included a review of Mohawk's back-up support for this claim to determine if such records supported Mohawk's invoices for the 32,798 separate drug and related items allegedly scripted and dispensed during the 43 business days covered by the \$101,376.54 in DPA invoices which are the subject of Mohawk's claim.

The pharmacy audit of Mohawk's records pertaining to drugs and related items invoiced to IDPA was never

permitted to take place. Mohawk and Mr. Hartzman have produced no evidence that their pharmacy dispensed 2,044 containers of “drug No. 00746620 Selsun Blue Shampoo Lotion” during this 43-day period as invoiced to IDPA. No documentary support has been offered for the 1,513 bars of 00722300 Lowila Cake 3.75 oz. allegedly dispensed during this same period as invoiced or to support 2,815 containers of 50008052 Alcohol-Rubbin, 70%, 480 cc., 684 items of 60009924 elastic bandage, 940 tubes of 60009916 dermatologic preparations, and 2,520 items (37,971 tablets) of 50000763 Hydroxyzine Tab/Cap 100 mg., unusually large dosages of this sedating drug. These are only some of the items and quantities of items which Mohawk and Hartzman invoiced to IDPA for payment as having allegedly been sold by their pharmacy during the 43 specific days of service during December, 1977, through March 1978.

One of the many factors which IDPA audit staff look for in conducting a pharmacy vendor audit is the extent of correlation between volume and detail of the vendor’s wholesale purchases and inventory and the volume and detail of its drug billings to IDPA. Another factor involves a comparison of the vendor’s wholesale purchases of drugs having a known potential for abuse, whether alone or in combination with other drugs, against the quantity of sales of such drugs as invoiced to IDPA for payment. Such comparisons are impossible to make when the vendor refuses to allow an audit to occur.

Mr. Hartzman denied IDPA all access to such records while Mohawk was a MAP participant and such refusal was a sufficient ground for Mohawk’s removal from the program.

The Illinois Dangerous Drugs Commission (IDDC) was established by the General Assembly, through the

Dangerous Drug Abuse Act, to implement and coordinate the efforts of the private and public sectors in more effectively treating and rehabilitating those Illinois citizens who were suffering the effects of addiction to or abuse of harmful drugs (Ill. Rev. Stat. 1977, ch. 91½, par. 120.1 *et seq.*). Section 14 of the Act prohibited any person from establishing, opening, conducting, operating or maintaining a facility, or otherwise providing any services, “for the treatment, care, rehabilitation * * * of addicts and abusers of dangerous drugs without first obtaining a license from the [IDDC].” Criminal penalties are provided for violations of the Act, including the operation of such a facility, or a physician’s practice of medicine “significantly devoted to the treatment, care, rehabilitation * * * of patients suffering from such afflictions.” Neither Dr. Roque nor the Mohawk pharmacy had ever obtained the required IDDC license to engage in the activities and supply the goods and services which are the subjects of this claim.

It is apparent that the same license requirement, as a condition to Mohawk’s opening of its facility, was just as applicable to its pharmacy operation. A very significant portion of the pharmacy’s IDPA-invoiced sales were of drugs in grossly excessive quantities and having well-known abuse potential which the pharmacy was dispensing to known drug abusers.

The appellate court’s November 1980 opinion issued to Dr. Roque’s appeal (*Roque v. Quern*) (1980), 90 Ill. App. 3d 1015, 414 N.E.2d 161, 46 Ill. Dec. 439), describes the regulatory and licensure scheme found in the comprehensive provisions of the Act for the purposes of controlling abusers’ access to abusable drugs and of discouraging profiteering in drug-related transactions to the detriment of such abusers by members of the health care

community and others. Mohawk pharmacy's inventory was the source of the drugs which Dr. Roque and the other seven Mohawk physicians were prescribing for their abuser-patients.

IDPA conducted a complete, computerized analysis of all of the data reported by Mohawk on each of its drug invoices which are the subject of this claim. The analysis indicates that during a period of only 43 business days (December 15, 20 and 22, 1977; January 3 through 17, 19, 21 and 23 through 31, 1978; February 6, 7, 12, 16, 18, 20, 21, 22, 25 and 27, 1978; and March 2, 3, 4 and 6, 1978), Mohawk alleges that it filled a total of 32,798 prescriptions based upon script written by the eight Mohawk physicians previously named herein consisting of drugs and other goods allegedly dispensed to 3,601 different patients over the course of 4,993 different patient-visits as determined by the "date of service" on which a given pharmacy item was allegedly dispensed to a named patient as reported in Mohawk's DPA-form 215 invoices.

The analysis indicates the quantities of Pentazocine (Talwin) and Tripeleminamine HCL tablets (PBZ) dispensed by Mohawk as reflected in its IDPA invoices. Mohawk charged for 4,944 separate prescriptions for Talwin, consisting of 74,659 tablets dispensed. During the same period, Mohawk charged for 4,898 separate prescriptions for PBZ (Tripeleminamine), consisting of 73,513 tablets. Mohawk provided these drugs over the course of 4,993 patient visits to a total of 3,601 patients. Thus, during the 43 business days covered by the drug invoices here in issue, an average patient-visit resulted in the pharmacy's dispensing 0.99018 Talwin prescription (averaging 15.1009 tablets or capsules per prescription) and 0.98097 Tripeleminamine (PBZ) prescription (averaging 15.0088 tablets or capsules per prescription).

Also dispensed during this period were the following antihistamines: Hydroxyzine, 2,520 prescriptions of 100 milligram tablets (total of 37,971 tablets dispensed) as well as 761 prescriptions of 50 mg. tablets (total of 10,711 tablets), and lesser quantity of 25 mg. tablets; Promethazine (Phenergran), 139 prescriptions; as well as the following anti-depressants: Amitriptyline, 1,022 prescriptions of 50 mg. tablets (total of 14,480 tablets dispensed), and lesser quantities of 25 mg. tablets; Doxepin, 545 prescriptions of 10 mg. tablets (total of 3,888 tablets dispensed), and lesser quantity of 5 mg. tablets. Also dispensed were a number of cough preparations with high alcohol content such as: Dimetane expectorant, 445 prescriptions and Benylin expectorant, 17 prescriptions.

The significance of Mohawk's drug-dispensing practices as compared with the needs of its clientele becomes apparent when viewed in the context of addicts' use of the drugs which Mohawk was dispensing.

Talwin (Pentazocine) is a potent narcotic analgesic prescribed for the relief of moderate to severe pain. Since its introduction in the American pharmaceutical market in 1967, Talwin's ability to produce psychic craving, euphoria, tolerance and physical dependence has been well-documented. Since 1976, heroin addicts in the Chicago area have used Talwin in combination with other agents for its euphoric effects. PBZ (Tripeleminamine), an antihistamine, is a particularly popular drug for use in such combinations with Talwin to achieve this desired effect.

"T's and B's," "T's and Blues," "Tops and Bottoms," "Toms and Bettys," and "Tricycles and Bicycles" are all slang terms for the Talwin-PBZ combination. "Blues" is derived from the light-blue colored Tripeleminamine tablets, and "T's" from Talwin. Users inject varying ratios of Talwin and PBZ tablets until the desired subjective or

euphoric effects are obtained. PBZ reportedly delays the onset and prolongs the duration of the Talwin-induced euphoria. The tablets are dissolved in a small quantity of water and the solution is filtered and then injected intravenously. Addicts experience a rush, reportedly indistinguishable from that of heroin, of 5 to 10 minutes duration, followed by a euphoria which is prolonged for several hours by the drug mixture. Then, the addicts experience restlessness, irritability, abdominal cramps, general malaise and other symptoms as described by Dr. Roque in his testimony. Repeated injections produce repeated rushes.

“T’s and Blues,” in combination, are sold as a set—one tablet of each drug—that costs \$10 to \$12 on the street. The combination is used primarily as an inexpensive substitute for heroin when the latter is in short supply or of poor quality. Some users report a preference for “T’s and Blues” over heroin, owing to a more consistent high achieved with this mixture. According to pharmacologic theory, the intravenous administration of Talwin should worsen, not relieve, the effects of an addict’s withdrawal from heroin dependence because Talwin acts as a narcotic antagonist. Nevertheless, the symptoms of withdrawal can sometimes be relieved by using “T’s and Blues.” Antihistamines, such as those dispensed by Mohawk, are often combined with Talwin. Alcohol is frequently ingested by users in conjunction with “T’s and Blues” injections to modify the “speedy” effects. Sedative agents, including anti-depressants, are used by addicts to counter the severe anxiety, depression, panic and inability to relax associated with the down side of narcotic use.

Mohawk’s drug-dispensing pattern for these 43 days of invoiced services correlates closely with the “T’s and Blues” use of Mohawk’s patients. Virtually every patient

received Talwin and either PBZ or another antihistamine. Approximately 50 percent of the patients received an antidepressant and 1 in 10 received a cough syrup of high alcoholic content. Talwin mixed with the antihistamine produced the high, with ethanol ingested to stabilize the stimulatory effects. Antidepressants blunted the after-effects.

Mohawk and its physicians were among the Chicago-area pharmacies who had attracted IDPA's attention, beginning in 1977 and 1978, with MAP invoices reflecting grossly excessive prescriptions of drugs with well-known abuse potential and physicians' invoices showing services consisting of perfunctory examinations followed by the writing of script for such drugs. It was just such practices which the Illinois Dangerous Drug Commission was attempting to control and eventually eliminate.

These prescribing and dispensing practices cannot be said to represent any legitimate form of treatment nor do they serve to provide any medical benefit to Mohawk's patients.

The Illinois Department of Public Aid (IDPA) pays medical vendors for certain medical services rendered to those persons whom IDPA has determined to be eligible for medical assistance under the Medical Assistance Program (MAP) which IDPA administers. When such persons have been determined to have satisfied all such requirements, they are found to be recipients of medical assistance. Payments to medical vendors are conditional upon the satisfaction of IDPA's requirements, including:

- a. the vendor has been enrolled as a MAP participant;
- b. the services for which the vendor is billing IDPA have been rendered to a person who, at the time of the service, was an eligible recipient;

- c. the services for which the vendor is billing IDPA were services for which IDPA has agreed to pay in the program under which the recipient was eligible (“covered services”);
- d. where prior approval for such a particular service is required and the vendor is billing for such a service, that the prior approval has been validly obtained;
- e. the vendor has properly prepared its invoices (bills and rebills) and has timely submitted such invoices to IDPA in compliance with IDPA’s requirements.

Each of these requirements is established by Federal and State law and regulations; each of these requirements is also explained in detail in IDPA’s MAP handbooks for providers, which handbooks IDPA has distributed to all vendors who participate in the MAP.

Compliance with these requirements is essential to the efficient processing of invoices. IDPA receives and adjudicates an average of 3.2 million medical service claims each month. These invoices represent services to many of the 1.1 million Illinoisans who are IDPA recipients of medical assistance. A vendor’s failure to prepare its invoices properly and submit them within the required time periods not only makes it increasingly difficult and expensive for IDPA to process claims accurately, it also may jeopardize the IDPA’s ability to receive from the federal government the matching funds available for many of IDPA’s proper payments. *Memorial Medical Center v. State* (1988), 40 Ill. Ct. Cl. 73.

At no time during the operation of Claimant’s clinic did Claimant apply for, obtain or possess a license to operate a facility for the care, treatment or rehabilitation of

addicts and abusers of dangerous drugs, as required by the provisions of the Dangerous Drug Abuse Act. (Ill. Rev. Stat. 1977, ch. 91½, par. 120.1 *et seq.*) During the period of December, 1976, through March of 1978, none of the physicians employed by Claimant at the Mohawk Medical Center possessed a license to care for, treat or rehabilitate addicts and abusers of dangerous drugs, as required by the Dangerous Drug Abuse Act. During the course of the proceedings in this case, Claimant did produce IDPA form drug invoices showing a total claim of \$101,376.54. The Claimant claims it dispensed pharmaceuticals and medical goods to 3,601 IDPA recipients over the course of 4,993 alleged patient-visits.

The Respondent did not serve Claimant with a written notice for an audit by IDPA. In *Mohawk Medical Center, Inc. v. Quern* (1988), 84 Ill. App. 3d 1026, the appellate court affirmed the Illinois Department of Public Aid's termination of Mohawk as a vendor of medical goods and services under the Medical Assistance Program.

In March of 1978, Mohawk ceased its operations. Mohawk's claim for vendor payments was denied by notice letter on October 29, 1979. The notice stated that, "The basis for this decision include the pharmacy's refusal to allow a Department of Public Aid audit and the fact that Mohawk Medical Center, Inc. was closed by the Department of Public Health for operating without a license."

The memorandum decision of the hearing officer is crucial to the determination of this claim and is therefore set out here in its entirety with Mohawk substituted for Respondent so that confusion can be avoided.

"Mohawk Medical Center, Inc. Pharmacy received a notice dated April 10, 1978, from the Illinois Department of Public Aid stating an intention to terminate its participation as a vendor in the Medical Assistance Program, Ill. Rev. Stat., 1977 and Supp. 1978, Ch. 23, Sec. 5—1, *et seq.* A hearing to be

conducted under the 'Rules for Medical Vendor Administrative Proceedings' (effective December 27, 1977 and amended May 26, 1978) promulgated by the Department under Ill. Rev. Stat. 1977 and Supp. 1978, Ch. 23, Sec. 12—4.25, 12—4.26, 12—4.27 and 12—13, was scheduled for May 8, 1978. Both Mr. Alan Hartzman and Mr. David Blumenfeld as registered agent received copies of this notice.

There were two stated grounds for termination. One was that an 'owner and/or corporate officer' of the pharmacy, Mr. Alan Hartzman, was an administrator of a medical center at the same location which treated narcotic addicts without a Dangerous Drug Abuse Commission license alleged to be necessary under Ill. Rev. Stat., 1977, Ch. 91½, Sec. 120.14. If the Department's allegations were true, either the medical center or Mr. Hartzman would be in violation of state law. If Mr. Hartzman himself were required to have a license, which he failed to obtain, and if he were proven to be an officer or 5%-or-greater owner of the Respondent pharmacy, then the Respondent pharmacy could be terminated under Department rule 4.51(i)(1) because 'an officer or person owning (directly or indirectly) 5% or more of the share of stock or other evidences of ownership in a corporate vendor * * * has engaged in practices prohibited by applicable Federal or State law or regulation * * *.' If the medical center itself were shown to be a vendor as defined in Section 4.22 of Department rules and was required to have a license which it did not obtain, and Mr. Hartzman were shown to be its administrator while having the same incidences of ownership in the Respondent pharmacy as discussed above, then the Mohawk pharmacy could be terminated under Section 4.51(i)(2) because 'an officer or person owning (directly or indirectly) 5% or more of the shares of stock or other evidences of ownership in a corporate vendor * * * was a person with management responsibility for a vendor at the time that such vendor engaged in practices prohibited by applicable federal or State law or regulation * * *.' The second ground for termination in the Department's notice is that the Respondent pharmacy refused to allow a Department audit of the pharmacy, and is thus in violation of Department rule 4.51(d) because it 'failed to furnish any information requested by the Department regarding payments for providing goods or services, or has failed to furnish all information required by the Department in connection with the rendering of services or supplies to recipients of public assistance by the vendor, his agent, employer or employee.' The above two grounds for termination fall within the purview of Ill. Rev. Stat., 1977 and Supp. 1978, Ch. 23, Sec. 12—4.25(A)(d) and (h).

The May 8, 1978, session scheduled by the above notice was postponed because Mohawk's counsel arrived more than an hour late, unaccompanied by Mr. Alan Hartzman, whom Department counsel had asked to call as an adverse party witness. He was unable to proceed, stating that he was in the middle of a jury trial and had 'called a recess' specifically to appear here. It was clear he could not present Mohawk's case but wanted the Department to present its case. Department counsel had one witness available, had subpoenaed another witness who had not appeared, and had expected to call Mr. Hartzman as his first witness. Mohawk's counsel was adamant that Mr. Hartzman be called only after the Department had presented the remainder

of its case, a question the hearing officer said would be decided at a subsequent session at which both parties were to have all witnesses available and to be ready to proceed and conclude the matter. That session could not be scheduled for more than a month because of Mohawk's counsel's trial calendar, since he stated that his current jury trial would run four weeks.

At the June 12, 1978, session, Mohawk failed to appear. Department counsel was asked to call Mohawk's counsel's office approximately one-half hour after the scheduled starting time and represented for the record that his office staff said they had not heard from him all morning. After another brief wait, Department counsel presented his case, with the exception of questioning Mr. Hartzman who had not appeared. He asked that Mohawk be terminated both on the basis of his evidence under Department rule 4.51(d) and (i) and under rule 9.60, which reads in pertinent part: 'If the venter without good cause, fails to appear at a hearing or formal conference scheduled by the Department, the Department's action or decision and the grounds asserted as the basis therefor shall be a final and binding administrative determination.'

Several hours after the conclusion of this session, both Mohawk's counsel and his secretary called this hearing officer to ask for another session, without giving any reason for the request. Mohawk's counsel then submitted a motion which stated that Department counsel had previously been informed by both himself and his secretary of the need for a continuance and had promised to schedule another date. The stated reason for the continuance was that Mohawk's counsel had been unable to go ahead 'on this date (June 12, 1978) as said Robert E. Gorgon was starting a trial in Waukegan in the matter of *Larson v. Libertyville*, 75-L-462,' although this trial ultimately did not go ahead as scheduled. Mohawk asks for a transcript of the Department's case and the opportunity to present a defense to that case. Department counsel denies ever being approached about a continuance prior to the June 12, 1978, session.

Since either the Chief or designated hearing officer decides whether or not to grant continuances, Department scheduling letters explicitly direct parties to call hearing officers if a continuance is necessary. Since this hearing officer was never contacted, it does not appear that Mohawk ever requested a continuance. Department counsel would have little reason to ignore such a request since Mr. Hartzman was to be his first witness. The 'scheduling' problems raised at both sessions appear to be directed toward avoiding making Mr. Hartzman available as a witness until the Department had presented all other evidence. If Mohawk's counsel's Waukegan trial did not go ahead as scheduled, there was no reason for him not to attend the June 12, 1978, session. Further, it does not appear that a trial was even scheduled as claimed. The attached certified copies of orders entered by the Lake County Circuit Court in *Larson v. Libertyville*, 75-L-462, on the nearest dates (June 7 and 16, 1978) show that the case had just been transferred to a new judge and new parties were being brought into the action.

Therefore, the hearing officer finds that Mohawk failed to appear 'without good cause' and under Department rule 9.60 has no discretion to consider either the Department's presentation or any other evidence since the

grounds stated in the Department's notice of termination by rule 'shall be a final and binding administrative decision.'"

The Circuit Court of Cook County affirmed the department's decision as not being contrary to the manifest weight of the evidence. The First District Appellate Court affirmed the judgment. (84 Ill. App. 3d 1026.) Pursuant to Department Rule 4.51(d) and (i) and under Rule 9.60, the two grounds asserted for the basis of the termination became final and binding administrative determinations.

Claimant seeks to relitigate these final determinations in this Court. We decline to do so. We find that Mr. Alan Hartzman, an owner and/or corporate officer of the pharmacy, was the administrator of a medical center at the same location which treated narcotic addicts without a Dangerous Drug Abuse Commission license necessary under the Dangerous Drug Abuse Act. (Ill. Rev. Stat. 1977, Ch. 91½, par. 120.14.) This is a violation of State law. We further find that the Claimant pharmacy refused to allow a department audit of the pharmacy and is therefore in violation of Department Rule 4.51(d). The above two grounds for termination fall within the purview of Ill. Rev. Stat., 1977 and Supp. 1978, Ch. 23, section 12—4.25(A)(d), (H) of the Public Aid Code. Ill. Rev. Stat. 1977, ch. 23, par. 12—4.25(A)(d), (h).

The Claimant should have contested these issues at the administrative hearing. If the Claimant had submitted to an audit or prevailed at the termination hearing, they may very well have prevailed and obtained compensation. We will never know because Claimant refused to submit to an audit and failed to attend the termination hearing. To prevail in this Court, a claimant must exhaust all other remedies and sources of recovery, whether administrative or judicial. Clearly this Claimant failed to exhaust his

remedies. (*Watkins v. State* (1992), 45 Ill. Ct. Cl. 203; *Lyons v. State* (1981), 34 Ill. Ct. Cl. 268; *Fowler v. State* (1982), 44 Ill. Ct. Cl. 431; *University of Chicago Professional Services Offices v. State* (1990), 42 Ill. Ct. Cl. 277.) In *University of Chicago Professional Services Offices v. State, supra*, at 281, this Court held that full compliance with the Department of Public Aid rules and handbook is a prerequisite for exhaustion of remedies. Claimant has clearly failed to exhaust its remedies and for that reason alone this claim is subject to dismissal.

Claimant argues it is not collaterally estopped to raise the issue of proper audit procedure. Claimant states the only findings in the July 14, 1978, memorandum recite Mohawk's failure to appear without good cause thereby making the notice of termination finding. Claimant fails to consider that the grounds stated in the notice became a final decision by Claimant's failure to appear at the hearing. The time to have litigated the audit issue was at the administrative hearing. This Court's exhaustion of remedies law is clear that you cannot bypass a remedy and then try to relitigate the issue in the Court of Claims. Claimant failed to litigate the audit issue in the administrative proceedings where it could have been raised.

Beyond the exhaustion of remedies basis, the Claimant is collaterally estopped from raising the issue in the Court of Claims. Collateral estoppel applies upon proof that the issue decided in the prior adjudication is identical with the one presented in the current suit, the prior suit was terminated with a final judgment on the merits, and the party against whom the estoppel is asserted was a party or in privity with a party in the prior suit. (*In Re Nau* (1992), 153 Ill. 2d 406.) Mohawk was a party to the administrative proceeding involving termination in the MAP program. The issue of the audit was decided at the

administrative decision by virtue of the fact that Claimant's failure to appear made the grounds stated in the notice of termination a final administrative decision. The administrative action ended in a final judgment of termination which was affirmed by the Circuit Court of Cook County and the First District Appellate Court.

We, therefore, find Claimant failed to allow an audit and Claimant was not properly licensed. There is no question that Claimant was properly terminated and that Claimant should have been terminated as a vendor under the State program. Claimant argues, however, that even if Mohawk was rightfully terminated, they would be entitled to payment for pharmaceuticals sold prior to termination. The argument by Claimant fails to take into account the provision of section 12—15 of the Public Aid Code, which had an effective date of December 1, 1977, and section 12—15.1, which also had an effective date of December 1, 1977. Section 12—15 states:

“§12—15. Vendor Fraud and Abuse—Civil Recoveries. Any person, firm, corporation, association, agency, institution or other legal entity (other than an individual recipient) that willfully, by means of a false statement or representation, or by concealment of any material fact, or by other fraudulent scheme or device on behalf of himself or others, obtains or attempts to obtain benefits or payments under this Code to which he or it is not entitled, shall be liable for repayment of any excess benefits or payments received, and, in addition to pay any other penalties provided by law, civil penalties of (1) interest on the amount of the excess benefits or payments at the maximum legal rate in effect on the date the payment was made to said person, firm, corporation, association, agency, institution or other legal entity for the period from the date upon which payment was made to the date upon which repayment is made to the State, (2) an amount not to exceed 3 times the sum of \$2,000 for each excessive claim for benefits or payments.

Any person, firm, corporation, association, agency, institution or other legal entity (other than an individual recipient) who, without intent to violate this Code, obtains benefits or payments under this code to which he or it is not entitled, or in a greater amount than that to which he or it is entitled shall be liable for any excess benefits or payments received.

Civil recoveries provided for in this Section may be recoverable pursuant to court proceedings initiated by the Attorney General.” Added by P.A. 80—2, 2nd Sp. Sess., Sec. 2, eff. December 1, 1977.

Section 12—15.1 of the Public Aid Code states:

“§12—15.1. Vendor Fraud and Kickbacks—Penalty. Any person, firm, corporation, association, agency, institution, or other legal entity that willfully, by means of a false statement or representation, or by concealment of any material fact, or by other fraudulent scheme or device on behalf of himself or others, obtains or attempts to obtain benefits or payments under the Public Aid Code to which he or it is not entitled, or in a greater amount than that to which he or it is entitled; or who solicits, offers or receives any kickbacks or bribes in connection with the furnishing of medical assistance; or who solicits, offers or receives any rebate of any fee or charge for referring any individual to another person for the furnishing of medical assistance under the Public Aid Code shall be guilty of a Class 2 felony.” Added by P.A. 80—2, 2nd Sp. Sess., Sec. 2, eff. Dec. 1, 1977.

If the State can recover overpayments, they can surely defend non-payments for claims not properly substantiated.

We find that the Claimant willfully concealed material facts by refusing to submit to an audit for those invoices for which it seeks payment in this Court. We also find that by concealment of material facts, Claimant is trying to obtain payments under the Public Aid Code to which it is not entitled for the reasons heretofore stated. To assist Claimant in its attempt to achieve its ill-gotten gains would verge on being criminal. The required provider agreement required by title 43 Public Health Chapter IV-Health Care Financing Administration, section 431.107(b)(2) required the provider to furnish the agency with any information they may request regarding payments claimed by the provider furnishing services. This Claimant failed and refused to do so.

Based on the evidence of the medications provided, the lack of proper licensure, and the care provided at Mohawk, it is no wonder Claimant did not want to be audited.

We also find that because of the number of addicts treated at Mohawk that the Claimant was in violation of its requirement to have a license under the Illinois Dangerous Drug Abuse Act. On that basis alone, this claim

should be denied. Neither Dr. Roque nor any of the other physicians working at Mohawk Medical Center were licensed under the Illinois Dangerous Drug Abuse Act nor was the center itself so licensed.

Finally, section 14 of the Court of Claims Act (705 ILCS 505/14) states whenever any fraud against the State of Illinois is practiced or attempted by any Claimant in the proof, statement, establishment or allowance of any claim or any part of any claim, the claim or part thereof shall be forever barred from prosecution in the Court. Claimant, since the initial submission of the bills at issue, has attempted to avoid an audit of those bills, has practiced without the proper licenses, and attempted to obtain payment by willfully failing to provide the information requested at the entrance visit. As the Claimant was not properly licensed, we find by clear and convincing evidence that a payment for services to an improperly licensed provider would constitute fraud. Section 111(12) of the provider participation requirements requires a provider to furnish to the Department on the form and manner requested, pertinent information regarding services for which charges are made. Section 111(15) requires the provider to comply with the requirements of applicable Federal and State law and the participant shall not engage in practices prohibited by applicable Federal and State law. It would be a fraud on this Court to pay Claimant while Claimant willfully violates the requirements of participation in the program that Claimant agreed to do.

For the foregoing reasons, it is the order of this Court that the claim of Claimant be and hereby is denied.

(No. 81-CC-1746—Claim dismissed.)

TOLEDO, PEORIA & WESTERN R.R. CO., Claimant, *v.*
THE STATE OF ILLINOIS, Respondent.

Opinion filed August 25, 1994.

Order filed August 17, 1995.

KAVANAGH, SCULLY, SUDOW, WHITE & FREDERICK,
P.C. (JULIAN CANNELL, of counsel), for Claimant.

JIM RYAN, Attorney General (MICHAEL TAYLOR, As-
sistant Attorney General, of counsel), for Respondent.

REAL PROPERTY—*what constitutes abandonment of easement.* Mere non-use of an easement acquired by grant does not, of itself, constitute abandonment and therefore an extinguishment of the easement, but rather, to constitute abandonment of an easement created by grant, there must be non-use and an intention of the owner of the easement never again to resume possession, and the Claimant has the burden of proving that the easement has been abandoned.

SAME—*State did not abandon easement for highway purposes.* Despite evidence that representatives of the State had prepared a preliminary vacation plat for a portion of the Claimant's land in which the State had an easement, and notwithstanding discussions between the parties concerning a possible land trade, the Claimant failed to prove that the State intended to abandon the easement.

SAME—*use for which easement is granted determines its character.* The use to which an easement is devoted or for which it is granted determines its character, and its owners' rights are paramount to the extent for which it is necessary to carry out the purpose of the easement, but an easement for use as a right of way cannot be enlarged or extended by unauthorized acts.

SAME—*State's lease of Claimant railroad's land for parking lot was not allowable use of easement.* Where the State had an easement for highway purposes over the Claimant railroad's property, but leased a portion of the land to a neighboring motel for a parking lot, the lease violated the terms of the easement, the State was found to be liable to the Claimant for the rents received from the motel owners, and the cause was remanded for a determination of the actual amount of rent received by the State.

PRACTICE AND PROCEDURE—*claim dismissed for want of prosecution.* The failure of the Claimant railroad or its successor in interest to make a good faith effort to pursue their claim against the State resulted in the claim being dismissed for want of prosecution.

OPINION

FREDERICK, J.

Claimant, Toledo, Peoria & Western Railroad Company,

a corporation, filed its claim in the Court of Claims on February 13, 1981. The complaint, sounding in tort, sought an accounting for rents and profits from the Respondent's commercial use of part of Lot J. Lot J is a parcel of land upon which Respondent had obtained an easement from Claimant for highway purposes.

The Claimant filed an amended complaint on October 3, 1984, which additionally prayed for a declaratory judgment that the State's interest in Lot J had been extinguished by operation of law. In the alternative, count II prays for damages against Respondent for the wrongful taking of the railroad's fee interest in Lot J.

The parties agreed that the common law report of proceedings before the United States District Court, submitted by the Claimant, would be the only evidence considered by the Court of Claims in deciding this case.

The case was originally filed by Claimant in the tenth judicial circuit of the State of Illinois. That cause was dismissed on jurisdictional grounds. The Claimant then filed a civil rights action under title 42 U.S.C. Sec. 1983 against the Illinois Department of Transportation in the United States District Court for the Central District of Illinois. The district court found in favor of Claimant on the issue of abandonment. However, the United States Appellate Court, Seventh Circuit reversed the judgment on the grounds that the district court lacked subject matter jurisdiction over the suit. The Seventh Circuit held that the availability of a remedy in the Illinois Court of Claims satisfied the requirements of the fifth and fourteenth amendments. The Claimant then proceeded in this Court.

Preliminarily, we find that the Illinois Court of Claims does have jurisdiction to decide this case. This Court has

found jurisdiction in numerous cases involving declaratory judgments, title to land, and damages related to land. (*Ross v. State* (1990), 43 Ill. Ct. Cl. 20 (damages related to potential acquisition of land); *Gordon v. State* (1991), 43 Ill. Ct. Cl. 146 (determination of ownership of property-adverse possession); *Bohne v. State* (1979), 33 Ill. Ct. Cl. 181 (resale of land after condemnation); *Hicks v. State* (1978), 32 Ill. Ct. Cl. 529 (reformation of deed); *Orr Construction v. State* (1975), 30 Ill. Ct. Cl. 266 (declaratory relief).) While the complaint states the Respondent is the Department of Transportation, State of Illinois, the State of Illinois is the true party in interest as the decision required affects directly the property of the State over which the Court of Claims has exclusive jurisdiction. *Sass v. Kramer* (1978), 72 Ill. 2d 485. *Gordon v. Department of Transportation* (1982), 109 Ill. App. 3d 1071.

The Facts

The facts have for the most part been agreed to by the parties. The dispute concerns a piece of land hereinafter referred to as “Lot J.”

Lot J is a 3.38 acre triangular lot fronting on Camp Street in East Peoria, Illinois. In 1956, Claimant conveyed an easement for highway purposes to all of Lot J to the State of Illinois for \$6,000. Pursuant to the construction of Interstate Highway I-74, the eastern tip of the triangular lot was used as road bed for the relocation of Camp Street. At the time the State acquired its easement in Lot J, the land’s contour was a steeply sloped hillside. The toe of the slope was adjacent to Camp Street and was supported in part by a concrete retaining wall. Between 1956 and 1963, both the State and the Claimant removed materials from Lot J. The lot’s present topography, which was created by the parties’ removal of materials, is relatively level with an approximate 9% grade running from

the toe of the Fondulac Street abutment toward Camp Street.

The Claimant pursued negotiations with the State for the release of the State's easement in Lot J beginning in 1963, except for the .25 acre triangle used as a road bed for the relocation of Camp Street. In February, 1965, the State prepared a plat of vacation for part of Lot J which reserved access to the toe of the Fondulac Drive abutment and additional right-of-way along Camp Street. The vacation plat was designated "preliminary" and "proposed for land trade," and includes 2.05 acres of the original 3.38 acres dedicated to the State. Claimant's witnesses testified that the possibility of a land trade for Lot J had been discussed with State personnel. Mr. John Harland, the State's district engineer, testified that the preparation of a vacation plat is a preliminary step to determine the boundaries of land which might be vacated. It is not a significant step in the decision of whether to dispose of land. At no time did Mr. Harland recommend that the department dispose of Lot J.

On January 13, 1970, the Claimant wrote the State's district engineer inquiring about the possibility of trading railroad lands needed for Route 474 for Lot J. On January 20, 1970, the district engineer responded by letter that the State "will have valuation appraisals prepared and will be in contact with you concerning a possible trade of properties as mentioned in your letter." On June 9, 1970, the district engineer advised the Claimant that "there is no current basis for disposing of Lot J since the City of East Peoria and the State are now studying several alternate locations for relocation of Main Street, East Peoria."

On June 30, 1977, the State entered into a rental agreement for part of Lot J with the adjoining motel owner, Best Inns. Under the terms of their agreement,

the State received \$50 a month and the tenant was authorized to improve the parking lot with gravel and was given access to Camp Street. On January 24, 1980, representatives of the Claimant met with the district engineer in his office. The purpose of the meeting was to discuss lifting of the easement from Lot J. At the meeting, the State agreed to prepare a boundary survey of Lot J, and then to discuss the possibility of releasing the easement once the boundaries had been established. On June 9, 1980, there was a second meeting at Lot J. The district engineer stated at this meeting that it would be necessary to continue an easement along the northern boundary of Lot J for access to the Fondulac Drive abutment and that the State would develop the appraisal of the property and provide a survey so that they could proceed with the vacation. During the month of June, 1980, the State prepared a second vacation plat reserving access to the Fondulac Drive abutment. The State also prepared a legal description of the area to be vacated, which included 2.708 acres of the original 3.38 acres that had been dedicated in 1956. By letter dated July 21, 1980, the Claimant was notified that the amount of the State's appraisal for the 2.708 acres to be vacated was \$206,400 which was the full market value of the fee interest. The Claimant refused to pay the appraised amount and the litigation began.

The Law

There are two issues before the Court. The first issue is whether the Respondent has abandoned the easement and the second issue is whether the Respondent has misused the easement.

The Respondent takes the position that the State cannot ever abandon an easement under any circumstances. However, Respondent cites the Court to no authority directly on point. The State asks us to liken an

abandonment to adverse possession. Adverse possession will not lie against a public entity regarding the dedication of streets and highways for use of the public. (*Russell v. City of Lincoln* (1902), 200 Ill. 511.) The argument propounded by the State is that, because a party cannot adversely possess the lands of the State because the State cannot be held to watch over all of its property, the State cannot therefore be held to abandon property. We reject this argument and find that under proper circumstances where abandonment is proven as a matter of fact, the State can abandon an easement.

The evidence is clear that the Claimant owned Lot J. The instrument of conveyance granted the State an easement for highway purposes. The easement terminates upon abandonment of such use and the land would revert to Claimant. (*Schwabel v. County of DuPage* (1981), 101 Ill. App. 3d 553.) Mere non-use of an easement acquired by grant does not of itself alone constitute an abandonment and therefore an extinguishment of the easement. (*Beloit Foundry Co. v. Ryan* (1963), 28 Ill. 2d 379; *Chicago Title & Trust v. Wabash-Randolph Corp.* (1943), 384 Ill. 78; *Pacemaker Food Stores v. Service Mont. Corp.* (1983), 117 Ill. App. 3d 636.) To constitute abandonment of an easement created by a grant, there must be non-use and an intention of the owner of the easement to abandon the easement. (*Kurz v. Blume* (1950), 407 Ill. 383.) An easement which has lain dormant through non-use without intentional abandonment thereof may be revived at a later date. *Finn v. Williams* (1944), 376 Ill. 95.

Claimant has the burden of proving that the easement has been abandoned. (*Burnette v. DeWitt* (1935), 360 Ill. 518.) The Claimant conveyed an easement to the people of the State of Illinois for the purposes of a public highway. The instrument indicates no time limit and is

therefore perpetual. As the easement is perpetual, it is not affected by non-use. The intent to abandon must be clearly proven for Claimant to prevail. Lot J has not been used as a public highway since 1956. The Respondent claims the land may be used as a public highway in the future. The Respondent also claims Lot J is needed for lateral support or drainage to an existing highway. The Department of Transportation did prepare a vacation plat proposing to release over two acres of the property but reserving the toe of the slope and access to Camp Street to the State. The State, in 1977, leased a substantial part of Lot J as a motel parking lot. The State considered vacating Lot J when it prepared its vacation plat. However, the district engineer testified that the preparation of a vacation plat is a preliminary step and at no time did he recommend the disposal of Lot J. There was considerable talk about a land trade but all of these discussions were limited to possibilities.

The Court of Claims has had occasion to determine if an easement for highway purposes has been abandoned by the State. (*Sass v. State* (1984), 36 Ill. Ct. Cl. 111.) In that case, a highway easement was obtained in 1932. Subsequent to 1957, the highway was moved and the easement at issue was no longer used or necessary. In 1974, the plaintiff sought to acquire the State's easement but a negotiated settlement could not be reached. A bill was passed in the legislature to release the State's easement upon payment by plaintiff of the fair appraised value of the State's interest. Plaintiff refused to pay the fair appraised value and he filed suit to have the easement declared abandoned. This court, citing Respondent's brief with approval, denied the claim because:

"Abandonment which may also serve to extinguish a written easement implies an intentional relinquishment of ownership, possession or control of the property without regard to future possession. 1 C.J.S. Abandonment, Section

1. Thus there are two requirements to a finding of abandonment: an intent and an external act. Mere non-use of the property is not in itself sufficient to prove abandonment. The question of abandonment is one of intent to be determined from the evidence and there is no abandonment unless the premises were left with an intention of not again resuming possession. (*Burns v. Curran* (1916), 275 Ill. 448.) The record clearly indicates that the State of Illinois had no intention to abandon its rights and had not abandoned or released its rights to this easement. Thus one necessary prerequisite to abandonment was lacking.” 36 Ill. Ct. Cl. at 118.

The Court adopted the Department of Transportation’s position that the State had a right of way for the use of the property for highway purposes until that right was released as it was possible that at some future date, it would be used.

From the evidence in the present case and relying on *Sass v. State, supra*, we cannot say that the Claimant has proven by a preponderance of the evidence that the Respondent had the intent to abandon the easement. In the present case, the vacation plat preparation was preliminary and not binding, trade talks were mere possibilities, and clearly less evidence of intent than the bill passed by the legislature in *Sass, supra*. Additionally, the vacation plat did not give up or release the entire easement. We must therefore decline to declare that the Respondent has abandoned the easement and we do find that the Respondent did not abandon the easement.

The second issue is whether the State has misused the easement and therefore is liable to the Claimant for money damages. The use to which an easement is devoted or for which it is granted determines its character, and its owners’ rights are paramount to the extent for which it is necessary to carry out the purpose of the easement. (*Farmers Grain and Supply Co. of Warsaw v. Toledo P. & W. R.R.* (1942), 316 Ill. App. 116.) The reasonableness of an easement’s use is a question of fact to be determined from the evidence. (*Ogelby v. Donaldson’s*

Floors, Inc. (1958), 13 Ill. 2d 305.) Title to an easement in the case of a roadway over the land of another carries with it the right to do whatever is necessary for the reasonable use of the way for the purpose for which it was acquired. (*Sell v. Finke* (1920), 295 Ill. 470; *Keessen v. Zarattini* (1969), 119 Ill. App. 2d 284.) An easement for use as a right of way cannot be enlarged or extended by unauthorized acts. *Tripplett v. Beackman* (1976), 40 Ill. App. 3d 379; *Rinderer v. Keeven* (1980), 90 Ill. App. 3d 34.

In this case, it is without question that the easement was for highway purposes. There may be instances where parking on an easement is an allowable use. (*Delgado v. Wilson* (1989), 178 Ill. App. 3d 634.) However, the State, in violation of the terms of the easement in this case, leased part of Lot J to a neighboring motel for a parking lot. We find that such lease agreement was not an allowable use for this easement. If an easement is limited in purpose, the owner of the property is entitled to damages where the easement holder exceeds the purpose of the easement. (*LeClerg v. Zaia* (1975), 28 Ill. App. 3d 738.) The Respondent's leasing part of Lot J for a parking lot to an adjacent land owner exceeded the purpose of the easement and the State is liable to the Claimant for the rents received.

Beginning in July of 1977, the Respondent leased part of Lot J to the Best Inn Motel on a month-to-month basis at \$50 per month until a time between April 29, 1981, and June 6, 1983. The rents collected amount to between \$2,300 and \$3,550. The railroad is entitled to an accounting of the rents to determine the actual amount collected by the State. Upon a determination of the amount of rents collected, that amount will be ordered paid to Claimant as and for its damages.

For the foregoing reasons, it is the order of the Court:

A. That Claimant's request for declaratory relief is denied as the State did not abandon its easement in Lot J.

B. That the Claimant has failed to prove by a preponderance of the evidence that the State abandoned Lot J.

C. That Claimant is entitled to an accounting of the actual amount of rents collected by the State from Best Inns for the rent of part of Lot J as a parking lot.

D. That the cause is remanded to the active docket of the Commissioner assigned to the case to determine the amount of rents collected by the State for Lot J and to report that amount to the Court.

E. That upon the determination of actual rents collected that amount will be awarded to Claimant as and for its damages for the misuse of the easement.

F. That all other or further damages or relief requested by Claimant is denied.

ORDER

FREDERICK, J.

This cause comes before the Court on the Court's own motion, and the Court being fully advised in the premises, Wherefore, the Court finds:

1. That the Claimant, Toledo, Peoria & Western Railroad Company, no longer exists.

2. That its successor in interest apparently is the Atchison Topeka and Santa Fe Railway Company.

3. That no entry of appearance has been filed on behalf of the successor.

4. That there has been no activity in this cause for a long period except for a copy of a letter to the Commissioner being filed. The filing was on July 20, 1995.

5. The Court may dismiss a case for want of prosecution where the Court finds the Claimant has not made a good faith effort to proceed.

6. This is a 1981 case.

7. That Claimant has failed to make a good faith effort to prosecute its claim.

Therefore, this cause is dismissed for want of prosecution.

(No. 81-CC-1930—Claimant awarded \$30,000;
petition for rehearing denied.)

RICHARD TOTH, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed April 19, 1995.

Order on petition for rehearing filed July 17, 1995.

RICHARD TOTH, *pro se*, for Claimant.

JIM RYAN, Attorney General (JOHN MCPHEE, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*State's duty to provide inmates with safe working conditions and safety equipment.* The State owes a duty to inmates of its penal institutions to provide them with safe working conditions to perform their assigned work, and to provide them with proper safety equipment to complete their assigned duties.

SAME—*injuries sustained by inmate in fall while washing windows—safety belt broke—State liable.* An inmate was awarded damages in his claim for injuries sustained in a fall while he was washing windows at a State correctional facility, since the inmate's uncontradicted testimony that the safety belt issued to him was worn and cracked, and that it broke, causing him to fall 30 to 40 feet, indicated that the State negligently failed to provide the inmate with safe equipment and working conditions.

OPINION

PATCHETT, J.

This claim was filed as a result of a fall involving Mr.

Toth. Mr. Toth was an inmate at the Menard Correctional Center. On June 17, 1980, he was assigned to wash windows at the south cellblock. Mr. Toth was issued a safety belt.

Mr. Toth testified that the safety belt was worn and cracked. After he began using the safety belt to wash the windows, it broke and he fell. At the hearing of this case, no one appeared on behalf of the State. The Respondent contacted the Commissioner of this Court at 4:00 p.m. on the day before the hearing and indicated that he did not have sufficient time to prepare for the hearing. The Commissioner never received a copy of the purported motion. The motion to continue was denied, and the assistant attorney general was informed that the hearing would proceed. It should be noted for the record that this hearing was scheduled for April 1, 1994, involving an incident which occurred on June 17, 1980, and a claim which was filed on March 3, 1981.

Mr. Toth was the only witness who testified in person. His testimony established, without contradiction, that the safety belt issued to him broke, causing him to fall 30 to 40 feet. He indicated that the belt was hanging in two pieces still attached to the bars after he fell. The Claimant did not pay for any of his medical expenses. He is seeking compensation for pain and suffering. He wore a back brace for over a year after the incident and a body cast for a couple of months after the incident.

The evidence established that Mr. Toth received a fracture of the third lumbar vertebra, the lateral cortex of the tarsal bone on his left foot, and the first metatarsal on his right foot as a result of the fall. He was treated at Memorial Hospital in Chester and was released on June 23, 1980.

The Respondent owes a duty to inmates of its penal institutions to provide them with safe working conditions to perform their assigned work. The State further has a duty to provide inmates with proper safety equipment to complete their assigned duties. *Jones v. State* (1993), 45 Ill. Ct. Cl. 90; *Branch v. State* (1993), 45 Ill. Ct. Cl. 102.

The record before us clearly establishes that the State was negligent because it failed to provide Mr. Toth with either safe working conditions or safe equipment. Therefore, we find liability.

Mr. Toth testified as to his continued pain and suffering. It is extremely difficult for this Court to assign an adequate award based on the record before us. However, since the testimony of Mr. Toth as to his pain and suffering and the restrictions on his activities he has encountered since the accident is uncontradicted, we will issue an award. We award Mr. Toth the sum of \$30,000 as compensation for his injuries.

ORDER

PATCHETT, J.

The Respondent has filed a petition for rehearing. The assistant attorney general has included many interesting facts which would have been relevant if they had been presented at the hearing.

This case was filed in 1981. It was set for hearing on April 1, 1994. On March 31, 1994, at approximately 4:00 p.m., the assistant attorney general contacted the Commissioner and indicated that he had filed a motion to continue the hearing because he was recently assigned the case and did not have sufficient time to prepare for the hearing. The Commissioner had not received a copy of the motion to continue. The Commissioner denied the

Respondent's request to continue the hearing and informed the assistant attorney general that the hearing would proceed. The assistant attorney general did not appear for the hearing. Therefore, all of the facts listed in the petition for rehearing were not before this Court in a timely manner. The petition for rehearing is denied.

(No. 82-CC-0477—Claimant awarded \$65,000.)

CAROL SMART, Claimant, v. THE STATE OF ILLINOIS,
Respondent.

Opinion filed April 14, 1995.

Opinion filed February 22, 1996.

SCHOENFIELD & SWARTZMAN (RICK SCHOENFIELD, of
counsel), for Claimant.

JIM RYAN, Attorney General (IAIN D. JOHNSTON, As-
sistant Attorney General, of counsel), for Respondent.

HOSPITALS AND INSTITUTIONS—*false imprisonment defined*. False imprisonment is an unlawful restraint of an individual's personal liberty or freedom of locomotion.

JURISDICTION—*issues of constitutionality are outside jurisdiction of Court of Claims—summary judgment granted for State on constitutional claims*. Issues of constitutionality are outside the jurisdiction of the Court of Claims, and therefore, summary judgment was granted for the State on the Claimant's constitutional due process claims.

HOSPITALS AND INSTITUTIONS—*Claimant criminally committed after being charged with murder—State liable for false imprisonment*. The State was found liable for falsely imprisoning the Claimant during three separate periods after he was found unfit to stand trial on murder charges and confined with the Department of Mental Health and Developmental Disabilities where, during two of the periods in question, the Claimant was detained without a timely hearing as required by State law after being declared competent, and on the third occasion he was not released upon serving the maximum period of confinement with the department allowed by law; however, the State was not liable with regard to a fourth period during which the Claimant was confined pursuant to a court order.

STIPULATIONS—*false imprisonment—damages awarded pursuant to parties' agreement.* Pursuant to the parties' joint stipulation, the Claimant was awarded \$65,000 in damages in full satisfaction of his false imprisonment claim against the State.

OPINION

JANN, J.

This cause comes on to be heard on the parties' cross motions for summary judgment. Both parties have submitted briefs and oral arguments were heard by the Court.

Facts

Claimant, Carol Smart, was charged with murder in the shooting deaths of his mother and father in the Circuit Court of Christian County, Illinois in 1958. A jury found Smart unfit to stand trial on criminal charges by reason of "feble-mindedness." Pursuant to Ill. Rev. Stat. 1957, ch. 38, par. 592, the court ruled that Smart was "legally insane by reason of mental retardation or feble-mindedness at the time of the impaneling of this jury." The court ordered Smart confined by the Department of Public Welfare, predecessor of the Department of Mental Health and Developmental Disabilities (hereinafter DMHDD). Smart was to be confined until he had "entirely and permanently recovered from his insanity." It was further ordered that if Smart recovered or was due to be released by due process of law, he was to be transferred to the custody of the sheriff of Christian County for disposition of the pending criminal charges.

Claimant was subsequently held in the custody of DMHDD until September 16, 1980, when all pending charges against him were dismissed with leave to reinstate and Claimant was released. Claimant contends that he was falsely imprisoned during four specific periods between

1974 and 1980 and that damages result from said false imprisonments. Respondent contends that Claimant was held pursuant to court orders and that DMHDD cannot be held liable for false imprisonment as a matter of law. We shall discuss each time period in question separately.

I. *July 31, 1974, to November 4, 1975*

On July 31, 1974, the Circuit Court of Lee County ruled that Smart was competent to manage his person and estate and ordered him restored to legal competency. Claimant had been confined at the Dixon Development Center (hereinafter Dixon) since October 10, 1968. David Edelson was superintendent of Dixon from July, 1962 until October, 1978. The record indicates Mr. Edelson received notice of the court's order. Smart was not transferred to the sheriff of Christian County until more than 15 months had elapsed.

On August 5, 1975, an attorney for DMHDD wrote a letter to the assistant state's attorney of Christian County and copied Superintendent Edelson advising that action be taken to make a determination as to Smart's fitness to stand trial or that the pending criminal charges be dropped and civil commitment proceedings begun. These actions were advised to avoid civil rights violations as adjudicated in *Jackson v. Indiana* (1972), 406 U.S. 715. The U.S. Supreme Court held in *Jackson* that "a person committed because of their unfitness to stand trial cannot be held more than a reasonable time to determine if they will have the capacity in the foreseeable future to stand trial. If this is not the case the state must either institute civil commitment proceedings or release defendant."

The letter further stated that the staff at Dixon believed Smart had "maximized his treatment within the institutional setting and that treatment is now more appropriate in a less restrictive environment * * *."

On October 14, 1975, the same DMHDD attorney wrote again to the assistant state's attorney, copying Superintendent Edelson, reiterating the DMHDD's request that action be taken by the state's attorney's office.

Smart continued in custody at Dixon until November 4, 1975, when he was produced in Circuit Court of Christian County pursuant to a writ of habeas corpus directed to Superintendent Edelson. Smart was transferred to the custody of the sheriff of Christian County relieving DMHDD of custody and responsibility at that time.

Claimant asserts that he was falsely imprisoned as the 1958 court order constituted only a criminal commitment, as he was unfit to stand trial and charges were still pending against him. Respondent argues that the 1958 order was both civil and criminal, as Ill. Rev. Stat. ch. 38, section 592 read, in pertinent part, "if said jury so impaneled by their verdict determined that said person was at the time of impaneling * * * either insane *or* feeble minded (emphasis added) it shall be the duty of the Department of Public Welfare to keep safely the person committed in the institution as directed by the Court, until he or she shall have fully and permanently recovered from insanity." Ill. Rev. Stat. 1957, ch. 91½, par. 1—1 *et seq.*, now was the civil commitment statute extant in 1958 as part of the Illinois Mental Health Code.

Section 592 was repealed in 1965 and was replaced by article 104 of Illinois' new Criminal Code. That article provided, in relevant part, as follows:

“§104—1. Definition.

For the purpose of this article, 'incompetent' means a person charged with an offense who is unable because of a physical or mental condition:

- (a) To understand the nature and purpose of the proceedings against him; or
- (b) To assist in his defense;

* * *

§104—2. Proceedings to Determine Competency.

- (a) If before a trial * * * the court has reason to believe that the defendant is

incompetent the court shall suspend the proceedings and shall impanel a jury to determine the defendant's competency * * *.

(f) If the defendant is found to be incompetent he shall be committed or remain subject to the further order of the court in accordance with Section 104—3.

* * *

§104—3. Commitment of Incompetent.

* * *

(b) A person who is found to be incompetent because of a mental condition shall be committed to the Department of Mental Health during the continuance of that condition.”

Sections 104—1 through 104—3 were repealed as of January 1, 1973, and replaced by sections 1005—2—1 *et seq.* (Ill. Rev. Stat. 1977, ch. 38, par. 1005—2 *et seq.*) Those sections defined unfitness in the same terms as the 1965 Code. With regard to defendants who were to be unfit to stand trial, section 1005—2—2 provided, in relevant part, that:

“(a) If the defendant is found unfit to stand trial * * * the court shall remand the defendant to a hospital, as defined by the Mental Health Code of 1967, and shall order that a hearing be conducted in accordance with the procedures, and within the time periods specified in such Act. The disposition of defendant pursuant to such hearing, and the admission, detention, care, treatment and discharge or any such defendant found to be in need of mental treatment, shall be determined in accordance with such act. If the defendant is not ordered hospitalized in such hearing, the Department of Mental Health shall petition the trial court to release the defendant on bail or recognizance, under such conditions as the court finds appropriate, which may include, but need not be limited to requiring the defendant to submit to or to secure treatment for his mental condition.

(b) A defendant hospitalized under this Section shall be returned to the court not more than 90 days after the court's original finding of unfitness, and each 12 months thereafter. At such re-examination the court may proceed, find, and order as in the first instance under paragraph (a) of this Section. If the court finds that defendant continues to be unfit to stand trial * * * but that he no longer requires hospitalization, the defendant shall be released under paragraph (a) of this Section on bail or recognizance.”

The Mental Health Code hearing referred to in section 1005—2—2(a) was required to be held within five court days, after admission of the subject to the hospital, or the court's receipt of the petition, whichever was earlier. (Ill. Rev. Stat. 1973, ch. 91½, par. 8—8.) The standard for commitment under the Mental Health Code was

dangerousness to one's self or to others, and excluded mental retardation. Ill. Rev. Stat. 1973, ch. 91½, par. 1—11.

Based upon the above legislative history, we find Claimant is correct in asserting the original and subsequent commitments were criminal in nature and did not constitute civil commitment for the period ending November 4, 1975. The letters to the Christian County state's attorney from the DMHDD lawyer also belie Respondent's argument that Smart's commitment was civil as well as criminal. Said letters request a determination of Smart's competency to stand trial or that the charges be dropped and Smart be committed civilly under the Mental Health Code.

False imprisonment is an unlawful restraint of an individual's personal liberty or freedom of locomotion. In this instance, Smart was held for over one year after being declared competent without hearing in accordance with DMHDD's own rules or the 90 day period required by section 1005—2—1 of the Criminal Code (Ill. Rev. Stat. 1973, ch. 38, par. 1005—2—1) applicable at the time. The State cannot rely upon arcane language from the 1958 statute which was repealed in 1965. We find Smart was falsely imprisoned from October 31, 1974, to November 4, 1975, and grant his motion for summary judgment for said period for false imprisonment and deny Respondent's cross-motion thereon.

Claimant asserts a due process violation pursuant to *Jackson v. Indiana* (1972), 406 U.S. 715. *Jackson* addressed both equal protection and due process under the Federal constitution. Claimant argues claims based on constitutional rights are tort claims, and, as such are properly brought before this Court under section 8(d) of the Court of Claims Act. (705 ILCS 505/8(d).) Respondent

argues that this Court lacks jurisdiction because a cause of action alleging violation of due process can be brought in the United States District Court, a court of general jurisdiction.

A review of case law indicates that Respondent's position is correct. Issues of constitutionality are outside the jurisdiction of the Court of Claims. (*Reyes v. State* (1979), 35 Ill. Ct. Cl. 498; *Winzeler Trucking Co. v. State* (1978), 32 Ill. Ct. Cl. 191.) Both cases dealt with alleged violations of equal protection and due process which this Court is not given exclusive authority to hear. Claimant has already sought relief on these issues in Federal district court. Additionally, the issue of false imprisonment appropriately before this Court by its very definition requires a determination as to a violation of due process under Illinois law.

We hereby deny Claimant's motion for summary judgment as to jurisdiction on the constitutional due process claims for all periods and grant Respondent's motion for summary judgment thereon.

II. *December 29, 1975, through October 27, 1976*

On December 29, 1975, the Circuit Court of Christian County held a competency hearing and found Carol Smart unfit to stand trial. The order provided that Smart "be remanded to a hospital as defined in the Mental Health Code and specifically to the Dixon Developmental Center where a hearing shall be held in accordance with the provisions of the Mental Health Code and within the time specifications." Claimant was not given a hearing pursuant to the section 1005—2—2(a) of the Mental Health Code. As discussed in Part I of this opinion, a hearing was to be held within five court days after admission of the subject to the hospital, or the court's receipt of

the petition, whichever was earlier. The standard for civil commitment under the Mental Health Code was dangerousness to one's self or to others and excluded mental retardation. (Ill. Rev. Stat. 1973, ch. 91½, par. 1—11.) Section 1005—2—2(a) further provided, "If the defendant is not ordered hospitalized in such hearing, the Department of Mental Health shall petition the trial court to release the defendant on bail or recognizance * * *."

Respondent argues that its failure to hold the hearing was of no consequence as Smart was subsequently returned to DMHDD custody at his bond hearing on October 27, 1976, and that even if a hearing had been held, the DMHDD could not have released Smart from custody.

We disagree with Respondent's contentions. The language of the Christian County Circuit Court order and section 1005—2—2(a) is clear that Smart was to be given a hearing in a timely manner. A determination was to be made at that time as to whether Smart should have been hospitalized. If he was not ordered hospitalized, DMHDD should have petitioned the trial court for Smart's release on bail or recognizance.

Smart was entitled to a hearing to determine whether he should have been hospitalized. We cannot speculate as to the result of such a hearing and thereby cannot conclude that the Respondent should have petitioned for his release or bond. When a custodian continues to hold an inmate in custody in violation of the custodian's obligation to bring the inmate to court, the custodian is liable for wrongfully detaining the inmate. (*Fulford v. O'Connor* (1954), 3 Ill.2d 490, 500; *Llaguno v. Mingey* (7th Cir. 1985), 763 F.2d 1360; *Gerstein v. Pugh* (1975), 420 U.S. 103.) We find Respondent's failure to give Smart a hearing amounted to false imprisonment for the period of five

court days after December 29, 1975, to October 27, 1976. Claimant's motion for summary judgment on false imprisonment during this period is granted and Respondent's cross-motion for summary judgment thereon is denied.

III. *November 10, 1978, to September 16, 1980*

A bond hearing was held in Christian County on October 27, 1976. The court entered an order on November 10, 1976, which provided in pertinent part:

"Defendant is no longer a person in need of hospitalization, as defined by Ch. 91-1/2, The Mental Health Code

It is hereby ordered:

That the Defendant is released on his own recognizance, subject to the following terms and conditions:

- (a) That the Defendant is to remain under the supervision of the DMHDD;
- (b) That such supervision is to be at the Dixon State Hospital, or such facility associated therewith as DMHDD may direct;
- (c) That the Defendant is to be placed in such rehabilitation program as may be directed by DMHDD; ° ° ° any material change in programs established by DMHDD, and any material change in condition of the Defendant be reported forthwith to this court."

Claimant was held by DMHDD, primarily at Dixon until his discharge on September 16, 1980. From November 2, 1977, to approximately March 10, 1978, Smart resided at a facility called the Village Inn which was a more permissive living facility than Dixon.

Smart argues that he was again falsely imprisoned as no hearing was held by DMHDD for civil commitment pursuant to section 1005—2—2(a), (b) of the Criminal Code (Ill. Rev. Stat. 1975, ch. 38, par. 1005—2—2(a)(b)) and the Mental Health Code of Illinois. He asserts that the conditions of bond resulted in a conundrum. In essence, the conditions of bond resulted in Smart's continued confinement at Dixon.

Respondent asserts that Smart was held pursuant to a viable court order which required DMHDD to supervise Smart at Dixon or some other DMHDD facility.

Respondent further asserts that Claimant's remedy lies in appeal of the Christian County Circuit Court's order, not with DMHDD which merely followed its order.

Claimant argues that *People v. Ealy* (1977), 49 Ill. App. 3d 922, 365 N.E.2d 149, 7 Ill. Dec. 864, is determinative of the issues herein. Ealy was charged with a felony robbery and released on a recognizance bond. Ealy was evaluated by Cook County court-appointed psychiatrists and a hearing was held to determine his fitness to stand trial. A criminal division jury found Ealy incompetent to stand trial. Ealy was then ordered transferred to DMHDD for a determination of whether he met the criteria for civil commitment. A DMHDD hearing was held in Cook County Circuit Court, County Division, wherein defendant Ealy was found to be "not in need of mental treatment." (*Ealy*, 49 Ill. App. 3d at 927.) Thereafter DMHDD filed a petition in the criminal proceeding for defendant's release on bail or recognizance. Instead, defendant's motion for a second psychiatric examination to determine fitness to stand trial was allowed. Defendant was again adjudged unfit to stand trial. The criminal court then transferred Claimant to DMHDD for a second commitment hearing. Ealy was again found to be "not in need of mental treatment." (*Ealy*, 49 Ill. App. 3d at 927.) DMHDD again petitioned for Ealy's release. A new hearing to determine fitness to stand trial was held. Ealy was granted bond at \$50,000, a bond defendant could not meet, based upon the court's belief that the defendant was a hazard to society and should be detained until DMHDD could rehabilitate him. Ealy demanded another hearing on fitness to stand trial and, specifically, whether he would ever become fit to stand trial. A hearing was subsequently held which determined Ealy would not become fit to stand trial in the foreseeable future. The trial judge denied Ealy's motion to dismiss the charges against him and

his request for release from DMHDD custody. Ealy was ordered transported to a DMHDD facility for hospitalization during the pendency of his appeal by order of the court.

On appeal by defendant Ealy and DMHDD, the appellate court ordered the trial court to vacate the order transferring Ealy to DMHDD, and remanded the case for a further bond hearing.

Ealy is not directly determinative of Smart's position during the period of November 10, 1978, to September 16, 1980. No hearing was held to determine Smart's ability to stand trial in the foreseeable future during the period in question as in *Ealy*. Further, Claimant's argument that DMHDD had absolute authority to release Smart under the bond is not proved in the pleadings and exhibits relied upon by Claimant. At the very least, DMHDD was bound by the circuit court order to advise the court of any change in Smart's treatment or condition. The plain language of the order indicates Respondent had no direct authority to release Smart without the court's permission.

DMHDD was in a similar position in *Ealy* and the appellate court recognized that DMHDD could not refuse to accept the defendant without risking contempt proceedings.

The *Ealy* court found that the trial court had acted improperly in directing Ealy's hospitalization at DMHDD and granted DMHDD's motions for appeal of the circuit court order. The court commented that:

“* * * there is nothing in either the UCC or the MHC permitting unfit defendants to be housed in Department facilities when the Department has already determined that no treatment can be offered to an individual found not in need of mental treatment. In fact, once an individual is no longer in need of hospitalization, the superintendent of the Department must grant an absolute discharge. (Ill. Rev. Stat. 1975, ch. 91-1/2, par. 10—4).”

However, the court did not state such discharge could be made in contravention of a court order.

The Claimant herein did not request clarification or seek appeal of the offending Christian County Circuit Court order. Had he done so, our task would be far simpler. The order acknowledges that Smart no longer needed hospitalization but specifically required him to be supervised at a DMHDD facility or a facility associated therewith. It further stated that Smart “was to be placed in such rehabilitation programs as may be directed by the Department.”

As no definitive interpretation of the above order is available to us, we must deny Claimant’s motion for summary judgment on false imprisonment during the period of November 10, 1978, to September 16, 1980, and grant Respondent’s cross-motion thereon. Claimant’s remedy was appeal or modification of the circuit court order.

IV. December 29, 1979, to September 16, 1980

Smart argues he was falsely imprisoned from December 29, 1979, to September 16, 1980, due to the enactment of section 104—28(a) of the Criminal Code (Ill. Rev. Stat. 1979, ch. 38, par. 104—28(a)) which became effective December 28, 1979. The statute provided that criminal defendants found unfit to stand trial prior to the date of the statute could not be held in DMHDD custody longer than the maximum time they would have served if they had been convicted before becoming eligible for parole, less credit for good time. Pursuant to section 1003—3—4(a) of the Criminal Code (Ill. Rev. Stat. 1979, ch. 38, par. 1003—3—4(a),) the longest term Smart would have served was 20 years. By the effective date of the statute, Smart was in custody for in excess of 20 years.

Respondent claims that holding Smart for nine months after the statute became effective did not constitute

false imprisonment because the court, not DMHDD, is responsible for a defendant's release. We find this argument lacking merit. Ill. Rev. Stat. 1975, ch. 38, par. 1005—2—2(c), enacted prior to this statute, provided that if a defendant was confined in a hospital for a period equal to the maximum sentence "the court shall order the charge or charges dismissed on motion of the defendant, his guardian or the Director of DMHDD." Also, Respondent had been responsible for petitioning the circuit court for hearings on fitness to stand trial pursuant to section 1005—2—2(a) of the Criminal Code. (Ill. Rev. Stat. 1975, ch. 38, par. 1005—2—2(a).) It appears clear that DMHDD as supervisor of Smart was responsible for petitioning the court for Smart's release.

We hereby grant Smart's motion for summary judgment on false imprisonment for the period of December 28, 1979, through September 16, 1980.

Claimant's final motion for summary judgment is for an alleged violation of Smart's right to treatment while in custody at Dixon. We find there is insufficient evidence in the pleadings to support Claimant's motion and it is hereby denied.

It is hereby ordered that this cause shall be remanded for hearing on:

- (1) Damages on false imprisonment during periods I, II and IV;
- (2) The claim of denial of right to treatment.

OPINION

JANN, J.

This matter is before the Court upon the joint stipulation of the parties hereto. This claim sounds in tort and

is before us pursuant to section 8(d) of the Court of Claims Act. 705 ILCS 505/8(d).

That the Claimant was charged with murdering his parents in 1958. Claimant was found not mentally fit to stand trial. Therefore, Claimant was admitted to the Department of Public Welfare, which became the Department of Mental Health and Developmental Disabilities (DMHDD). Claimant was held by DMHDD until his release in 1980. Claimant brought this action for false imprisonment for periods of time he was held by DMHDD between the years 1975 and 1980. On April 14, 1995, this Court granted summary judgment as to parts of Claimant's claim.

We note that the parties hereto have agreed to a settlement of these claims, and that Respondent has agreed to the entry of an award in favor of Claimant in the amount of \$65,000.

Based on the foregoing, Claimant Carol Smart is hereby awarded the sum of \$65,000 in full settlement and final satisfaction of the claim herein.

(No. 83-CC-0539—Claim dismissed.)

RUTH ELLIS, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed April 15, 1996.

CORNFIELD & FELDMAN (GILBERT A. CORNFELD, of
counsel), for Claimant.

JIM RYAN, Attorney General (MARK T. DUNN, Assis-
tant Attorney General, of counsel), for Respondent.

EMPLOYMENT—*tenured professor's wrongful discharge claim dismissed.*
A tenured university professor's claim that she was discharged from her employment at a State university in violation of her contract and State law was dismissed, since the record indicated that the Claimant preferred to stay in Scandinavia where she had previously taught rather than return to her teaching position in the United States, and that she had in fact resigned from her employment with the university.

OPINION

RAUCCI, J.

This claim was brought by Ruth Ellis, a tenured professor at Northeastern Illinois University (NEIU). Dr. Ellis began her association with Northeastern Illinois University in 1961 when the institution was known as Chicago Teacher's College North. Dr. Ellis received her Ph.D. from Stanford University and in 1975 was a member of the Psychology Department at NEIU.

It is the claim of Dr. Ellis that the university discharged her without giving her process to which she was entitled under her tenure contract and in violation of section 8(3) of the Board of Governors Act. (110 ILCS 605/8(3).) The Respondent had previously filed a motion to dismiss this matter, and this Court by order executed May 25, 1989, remanded for a factual hearing on the following issues:

(a) Did the Claimant resign or was she discharged by the university?

(b) If she was discharged, was it for good cause, and was she afforded her procedural rights during the process?

We find that Dr. Ellis, in fact, resigned her position in September of 1977.

Between 1953 and 1958, Claimant held several teaching positions in Scandinavia. In 1961, she was hired by Northeastern Illinois University and assigned to the

psychology department. In 1974, Claimant made a request through NEIU for permission to return to Scandinavia in 1975 to teach a seminar. Because of her background, her knowledge of the culture and language, the university agreed to offer a graduate class in human development to be taught by Dr. Ellis in Scandinavia. Eventually, eleven American students enrolled in the class which was to begin in January of 1975, and end on June 30, 1975. Dr. Ellis left for Scandinavia some time before the beginning of classes in January of 1975. In March of 1975, she was diagnosed with having high blood pressure by a physician in Sweden. In June of that year, the course ended and the normal progression of events would have been for Dr. Ellis to return to the United States prior to the next semester in September. However, Dr. Ellis decided to stay in Sweden under the care and direction of her doctor. In January of 1976, while she was improving, her doctor indicated that she needed five to six more months of rest. Dr. Ellis used accumulated sick days for the period between September of 1975 and February of 1976. Her sick days ended as of February 2, 1976.

In August of 1975, the Claimant had called an employee of Northeastern Illinois University, Ms. Diane Hirsch, to acquire information on her options. At this point it was apparent that Dr. Ellis was not sure when she would be returning. Hirsch wrote to Ms. Ellis explaining both the conditions for sick leave and informing Dr. Ellis of how to apply for disability benefits. In September of 1975, Hirsch wrote Dr. Ellis to inform her that she had been placed on sick leave. Hirsch advised the Claimant of her sick leave situation and indicated that she should contact the personnel office well in advance of any disability claims. It was not until February of 1976 that Dr. Ellis actually applied for disability by returning the forms to Hirsch. Because of the delay, she had no choice but to

seek a leave of absence without pay in February of 1976. Her request for disability benefits was never approved. Between February of 1976 to November of 1976, Dr. Ellis was granted her first leave without pay from the university. It is important to note that in August of 1975, Dr. Ellis' physician in Scandinavia reported that her condition had improved and her blood pressure was just slightly above normal. By November of 1976, her blood pressure was stabilized at normal and no further treatment was required. At that time the doctor indicated that she was ready to resume full-time employment. In spite of that fact, in November of 1976, another leave of absence was sought and granted without pay to run from November of 1976 until September of 1977.

The application for disability, which Dr. Ellis had filed in February of 1976, was rejected in April of that year, and she was informed that the Illinois Pension Code requirements had not been met. She was also sent a brochure which explained the options available to her. In May of 1976, Ms. Hirsch, by letter, informed Claimant that she should personally contact the retirement office and also give her specific information. In June of 1976, the State University Retirement System wrote the Claimant explaining its retirement benefits available. She eventually received that letter in August, 1976. In July of 1976, another employee of the university, Ms. Dorothy Bacon, wrote on behalf of the department asking the Claimant to give the department her plans as soon as possible so that the university could make whatever plans were necessary. In August of 1976, the Claimant's actions indicate an unwillingness to return to the United States. It is apparent that she preferred the lifestyle in Scandinavia over that of the Chicagoland area. In September of 1976, Dr. Ellis admitted that she was unsure of what her course of action would be. By October of 1976, the State

Universities Retirement Board took the position that the high blood pressure alone was not sufficient to disable Claimant. It concluded the high blood pressure, if it existed at that time, could be controlled by medication.

Even though her blood pressure had returned to somewhat normal in the fall of 1976, it was not until March of 1977 that the Claimant had indicated an interest in returning to teach. At that time, her correspondence indicated that she would return in the fall when her second leave was up. However, subsequent to that letter she believed her condition regressed and she decided to request for yet a third leave without pay. Not surprisingly, this third leave without pay was denied. She was informed of the decision on September 14, 1977 and she was requested to quickly notify the Department of her intentions. The new semester was to begin shortly. At that time there was a new provost at the university, Mr. John Cownie, and he specifically asked Claimant to inform him of what her intentions were regarding the next semester. On September 20, 1977, the Claimant talked to Hirsch again over the phone. Hirsch memorialized that conversation and that documentation was submitted as evidence. During the course of the conversation, Claimant makes reference to complicated personal reasons why she did not want to return to the United States, only one of which was her health. Faced with the prospect of returning to the United States, Claimant indicated to Hirsch that it was her intention to resign and to follow up on a request to become a professor emeritus. On September 21, 1977, Claimant wrote a letter to the provost. Specifically, she wrote, "I am taking an early retirement effective as of now and I am requesting that the papers necessary to effectuate this be sent to me as soon as is convenient." In a subsequent paragraph the Claimant indicates that she believed she was entitled to the status of

professor emeritus of psychology. She goes on to relate why it is that she is entitled to this position. She further indicates a willingness to return to the university in some capacity to teach. At that time the Claimant was in limbo in terms of her relationship with the university. She was not accruing any service time or benefits and she was not being paid. After that letter, the provost waited approximately three months and finally, on December 8, 1977, he wrote her a letter accepting the resignation as of September 21, 1977. He also indicated that he would pass on her application for emeritus status to the department. In July of 1978, some seven months later, the Claimant wrote a letter to the provost again requesting a clarification of her status. She was informed later that month that her status was that of a retired professor. It was not until 1979 or 1980 that Claimant finally returned to the United States.

The factual scenario which emerges from this record involves a woman with a clear enjoyment of the lifestyle that she found in Scandinavia as compared with that available with teaching at Northeastern Illinois University. She was torn between her love for that lifestyle and her need to return to the university to teach. Because of complicating factors, including her health, she chose the former instead of the latter. Her health problems, however, were not serious enough to justify a disability claim or, if in fact they were, she did not perfect that claim. It was her responsibility to do so and not the employees of the university. She was continually and repeatedly reminded by people at the university of the requirements for the disability claim, and additionally, the need for the university to know her intentions. It was through no fault of the university employees that she placed herself in a corner from which she could not escape. The facts of this case lead to the inescapable conclusion that the Claimant

was not discharged, but simply resigned. Additionally, the claim that her resignation was only conditioned upon her status as a professor emeritus is rejected. Neither her letter of resignation nor her conversations with the employees of the university reflect any conditions to her action.

It is therefore ordered, adjudged and decreed that this claim is dismissed and forever barred.

(No. 83-CC-2044—Claim denied.)

CLAY M. HAMBRICK, as Administrator of the Estate of
DELORES A. HAMBRICK, Deceased, Claimant, *v.*
THE STATE OF ILLINOIS, Respondent.

Opinion filed December 28, 1995.

JOHN P. GIBBONS, for Claimant.

JIM RYAN, Attorney General (CLAIRE TAYLOR, Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*State's duty to maintain highways—elements of negligence claim.* The State is charged with a duty to maintain its roads and highways in a reasonably safe condition for the purpose for which they were intended, and in order for a Claimant to recover for injuries due to a breach of that duty, the Claimant must prove by a preponderance of the evidence that there was a breach and that it proximately caused the Claimant's injuries.

SAME—*negligence—notice of defective condition required.* The mere fact that a defective condition existed is not sufficient to constitute an act of negligence on the part of the State, but rather, the burden is on the Claimant to show that the State had actual or constructive notice of defects that cause injuries.

SAME—*Claimant's wife killed in motorcycle accident—no proof of State's negligence—claim denied.* Where the Claimant's wife was killed after being thrown from a motorcycle which the Claimant was driving while under the influence of alcohol, the Claimant failed to prove that the State was negligent, since he presented no evidence that the State had actual or constructive notice of a dangerous condition allegedly created by improper illumination or inadequate median markings at the location in question.

OPINION

JANN, J.

Claimant Clay M. Hambrick, administrator of the estate of Delores A. Hambrick, deceased, brings this action for compensatory damages pursuant to section 8 of the Illinois Court of Claims Act. (705 ILCS 505/8.) Claimant asserts that his late wife, Delores Hambrick, died as a direct and proximate result of negligence committed by the State of Illinois on the interchange of Illinois Route 203 and Interstate 270 in Madison County, Illinois.

At approximately 12:30 a.m., March 29, 1981, Claimant was driving a 1981 Honda 1100 motorcycle in a northerly direction on Illinois Route 203 with his wife, the decedent, riding on the back of the motorcycle. They were returning to their home in Ferguson, Missouri, from a gathering of friends in Granite City, Illinois. Claimant turned off Illinois Route 203 onto the interchange to proceed westbound on Interstate 270. He and the decedent were unfamiliar with this particular stretch of road, which was illuminated with 150 watt mercury vapor lamps, located east of the point where the interchange ramp feeds into a collector-distributor lane running parallel to the westbound lanes of Interstate 270. There also were lights located on the south side of the eastbound lanes of Interstate 270 parallel to the collector-distributor lane. The lights were operating at the time.

Claimant proceeded onto the collector-distributor lane which is bordered on the left by a median approximately eight inches high and two feet wide that bears no striping. Claimant looked behind him to his left for approaching vehicles. Seeing none, he proceeded to merge onto the westbound lanes of Interstate 270 at about 55 miles per hour, striking the median. As a result, the motorcycle became airborne, landing in the westbound lanes

of Interstate 270 and sliding across these lanes. The decedent was thrown from the vehicle and suffered severe head injuries.

Both Claimant and the decedent were taken to St. Elizabeth Medical Center in Granite City, Illinois. The decedent was transferred to Firmin-Desloge Hospital in St. Louis, Missouri, where she died on March 31, 1981, as a result of her injuries. Claimant was treated at St. Elizabeth Medical Center, where mandatory blood tests showed his blood alcohol concentration to be .107 by weight. Although State law provides that the legal level of intoxication is 0.10, Claimant denies being intoxicated or under the influence of alcohol at the time of the accident. He was not charged with driving under the influence of alcohol.

The evidence consists of deposition testimony of Claimant and Robert Freesmeier, the decedent's employer at the time of her death; photographs of the accident scene; and State and Federal regulations regarding highway design, construction and maintenance. Claimant has offered evidence of a subsequent accident at the same location and subsequent remedial measures performed by Respondent following the accident in the instant case and the subsequent accident. Respondent objects to this evidence.

Both parties have submitted briefs, and the Commissioner heard arguments on May 17, 1990. Both parties then submitted supplemental briefs.

Claimant asserts that Respondent breached its duty of care by failing to exercise reasonable care in the construction and maintenance and care of these highways, and, specifically, by failing to follow standards of the United States Department of Transportation, Federal Highway Administration. Claimant contends this breach

was the direct and proximate cause of the death of the decedent. In the alternative, Claimant asserts that in the absence of violations of regulations, Respondent has a general duty of exercising reasonable care, which Respondent breached by failing to properly illuminate and/or mark the median separating the collector-distributor lane and the westbound lanes of Interstate 270.

However, Respondent contends that the interchange in question was designed, constructed and maintained in compliance with the standards of the Illinois Department of Transportation and the United States Department of Transportation. Respondent also claims that it did not breach its general duty of exercising reasonable care because it had no notice of any dangerous conditions at that interchange prior to Claimant's accident. Furthermore, Respondent asserts that Claimant himself proximately caused the accident because he was presumptively under the influence of alcohol as a result of his blood-alcohol concentration being in excess of the legal level; he was driving at a speed in excess of what was reasonable and proper under the circumstances; and he failed to keep a proper lookout.

The State is charged with a duty to maintain its roads and highways in a reasonably safe condition for the purpose for which they were intended, and in order for a Claimant to recover for injuries due to a breach of that duty, the Claimant must prove by a preponderance of the evidence that there was a breach and that this breach proximately caused the injuries sustained by the Claimant. *Preikshat v. State* (1985), 37 Ill. Ct. Cl. 29.

Claimant asserts that Respondent breached its duty by failing to comply with Federal highway standards set forth in the United States Department of Transportation, Federal Highway Administration, *Manual on Uniform*

Traffic Control Devices (1978 edition), hereinafter referred to as the Federal manual. Although none of the Federal manual is contained in the file of this case, portions are quoted in the parties' briefs.

The following are pertinent excerpts from the Federal manual:

“Under authority granted by Congress in 1966, the Secretary of Transportation has decreed that traffic control devices on all streets and highways in each state shall be in substantial conformance with standards issued or endorsed by the Federal Highway Administrator. (Page 1A-3).

° ° °

The responsibility for traffic control devices rests with a multitude of governmental jurisdictions. In virtually all states, traffic control devices placed and maintained by state and local officials are required by statute to conform to a State Manual which shall be in substantial conformance with this Manual. Many Federal agencies have regulations requiring standards in conformance with this Manual for their control device application. (Page 1A-3).

° ° °

Islands should be carefully planned and designed to provide travel paths that are obvious, easy to follow, and continuous, so as not to constitute a hazard in the roadway. (Page 5B-1).

° ° °

Islands should be clearly visible at all times and from a position sufficiently in advance so that the vehicle operators will not be surprised by their presence. Islands should occupy the minimum of roadway space needed for the purpose and yet be of sufficient size to be noticeable. (Page 5B-1).

° ° °

Easy recognition of islands by approaching vehicle operators is necessary for efficient and safe operation. The forms or means of designating island areas vary, depending on their sizes, locations, and functions, and also the character of the adjacent area, rural or urban. An important consideration, in all locations, is to provide a contrast in color, and preferably texture, between islands and adjacent pavements.

Generally, islands should present the least potential hazard to approaching vehicles and yet perform their intended functions. When curbs are used, the mountable type is preferable except where a barrier curb is essential for traffic control or pedestrian refuge. Barrier curb also may be used on islands where traffic control devices are installed.

Islands may be designated as follows:

1. Raised and outlined by curbs and filled with pavement, turf, or other material.
2. Formed by pavement markings (sometimes supplemented by buttons or raised bars or flexible stanchions on all paved areas).
3. Unsurfaced areas (sometimes supplemented by delineators, guideposts, or other devices). (Page 5B-2).

All islands and the proper channels of travel through them should be made clearly visible at night by adequate reflectorization and/or illumination. Illumination of refuge islands, including their approach-end treatment, should be sufficient to show the general layout of the island and immediate vehicular travel paths, with the greatest concentration of illumination at points of possible danger to pedestrians or vehicles, as at barrier curbs or other structures.” (Page 5D-1).

Although Respondent contests the assertion that the median in question is an “island” as meant in the above regulations, Respondent has not presented any evidence contrary to that assertion. Because of the wording of the regulations, which will be analyzed below, it is not dispositive whether the median is an “island.” For the sake of argument, we will give Claimant the benefit of the doubt and accept that the median is an island.

Respondent contends that pursuant to the above-quoted regulations from the Federal manual, *The Illinois Manual on Uniform Traffic Control Devices* (1958 and 1979 editions), hereinafter referred to as the State manual, is in substantial compliance.

Respondent also contends that the interchange in question was designed, constructed, and maintained in compliance with the State manual. Claimant has offered no evidence to show that the interchange’s design, construction, or maintenance failed to comply with the State manual.

Respondent correctly argues that based on the language in the Federal manual, the sections quoted above regarding the illumination and delineation of islands are advisory and permissive in nature, not mandatory. The regulations state what agencies should and may do regarding islands, not what they must do.

Claimant argues that the wording indicates the duty of the State to properly construct, design, mark, and

maintain highways. This may very well be true, and Respondent's general duty of due care will be discussed below.

It seems clear that from the wording of the passages quoted above, Respondent was not in violation of any mandatory Federal regulations regarding illumination or delineation of the median in question. Furthermore, it is not asserted that Respondent was in violation of any of its own regulations.

In the absence of violation of any regulations, Claimant contends that Respondent still had a general duty to keep its roadways in a reasonably safe condition and to maintain adequate and proper warning signs or devices alerting the public to unusual and dangerous conditions. (*Consolidated Freightways v. State* (1985), 37 Ill. Ct. Cl. 32.) Claimant claims Respondent breached this duty by failing to properly illuminate the section of the interchange where the accident occurred and/or failing to mark the median to alert motorists of its presence.

It is true that Respondent has a general duty in absence of any regulatory violations. To prove negligence, Claimant must also prove that Respondent had notice of a dangerous condition; that in spite of such notice, Respondent breached its duty; and that this breach was a proximate cause of the injuries suffered. Claimant has failed to prove all three of these elements, which are necessary for a finding of negligence. In fact, Claimant's citing of *Consolidated Freightways* fails to support his argument. That case can be distinguished from the instant case in that the Court found that numerous accidents occurred on the stretch of road at issue there, giving the State notice of the dangerous condition. *Id.* at 34.

Upon looking at the diagram showing location of illumination at the interchange in question, it is apparent

that a potentially dangerous condition did exist with the closest lighting located to the east of the site where the accident occurred, rather than directly above the collector-distributor lane. A motorist exiting the ramp and entering the collector-distributor lane would have the lighting behind him. Thus, the absence of any markings and striping or the median, would make the median difficult to see in such a condition where the motorist was backlit.

However, the mere fact that a defective condition existed if, in fact, it did exist, is not in and by itself sufficient to constitute an act of negligence on the part of Respondent. (*Cotner v. State* (1987), 40 Ill. Ct. Cl. 70; *Palmer v. Northern Illinois University* (1964), 25 Ill. Ct. Cl. 1.) The burden is upon Claimant to show that the State had actual or constructive notice of defects that cause injuries. (*Cotner*, 40 Ill. Ct. Cl. at 72; *Norman v. State* (1982), 35 Ill. Ct. Cl. 693.) Claimant has presented no evidence to show that Respondent had actual or constructive notice of a dangerous condition at the interchange in question. Furthermore, Respondent represents that this is the first accident involving the median on this collector-distributor lane since completion of construction of the interchange in 1962. Claimant has failed to produce evidence of any complaints to Respondent or incidents that would show Respondent had notice of a dangerous condition.

Claimant attempts to show notice through Claimant's testimony that he saw tire marks and gouges in the median in question weeks after the accident. There is no evidence, however, that Respondent was aware of these marks or that they were in fact what Claimant purports them to be, i.e., evidence of other motorists striking the median prior to Claimant's accident. Without notice, there can be no breach, and without breach, there can be

no proximate cause. Therefore, Claimant has failed to show that Respondent was negligent.

In further support of his argument, Claimant requests the Court take judicial notice of an action against Respondent resulting from a subsequent motorcycle accident at the same location at approximately the same time of day. Although the occurrence of a similar accident at the same location under similar circumstances buttresses the assertion that a dangerous condition existed, it fails to rebut the fact that Respondent had no actual or constructive notice, because the other accident occurred after Claimant's accident.

In addition, Claimant wishes the Court to consider subsequent remedial measures Respondent took at the interchange after the accident occurred as evidence of negligence. Evidence of subsequent remedial measures generally is prohibited, but there are exceptions. Claimant asserts that such evidence is permissible, according to holding in *McLaughlin v. Rush-Presbyterian St. Lukes* (1979), 68 Ill. App. 3d 546, 386 N.E.2d 334, and *Lubbers v. Norfolk & Western* (1986), 147 Ill. App. 3d 501, 498 N.E.2d 357.

However, these cases fail to support Claimant's argument and are inapposite to the instant case. The use of evidence of subsequent remedial measures in *McLaughlin* involved post-occurrence change in the design of a catheter in a medical negligence action against a hospital. The court admitted the evidence because the manufacturer of the catheter was not a party to the suit, and admission of the evidence did not prejudice the manufacturer. Nor was it introduced to prove the manufacturer's negligence. The court also cited the Federal Rules of Evidence, which state that evidence of subsequent remedial measures is inadmissible to prove negligence or culpable

conduct but is admissible for such other purposes as providing ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. (*McLaughlin*, 68 Ill. App. 3d at 549.) In the instant case, Claimant wishes to use Respondent's own subsequent remedial measures against Respondent to prove Respondent's negligence, a tactic of which the court in *McLaughlin* would surely disapprove.

In *Lubbers*, where admissibility of subsequent repairs to a train crossing signal was at issue, the court also stated that evidence of subsequent repairs or improvements is inadmissible to show defendant's negligence, but such evidence may be used for proving ownership, feasibility of precautionary measures, or impeachment. In that case, the court found that the plaintiff simply stated that the evidence would have been admissible to show defendant's notice of the problem and the feasibility of making repairs; however, the plaintiff failed to show how these matters relate to any of the issues involved in that case. *Lubbers*, 147 Ill. App. 3d at 515.

In the instant case, Claimant is not seeking to use evidence of subsequent remedial measures to prove ownership, control, feasibility of precautionary measures, or impeachment, but to show Respondent's negligence. Therefore, Claimant's reliance on these exceptions is misplaced. Respondent correctly states the rule that subsequent remedial measures can be used as evidence in only those narrow exceptions and never to prove negligence. *Davis v. International Harvester Co.* (1988), 167 Ill. App. 3d 814, 521 N.E.2d 1282.

Although it is unnecessary to decide the proximate cause of the accident because Respondent had no actual or constructive notice of a dangerous condition, the issue of proximate cause was hotly contested by the parties and deserves to be addressed.

Despite the fact that a dangerous condition existed, Claimant still must prove the condition to be the proximate cause of the decedent's death. *Nunley v. Village of Cahokia* (1983), 115 Ill. App. 3d 208, 450 N.E.2d 363; *Misch v. Meadows Mennonite Home* (1983), 114 Ill. App. 3d 792, 449 N.E.2d 1358.

Respondent contends Claimant's negligence was the sole proximate cause of the accident. This contention is supported by the evidence. Blood-alcohol testing is recognized as a proper means of proving intoxication in personal injury actions. (*Burris v. Madison County* (1987), 154 Ill. App. 3d 1064, 507 N.E.2d 1267; *Thomas v. Brandt* (1986), 144 Ill. App. 3d 95, 493 N.E.2d 1142.) In addition, section 501.2(b) of the Illinois Vehicle Code (625 ILCS 5/11—501.2(b)) states:

“Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of alcohol, the concentration of alcohol in the person's blood or breath at the time alleged or shown by analysis of the person's blood, urine, breath, or other bodily substance shall give rise to the following presumptions:

° ° °

3. If there was at that time an alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol.”

It is uncontroverted that Claimant's blood-alcohol concentration shortly after the accident was 0.107 by weight, giving rise to the presumption that Claimant was under the influence of alcohol. To rebut this presumption, Claimant testified that he did not feel intoxicated. However, it is well established that a motorist can not feel intoxicated but still be under the influence to the extent that his ability to operate a motor vehicle is compromised.

In addition, Claimant admits that he was accelerating to highway speed (approximately 55 miles per hour) on a stretch of road with which he was unfamiliar. Also, at that time, he was looking behind him and not ahead, where the median was located.

Although because of the failure of Claimant to establish that Respondent had notice of a dangerous condition, proximate cause of the accident was not established, the Court should note that Claimant was, at least, contributorily negligent, or, at most, his negligence was the sole proximate cause of the accident.

It is unfortunate and tragic that a life was lost, either due to a dangerous highway condition or to Claimant's own negligence. However, the Court must follow the law of this State, and this Claimant's claim must be denied because he failed to show Respondent had notice of a dangerous condition, that ignoring that condition resulted in Respondent breaching its duty of care, and that a breach of this duty was the proximate cause of the decedent's death.

(No. 83-CC-2123—Claim dismissed; subrogation claim denied.)

GARY HODGES, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Order filed January 24, 1985.

Opinion filed July 6, 1995.

DONOVAN, HATCH & CONSTANCE, P.C. (MICHAEL J. NESTER, of counsel), for Claimant.

NEIL HARTIGAN and JIM RYAN, Attorneys General (SUE MUELLER and JAMES C. MAJORS, Assistant Attorneys General, of counsel), for Respondent.

HIGHWAYS—*driver's statutory duty at open intersection.* At an open intersection, a driver has a statutory duty to yield to vehicles approaching from the right, and this duty applies when a stop sign is missing at an open intersection.

SAME—*Claimant failed to yield to car approaching from right at intersection—claim dismissed.* The Claimant's action against the State arising out

of an accident at an open intersection was dismissed, because the Claimant failed to yield to the other vehicle which was approaching the intersection from the right, and the Claimant's negligence was the sole proximate cause of the accident.

SAME—State not insurer of all accidents—duty to correct defects of which State has notice. The State is not an insurer of all accidents upon its highways, but the State does have a responsibility to correct dangerous defects of which it has actual or constructive notice.

SAME—State had no notice of missing stop sign—subrogation claim denied. Where there was no evidence that the State had been notified of a missing stop sign at an intersection where the Claimant's car was involved in a collision, and the stop sign was missing for eight to nine hours prior to the accident, the State could not be charged with actual or constructive notice of the missing sign, and therefore, a subrogation claim by the Claimant's insurer was denied.

ORDER

HOLDERMAN, J.

This cause comes on to be heard on the Respondent's motion to dismiss and the Court is duly advised in the premises, finds that the Claimant's complaint states on its face that Claimant was proceeding in an easterly direction at the time of the accident when his car was struck by one Rosemarie Timmermann, who was traveling in a northerly direction at the time of the accident. The complaint further states that Ms. Timmermann struck Claimant's vehicle on the right-hand side, indicating that the Timmermann vehicle and the Claimant's vehicle were approaching each other at a 90-degree angle, and that the Timmerman vehicle was to the right of Claimant's vehicle immediately prior to the accident.

Because the intersection was legally an open one at the time of the accident, Claimant's breach of his statutory duty to yield to the Timmermann vehicle was the proximate cause of the accident. At an open intersection a driver has a statutory duty to yield to vehicles approaching from the right. (Ill. Rev. Stat. 1981, ch. 95½, par. 11—901(a); *Duewel v. Lahman* (1981), 103 Ill. App. 3d 220,

224, citing *Carr v. Shirland Township* (1978), 66 Ill. App. 3d 1033, 1036.) This statutory duty applies when a stop sign is missing at an otherwise open intersection. (See *Duewel, supra.*) This traffic law also constitutes the duty of care imposed upon a motorist. (See *Duewel, supra.*) Violation of such a traffic regulation is *prima facie* evidence of negligence. (*Baker v. Chicago Transit Authority* (1978), 65 Ill. App. 3d 91, 93, 382 N.E.2d 450; *Duewel, supra.*) The Claimant breached this duty of care by entering the intersection without yielding to the Timmerman vehicle which was approaching from his right. (See *Kofahl v. Delgado* (1978), 63 Ill. App. 3d 662, 624-625, 380 N.E.2d 407.) Thus Claimant's negligence was the sole proximate cause of the accident.

It is hereby ordered that, as Claimant's complaint fails to state a cause of action, Claimant's complaint is dismissed with prejudice.

OPINION

PATCHETT, J.

This is a subrogation claim by State Farm Mutual Automobile Insurance Company against the State of Illinois. The claim was filed on April 7, 1983, seeking damages in the amount of \$9,509.52. This claim arose from property damage and the payment of liability claims due to an accident which occurred on June 7, 1981, at the intersection of East "B" Street in Belleville, St. Clair County, Illinois, and Illinois Route 161 (also known as Sherman Street).

At that time and place, it was alleged that the State Farm insured, Gary Hodges, was operating his 1981 Toyota Celica in an easterly direction on East "B" Street at or near that intersection. At the same time and place, Rosemary Timmermann was driving her 1979 Ford Fiesta vehicle north on Route 161 at or near that intersection. It

was further alleged that the stop sign for motorists traveling east on “B” Street had been knocked down and because of its absence, the collision occurred between the vehicles in question, thus causing the loss to State Farm in the sum indicated above.

A trial of this matter was held before a Commissioner of this Court. It was stipulated that the Claimant had received \$1,500 towards his damages as a result of the settlement of another case in which the Claimant had sued the City of Belleville. Mr. Marvin Glaus was called as a witness for the Claimant. He testified that he lived near the scene of the accident and was acquainted with the Claimant. Hodges had been at Glaus’ house from around noon until 12:30 p.m. at a barbecue. Glaus and Hodges were employed by the same employer. After Hodges left the witness’ house, he returned at approximately 11:00 p.m. and asked that an ambulance be called.

Glaus testified that there was normally a stop sign controlling eastbound traffic on East “B” Street at the intersection in question. When Glaus went to the scene of the accident, the stop sign was down. Glaus testified that the stop sign had been down earlier in the day at approximately 2:00 p.m.

On cross-examination, Glaus testified that Hodges had attended a barbecue at his house where cans of beer in an icebox were available to anyone. Glaus could not say how many beers that Hodges had. Glaus did not report the stop sign being down earlier in the day to anyone. Upon examination by the Commissioner of this Court, Glaus testified that he had passed the intersection on the preceding Saturday and did not remember that the stop sign was missing on that Saturday.

It is clear that the State is not an insurer of all accidents upon its highways. (*Adams v. State* (1981), 35 Ill.

Ct. Cl. 216.) The State does have a responsibility to correct dangerous defects of which the State has actual or constructive notice. (*Finn v. State* (1962), 24 Ill. Ct. Cl. 177; *Pearlman v. State* (1980), 33 Ill. Ct. Cl. 28; *Stedman v. State*, 22 Ill. Ct. Cl. 446; *Weygandt v. State*, 22 Ill. Ct. Cl. 478.) This Court has repeatedly held that drivers utilizing highways of the State are charged with the duty of looking and seeing things which are obviously visible. (*Pyle v. State* (1973), 29 Ill. Ct. Cl. 133.) In the *Pyle* case, the accident occurred at the intersection of Route 148 and Old Route 13 in Williamson County. At that time, Route 148 was a preferential north-south highway protected by stop signs facing traffic approaching on Old Route 13. The Claimant was driving east on Old Route 13 and passed a stop ahead sign which she did not see. The Claimant did see a red pickup truck coming south on Route 148, slowed her speed, but did not stop because she did not see a stop sign in her lane.

In determining the *Pyle* case, this Court stated that it must determine whether and at what time the State had “knowledge of a dangerous condition on its highway” and whether the State failed to take an appropriate remedial action within a reasonable length of time. In the *Pyle* case, the Court determined that it could not hold the State liable for its failure to repair the sign or erect warning signs within 29 hours after notice of the condition. The Court stated:

“We have found no case holding a responsible governmental body liable when it had no more than 29 hours of notice, actual or constructive. Our survey included many cases involving busy intersections, much more hazardous than the one in the case at bar. Indeed, the shortest length of notice we found in any case in which liability was imposed, was the case cited by the Claimant, *Caudle v. State*, 19 Ill. Ct. Cl. 35 (1949). There, the State had 4 or 5 days notice that a dangerous hole existed in the center of its highway.” See *Pyle, supra*.

In *Adams v. State* (1981), 35 Ill. Ct. Cl. 216, this Court imposed liability upon the State when the evidence

established that the State had actual and constructive notice of a downed stop sign for at least 72 hours prior to the accident.

In *Clark v. State* (1985), 38 Ill. Ct. Cl. 164, Justice Poch stated that whether the State is to be charged with constructive notice of a missing stop sign depends on the facts of the particular case. In that case, the stop sign was missing for a period of a month and possibly as long as six weeks. The Court stated that a sign on a lightly traveled rural road is less likely to be noticed than one located in a small town or village. Therefore, a longer period should be allowed the State before the State is charged with constructive notice of a dangerous or defective condition.

In this case, the Claimant asks this Court to impose liability where the only evidence in the record establishes that the sign was down approximately 8 to 9 hours before the accident. There is no evidence of actual notice. This is simply an insufficient amount of time to be considered as constructive notice on the part of the State of the missing stop sign. Therefore, we deny this claim.

(No. 84-CC-1693—Claim denied.)

ROBERT LYNN LOVSEY, SR., Claimant, *v.*
THE STATE OF ILLINOIS, Respondent.

Opinion filed September 21, 1995.

WISEMAN, SHAIKEWITZ, MCGIVERN, WAHL, FLAVIN &
HESI, P.C. (SAMUEL A. MORMINO, JR., of counsel), for
Claimant.

JIM RYAN, Attorney General (THOMAS S. GRAY, Assis-
tant Attorney General, of counsel), for Respondent.

HIGHWAYS—*State's duty of reasonable care in maintaining highways.* The State of Illinois is not an insurer of the condition of highways under its maintenance and control, but it does have a duty to use reasonable care in maintaining roads under its control, to keep its highways reasonably safe, and to maintain them so that defective and dangerous conditions likely to injure persons lawfully on the highways shall not exist.

SAME—*negligence—notice requirement.* To be held liable for negligence, the State must have actual or constructive notice of a dangerous condition, and permit the condition to exist without warning to the motoring public.

SAME—*motorcycle accident—notice lacking—claim denied.* The Court of Claims denied a motorcyclist's claim for injuries sustained in an accident after his motorcycle allegedly struck a bump and a metal rod in the roadway, since there was no evidence that the State had prior notice of a dangerous condition, or that the alleged defect proximately caused the Claimant's loss of control of his motorcycle and resulting injuries.

OPINION

JANN, J.

This claim arises out of a motorcycle accident which occurred on May 23, 1983, involving Claimant, Robert Lynn Lovsey, Sr. Mr. Lovsey alleges Respondent was negligent in its care and maintenance of the Williamson Road in Madison County, Illinois, in that his motorcycle struck a bump and a metal rod in the roadway, resulting in injury to Claimant.

The parties have stipulated that the road in question was under the jurisdiction of the State of Illinois Department of Transportation. Additionally, plaintiff's group exhibit #1 was admitted by stipulation as being Claimant's medical bills incurred as a proximate result of the injuries he sustained in the accident in the amount of \$13,488.74.

Claimant testified that he was headed east with another cyclist, Ray Royer, who was behind him. The pair was riding in a staggered fashion with Claimant's motorcycle closest to the centerline of the road. The Claimant testified that he observed patchwork in the roadway or possibly a pothole in front of him, so he moved his motorcycle

closer to the centerline. When Claimant's motorcycle went over the patchwork, the front end of his motorcycle "started going real squirrely and shaking and everything," with subsequent loss of control and the resulting injuries. Claimant contends he was going about 40 miles per hour as he approached the patchwork and had previously been going about 50 m.p.h. The weather was dry and clear and the roadway was straight. It was about 4:50 p.m. at the time the incident occurred.

Claimant testified that after he was released from the hospital, he went back to the scene and took photographs of a piece of steel protruding from the roadway. Claimant and his wife testified that they had been informed of the existence of the piece of steel which purportedly caused the accident by Claimant's friend Ray Royer. Claimant made identifying marks on the photographs of the area where the accident occurred. The photographs were admitted into evidence. Claimant contends he did not see the steel because "it kind of blended in with the patch." The photographs introduced into evidence show a patched area which is clearly visible. The steel is far more difficult to discern. Claimant's friend, Mr. Royer, attempted to move the steel when he and Claimant visited the site some two weeks after the accident. The steel was immovable as it was imbedded in the concrete of the roadway.

Claimant stated on cross-examination that he was familiar with Williamson Road and had driven upon it once or twice a week without having previously seen the steel protruding from the road. He did not see the steel in the roadway on the day of the accident and was attempting to avoid a pothole in the patched area when he lost control of his motorcycle. Claimant's assertions that the steel in the roadway caused his accident was based upon Mr. Royer's observations after the accident.

Royer testified he was riding his motorcycle behind the Claimant at the time of the accident. Royer was 20 or 30 feet behind the Claimant in a staggered fashion. Royer noticed Claimant's motorcycle wobbling and shaking and observed Claimant's motorcycle start "flipping over." Royer testified they were traveling at the speed limit. Royer stated that he and the Claimant had slowed down as they approached the patched area in the highway.

Royer returned to the scene of the accident two days later to see what had caused the accident and he found the piece of steel sticking out of the patchwork. Royer identified the photograph marked as plaintiff's exhibit #2 as showing and portraying the piece of metal as he saw it when he went to the accident scene two days after the accident. He tried to dislodge the steel but he said "there was no dislodging it from where it was." Royer stated that the metal looked like a railroad rail.

Royer admitted on cross-examination that on the date of the accident he did not know what had caused the problem leading to the accident. Royer testified on cross-examination that he recalled the steel sticking above the traveled portion of the roadway about an inch-and-a-half.

Michael Weber, an employee of the Illinois Department of Transportation testified that he was in charge of the maintenance of the section of Williamson Road where the accident occurred. Weber routinely inspected the road. Weber did not observe a piece of steel and had no record of receiving any complaints regarding the area. Weber produced plans that showed that there was steel in the roadway upon its construction in 1937. The steel included a flange laid in the cement one-half inch below the surface of the roadway which secured one-half rebar every two and one-half feet. After the accident in August of 1983, there was additional work done as a result of

highway deterioration that occurred in the location of the accident. Weber had no recollection or knowledge of any steel sticking out of the highway at the time of the August, 1983, repairs.

There is no question that the Claimant was seriously injured and sustained substantial medical expense. His injuries included a right collar bone fracture, left shoulder separation, several broken ribs, broken right hand, large contusions and a gouge in his leg. The Claimant sustained collapsed lungs as a result of the chest injuries sustained. Claimant was in intensive care for ten days. Claimant testified that he has continuing pain and disabilities and loss of sleep.

At the time of the accident, Claimant was laid off at his job at Laclede's Steel and was not recalled until the fall of 1983. Claimant did not lose employment as a result of his injuries. Claimant's total medical bills as a result of his injuries were stipulated to be \$13,488.74, and there is a public aid lien to the extent of \$4,022.74 against any award that may be made to the Claimant.

Both parties submitted post-hearing briefs. Claimant has the burden of proving each of the following propositions:

1. That the Respondent was negligent;
2. That the Respondent's negligence was the proximate cause of Claimant's injuries;
3. That Claimant had actual or constructive notice of a dangerous condition;
4. Damages.

Claimant first contends that the patchwork at the scene of the accident establishes that the roadway was deteriorated, and that at some point in the deterioration the

steel was allowed to sink into the roadway and protrude from the surrounding concrete. Claimant contends that the existence of a patch in the area where the steel protruded from the concrete establishes that the State had notice of the dangerous condition, and that the repairs that were attempted (i.e. patching) were ineffective. Claimant argues that the State has a duty to maintain its highways in a reasonably safe condition and a duty to the public to warn of a danger that exists which could not be discovered by the public. (*Robertson v. State* (1983), 35 Ill. Ct. Cl. 643.) Further, the duty of the State includes the obligation to perform maintenance and effectively remedy dangers, and to refrain from ineffective remedies. (*Sisco v. State* (1963), 24 Ill. Ct. Cl. 306; *Robertson, supra.*) Claimant further contends that when a dangerous condition exists the State has a duty to warn members of the general public, citing *Sisco* and *Robertson, supra.*

As to the issue of proximate cause, Claimant argues that both Claimant and his friend, Royer, testified that Claimant's motorcycle went out of control as it passed over the patchwork area on Williamson Road. It is not disputed that all of Claimant's injuries were related to the accident which resulted when his motorcycle went out of control after crossing the patched area. Claimant contends that it was a sunny day and the road was level and clear without visible surface debris. There was evidence that the motorcycle was in good condition and that the tires of the motorcycle were not damaged in the accident. The evidence sustained a conclusion that Claimant had experience as a motorcycle operator. Finally, Claimant suggests that the State offered no alternative theory of causation.

Respondent contends that the Claimant's proof failed to demonstrate that the piece of steel in the road

was the cause of his injuries, and failed to prove that the State had actual or constructive knowledge of any dangerous condition regarding the road prior to the incident. Claimant was familiar with the road and had not seen any metal sticking out of the road previously. Claimant did not see the metal prior to the accident. Respondent contends that the Claimant only assumes that he struck the steel and Claimant's testimony that the steel caused the accident is mere speculation. Respondent points to the fact that the Claimant's motorcycle tires remained inflated and undamaged after the accident. Respondent argues that there is no direct proof that the metal in the roadway or any other factor was the cause of the accident and concludes that the Claimant is asking the Court "to take a blind leap of faith" on the issue of proximate cause.

Respondent contends that all the evidence in the case indicated that neither the Claimant nor any agent of the Respondent ever saw or had noticed the metal objects imbedded in the road before this incident. State inspectors did not observe any scrap metal protruding from the road. There was no proof of complaints regarding the condition during the relevant time period.

Claimant replies that it is not disputed that he lost control of his motorcycle while crossing the patched area and that it was later determined that the steel was protruding from the road surface at or near the location where he lost control of his motorcycle. This, Claimant contends, combined with testimony that the Claimant was exercising due care and there could have been no other possible causes of the accident is sufficient proof of proximate cause in this case. Claimant's argument suggests that Claimant's proof of proximate cause shifted the burden of proceeding to the State to come forward with evidence of causation other than the existence of the

patched roadway and the protruding steel. As to the issue of notice, the thrust of Claimant's reply is that the existence of patches in the area where the steel allegedly protruded from the surface of the roadway was proof of prior notice of a dangerous condition, and that the Illinois Department of Transportation should have foreseen that the steel would or could protrude through the patchwork and create a dangerous condition.

The State of Illinois is not an insurer of the condition of its highways under its maintenance and control, but it does have a duty to use reasonable care in maintaining roads under its control. (*Ohms v. State* (1975), 30 Ill. Ct. Cl. 410.) The exercise of reasonable care requires the State to keep its highways reasonably safe. It is the duty of the State to maintain its highways so that defective and dangerous conditions likely to injure persons lawfully on the highways shall not exist. (*Moldenhauer v. State* (1984), 36 Ill. Ct. Cl. 24.) To be held liable for negligence, the State must have actual or constructive notice of a dangerous condition, and permit the dangerous condition to exist without warning to the motoring public. *Clark v. State* (1974), 30 Ill. Ct. Cl. 32; *Baker v. State* (1989), 42 Ill. Ct. Cl. 110, 115.

In *Baker, supra*, Claimant's motorcycle went out of control on an exit ramp allegedly because the State had allowed gravel to accumulate on the exit ramp. Claimant contended that when his motorcycle hit the gravel, he lost control and was injured. IDOT employees testified that they cleaned debris from the road when it was seen and observed. The road was observed by IDOT employees daily and there were no reports of debris on the exit ramp in question. IDOT employees did not remember sweeping any crushed rock or gravel off of the exit ramp. Photographs of the scene showed rocks off of the main

traveled portion of the roadway. Citing *Wagner v. State* (1978), 32 Ill. Ct. Cl. 50, this Court held, in *Baker, supra*, that there was an absence of proof as to how long the condition had existed and no evidence upon which to charge the State with notice of the existence of a dangerous condition. On the basis of the fact that the State had not been shown to have actual or constructive notice of a dangerous condition, the claim was denied.

In order to sustain Claimant's theory of liability in this case, we must be prepared to find and hold that the existence of patching in the area where the steel allegedly protruded from the main traveled portion of the roadway constituted direct evidence of prior notice of a dangerous condition on the part of the State. It is clear that asphalt patches were present at the scene of the steel which allegedly protruded from the surface of the roadway. It does not follow that the existence of these patches imputes prior knowledge of a dangerous condition to Respondent. Indeed, the evidence is clear and uncontradicted that the existence of the steel protruding from the roadway was hard to determine and could not be seen by passing motorists. The steel was not seen or observed by the Claimant prior to the accident, nor was it seen or observed by persons whose duty it was to inspect the condition of the highway. All those testifying on the point agreed that the existence of the allegedly dangerous condition could not be easily observed due to the fact that it "blended" into the patchwork on the roadway at the scene where the Claimant lost control of his motorcycle. Furthermore, there is absolutely no evidence, other than pure speculation, that the steel allegedly protruding from the surface of the roadway was the, or any, proximate cause of the Claimant's loss of control of his motorcycle. The State does not have the burden of explaining how it came to pass that the Claimant lost control of his motorcycle. The

burden of proof remains with the Claimant throughout the course of the trial. It is not up to the State to bring forward evidence or speculation as to what conditions or causes may have existed with respect to the accident other than the causes alleged by the Claimant.

Claimant has failed to prove that Respondent had actual or constructive notice of a dangerous condition which was the proximate cause of Claimant's injuries.

Based upon the foregoing, we must hereby deny this claim.

(No. 85-CC-2350—Claim denied.)

ANGELA DAWN OWSLEY, a minor, by her father and
next friend, RICHARD W. OWSLEY, JR., Claimant, *v.*
THE STATE OF ILLINOIS, Respondent.

Opinion filed July 6, 1995.

HEILIGENSTEIN & BADGLEY (BRAD L. BADGLEY, of
counsel), for Claimant.

JIM RYAN, Attorney General (CHAD D. FORNOFF, As-
sistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*State not insurer against accidents on its highways—notice of defect required.* The State is not an insurer against all accidents which may occur by reason of a condition of its highways, and a Claimant must show that the State had actual or constructive notice of a defect in order to recover on a negligent highway maintenance claim.

SAME—*intersectional collision—inoperable flashing lights—claim denied.* The Claimants' negligent highway maintenance claim arising out of an automobile accident at an intersection was denied since, although the Claimants alleged that flashing red lights placed above stop signs at the intersection were inoperable, there was no evidence indicating how long the alleged defect had existed or that the State had notice thereof, and the presence of other traffic control devices precluded a finding of liability against the State.

OPINION

PATCHETT, J.

This claim arose out of an automobile accident which occurred on December 9, 1993, at the intersection of Illinois Routes 13 and 142 near Equality, Illinois. The Claimants were passengers in an automobile being driven north on Route 142. As the car entered the intersection, it was struck by a pickup truck traveling west on Illinois Route 13. As a result of the accident, the various Claimants sustained a wide range of injuries, some of them very serious. The basis for the claim is that the red flashing lights, which had been placed above the stop signs on Illinois Route 142, were inoperable.

The State of Illinois is not an insurer against all accidents which may occur by reason of a condition of its highways. *Gray v. State* (1954), 21 Ill. Ct. Cl. 521; *Scroggins v. State* (1991), 43 Ill. Ct. Cl. 225.

A claimant must show that the State had actual or constructive notice of the defect in order to recover on a negligent highway maintenance claim. *Pigott v. State* (1968), 26 Ill. Ct. Cl. 262; *Scroggins, supra*.

In the present case, there was no evidence that the State of Illinois had actual knowledge that the light in question was inoperable. No evidence was submitted as to when the light became inoperable. Therefore, we must look to the issue of constructive notice. Since we do not know when the light became inoperable, the normal means of proving constructive notice are inapplicable. Either the nature and extent of the defect, or the length of time the defect existed, may be used to establish constructive notice. Numerous cases have upheld constructive notice in those situations. Based on the facts at hand, neither the nature and extent of the alleged defect, nor

the length of time that the defect existed, are available to the Claimants to prove constructive notice.

The Claimants have made a very strong, somewhat unique argument that the State should be liable for failure to inspect or perform preventative maintenance on the lights. This is despite the fact that the lights were not required to be placed there to begin with, and despite the fact that there is no evidence as to when the lights in fact failed. While the Claimants have done an extraordinary job as attorneys in preparing and advocating this argument, there are simply insufficient facts to warrant the finding of liability on that theory in this case.

Finally, and most important, the driver of the automobile in question ignored numerous other traffic control devices which were present and which were not in defective condition. The presence of the other traffic control devices, including the stop sign in this instance, would preclude a finding of liability against the State.

For the reasons stated, we deny this claim.

(Nos. 86-CC-1644, 86-CC-1645 cons.—Claims denied.)

KIM SUTTER and ELIZABETH FLEMING, Claimants, *v.*
THE STATE OF ILLINOIS, Respondent.

Opinion filed March 19, 1996.

WISEMAN, SCHAIKEWITZ, MCGIVERN, WAHL, FLAVIN,
HESI, BARYLSKE & MORMINO (MARK W. PARKER, of counsel), for Claimants.

JIM RYAN, Attorney General (NUVIAH SHURAZI, Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*when State is liable for defect of which it has knowledge.* The question as to what length of time is allowable for the State to remediate a known dangerous condition existing on its highways without being liable for negligence depends on the facts and circumstances of each case.

SAME—*water on highway—State had actual notice but acted with reasonable diligence—claim denied.* Although the State had been notified one and one-half hours before the Claimants' automobile accident of a dangerous condition on the highway, where the incident occurred on a Saturday, and IDOT workers were dispatched and traveling to the location in question 20 minutes after receiving notice of the dangerous condition, the State acted with due diligence and was not liable to the Claimants for injuries sustained when their car struck the water and overturned.

OPINION

SOMMER, C.J.

On the morning of Saturday, April 21, 1984, shortly before 9:00 a.m., Claimant Elizabeth A. Fleming was operating her 1982 Ford Escort southbound on Illinois Route 3 near the Bissell Street intersection in Madison County. Claimant Kim Sutter was a passenger in the front seat. The driver's sister, Patricia Simpson, was also a passenger. Although it had been raining the night before, Claimant Fleming testified that the weather was fine, although it was misting a bit and was partly cloudy.

The vehicle operated by Claimant Fleming struck water in a southbound lane of Illinois Route 3 and overturned, causing injuries to the Claimants. Claimant Kim Sutter alleges that the accident and her resulting injuries were caused solely by the negligence of the Respondent. Claimant Elizabeth Fleming maintains that the Respondent's agents had notice of the dangerous condition created by water on the highway and did not act with sufficient dispatch to correct the condition or to warn users of the highway of the dangerous condition.

There is no dispute that Illinois Route 3 at the location of this accident was under the jurisdiction of the Illinois Department of Transportation (hereinafter "IDOT")

at the time of the accident. Illinois Route 3 at the scene of the accident consists of three 12' northbound lanes and three 12' southbound lanes, both bordered by a 10' stabilized asphalt shoulder. The northbound and southbound lanes are divided by a 6' median with a raised concrete barrier in the middle. From the center of the middle concrete barrier to the outside edge of the stabilized asphalt shoulder the pavement measures 49 feet for both northbound and southbound traffic.

Claimant Fleming testified that as she proceeded south on Route 3 there was nothing obstructing her view, and she was traveling 45 to 50 miles an hour. She testified that she was driving down the road and the next thing she knew the car was out of control and upside down with water pouring through the car. She stated that she never saw the water on the pavement prior to the accident.

The evidence revealed that the Madison Police Department called IDOT at 7:39 a.m. on April 21, 1984, and warned of water on the pavement. Under the heading "Particulars of Communications" an IDOT employee made the following entry as to the communication at 7:39 a.m. from the Madison P.D.:

"WATER ON PAVEMENT IL 3. 300 yards N of Bissell Street in Southeast lane, River Road, highway Route 3 that follows the river at Old Army Depot."

Traffic Operations Engineer George Huhman* was off duty on Saturday, April 21st when he was called by the IDOT dispatcher. Huhman's diary concerning the call recites as follows:

"Received call from Hazel, dispatcher around 7:30 a.m. advising water on pvt. Route 3 in Venice, after talking it over told Hazel did not think it was mine but the City of Venice. Hazel advised would see K. Called back shortly, and I still did not think location was our.

Hazel called back around 8:00 a.m. advised water 1 foot – 2 feet deep on Route 3 near Army Depot, S.B. Lanes. Advised Hazel would (?) would ck. it out."

*George Huhman's name is misspelled as Huemann in the transcript.

Huhman testified that during the first conversation he and the dispatcher, Hazel, discussed the location of the standing water. After the conversation with Hazel, Huhman said he was not sure if the area where the water was located on the highway was or was not in his area. Huhman stated that the dispatcher informed him that she would check on the jurisdiction and get back with him. The dispatcher called Huhman back and spoke to him again about the situation. Huhman has no specific memory of what was said in the second telephone conversation. In any event, after the conversation Huhman still did not believe that the area where the water was sitting was his area of responsibility or IDOT's responsibility, but he also was not sure that the area was definitely not in his area of responsibility. Huhman testified that the diary entry after the first entry related to a third call between him and the dispatcher. It was at that time, about 8:00 a.m., that Huhman claimed that the dispatcher told him water was one to two feet deep, and it was near the Army Depot. Huhman stated that when the dispatcher (Hazel) mentioned that it was near the Army Depot, he was convinced that the water was in his area of responsibility. He advised the dispatcher that he would take care of it. Huhman stated that according to his log he immediately called Kyle Steiner, an IDOT employee, knowing that one to two feet of water on Route 3 would be an unsafe and hazardous condition. Huhman was aware that the speed limit on Route 3 at the subject location was 55 m.p.h.

Huhman contended in his testimony that the radio dispatcher did not give him all of the information recited on her log sheet when she first called him at 7:39 a.m. Huhman admitted that if he had had all the information logged on the radio dispatcher's log sheet, he would have deemed it to be an emergency situation within his jurisdiction that required immediate action. Huhman also

stated that there were IDOT employees who lived closer to the area than the man he called, Kyle Steiner, and that John Gabriel and Larry Widdows lived closer. Huhman explained that there was a union contract establishing requirements for employees who were called out on overtime pay. Huhman testified that IDOT's "normal chain of command" on a call-out situation was to go to the lead worker, who was Mr. Gabriel, but that he must not have been home.

Huhman testified that Hazel Schooler, the radio dispatcher, had a map as to the jurisdiction of IDOT, but Huhman stated that the dispatcher initially did not tell him exactly where the dangerous condition was. Huhman denied that the entries which located the water near the Army Depot on the dispatcher's log accurately reflected the three conversations he had with the dispatcher. Huhman admitted that he had power to deviate from the union contract in emergencies; but that his diary did not show that he had called either Mr. Gabriel or Mr. Widdows. Huhman acknowledged that the dispatcher thought that the area was within IDOT's jurisdiction when she called Huhman.

Kyle Steiner of IDOT testified that at the time in question he was a foreman with IDOT. Steiner did not remember who contacted him on the day in question or what time he was contacted, but stated that after he was contacted he called out Tom Butler to assist him. Steiner did not have coffee, but went out as soon as he could. Steiner did not remember how long it took him to get to the accident scene or what time he left home. IDOT's departmental report reflected that Steiner went 10-8 at 8:26 a.m., which meant that he was going in service. Steiner picked up Butler on Liberty Street in Alton, but did not recall the time. Steiner did not remember whether Butler

was ready when he got there to pick him up or not. Butler's house was closer to the accident than Steiner's house. Steiner's guess was that it would have taken maybe 20 minutes to get to the accident scene from Butler's house. When they arrived at the scene they saw the Claimant's vehicle overturned. There were no warning signs warning motorists of standing water. Steiner and Butler unclogged the drains serving the southbound lanes. Steiner stated that in emergency situations someone could be called who lives closer, and that if he had the information that the dispatcher stated was conveyed to Huhman he would have known that that was within IDOT jurisdiction.

In recent years, this Court has decided similar cases. In *Sallee v. State* (1990), 43 Ill. Ct. Cl. 41, an award was made because the State failed to warn of water on a highway even though it had notice of the defect in question. In *Sallee*, Justice Montana wrote:

"Another difficult issue to resolve in this case, and the one which more often arises in similar cases, is that of negligence. Numerous cases decided by this Court have held that this State is not an insurer as to the safety of motorists or passengers upon its highways. The State is only required to maintain its highways in a reasonably safe condition. In addition, before the State can be held liable for highways which are not maintained in a reasonably safe condition, the State must have notice of the dangerous condition.

This notice requirement has been defined by this Court in numerous cases to be either actual notice or constructive notice. If the State had notice of water standing on the roadway at this location, the State would have been required to either correct that situation or to place warning signs as to the dangerous condition."

Unlike the *Sallee* case, there is no serious dispute in the case at bar that (1) a substantial amount of water had accumulated on the southbound lanes of Route 3 as a result of clogged drains, and (2) at 7:39 a.m., the State had actual knowledge of this emergency dangerous condition. Also, there is no dispute that at the time the Claimants in this case approached the scene of the accident on Illinois Route 3 there were no warnings or barricades of any kind

to alert the Claimants to the presence of this dangerous condition. However, unlike the fact situation in the similar case of *Haggard v. State* (1983), 35 Ill. Ct. Cl. 727, 730, the State did not have any knowledge or notice that the area in question was likely to flood in heavy rain, or that the drainage sewers serving that area of Illinois Route 3 would be likely to clog, or had any time in the past clogged or presented any problems or hazards to traffic. In cases where the State was on notice that a particular area of the highway was likely to flood or become impassible or dangerous due to water standing on the highway, this Court has not hesitated to make awards to compensate Claimants victimized by the dangerous condition created by heavy rainfall of which the State had prior notice. *Haggard, supra*. Also see the exhaustive opinion of Judge Raucci in *Scott v. State* (1990), 43 Ill. Ct. Cl. 85.

Thus, in appropriate circumstances, this Court has repeatedly sustained awards in situations where the State has failed to give warning of dangerous conditions of which it has either actual or constructive notice. *Gatlin v. State* (1985), 39 Ill. Ct. Cl. 51; *Heid v. State* (1991), 44 Ill. Ct. Cl. 82, 87.

Thus, it would appear that the narrow issue which the Court is called upon to decide in the case at bar is whether, under the particular facts and circumstances of this case, the Respondent acted reasonably to discharge its duty to give warning to motorists of a dangerous condition of which the State admittedly had actual knowledge. Claimant Fleming cites Judge Patchett's opinion in *Shaw v. State* (1986), 38 Ill. Ct. Cl. 129, and Justice Holderman's opinion in *Robertson v. State* (1983), 35 Ill. Ct. Cl. 643. Both cases awarded damages to the Claimants injured by dangerous conditions on the roadway. In *Shaw*,

the roadway in question had been dangerous and become progressively worse over a period of almost 2 years with no warning signs posted. (*Shaw, supra*, at 313.) In *Robertson*, the Claimants were injured when their vehicle struck a hole in the road upon which an attempted repair had been made 5 days before the accident. This repair was done in a manner that was not recommended with a temporary patch that was known by the Respondent to be susceptible to failure within a short period of time. No warning signs of the dangerous condition had been erected by the Respondent. This Court found that the State was negligent in having failed to use recommended procedures to properly repair the dangerous condition and having failed to warn motorists of the dangerous condition of the roadway.

Claimant Fleming also cites *Allen v. State* (1984), 36 Ill. Ct. Cl. 242. In *Allen*, this Court denied relief to a motorcyclist who was injured when he lost control of his motorcycle. The motorcyclist contended that a patched area in the highway had caused him to lose control. In *Allen*, Justice Roe found that the Claimant had failed to meet his burden of proof, and that he had failed to show that the patched area of the highway was so defective and dangerous that it left the highway unfit for the purpose for which it was intended, or that the highway was not reasonably safe. IDOT employees testified that the area in question had been repeatedly examined and repaired using state maintenance standards. *Shaw, Robertson*, and *Allen* do little to support the theory of Claimant Fleming in the case at bar.

Claimant Fleming also relies on *Haggard and National Bank of Bloomington v. State* (1990), 34 Ill. Ct. Cl. 23, which, nearly identical to *Haggard*, held an award justified where the evidence indicated that a flooding condition

over a roadway was a recurring condition and it was the practice of the State to place temporary warning signs whenever water accumulated. In *National Bank of Bloomington*, there was evidence that the dangerous condition at the site of the accident had existed over a period of 28 years, and that on occasion the State had placed temporary lighted signs to warn motorists, which were not present when the accident happened.

Finally, Claimant Fleming offers *Interstate Bakeries v. State* (1974), 29 Ill. Ct. Cl. 446. In *Interstate Bakeries*, it was claimed that the Respondent had failed to remove an accumulation of oil from the highway which caused an accident injuring the Claimant. The evidence indicated that the accident occurred on September 26, and that, as early as September 4 of the same year, the State had been notified by residents of a nearby village that oil was accumulating on the road and creating a dangerous condition. In fact, the Respondent had dispatched a maintenance crew to the site and had previously scraped excess oil off of the road. The condition was caused by oiling of the village roads adjacent to the highway. No warning signs were ever placed at the location where oil accumulated. This court held that the State had actual notice on September 4, 1966, of the dangerous condition prior to the accident on September 26 of the same year. An award was made in the face of evidence that the State's maintenance crews had been to the site three to five times. The Respondent knew that the condition was a recurring one, and although the Respondent made efforts to repair the situation, the recurring nature of the situation was found to have placed the State on notice that its maintenance was ineffective and that warnings alerting motorists of a possible accumulation of oil at the intersection should have been posted. Again, *Interstate Bakeries* offers little support for the proposition that a reaction time of less

than 2 hours on the part of the State to a known dangerous condition is unreasonable or negligent.

The two cases cited on behalf of Claimant Sutter, as to the liability issue are not helpful.

In *McCoy v. State* (1985), 37 Ill. Ct. Cl. 182, 185, the Court denied any award in the situation where the Claimant drove his automobile through a safety zone marked by flares and collided with a tow truck whose flashing lights were revolving. Also present were the flashing blue lights of a police car and a paramedics' vehicle at the scene of an accident. The Respondent was found free from negligence in attempting to clear away the wreckage of an accident.

In *McKee v. State* (1978), 33 Ill. Ct. Cl. 58, 61, the Court allowed an award to a motorcyclist whose vehicle had struck a hole in a highway. The evidence revealed that a sewer line had been placed under the highway about a year prior to the accident, and that work had been done in that area almost yearly. State police officers noticed the depressed area where the accident occurred getting worse during the day, but did not believe the situation sufficiently bad to report to IDOT. The State placed no warning signals or barricades at the scene to warn motorists. Additional evidence was adduced that the Respondent had been patching the street in that area over a long period of time. The tendency of the highway to develop holes or dangerous conditions had apparently been caused by an improper auguring process used to install a sewer under the highway. The Court found that the State had continually had trouble with that stretch of roadway requiring repeated repairs and that the State had not properly fulfilled its duty in supervising the auguring under the highway, which created the dangerous condition. This Court concluded that the State had constructive notice of the dangerous condition, and thus, granted the injured Claimant an award.

Both Claimants argue long and hard that the facts in this case justify the conclusion that the State was negligent in failing to properly respond to a known dangerous emergency situation which had developed on Illinois Route 3 when drainage guttering had been unexpectedly blocked by debris. Claimant Sutter complains that, had engineer Huhman acted more quickly or assigned responsibilities to IDOT employees who lived closer to the scene, the accident would have been avoided. It should be remembered that Huhman was contacted by his dispatcher at 7:39 a.m. on a Saturday, and called Steiner who left his home at approximately 8:26 a.m. to pick up IDOT employee Don Butler in Alton and proceed to the scene, arriving sometime shortly after 9:00 a.m. It should be remembered that Huhman testified that he was uncertain from the description he got from the radio dispatcher as to whether or not the problem existed in an area of the highway under the jurisdiction of IDOT. Thus, he did not know whether he had jurisdiction until 8:00 a.m. Huhman claims that he followed weekend work assignment procedures required by IDOT's protocol and by union contracts, but did not deny that he had the power to deviate from normal procedure in emergency situations. Claimant Fleming argues that Huhman should have contacted other agencies or emergency personnel to place warning signs or divert traffic.

The arguments of both Claimants hang on a simple question with no simple answer—Did IDOT respond with reasonable dispatch to an unexpected emergency highway condition within its jurisdiction?

Claimant Fleming asserts that she was a 25-year-old woman, pregnant and expecting her third child at the time of the accident. The child was delivered by C-section four months after the accident. She was told by her

physician not to work from the time of the accident until the birth of the child. She claims to have missed four months of work at \$300 a week; and, as a result of the C-section delivery, she missed an additional month that she would not have missed had her third childbirth been normal. Her vehicle was totaled and had a value of approximately \$4,100. She lists damages as follows:

<i>Item</i>	<i>Amount</i>
Lost vehicle	\$4,100.00
St. Elizabeth's Hospital	300.00
Ambulance bill	160.00
Dr. Yoder	600.00
Wage loss	<u>6,000.00</u>
Total	\$11,160.00

Claimant Fleming seeks an award of \$15,000.

Claimant Sutter contends that she suffers from permanent injuries, and has had “constant middle and lower back pain.” Chiropractor Lawrence Seger diagnosed Claimant Sutter as having suffered an “acute severe sprain of the thoracic and lumbar spine with accompanied ligamentis instability, mild myofascitis and localized evidence of nerve root irritation.” Dr. Seger opined that the injuries were caused by the accident and would last throughout Claimant Sutter’s life expectancy of 46.3 years. Claimant Sutter lists medical expenses incurred and paid of \$4,587 and seeks an award of \$54,587.

The Respondent has cited 13 decisions, many of which are of little assistance. Among those cases cited is *Pyle v. State* (1973), 29 Ill. Ct. Cl. 133. In *Pyle*, the Court dealt with a problem involving a stop sign that had been knocked down at an intersection. The Claimant brought suit on the theory that the State was negligent in failing to replace the downed stop sign within a reasonable time after

having actual notice of the dangerous condition. In a lengthy opinion authorized by Justice Burks, this Court reviewed a number of cases from both Illinois and other jurisdictions on the question of whether the State failed to take appropriate remedial action within a reasonable length of time after having actual knowledge of the dangerous condition on its highway. The evidence in *Pyle* was not disputed. The dangerous condition was first discovered by an Illinois State trooper 29 hours before the Claimant's accident. The Court agreed that, at the time that the Illinois State trooper observed the dangerous condition, the State was chargeable with actual knowledge. The Court then identified the issue which this Court believes is the narrow issue, upon which the present case turns, as follows:

"We turn next to the question as to what length of time constitutes a "failure" on the part of the State to take appropriate remedial measures after receiving notice of a downed stop sign." (Dangerous condition on the highway). *Pyle*, at 137.

The Court ruled that the answer to the above question depended on the facts and circumstances in each particular case. The Court held that Respondent's failure to repair the condition or to erect warning signs over a period of 29 hours after actual notice could not be ruled to be negligence on the part of the Respondent, primarily because other signs were present.

The issue, exhaustively reviewed by this Court in *Pyle*, is not materially different than the issue before the Court in this case, even though most of the cases cited in *Pyle* involved downed stop signs. At least one case involved a hole in the highway. (*Caudle v. State* (1949), 19 Ill. Ct. Cl. 35.) In *Caudle*, the State had a four or five day notice that a hole existed in the highway, yet liability was not imposed.

In the present claim, it was a Saturday—a day in which most IDOT employees were off work. At 7:39 a.m., Mr. Huhman received a call from the dispatcher concerning the water on Route 3. It took 20 minutes, until 8:00 a.m., to locate the water within IDOT's jurisdiction. Mr. Steiner was called at 8:00 a.m. He got dressed, but did not drink or eat, and went out at 8:26 a.m. He picked up Mr. Butler directly on the way to the water on Route 3. He did not go to the yard or headquarters first. Mr. Steiner and Mr. Butler arrived at the scene at approximately 9:00 a.m. The accident occurred shortly before 9:00 a.m.

The Claimant argues that, had there not been the confusion between Mr. Huhman and the dispatcher as to the location of the water, and had a closer lead worker been called out, the accident would have been prevented by the earlier arrival of the IDOT crew.

As we have stated previously, the length of time required to remediate a known dangerous condition depends upon the circumstances.

It is easy to speculate that the radio dispatcher employed by IDOT or the traffic engineer for IDOT could have reacted to evidence of the dangerous condition in a more timely, imaginative, or heroic fashion, but the precedents do not require such. So long as the IDOT employees conducted themselves in a reasonably diligent manner in relation to the known hazard and circumstances, we cannot hold them to a greater duty.

In the present claim, one to two feet of water was reported on Route 3. It was necessary for IDOT to locate the water and locate a crew to be dispatched to the scene. The crew had to prepare themselves to go out and then travel to the scene. All this took one and one-half hours on a Saturday. We find the response of the State to have

been reasonably diligent under the circumstances and, therefore, the State did not breach its duty and was, thus, not negligent.

It is the ruling of this Court that the claims of both Claimants are denied.

(No. 86-CC-1944—Claimant awarded \$100,000.)

GERTRUDE LYNCH, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed October 26, 1995.

Order filed February 26, 1996.

CHASE AND WERNER, LTD. (ALAN D. KATZ and
DAVID S. POCHIS, of counsel), for Claimant.

JIM RYAN, Attorney General (KENNETH H. LEVINSON,
Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*State's duty to maintain highways and warn of known dangers.* While the State is not an insurer with respect to its highways or those who travel upon them, the State does have a duty to exercise reasonable care in the maintenance of its highways and to warn of those conditions which it knows exist but cannot adequately remedy.

SAME—*icy roadway—State had constructive notice—failure to warn—award granted.* The Claimant was entitled to an award of damages as a result of injuries received when she lost control of her car on an icy highway, where several witnesses testified that the location in question had long been a problem area and the scene of numerous prior accidents, but despite having constructive knowledge of the dangerous condition, the State failed to warn motorists of its existence.

OPINION

PATCHETT, J.

This claim is the result of an accident which occurred on January 17, 1985, at the intersection of 143rd Street and Harlem Avenue in Orland Park, Illinois. Lynch

was proceeding westbound on 143rd Street. As she passed the top of a hill, she lost control of her car in icy conditions. She veered into the eastbound lane and was hit by another automobile. As a result of this accident, she sustained serious injuries.

The road in question was a down slope and was covered by trees. The trees completely enclosed the roadway and did not allow sunlight to penetrate to any great degree. The Claimant testified that while the road had been clear prior to reaching the crest of the hill, it was extremely slippery on the other side. These facts were confirmed by numerous eyewitnesses.

This case involves the issue of constructive notice. The police officers who investigated the scene indicated that this was a problem area in which numerous accidents had occurred in the past. Many of these prior accidents involved weather conditions. The police officers further testified that copies of the accident reports were forwarded to the State of Illinois. Obviously, there is no way to confirm how many reports there were and whether the reports were in fact received by the State. However, it is clear that the standard procedure is to forward the accident reports to the State, and that at least some of them should have been received. The departmental report, filed herein by the Respondent, stated that a thorough search of the records disclosed one report of an accident due to weather conditions, and that was subsequent to the accident herein. Obviously, the State did not receive notice even of the particular accident in question. Therefore, the Respondent's departmental report is suspect, at best.

Edward Zak, an employee of the Illinois Department of Transportation for 24 years, testified at the trial of this case. On the date of the accident, Zak was a maintenance field technician and responsible for the supervision,

scheduling, and directing of maintenance activities along State roads in southwest Cook County. He testified that he had driven the road in question on numerous occasions during his career and had never ascertained that there was a problem. He further testified about the amount of equipment available to combat snow conditions during the period of the accident.

Denise Gartland, a bus driver in Orland Park, Illinois, testified that she made numerous trips in the vicinity of 147th Street and Harlem Avenue for ten years prior to the accident. She testified that she avoided the area by going around it during wet or icy conditions because the locale was always slick. Again, the police officers who investigated the accident confirmed the situation.

There is no evidence that the State had actual notice of the slippery conditions on the road in question on the morning of the accident. Therefore, the issue is one of constructive notice. This is a close case. Obviously, the police officers' testimony, taken along with that of the bus driver, indicate that some people knew that a dangerous condition existed at the accident scene for a long time prior to the accident. The State, however, produced evidence which showed that it may not have had adequate notice or warning of this condition.

This Court has held on numerous prior occasions that the State is not an insurer with respect to its highways or those who travel upon them. The State does, however, have a duty to exercise reasonable care in the maintenance of its highways, and the further duty to warn of those conditions which the State knows exist, but which they cannot adequately remedy.

The State is not required to keep its highways totally free from ice and snow—an impossible task. The State, however, must use all reasonable care to do so. Because

the State could not have been charged with liability based on the failure to adequately correct the icy condition, the issue in this claim involves whether the State should have posted warning signs of the regularly recurring hazardous conditions at this site. Obviously they were not required to have posted a warning sign unless they had constructive notice of the defective condition in the first place.

Both the Claimant and Respondent have cited several prior decisions of this Court in this case. The Claimant has cited *Burgener v. State* (1964), 25 Ill. Ct. Cl. 6, on the issue of notice, but that case is distinguishable. There the State had notice that several other accidents had occurred at that location in similar weather conditions on the evening before the accident.

In *Smith v. State* (1984), 36 Ill. Ct. Cl. 5, this Court granted a claim on the basis that the State had constructive notice of a flooded viaduct. There the testimony established that the condition had been recurring regularly after heavy rains for many years, and the State failed to correct the condition or give proper warnings.

The Claimant also cited *Kelly v. State* (1981), 35 Ill. Ct. Cl. 56. There this Court awarded a claim where an accident occurred as the result of unusual accumulation of ice and water. The State knew of previous accidents at that site. The State failed to warn the public of the dangerous conditions, and that was the basis for liability. However, that case is somewhat distinguishable because there the State had specific notice of the situation and while attempting to warn the public, took insufficient steps in order to do so. However, the factual situation as to the ice at the scene is similar to the one that we face in this case. There, traffic was traveling on an overpass on wet, but not slippery, pavement which became icy at the crest of the overpass. There, however, four vehicles had previously slid off the pavement on the morning of, and prior to, the accident.

The Respondent cites the case of *Slagil v. State* (1991), 41 Ill. Ct. Cl. 28, where this Court held that the absence of a warning sign did not create a hazard. However, that case involved a missing hazard sign regarding a curve on the highway. The section of highway was hilly and curvy and had numerous other warning signs and markings. Therefore, it is not particularly helpful in an analysis of the present situation.

Considering all the facts and the applicable law, we make the following findings:

We find that the State had, or should have had, constructive notice of the defective condition existing at 143rd Street and Harlem Avenue in Orland Park, Illinois. While the State is not an insurer of the highways, the State did have a duty to erect a warning sign. In fact, this was done after the accident in question. We therefore find liability of the State on this basis.

The Claimant's injuries were very significant. During the trial of this case, the State did not attempt to use the affirmative defense of contributory fault. However, during the briefing of this case, the State did attempt to urge comparative or contributory fault of the Claimant.

This Court faces this situation numerous times in which the State attempts to rely on a defense which it has not previously pled or raised at the trial level. Because this defense was not raised or pled at the trial level, we reject it.

We find that the Claimant's medical bills exceeded \$200,000. We therefore award the Claimant the sum of \$100,000, the maximum statutory amount.

ORDER

FREDERICK, J.

This cause comes on to be heard following notification that the Respondent will not be filing a motion for

reconsideration; it is hereby ordered that this matter is closed.

(No. 86-CC-2861—Claim dismissed.)

WARREN J. OPPE and THERESA D. OPPE, Claimants, *v.*
THE STATE OF ILLINOIS, Respondent.

Order filed November 29, 1990.

Order filed May 13, 1996.

ELMO E. KOOS, SR., for Claimants.

JIM RYAN, Attorney General (CLAIRE G. TAYLOR, Assistant Attorney General, of counsel), for Respondent.

LIMITATIONS—*when claim must be filed in Court of Claims.* Under the Court of Claims Act, a claim must be filed within two years after it first accrues, but minors and other persons under legal disability at the time the claim accrues must file within two years from the time the disability ceases.

PRACTICE AND PROCEDURE—*when document is deemed filed.* In order to file a legal document, it must be placed in the hands and under the control of the clerk, and it must pass into his exclusive custody and remain within his power, and the file mark on a paper constitutes *prima facie* evidence that it was delivered to the proper office for filing on the date indicated by the file mark.

SAME—*complaint was timely filed when placed in exclusive possession of clerk despite absence of filing fee.* The Court of Claims vacated a previous order finding that the Claimants' complaint was not timely filed within the two-year statute of limitations period since, although the complaint was not initially accompanied by a filing fee on the date that the Claimants' attorney handed it to an employee of the clerk's office, the employee accepted the complaint into the clerk's custody, file-stamped it as being received on that date, and returned a file-stamped copy to the attorney.

SAME—*claim dismissed for want of prosecution.* The Claimants' failure to file any pleadings, or in any way pursue their claim for more than five years after the Court determined that their complaint had been timely filed, resulted in the claim being dismissed for want of prosecution.

ORDER

MONTANA, C.J.

This cause is before the Court on Claimants' motion

to vacate order and to reconsider and Respondent's responses thereto.

On July 3, 1986, this Court entered an order dismissing this claim on the grounds that the complaint was not filed within the two-year period required by section 22(f) (now section 22(g)) of the Court of Claims Act. (705 ILCS 505/22(f).) Section 22(f) provided:

"All other claims must be filed within 2 years after it first accrues, saving to infants, idiots, lunatics, insane persons and persons under other disability at the time the claim accrues, in which case the claim must be filed within 2 years from the time the disability ceases."

That decision was based on the record existing in the file in the Office of the Clerk of the Court of Claims at that time which consisted of a complaint, a notice of personal injury, and a motion to dismiss filed by Respondent. The complaint alleged that Claimants were injured on March 25, 1984. A circular stamped date on the front of the complaint indicated the date of receipt by the Court of Claims was April 2, 1986. (The Court did not see a square stamp on the back side of the last page of the complaint dated March 25, 1986.) Respondent's motion to dismiss asserted that Claimants' complaint was filed beyond the two-year requirement of Section 22(f) of the Act. Claimants failed to file a response to the motion to dismiss. The Court, agreeing with Respondent's assertions, dismissed Claimants' complaint.

Claimants then timely filed a motion to vacate order and to reconsider. Claimants stated in the motion that the complaint was in fact filed on March 25, 1986, and not April 2, 1986. In support of this assertion, Claimants attached a copy of a complaint bearing a Court of Claims file stamp date of March 25, 1986.

Respondent then filed a motion to strike Claimants' motion to vacate order and to reconsider. Shortly thereafter

Respondent filed a motion to withdraw motion to strike Claimants' motion to vacate order and to reconsider and objection to Claimants' motion to vacate order and to reconsider. This document, in relevant part, states:

"4. It has come to Respondent's attention that the facts in this case, pertaining to the time of the filing of the complaint, as set out in full in the attached affidavit (Exhibit A, attached hereto and incorporated herein by reference), present an issue not discussed heretofore.

5. The issue to be decided is what, under these circumstances, is a proper filing of a complaint. The pertinent documents are attached hereto as Exhibits B and C, and are incorporated herein by reference. Exhibit B is the first page of a complaint against the State of Illinois bearing a square stamp of the Court of Claims dated March 25, 1986. Exhibit C is a complaint against the State of Illinois with the same allegations, but with a round, red and blue stamp of the Court of Claims dated April 2, 1986, and a stamp showing case #86-2861. Exhibit C has an original signature and notary seal on the last page. [Note: Respondent's file copy of Exhibit C is filed herewith as the Claimants' original.]

6. Reference to the filing of complaints and assessment of fees for same, is found at Ill. Rev. Stat., ch. 37, sec. 439.21, entitled *Fees*. Section 21 states that the court is authorized to impose, by uniform rules, certain fees for the filing of petitions.

Court of Claims Rule #27 fixes the fees the legislature authorized in Section 21, by using the mandatory language of " * * * the following fees shall apply * * * ."

Court of Claims Rule #4, entitled *Procedure*, at subsection A., entitled *Filing*, provides in pertinent part as follows:

"Cases shall be commenced by the filing of a verified complaint with the Clerk of the Court * * * . The Clerk will note on the complaint, and each copy, the date of filing, and deliver one of said copies to the Attorney General or to the legal counsel of the appropriate State agency * * * ."

Thus the Court of Claims rules set out what fees *shall* apply (*shall* being mandatory language), and what constitutes the filing procedure. Payment of fees is a condition precedent that the Claimant must meet.

7. Because the Affidavit (Exhibit A) establishes that no fee accompanied Exhibit B, actual and proper filing of the complaint took place on April 2, 1986 when Exhibit C was submitted with a fee and duly processed by the Clerk of the Court of Claims.

8. Therefore, as originally set out in Respondent's Motion to Dismiss, Claimants' complaint is not timely, and should be dismissed."

The affidavit referred to as Exhibit A is signed by Richard N. Bozarth and, in pertinent part, states:

"I, RICHARD N. BOZARTH, being first duly sworn upon oath, depose and state that I am over 21 years of age and if called upon to testify, I could competently testify as follows:

1. I am employed as a Docket Clerk of the Clerk of the Court of Claims, 630 South College, Springfield, Illinois, and I was so employed during April and May of 1986.

2. As a Docket Clerk of the Court of Claims, it is part of my duties to duly file complaints and other pleadings submitted to the Court of Claims, and to act as custodian of the pleadings so filed.

3. On March 25, 1986, Mr. Elmo E. Koos, Sr., Attorney for Claimants in this case, came into the office building of the Clerk of the Court of Claims at 630 South College, Springfield, Illinois. Mr. Koos presented a complaint, and it was taken from him by Sandy Szkutnik, who was seated at a desk near the door. Ms. Szkutnik stamped the complaint with a stamp which states 'Filed, Court of Claims, Mar. 25, 1986.' Mr. Koos then left the clerk's office.

4. After Mr. Koos left, the complaint was handed to me for filing. Because I determined that no filing fee was included with the complaint, I did not assign it a case number, or send a copy to the Attorney General's office, or otherwise complete the filing procedure.

5. On April 1, 1986, I telephoned Mr. Koos to inquire about the fee, and advised him to send it in immediately.

6. On April 2, 1986 I received by mail a check for the fee. The complaint which had been previously brought in had the square stamp (described above in paragraph 3) on the back side of the last page. I stamped the front page with a round dial-type stamp that said 'Received, Court of Claims, 4-2-86.' I also assigned the case the #86-CC-2861, and completed the required steps in the filing procedure, including the sending of a copy of the complaint to the office of the Attorney General, and sending a letter to the Claimant's attorney acknowledging filing."

We note that while Claimants' motion to vacate and to reconsider has been pending, Claimants have been involved in another suit in the Circuit Court of Woodford County and the Fourth District Appellate Court arising out of the same set of facts alleged in Claimants' complaint in this Court.

The information contained in Claimants' motion to vacate order and to reconsider and Respondent's responses was not present when this Court originally determined that this claim should be dismissed. After reviewing that information and relevant case law, it is the opinion of

this Court that the decision should be reversed for the following reasons.

Respondent asserts that, as the Court of Claims rules set out what fees shall apply for filing claims and what constitutes the filing procedure, payment of fees is a condition precedent that Claimant must meet before a claim can be deemed as filed. This is contrary to the Fourth District Appellate Court decision in *Hanks v. Floyd* (1977), 51 Ill. App. 3d 1048, 367 N.E.2d 483, wherein the court determined that a complaint for personal injuries was timely filed within the statute of limitations even though the filing fee had not been paid on the filing date and, when the filing fee arrived two days later and the clerk himself discovered that the fee had not been paid until that date, the clerk changed the file stamp date to reflect the date of fee payment. In reaching its decision the court stated at 51 Ill. App. 3d at 1050, 367 N.E.2d at 484:

“Although by statute the fees of the clerk of the circuit court ‘shall be paid in advance’ (Ill. Rev. Stat. 1973, ch. 53, par. 31), this language has been interpreted to be merely directory, not mandatory. In *Elles v. Industrial Comm.* (1940), 375 Ill. 107, 30 N.E.2d 615, the plaintiff sought to appeal a decision of the Industrial Commission to the circuit court. However, the plaintiff did not pay the filing fee. The clerk of the circuit court filed the action even though a statute provided that fees of the clerk ‘shall be paid in advance.’ The supreme court held that the statute was merely directory to the clerk and that the failure to pay the filing fee did not deprive the circuit court of jurisdiction.”

The situation in the claim at bar is similar to that presented in *Ayala v. Gold* (1988), 176 Ill. App. 3d 1091, 531 N.E.2d 1040. In *Ayala* plaintiff was injured on January 28, 1985. Plaintiff’s attorney sent a complaint with a cover letter dated December 30, 1986, addressed to the “Clerk of Kane County, Geneva, Illinois.” The letter indicated the complaint was being sent “along with our check in the sum of \$52.00” and requested the clerk to forward stamped copies and forms to issue summons. It was undisputed that the circuit clerk received the letter and

complaint and stamped the complaint as filed on January 5, 1987, and assigned the complaint a case number. It further appeared that sometime after the initial filing of the complaint an unknown employee of the circuit clerk's office crossed out the January 5, 1987, filing date and re-stamped the complaint as having been filed on March 25, 1987, at 2:51 p.m. and a different case number was assigned by the circuit clerk.

At the hearing of the defendant's motion to dismiss, the circuit clerk testified that a courtesy policy had been developed to notify attorneys who filed complaints by mail if the filing fees were not enclosed. A telephone call was made to the attorney the day a complaint was received advising of that fact and that paperwork would be held five days for submission of the fee. The circuit clerk further testified it was the clerk's policy to file stamp a complaint when received and, if payment was not received, to scratch out or otherwise remove the filing notation from the complaint.

A deputy circuit clerk testified he had received the cash receipt records of the clerk's office and could not locate any record of money received from plaintiff for filing on January 5, 1987, but did find a copy of a check corresponding to the revised filing date of March 25, 1987. Another deputy circuit clerk testified that her handwriting and signature appeared on the front of the cover letter sent by plaintiff's attorney when the complaint was mailed to the clerk's office. Her signature followed a notation on the letter regarding service of summons, but no mention was made of a missing filing fee. She further testified she had no personal recollection concerning whether a filing fee was included with the complaint.

An employee of the circuit clerk's office testified she entered plaintiff's complaint in the computer on January

9, 1987, but deleted it seven minutes later. She further testified she had no independent recollection of the matter, or of advising plaintiff's attorney of the missing filing fee; but her initials and terminal number appeared on the computer printout.

The trial court ruled that receipt of the filing fee by the circuit clerk was a condition precedent to the filing of a complaint and since plaintiff offered no direct evidence that a check had been sent with the complaint it was not taken into custody of the circuit clerk until the March 25, 1987, filing date which was after the limitations period had run.

The Second District Appellate Court, citing *Hanks, supra*, reversed the trial court's decision. In so doing the court stated at 176 Ill. App. 3d at 1694, N.E.2d at 1042, 1043:

"Our supreme court has considered the circumstances which will be regarded as the filing of a document, as follows:

'[T]o file a paper in a cause it must be placed in the hands and under the control of the clerks. It must pass into his exclusive custody and remain within his power. * * * [T]he purpose and object is to render it a part of the records of his office, and that object must be communicated to him in some manner capable of being understood.' *Brelsford v. Community High School District No. 36* (1927), 328 Ill. 27, 34, 159 N.E. 237, 240. *Hamilton v. Beard-slee* (1869), 51 Ill. 478, 480.

The file mark on a paper constitutes prima facie evidence that it was delivered to the proper officer for filing on the date indicated by the file mark. (*Gage v. Nichols* (1890), 135 Ill. 128, 133, 25 N.E. 672, 673; see 1 C. Nichols, Illinois Civil Practice §380 (1984).) After the clerk has put his mark on it and docketed the case, the papers in a cause become the files of the court and cannot be withdrawn without leave of the court. (*Coles v. Terrell* (1896), 162 Ill. 167, 169-70, 44 N.E. 391, 392.) More recently, this court has stated that the actual filing date of a petition (like a complaint) is when it is received and stamped by the circuit clerk's office. *Wilkins v. Dellenback* (1986), 149 Ill. App. 3d 549, 553-54, 102 Ill. Dec. 799, 802-03, 500 N.E.2d 692, 695-96, *appeal denied* (1987), 113 Ill. 2d 586, 106 Ill. Dec. 57, 505 N.E.2d 363."

The court further stated at 176 Ill. App. 3d at 1095, 531 N.E.2d at 1043:

"We point out that the clerk may refuse to accept a document unless the fee is paid (Ill. Rev. Stat. 1987, ch. 25, par. 27.1); however, where the clerk has accepted a document for filing without the fee, file stamps it and assigns a docket number, as occurred in the present case, the circuit court nevertheless acquires jurisdiction of the case. Where the fee has not been paid, it may properly order the fee paid before proceeding with the matter, but the harsh remedy of dismissal with prejudice should be considered only upon plaintiff's noncompliance with an order for payment. See generally *Ganja v. Johnson* (1972), 6 Ill. App. 3d 701, 286 N.E.2d 775, 777."

Based on the foregoing, we find that the complaint in the claim at bar was filed on March 25, 1986, the date Claimants' attorney in person presented the complaint to an employee of the Office of the Clerk of the Court of Claims and the employee accepted the complaint, file stamped it as being received on March 25, 1986, and returned a file stamped copy to the attorney even though payment of the filing fee may not have been tendered at the time. It is on that date that the complaint came into the exclusive custody of the Office of the Clerk of the Court of Claims and became a part of its records. We further find that since Claimants' complaint was filed on March 25, 1986, it was timely filed within the two year period required by section 22(f) (now section 22(g)) of the Court of Claims Act.

Wherefore, it is hereby ordered that this Court's order dismissing this claim dated July 3, 1986, be vacated and that the cause be assigned to a Commissioner for further proceedings.

ORDER

FREDERICK, J.

This cause comes before the Court on the Court's own motion, and the Court having reviewed the court file, and the Court being fully advised in the premises, Wherefore, the Court finds:

1. That the Court has reviewed this case in the Court's continuing review of all cases that were filed prior to 1990.

2. That this claim was filed on April 2, 1986.
3. That there has been no activity in the case noted on the docket sheet since November 29, 1990.
4. That there have been no pleadings filed and no hearings held in this case in more than five years.
5. That this Court will not hold a case open indefinitely.
6. That the Court may dismiss a case for want of prosecution where the Court finds a Claimant has failed to make a good faith effort to prosecute the claim.
7. That Claimants herein have failed to make a good faith effort to prosecute their claim where there has been no activity in the case for more than five years.

Therefore, it is ordered that this claim is dismissed for want of prosecution.

(No. 86-CC-3577—Claim denied.)

PATRICK POWELL, Administrator of the Estate of
MICHAEL POWELL, Deceased, and PATRICK L. POWELL,
JEAN M. POWELL, THOMAS P. POWELL, NANCY J. POWELL,
JAMES L. POWELL, and WILLIAM A. POWELL, Claimants, v.
THE STATE OF ILLINOIS, Respondent.

Opinion filed May 17, 1996.

O'CALLAGHAN & WALLER, for Claimants.

JIM RYAN, Attorney General (DIANN K. MARSALEK,
Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—imposition of legal duty—removal of potential sources of injury—foreseeability. There is no legal duty upon the State to remove every possible source of injury from areas in the more remote proximity of the

roadway, since a legal duty requires more than the possibility of occurrence, and the State is charged with such a duty only when the harm is legally foreseeable.

SAME—negligence—State did not have duty to remove tree located near highway. The State was not under a legal duty to remove a tree which the decedent's car struck after it missed a curve in the highway and traveled down an incline, since the tree was located 12 feet from the roadway, and the recommended clearance was ten feet.

SAME—negligent design and maintenance of roadway—what Claimant must prove. The State is chargeable only with designing and maintaining roads in a reasonably safe condition for the purpose for which they are intended, and in order to prove negligence, a Claimant must show by a preponderance of the evidence that the State breached its duty and that the breach proximately caused the Claimant's injuries.

SAME—fatal one-car accident—Claimants failed to prove State's negligence. A claim brought by relatives of two young men who were killed when their vehicle missed a curve in a highway and struck a tree was denied, where the State had complied with mandatory sign provisions, and the evidence showed that the driver could have negotiated the curve if he had not been speeding, under the influence of alcohol, and had exercised reasonable care.

OPINION

PATCHETT, J.

This is a claim arising under section 8 of the Court of Claims Act, 705 ILCS 505/8. It is a wrongful death claim involving the death of Michael Powell.

On June 29, 1985, Michael Powell, 19 years of age, was a passenger in a motor vehicle being operated by Darrell L. Holmes, age 21 years. The car was proceeding in a northbound direction upon Illinois Route 78 approximately five miles north of Mt. Carroll, Illinois. Michael Powell was last seen by his father, Patrick Powell, on June 28, 1985, when he left home to assist Darrell L. Holmes in the building of a garage on a farm in Stockton, Illinois. Thomas Holmes, father of Darrell L. Holmes, testified at the coroner's inquest that both Darrell L. Holmes and Michael Powell had been pouring a foundation for a garage on the Holmes' farm, two miles north of the accident scene. The boys had changed clothes and left the

farm at approximately 9:30 p.m. on the night of June 28, 1985, to go to either Thompson, Illinois, or Clinton, Illinois. The boys never returned.

The Holmes' vehicle was found on June 29, 1985, at 3:10 p.m. by Deputy Sheriff Mike Weber. Both Holmes and Powell were dead. Rigor mortis had already set in for both occupants.

Deputy Weber testified that the vehicle left the roadway prior to the guard rail at the curve on Route 78. The time of the accident was unknown, but the motor of the vehicle was cold when he discovered it. The weather had been warm and sunny. The car traveled straight off the curve, a distance on the shoulder of the roadway, down an incline, and into trees which had broken down over the car. The car landed approximately 12 feet from the roadway, which included a six-foot earth shoulder. There was one faint scuff mark on the edge of the roadway, but not enough to obtain a drag factor to indicate speed. Photographs were taken of the scene as the rescue squad arrived. There were no eyewitnesses. No one knew anything about the activities of Holmes or Powell immediately prior to the accident.

The boys were pronounced dead at the scene by the coroner. Blood samples were drawn on both decedents. Blood levels indicated alcohol in both Holmes and Powell.

Death was instantaneous for both Holmes and Powell. Holmes died of a massive skull fracture, and Powell died of massive leg, internal, chest, and stomach injuries. The coroner's jury determined that both deaths were accidental but recommended that the guard rail be extended on Route 78 at the scene of the accident.

The Powells instituted a lawsuit against the estate of Darrell L. Holmes. This lawsuit was settled for \$50,000,

the amount of the available insurance coverage. The Powells had exhausted all other remedies prior to filing this lawsuit.

The Claimants herein, Patrick Powell and Jean Powell, the parents, brothers, Thomas, James, and William Powell, and a sister, Nancy Powell, proceeded with this claim for wrongful death as a result of alleged negligence on the part of the Department of Transportation.

The Powells produced testimony from Robert Lippman, a civil engineer and an expert in accident reconstruction. Lippman concluded that the approximate cause of the accident was a surprise factor from the lack of positive guidance and delineation on the roadway. Lippman compared five curves on the roadway in question. This included the curve at the accident site and the four preceding curves. Lippman identified the accident site as curve #5 and testified that curve #3 was very similar. He noted that curves #3 and #5 had the same radius and concluded that they should have had the same speed limits and advisory signs.

Lippman stated that curve #3 had a speed limit of 40 miles per hour as compared to curve #5's speed limit of 45 miles per hour. Curve #3 had 13 chevrons, which are black and yellow signs placed at the outer edge of the curve. Curve #5 had no delineators. Lippman therefore concluded that the driver had a reasonable expectation of consistency in the roadway. He concluded that a lack of positive guidance and increased advisory speed resulted in an unsafe roadway that created an element of surprise. This caused the driver to miss the curve.

Lippman further testified that the tree struck by the vehicle was approximately 12 feet from the roadway. He testified that the State should have removed the tree,

thereby providing an area of safe recovery of at least 18 to 30 feet. Lippman concluded that the physical evidence indicated that the driver was not impaired at the time of the accident. He testified that the physical evidence of crossed tire tracks indicated that the driver was attempting to return to the roadway after missing the curve. Lippman concluded that the driver's actions were entirely consistent with normal reaction times. Lippman testified that he did not reach a conclusion as to the speed the vehicle was traveling prior to the accident. He disputed the conclusion of the Respondent's expert that the vehicle was traveling at 89 miles per hour. Lippman stated that this conclusion was not supported by the evidence, and that a vehicle traveling at that speed would have flipped over and knocked down the tree it struck.

The Respondent produced evidence from a reconstruction consultant. The consultant, Terry Shanafelt, a former State trooper, concluded that the subject vehicle was traveling at 89 miles per hour when the brakes were applied. He further concluded that the vehicle began to rotate counterclockwise and continued to skid an additional 84 feet down the shoulder. Shanafelt's conclusion was that, at the end of the skid, the vehicle's right tires dug into the turf and the vehicle vaulted and became airborne for 53 feet until the right portion of the driver's door impacted the tree in question. Shanafelt believed the vehicle was traveling about 71 miles per hour at the time of the impact.

Shanafelt further noted that the roadway had the proper signs. He also concluded that there was no evidence of roadway defect and no documented history of accidents in the area for five years prior to the incident. He noted the driver's excessive speed and blood alcohol level. Shanafelt concluded that the accident was the result of the driver's negligence.

The Respondent called Ronald Kucharik, chief toxicologist for the Illinois State Police Lab Division. In 1985, he was working at Great Lakes Forensic Laboratory doing contract work for the State of Illinois. Kucharik personally performed an analysis of the blood samples of Holmes and Powell. He indicated that the test demonstrated that Darrell L. Holmes had a blood alcohol concentration of 0.152%. The legal limit for operating a motor vehicle was 0.10%.

The Respondent called John Wegmeyer, a studies and plans engineer for the Illinois Department of Transportation. Mr. Wegmeyer testified that he initiated an investigation of the accident site. He determined that the advisory speed at curve #5 northbound was 45 miles per hour, but the advisory speed at curve #5 southbound was 40 miles per hour. He determined the advisory speed at curve #3, as indicated earlier, to be 40 miles per hour in each direction. His results confirmed the findings of a study of advisory speeds done on those curves in 1980. Wegmeyer testified that curves #3 and #5 are similar and that they have the same radius or degree of curvature. They are also significantly different because they have a different length and depth of the angle. He stated that the differences between the curves accounts for the five mile-per-hour difference between the posted advisory speed.

Wegmeyer also concluded that all the advance warning signs at the curve were properly placed, met all requirements, and were consistent with the other signing along the entire route. He testified that there was sufficient positive guidance in advance of curve #5 and no apparent necessity to extend the guard rail at that point. He testified that the tree struck by the vehicle was not in the clear zone.

One allegation of purported negligence by the State was a failure to remove trees adjacent to the highway. The Claimants allege this failed to create a safe recovery area as required. Mr. Wegmeyer's testimony established that the applicable standard at the time of the accident required a ten-foot clearance zone at the location of the accident. The current standard is 18 feet. Wegmeyer clearly testified that the tree was not in the clear zone which existed at the time of the accident.

This Court concluded in *Wilson v. State* (1989), 41 Ill. Ct. Cl. 50, 55, that the State had no legal duty to remove a tree that was outside the ten-foot clearance zone. This Court held as follows:

"The State was within compliance of recommended standards. There is no duty upon the State to clear every possible source of injury from areas in the more remote proximity of the roadway. A legal duty requires more than the possibility of occurrence, and the State, like any other person is charged with such a duty only when harm is legally foreseeable. The issues of 'foreseeability' and 'duty' involve a myriad of factors, including the magnitude of the risk involved, the burden of requiring the State to guard against the risk, and consequences of placing such a burden on the State * * * The fact that removal occurred after the accident, for unknown reasons, is not evidence of negligence." *Wilson*, at 55-56.

In the present case, there was no evidence presented that the tree was inside the recommended clearance zone. For the reasons stated, this Court concludes that the Respondent did not have a legal duty to remove the tree in question.

The Claimants also contend that the Respondent was negligent for failing to mark and maintain the roadway at the scene of the accident. This Court has consistently held that the State of Illinois is chargeable only with designing and maintaining roads in a reasonably safe condition for the purpose for which they are intended. Claimants must, in order to prevail, prove by a preponderance of the evidence that the Respondent breached its

duty and that the breach proximately caused the injuries to the Claimant. *Calvert and Williams v. State* (1985), 38 Ill. Ct. Cl. 104; *Louis v. State* (1983), 35 Ill. Ct. Cl. 741.

In *Slagel v. State* (1990), 42 Ill. Ct. Cl. 28, 32, the Claimant alleged that a vehicle accident was proximately caused by a missing sign which would have warned the driver of an approaching curve. The Court found that roadway was hilly and contained many curves. Other warnings or markings existed preceding the accident site. The Court found that the absence of the sign in question would not have created a hazard for a driver exercising due care and caution. Therefore, the absence of the sign was not the proximate cause of the accident. *Slagel*, at 32.

In this case, signs were appropriate and complied with mandatory sign provisions. It appears clear that the driver could have driven through the curve without incident if he had exercised due care, was not under the influence of alcohol, and not driving at an excessive speed. For the reasons stated, we have concluded that the Claimants have failed to meet their burden of proof that the State was negligent in this case. We therefore deny this claim.

(No. 87-CC-0070—Claimant awarded \$6,166; Respondents' petition for rehearing denied.)

EDWARD COOPER, Claimant, *v.* THE STATE OF ILLINOIS and
ILLINOIS DEPARTMENT OF CORRECTIONS, Respondents.

Opinion filed July 3, 1995.

Order on petition for rehearing filed February 7, 1996.

STEINBERG, POLACEK & GOODMAN (MARICAROL LACY,
of counsel), for Claimant.

JIM RYAN, Attorney General (RICHARD J. KRAKOWSKI,
Assistant Attorney General, of counsel), for Respondents.

PRISONERS AND INMATES—*working conditions—duty owed by State.* The Department of Corrections owes a duty to inmates of its penal institutions to provide them with safe conditions under which to perform their assigned work.

SAME—*slip and fall on prison kitchen floor—State was negligent—damages awarded.* In a prisoner's claim for compensation stemming from injuries he received when he slipped and fell in a prison dish-washing room, the State was liable and the inmate was awarded damages, since the failure of prison employees to follow prison procedure for regularly inspecting the floor and directing clean-up of spillage constituted a breach of the State's duty to provide the inmate with a safe workplace.

LIMITATIONS—*State's petition for rehearing denied as untimely.* Since the State failed to timely file its petition for rehearing in an inmate's claim for damages, the petition was denied.

OPINION

RAUCCI, J.

This claim is brought by Edward Cooper, former inmate of Vandalia Correctional Institution, for injuries he sustained on July 17, 1984, while performing his work in the prison kitchen. A hearing was held before the Commissioner.

The facts adduced at trial are as follows:

Claimant, Edward Cooper, appeared and testified that, in July, 1984, he was an inmate at Vandalia Correctional Center. On the evening of July 17, 1984, at approximately 10:45 p.m., Claimant reported to the kitchen for his work assignment as head cook. The Claimant described a large kitchen area and dining room with an adjacent dish-washing room. The dish-washing room was approximately 12 feet by 18 feet.

As the inmate's evening work began, other members of the kitchen crew removed the left-over potatoes and gravy from the steam table and brought the trays into the dish-washing area. At the same time Claimant was engaged in the preparation of the breakfast meal.

Some time later, as Claimant was preparing to put out the breakfast food, Claimant removed two pans from the steam table.

He described the pans as three feet wide and two feet high. He stacked the pans one inside the other and carried them in front of his body to the dish-washing room. The Claimant's actions were part of his regularly assigned duties.

As Claimant entered the dish-washing room, he was unable to see the area directly in front of him because the view was blocked by the pans. Claimant did, however, observe that the floor to both his left and right was clean. Claimant approached the slop sink and slipped and fell in what he described as greasy, soapy water with potatoes in it.

Claimant testified that he injured his right biceps and the little and ring fingers on his left hand. Claimant was transported to the hospital infirmary where he was treated with physical therapy and a splint was applied to his finger. Claimant testified that the supervisor on duty the evening of the incident was Eddie Dean, a member of the Illinois Department of Corrections personnel. Claimant stated that during all relevant times, Dean was seated at a table at the far end of the dining room from the dish-washing room. He further stated that, from where the supervisor was seated, it would have been impossible for Dean to see into the dish-washing room.

Approximately two or three weeks following the incident, Claimant returned to work on "light duty." He was restricted from lifting any pots or pans.

Following his release from Vandalia Prison, he was examined and treated by Dr. Treister.

Claimant testified that he still has limited ability to use his right arm and experiences pain. He further testified that he cannot close his left hand all the way and he experiences discomfort in his hand when he tries to use it.

Eddie Dean was called to testify. He stated that he was employed as a food service manager at Vandalia Prison on the date of the incident. He testified that his responsibilities included inspection of the kitchen area and, in the event he discovered a mess, he would instruct an inmate to clean it up. He also testified that, in the normal course of business, the food service manager typically inspected the work areas every 30 minutes and a failure to inspect that frequently would be a violation of his job responsibilities.

Dean testified that he did not have any recollection of whether or not he was working at the time of the incident and offered no testimony in regard to the specific details of the incident.

Despite Dean's inability to recall the incident, the State admitted that he was the food service manager at the time of the Claimant's accident and that he was the party responsible for inspecting and removing any dangerous conditions in the area of the prison kitchen.

The parties stipulated to the use of the evidence deposition of Galen Smith. Smith testified that, on the date of the incident, he was employed as a kitchen supervisor at Vandalia Prison. He confirmed that the kitchen supervisor was responsible for making a regular visual inspection of the kitchen area at least every 30 minutes and that it was the sole and exclusive responsibility of the kitchen supervisor to correct any dangerous condition he discovered.

Smith testified that he had no recollection of the specifics of the incident and did not recall whether or not he was working at the time.

The parties also stipulated to the use of the evidence deposition of orthopedic surgeon Dr. Michael Treister, M.D., dated July 7, 1994. Dr. Treister's examination of the Claimant on May 23, 1985, revealed a ruptured right biceps tendon which resulted in a loss of right arm strength and a 50 percent loss of range of motion, in addition to a cosmetic deformity, a small concavity or hole in the biceps. The doctor described the biceps injury as causing significant loss in moderate to heavy lifting and also as causing limitations in holding utensils and performing personal hygienic functions. The injury was classified by the doctor as painful and permanent.

The doctor also observed a fracture to the left small finger and a dislocation of the joint in the left ring finger. The finger injuries have resulted in limitation of his ability to close his hand completely. The doctor described nuisance and stiffness.

The doctor testified that he believed all three of the injuries were causally related to the Claimant's fall on July 17, 1984. He further determined that there is no available treatment for any of the injuries. Claimant's medical charges totaled \$166.

The Court has repeatedly held that the Department of Corrections owes a duty to inmates of its penal institutions to provide them with safe conditions under which to perform their assigned work. (*Hammer v. State* (1987), 40 Ill. Ct. Cl. 173, 175; *Reddock v. State* (1978), 32 Ill. Ct. Cl. 611.) The State also has a duty to supervise the work of inmates. *Lee v. State* (1992), 44 Ill. Ct. Cl. 246, 249.

On the evening of the incident, the Claimant was acting within the scope of normal procedure when he

carried the pans from the steam table into the dish-washing area.

The testimony of correction employees Dean and Smith established that the kitchen supervisor is required to visually inspect the work areas at least every 30 minutes. The Claimant's undisputed testimony was that Dean was the kitchen supervisor on the date of the incident. Claimant stated that Dean sat at a table in the dining room from approximately 10:45 p.m. until the time of the incident, approximately one to two hours later, without making any inspections of the dish-washing areas. Claimant further testified that it was not possible to see into the dish-washing area from Dean's position in the dining room.

The Respondent stipulated that Dean was the kitchen supervisor at the time of the incident and that he was the person responsible for inspecting and directing clean up of any of the kitchen staff's work areas. Dean testified that he had no recollection of the incident. The respondent did not offer any testimony or evidence to establish that any inspections of the dish-washing area had been made.

The Respondents' failure to visually inspect and provide for the clean up of the dish-washing room floor clearly establishes a breach of their duty to Claimant to provide a safe workplace.

The Claimant's undisputed testimony further established that the spillage from the dish-washing staff was the cause of his fall and that fall was the proximate cause of his injuries.

The testimony of both Claimant and Dr. Treister established that Claimant suffered injury to his right arm and his left hand's small and ring fingers. The injury to his

right arm has resulted in permanent loss of strength, limited his lifting ability, and caused a physical deformity in the form of a small hole in his biceps. Claimant's left hand was in a splint for several weeks. The injury has limited the strength in his hand and resulted in his inability to make a fist. Dr. Treister testified that Claimant's injuries could not be treated and are permanent.

The facts, however, do not support Claimant's request for an award in the amount of \$100,000.

The Claimant received medical bills in the amount of \$166. Considering the Claimant's pain and suffering and the permanency of the injury, Claimant should be awarded \$6,000 in addition to his medical expenses for a total award of \$6,166.

It is therefore ordered, adjudged and decreed that Claimant is awarded \$6,166 in full and complete satisfaction of this claim.

ORDER

RAUCCI, J.

This cause coming to be heard on the Respondent's petition for rehearing, the Court being fully advised in the premises, finds:

1. On July 3, 1995, we entered an opinion awarding Claimant \$6,166.
2. On August 22, 1995, Respondent's petition for rehearing was filed.
3. Our Rule 220 (74 Ill. Adm. Code 790.220) provides that a petition for rehearing shall be filed within 30 days of the filing of the opinion.
4. The Respondents' petition for rehearing is not timely filed.

ORDERED: The Respondents' petition for rehearing is denied.

(No. 87-CC-0495—Claimant Jane Doe awarded \$50,000.)

JANE DOE, a minor by her Mother and Next Friend, JOAN DOE,
and JOAN DOE, Individually, Claimants, *v.*
THE STATE OF ILLINOIS, Respondent.

Order filed December 19, 1988.

Order filed May 20, 1996.

MARY G. GORSKI, for Claimants.

NEIL F. HARTIGAN and JIM RYAN, Attorneys General
(GUY STUDACH, Assistant Attorney General, of counsel),
for Respondent.

NOTICE—*complaint filed by minor—leave granted to cure defects in notice.* Since the time for filing a notice of intent by a minor does not begin to run until majority is reached, and the filing of a complaint within the time required for filing a notice obviates the need for filing a notice, the Court of Claims denied the State's motion to dismiss the minor Claimant's complaint and granted her leave to refile in order to cure alleged defects in her notices and complaint.

SAME—*substantial compliance with notice provision satisfies statutory requirements—Claimant granted leave to amend complaint.* Substantial compliance with the notice provision as to content satisfies the requirements of section 22 of the Court of Claims Act, and in a mother's claim on behalf of herself and her minor daughter arising out of an alleged sexual assault of the daughter by a mental hospital escapee, the Claimants substantially complied with the notice provision, but were granted leave to amend their complaint to include a proper verification and a bill of particulars regarding damages.

STIPULATIONS—*sexual assault by mental hospital escapee—award granted pursuant to parties' stipulation.* Pursuant to the parties' joint stipulation, the Claimant was awarded \$50,000 in full satisfaction of her claim stemming from a sexual assault by an escapee of a mental hospital.

ORDER

MONTANA, C.J.

This cause comes on to be heard on the Respondent's motion to dismiss and the Claimant's response thereto,

due notice having been given, and the Court being advised:

On May 19, 1986, a notice of intent to commence a personal injury action was filed on behalf of Jane Doe, a minor. The notice stated that the incident giving rise to the action occurred May 18, 1985. Also on May 19, 1986, a similar notice was filed for a cause of action on behalf of Jane Doe's mother, individually. The mother's actual name was stated on the notice. A third notice, also on behalf of the mother, was filed the same day but stated that the incident occurred a day earlier, May 17, 1985. On May 21, 1986, another notice was filed on behalf of Jane Doe wherein the incident giving rise to the potential claim was alleged to have occurred on the May 17, 1985 date. Also on May 21, 1986 another notice of intent on behalf of the mother was filed, giving May 18, 1985 as the date of the incident. Then, on June 5, 1986, four amended notices of intent were filed, two for each party, alleging July 17 and July 18, 1985 as the dates of the occurrences. On September 25, 1986, a four-count complaint was filed with two counts for Jane Doe and two counts for her mother, alleging July 17 and 18, 1985, as the dates of the incidents giving rise to the claims. In none of the notices or the complaint was Jane Doe's real name provided. In all of the notices, Jane Doe's mother's real name was provided and she was identified as the mother. In the complaint, the mother was named Jane Doe and identified as the mother, but her real name was not stated.

On December 8, 1986, the Respondent moved for dismissal of the complaint on several grounds, all of which pertain to inadequate information in the notices and the complaint. First, Respondent alleges that the notices are not in compliance with section 22—1 of the

Court of Claims Act, Ill. Rev. Stat., ch. 37, par. 439.22—1, in that they fail to state the name and residence of the person injured, the name of the person to whom the cause of action accrued, and the place or location where the incident giving rise to the claim occurred, and therefore, the claim should be dismissed pursuant to section 22 of the Act.

As for Jane Doe, this Court has held that the time for filing notices of intent for minors does not begin to run until majority is reached. *Woodward v. State* (opinion filed January 21, 1987), No. 83-CC-1438. The filing of a complaint within the time required for filing a notice has been held to obviate the need for filing a notice. (*Johnson v. State* (Opinion filed March 26, 1987), No. 87-CC-0105; *Crosier v. State* (Opinion filed February 17, 1988), No. 87-CC-2187.) One of the primary reasons for the holding in the latter two cases is that once a complaint is filed, all the information required to be stated in the notice, and more, is discoverable by the opposing party. The record does not indicate that the Respondent has undertaken any discovery to date. The minor Claimant was stated to be under the age of 13 years in 1987. For the reasons stated above, we are not going to strike her claim, and grant her leave to refile to cure the alleged defects complained of in the notice.

The mother's situation is more difficult. Her notice contained her actual name, but as pointed out by the Respondent, neither her residence nor location of where the incident giving rise to the claim occurred was stated. The amended notice provided a post office box number in a city and state, but that is not a residence as is required by the Act. Only the county and state were provided to indicate where the incident occurred. Claims have been dismissed for inaccurate or vague descriptions in notices of

where incidents have occurred. (*Katrein and McKnight v. State* (1982), 35 Ill. Ct. Cl. 340; *Seaton v. State* (1966), 25 Ill. Ct. Cl. 291.) The rationale for dismissal for such reasons is the inability of the Respondent to “promptly and intelligently investigate the claim and prepare a defense thereto, and to protect governmental bodies from unfounded and unjust claims.” *Byrne v. State* (1980), 34 Ill. Ct. Cl. 248.

However, this Court has also held that *substantial* compliance with the notice provision as to content will suffice to meet the statutory requirement. (*Bodine v. State* (1983), 35 Ill. Ct. Cl. 777.) The failure to include certain details will not necessarily vitiate the notice. The sufficiency of the notice is an issue of fact. The absence of location of where the incident occurred is a serious deficiency. It would likely cause dismissal in a highway defect claim. The issue here is whether there was other information contained in the notice which would be sufficient to enable the Respondent to investigate the claim. We find that there was. The description of the incident was as follows:

“4. The injuries were incurred and continue as a result of criminal sexual assault on claimant’s minor daughter, Jane Doe, by Robert E. Woods who, on or about (May 17 and 18, 1985) was an escapee from the Adolph Myer Mental Health Center and on (May 17 and 18, 1985) sexually assaulted Jane Doe, claimant’s minor daughter.”

Elsewhere in the notice, it was stated that the incidents occurred in Champaign County, Illinois. With the name of the mother, the dates on which the incidents occurred, the name of the escapee and perpetrator, the name of the state institution from which he escaped, the county in which the incident occurred and, in particular, the specific nature of the incident, we think that the Respondent had sufficient information to investigate the incident and prepare its defense.

The Respondent's next objection related to verification of the complaint. Section 11 of the Court of Claims Act and rules 4 and 5A of the Rules of the Court of Claims require that complaints shall be verified. Respondent points out that the complaint filed herein was signed "Joan Doe" which is not a true signature and argues that thus the complaint is not properly verified. In her response to the motion, Claimant points out that section 11 of the Act allows for verification by an attorney and that her attorney also signed each count of the complaint. However, upon review of the complaint we find no verification at all. A mere signature is not a verification. Claimants are granted leave to amend the complaint by interlineation by the filing of a verification within 21 days of the date of this order.

Respondent also urges dismissal on the grounds that the complaint does not properly identify persons who are owners of, or who are interested in, the claim as required by rule 5A.4. As pleaded, the complaint stated that Jane and Joan Doe are those persons. While the Court does not know at this time who Jane Doe is, we think that the parties have been sufficiently identified to meet the pleading requirements when the record is reviewed as a whole.

Respondent's final grounds for dismissal raised are the lack of a bill of particulars as for the damages, and inadequate description of damages in the body of the complaint. A bill of particulars is required by rules 5.A.9 and 5.B. In response, Claimant argues:

"1. * * * This is not a contract case or a property damage case. The greater part of the injuries suffered by the Claimants herein are psychic injuries
* * * .

2. It is reasonable and proper for both Claimants to allege damages arising out of both medical expenses and mental injuries. In any case sounding in tort a claimant is entitled to damages for past and future medical expenses, and past and future pain and suffering. It is reasonable to believe that both

Claimants may have future medical expenses arising out of the negligence of the Respondents, including, but not limited to, the cost of future psychiatric treatment.”

We understand the Claimants’ inability to state with great specificity every item of damages. We do however find that Respondent is at least entitled to that information required to be stated in personal injury cases by rule 5B.2. Claimant should also provide a statement containing a brief description outlining special damages incurred to date to the best of her ability. Claimant is granted leave to file such information in a bill of particulars within 45 days of the date of this order. Claimant is also directed to comply with any discovery requests which may be forthcoming relating to details of the special damages.

At this point we think a few comments on court policy are appropriate. We understand that the incident giving rise to this claim is of a highly sensitive and personal nature and that protecting the identity of the Claimants was the reason for using the fictitious names. We have, in the past, directed the clerk’s office to substitute fictitious names throughout the record in similar cases after the cases have been decided. (*Jane and John Doe v. State* (1986), 39 Ill. Ct. Cl. 12.) The potential for problems with the approach taken by the Claimants in this case is obvious and our decision today is not to be construed as condoning it. Our holding today is limited to the facts of this specific case. We do think a sufficient amount of information was provided the Respondent to investigate. Although it was not relevant to this decision we do note that Claimant’s counsel has represented to the Court that a proposal to Respondent’s counsel was made that pseudonyms be used only in court documents which are a matter of public record and did offer, after the motion to dismiss was filed, to disclose to Respondent’s counsel the actual names of the Claimants, together with any medical records and

other information, on the condition that confidentiality be preserved. This should have been done within the time for filing the notice. In the future it is suggested that leave of the Court be sought to proceed under anonymity. Leave is granted in this case to use pseudonyms in matters of public record, but we will entertain any subsequent motions from the Respondent should problems develop.

Accordingly, it is hereby ordered that the motion to dismiss is denied consistent with the above. It is further ordered that this claim is put on general continuance subject to rule 7 pending the outcome of the workers compensation claim.

ORDER

JANN, J.

This cause comes on to be heard on the joint stipulation of the parties for dismissal with prejudice and joint stipulation for settlement. The Court being fully advised in the premises finds:

1. Counts III, IV, IX, X, XII and XIII of the complaint filed by Joan Doe, are hereby dismissed with prejudice.
2. Claimant Jane Doe has agreed to a settlement with Respondents in the amount of \$50,000 in full and final satisfaction of the claims herein. Claimant has reached legal majority during the pendency of this claim. Both parties have waived hearing, further taking of evidence and briefs.
3. The parties have stipulated and signed releases for an award in the amount of \$50,000 to Jane Doe.
4. Although the Court of Claims is not bound by the parties' joint stipulation (See *Moore v. State* (1987), 40 Ill.

Ct. Cl. 212), we find the record herein supports an award of \$50,000 to Claimant Jane Doe and the joint stipulation for settlement filed February 28, 1996, is hereby adopted by the Court.

Therefore, it is ordered: Claimant Jane Doe is awarded \$50,000.

(No. 87-CC-1753—Claimant awarded \$22,579.20.)

DONALD E. WILLIS, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed January 16, 1996.

JOHN R. LECOMTE, for Claimant.

JIM RYAN, Attorney General (LINO MENCONI, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*applicability of comparative negligence doctrine.* Claims adjudicated after the supreme court's decision in *Alvis v. Ribar*, but prior to the 1986 statutory modification of Illinois' comparative negligence doctrine, are governed by *Alvis*' pure form of comparative negligence, as the modifying statute is not retroactively applicable.

HIGHWAYS—*Claimant's car struck snowplow blocking road—State liable—award reduced to extent of Claimant's comparative fault.* The Claimant, who was injured when his car struck a State snowplow that was blocking a roadway, was awarded damages as a result of the State's negligent failure to warn of the snowplow's dangerous presence, but the award was reduced to the extent of the Claimant's comparative fault.

OPINION

EPSTEIN, J.

This personal injury claim arises out of a vehicular accident that occurred January 23, 1985, two miles south of Milledgeville, Illinois on State Route 88, a hilly two-lane road.

The accident occurred when the Claimant skidded his 1975 Volkswagen Rabbit into the rear of a State snowplow which was blocking or partly blocking the roadway while engaged, appropriately enough, in snowplowing operations—“crumbing” a snowbank away from the roadway—but whose State crew, inappropriately, was not utilizing the traffic warning signs or methods mandated by the operations manual of the Department of Transportation (“IDOT”), their employer, as well as by common sense.

The Claimant had been driving south on Route 88 for some time and was aware, or constructively aware, of ongoing snowplowing operations in the area, as he had admittedly passed another slow-moving State snowplow on the same road approximately 15 miles before his forceful encounter (and more than 15 minutes earlier according to his claimed rate of speed). Claimant acknowledges that light-blowing snow was prevalent and that approximately 1/4 inch of accumulated, but dry, snow was on the roadway. He insists, however, that the road was completely dry as he traveled at the legal 50 m.p.h. speed limit.

Claimant first saw the offending snowplow (which was with an endloader that was also blocking part of the road) as he came over a rise 300 feet (i.e. 100 yards or one football field length) before striking it. Claimant braked his Rabbit but was unable to stop on the dry but snowy and hilly road, which he attributes to snow placed in the immediate vicinity of the State vehicles by their plowing efforts. Claimant acknowledged that upon seeing the snowplow (and endloader) in the roadway, he forcefully hit the brakes, rather than pumping them. We take notice that Claimant was driving a vehicle which was built well before ABS brakes were available on automobiles in this country.

Claimant filed his negligence complaint against IDOT in this court in 1987, and the cause was tried before

former Commissioner Turner in August of 1992. The parties ultimately submitted post-trial briefs, which largely frame the issues for our determination.

The sole disputed issues in this case are the negligence of IDOT, the negligence of the Claimant and, if any, their comparative negligence and the allocation of causation and fault for the accident. The Respondent has not disputed the claimed damages.

As this Court has held, claims against the State adjudicated in this Court that arise after our supreme court's decision in *Alvis v. Ribar* (1981), 85 Ill. 2d 1, 421 N.E.2d 886, are governed by the comparative negligence doctrine adopted in that case. (*Peterson v. State of Illinois* (1984), 37 Ill. Ct. Cl. 104, 108-109.) However, for cases arising after the November 25, 1986 effective date of the statutory modification of Illinois' comparative negligence doctrine, codified at section 2—1116 of the Code of Civil Procedure, the modified comparative fault doctrine of the statute applies. As this case arose post-*Alvis* and pre-sec. 2—1116 (since this 1985 accident occurred after June 8, 1981, and before November 25, 1986), it is governed by the pure *Alvis* form of comparative negligence, as the modifying statute is not retroactively applicable.

In this case, it is apparent and hardly disputable that the IDOT snowplow crew was negligent in failing to give due and proper warning of their dangerous presence in the roadway. It is undisputed here that the IDOT crew failed to comport with the warning requirements set forth in the IDOT Worksite Protection Manual, which is a relevant, and here dispositive, standard of protection for the traveling public to meet the State's duty to give adequate warning of dangerous conditions. (See, *Hout v. State* (1966), 25 Ill. Ct. Cl. 301; *Smith v. State* (1990), 42 Ill. Ct. Cl. 19.) Claimant has cited, and we find persuasive, the

recent case of *Wade v. City of Chicago Heights* (1991), 216 Ill. App. 3d 418, 159 Ill. Dec. 228, in which the court approved the submission of a jury instruction containing language from an IDOT regulation relating to warnings to be given to motorists approaching work sites on roadways.

The more difficult issue is assigning a degree of comparative negligence to the Claimant. Despite Claimant's contention that his driving on the day in question was impeccable, we are convinced that he was significantly negligent in his driving and was a substantially contributing cause of the ultimate accident. As the Respondent cogently argues, Claimant's admission that he forcefully hit the brakes rather than pumping them, while cresting a hill at 50 m.p.h. is itself an admission of less than competent driving.

Moreover, given the conditions of (1) a winter day, (2) blowing snow present, (3) accumulated snow on the roadway present, (4) snowdrifts along the way that can, and did, sometimes extend onto the roadway, and (5) snowplowing operations ongoing that day on that road, all of which were observed by, and known to, the Claimant, we are compelled to conclude that driving on that two-lane, undulating road at the 50 m.p.h. speed limit that day was neither prudent nor safe, and was negligent. Snow on a roadway, however dry when left alone, does not remain dry and does reduce traction when traversed by weight-bearing tires, particularly when, as here, they are put into a skid. Snow on a roadway reduces traction and lengthens stopping distance. Claimant is presumed and obliged to know this.

We have reviewed the three negligence factors in evidence that have been shown to have contributed to this accident—the State's lack of warning, the Claimant's excessive speed for the conditions, and his improper braking technique—and are constrained to conclude that

Claimant's negligent driving was a dominant cause of the accident. The Court has concluded that a 60% comparative fault assigned to the Claimant's negligence in this cause is a fair and just measure.

The Claimant has shown actual out-of-pocket damages of \$11,448, which consist of \$1,000 of property damage to his Rabbit and \$10,448 in medical, hospital, ambulance and drug expenses incurred as a result of his injuries. Claimant also demands \$30,000 as compensatory damages for his permanent knee and back injuries, and \$30,000 for pain and suffering. The Respondent has not contested these demands, and has not substantially disputed Claimant's evidence of permanent damage or pain and suffering. We are not inclined, in this circumstance, to give strict scrutiny of these claim amounts on our own motion. However, noting that we have concluded that Claimant was the predominant cause of this accident we are inclined not to be so expansive on the pain and suffering award as Claimant's three-times-actual-personal damages prayer requests. Accordingly, we conclude that a gross award of \$1,000 in property damages, \$10,448 in compensatory personal damages, \$30,000 for compensation for permanent injury, and \$15,000 for pain and suffering, totaling in gross \$56,448, is the appropriate measure of damages in gross.

Applying the comparative fault ratio of 60% Claimant fault and 40% State fault that we have determined per the *Alvis* standard, the court will award Claimant \$22,579.20.

Accordingly, judgment is entered for Claimant and against the State, and Claimant Donald E. Willis is awarded \$22,579.20 as his full and just damages herein.

(No. 87-CC-2077—Claim dismissed.)

JOHN RATCLIFF, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed August 22, 1995.

STEPHEN J. MCMULLEN, for Claimant.

JIM RYAN, Attorney General (ANDREW N. LEVINE,
Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*negligence—requisite proof.* To prevail in a negligence action, the Claimant must prove by a preponderance of the evidence that the State had a duty to protect the Claimant from harm, that the State negligently breached that duty, and that the negligence was the proximate cause of Claimant's injury, and the State must also have actual or constructive notice of a dangerous condition to be held liable.

SAME—*State not insurer of prisoners' safety—reasonable care.* Although the State owes a duty of protection and must exercise reasonable care toward a prisoner, it is not an insurer of safety of prisoners.

NEGLIGENCE—*res ipsa loquitur—what Claimant must show.* The doctrine of *res ipsa loquitur* does not relieve the Claimant of the burden of proving negligence, and the Claimant must demonstrate that the injury is the kind which does not occur in the absence of negligent acts, was caused by an instrumentality within the exclusive control of the defendant, and was not due to any voluntary act or neglect on the part of the Claimant.

PRISONERS AND INMATES—*basketball injury—backboard was not under State's exclusive control—claim denied.* There was no liability on the part of the State in an inmate's claim for injuries suffered when a metal backboard fell on the inmate during a basketball game, since the inmate offered no evidence showing that the State had actual or constructive notice of a dangerous condition with respect to the backboard, and he failed to prove that the backboard was within the State's exclusive control at the time of his injury.

OPINION

RAUCCI, J.

This cause comes before the Court on Claimant John Ratcliff's complaint alleging negligence against the Respondent State of Illinois. The claim arises out of an incident occurring on September 16, 1986, when Claimant was struck by a basketball backboard and hoop while incarcerated at Joliet Correctional Center (hereinafter "JCC").

The hearing was conducted on May 17, 1994. Claimant testified and offered four exhibits into evidence, which were admitted into the record. Respondent presented one witness, Bruce Burger, and no exhibits.

John Ratcliff testified on his own behalf. On September 16, 1986, he was in the yard playing basketball and was injured by the backboard. He was waiting for a rebound and the backboard fell on top of his head and hand knocking him unconscious. He did not touch the backboard or hoop before it fell.

His hand and head bled. He has a scar on his left hand, several scars on his head and on his right knee. He had pain in his neck, back, head and arms. He was taken to Silver Cross Hospital.

Claimant identified six-page claimant's group exhibit no. 1 from Silver Cross Hospital. He received a shot to ease some pain and stitches were placed in his hand, head and knee. X-rays were taken. Claimant was not admitted overnight to the hospital but was treated in the emergency room. Based upon the representation that claimant's group exhibit no. 1 was being offered only to support the proposition that Claimant was admitted for emergency services at Silver Cross Hospital, it was admitted over objection of Respondent.

The next day he went to the infirmary at JCC because he was experiencing pain and dizziness. He was in the infirmary for a week.

Claimant was released from incarceration on May 25, 1987. He went to Ingalls Memorial Hospital because his left hand was throbbing, his back was hurting and his legs and knees were swelling where he had scars. He received pain pills and they took x-rays. Claimant identified claimant's group exhibit no. 4 (six pages) as the bill from

Ingalls Memorial Hospital. Cl. ex. no. 4 was admitted over objection, to demonstrate that Claimant went for medical treatment the one time at Ingalls.

Claimant continued to experience pain in his neck, arm and hand, even until the present. The injuries left permanent scars on his left hand and forehead.

Upon cross-examination, the Claimant stated that he was at JCC for about one and a half weeks prior to the incident, but it was his first day in the yard. He had finished playing one game, lasting approximately 20 minutes. Prior to the backboard falling, he was standing, shooting and rebounding for approximately five minutes while he waited for the second game. During all this time, he did not notice anything unusual about the backboard. Claimant was not aware of any complaints about the backboard.

Approximately one week after the incident, Claimant was transferred to Stateville Correctional Center. He went to doctors at Stateville three times a week for a period of time that is indiscernible from the record.

Bruce Burger, executive assistant to the warden at JCC, testified on behalf of Respondent. At the time of the incident, he was a correction leisure activities specialist 5 "CLASS V." He was responsible for providing recreation for the inmate population including non-structured activities referred to as "the yards." Inmates can play pick-up games of basketball. He supervised seven employees. He and his subordinates spent time in the yards.

Security officers, administrators and inmates would tell him and his subordinates if something was needed. He recalled that the wooden backboards were replaced with metal ones in the late 1970s, or in 1980. Work orders for maintenance and repairs within JCC are disposed of after two years.

He never received any complaints about the basketball hoops on or before September 16, 1986.

On cross-examination, Mr. Burger acknowledged that he saw that the backboard was down. The metal backboards had been welded onto their poles.

Claimant argues that Respondent had control of the basketball backboard which fell and injured Claimant and that we are presented with a classic case of *res ipsa loquitur*. Respondent has not rebutted the presumption and has not introduced evidence that somebody else caused it to fall. Claimant has scars, and experienced pain and suffering. He has a continuing problem of weakness in his arm. He had bills of \$49 from Ingalls Memorial Hospital and \$40 for physician Ardena's bill.

Respondent asserts that the case comes down to the issue of notice. During Claimant's 20-minute game no one noticed anything wrong with the backboard. Mr. Burger was not aware of any complaints about the backboards prior to, or on, the day in question. Respondent argues that there is no liability if the State does not have actual or constructive notice of a defect.

The parties did not cite any cases, or other legal authority, to support their positions.

To prevail on his claim, Claimant must prove by a preponderance of the evidence that the State had a duty to protect Claimant from harm, that the State negligently breached that duty, and that the negligence was the proximate cause of Claimant's injury. (*Starks v. State* (1992), 45 Ill. Ct. Cl. 285.) Although the Court has held that the State owes a duty of protection and must exercise reasonable care toward a prisoner, it is not an insurer of safety of prisoners. *Starks*, at p. 290.

In *Thornton v. State* (1993), 45 Ill. Ct. Cl. 272, the Court found that plumbing facilities were under the

management of Respondent and that the uncontradicted evidence indicated that Respondent had notice of the defective toilet causing the Claimant's injury. The *Thornton* Court stated that:

"When an injury has been caused by something under the management of the Respondent, and the injury is such that in the ordinary course of events it would not have happened if Respondent had exercised proper care, the accident itself affords reasonable evidence, in the absence of an explanation, that the accident arose from the Respondent's want of due care." *Thornton*, at 275.

The *Thornton* Court concluded that it was clear that Respondent was aware of the defective condition of the porcelain toilet and made an award.

The doctrine of *res ipsa loquitur* does not relieve the Claimant of the burden of proving negligence. (*Rutledge v. State* (1991), 44 Ill. Ct. Cl. 257, 259.) To avail himself of the *res ipsa loquitur* doctrine, the Claimant must demonstrate that the injury is the kind which does not occur in the absence of negligent acts, was caused by an entity or instrumentality within the exclusive control of the defendant, and was not due to any voluntary act or neglect on the part of Claimant. (*Rutledge*, at 258-259, citing *Lynch v. Precision Machine Shop, Ltd.* (1982), 93 Ill. 2d 266.) In *Rutledge*, hot oil emitted from a State chimney landed on Claimant's vehicle causing damage. Claimant Starks asserted that the State used a malfunctioning furnace because of incomplete burning of the oil. The Court denied the claim because of lack of evidence presented by Claimant that the State breached a duty, or to support an inference for application of the *res ipsa loquitur*. *Rutledge*, at p. 259.

In the case at bar, Claimant has not offered any evidence that the Respondent had actual or constructive notice of a defective or dangerous condition in relation to the backboard. The evidence clearly shows that no one,

including Claimant, was aware of a dangerous or defective condition in relation to the backboard. In the event Respondent did not have actual or constructive knowledge of a dangerous or defective condition, it is not liable. *Secor v. State* (1991), 44 Ill. Ct. Cl. 215.

The doctrine of *res ipsa loquitur* allows the trier of fact to draw an inference of negligence from circumstantial evidence. It is simply a rule of evidence relating to the sufficiency of plaintiff's proof. It permits, but does not compel, the trier of fact to find that defendant acted negligently. *Lynch*, 93 Ill. 2d at 273, 443 N.E.2d at 573.

Claimant has not presented sufficient evidence to support a conclusion that the doctrine of *res ipsa loquitur* should apply to this case. There is no evidence that the entity or instrumentality which caused the injury to Claimant was within the exclusive control of the Respondent. The backboard was not under the Respondent's exclusive control because inmates were using it to play basketball and there are potentially numerous events by Claimant or other third parties that may have affected the physical integrity of the backboard.

It is therefore ordered, adjudged and decreed that this claim is dismissed and forever barred.

(No. 87-CC-2098—Claimant awarded \$6,000.)

WILLIAM RICKETTS, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed November 13, 1995.

G. EDWARD MOORMAN, for Claimant.

JIM RYAN, Attorney General (NUVIAH SHIRAZI, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*State's duty to provide inmates with safe working conditions.* The State owes a duty to inmates of its penal institutions to provide them with safe conditions under which to perform their assigned work, and in order to recover, a Claimant must prove by a preponderance of the evidence that the State breached its duty of care and that the State's negligence was the proximate cause of his injury, and the State must have notice of a dangerous condition prior to the Claimant's injury.

SAME—*negligence—liability for known dangerous conditions.* An inmate does not have to prove that he affirmatively requested that a dangerous condition be remedied, if it can be shown that precautions were inadequate and the condition was known and recognized by those in charge of safety and supervision.

SAME—*fall from scaffold—State was negligent.* In a negligence claim by an inmate who was injured when he fell from a scaffold while performing plumbing work at a State correctional facility, the State was liable for breach of its duty to provide the inmate with safe working conditions, where the inmate was instructed to perform work on a scaffold with no railing, he believed that he could not refuse to perform the work, and corrections supervisors had knowledge of the dangerous conditions which existed.

OPINION

PATCHETT, J.

William Ricketts, the Claimant, is a licensed plumber. He asserts that he was injured while working as a plumber at the East Moline Correctional Center. Mr. Ricketts was a resident of the Department of Corrections at that time. The accident which he alleges caused his injuries occurred on August 18, 1986. At approximately 11:30 a.m. on that day, Mr. Ricketts was performing plumbing work at the institution. He was instructed by the department's plumber to clear a clogged drain underneath the kitchen area of the facility. Mr. Ricketts was instructed to use a six and one-half foot tall aluminum scaffold that had a platform measuring four by six feet. The scaffold had no railing.

After inserting a device into the pipe, the clog came loose. The clog struck Mr. Ricketts, causing him to either step back or be pushed back off the scaffold. Mr. Ricketts suffered a fracture to the distal portion of his left tibia, or

lower left leg near the ankle. After the fall, Mr. Ricketts went back to his room, and then to the infirmary. He was examined by a nurse at the infirmary, and given an ace bandage and oral analgesics. He was told to elevate his leg and put ice on it.

About three hours later, Ricketts was still experiencing pain and returned to the infirmary. He was admitted on this occasion. On August 20, 1986, Ricketts was seen by a physician and then taken to the Illini Hospital in Silvis, Illinois. An x-ray taken there showed that the leg was broken. Mr. Ricketts' leg was put in a cast. Approximately six weeks later, the cast was removed and Ricketts was given whirlpool treatments. He has not sought medical treatment since. Although it is uncontradicted that the left leg was broken, Ricketts testified that his right leg was injured, and that he suffered and continues to suffer from pain in that leg. He additionally indicated that the pain moved from the leg to the hip.

Ricketts is seeking \$10,000 for the nature, extent and duration of the injury, \$10,000 for pain and suffering, \$15,000 for disability and \$5,000 for physical defect. At the hearing of this cause before Commissioner of this Court, Ricketts testified and presented photographs of the scaffolds and pipes in question. He also presented medical records which were submitted into evidence.

The Respondent called the supervisor of maintenance personnel at the East Moline Correctional Center. He testified to the dimensions of scaffolding, and stated that he had no notice of any unsafe condition. He also stated that the scaffold used complied with the Illinois Department of Corrections rules and regulations for safe structural devices to be used by inmates.

On cross-examination, however, the supervisor testified that it was known that the force of fluid or clog from

a drain might cause a person to step back or move if struck by the fluid or clog.

The Respondent also called Virginia Dusay, a registered nurse with the correctional center. She testified as to the treatment received by Ricketts. Ricketts submitted a memorandum of law subsequent to the trial. The Respondent submitted neither a memorandum nor a brief. Counsel for the Respondent mentioned compliance with Federal OSHA regulations, but did not submit such regulations to the Court.

Ricketts contends that the negligence of the Respondent was the direct and proximate cause of the accident, because the Respondent failed to supervise repairs of the clogged drain, failed to provide a safe place for the Claimant to work, and failed to provide sufficient safety devices to protect the Claimant from injury as a result of the fall. The Respondent submitted three affirmative defenses, claiming in part that either the Claimant was negligent, or contributorily negligent.

It is a matter of law that the State of Illinois owes a duty to inmates of its penal institutions to provide them with safe conditions under which to perform their assigned work. In order to recover in this action, the Claimant bears the burden of proving, by a preponderance of the evidence, that the State breached its duty of care, and that the negligence of the State was the proximate cause of his injury. For the State to breach its duty of care, it must have notice of a dangerous condition prior to the Claimant's injury. *Reddick v. State* (1978), 32 Ill. Ct. Cl. 611.

An inmate of a penal institution is not ordinarily free to refuse to perform tasks assigned to him if he considers the working conditions unsafe. An inmate does not have the liberty of choice available to a person in private industry, and must work under conditions that are assigned to

him. Furthermore, Ricketts does not necessarily have to prove that he affirmatively requested that the dangerous condition be remedied, if it can be shown that precautions were inadequate, and the condition was known and recognized by those in charge of safety and supervision. *Burns v. State* (1982), 35 Ill. Ct. Cl. 782.

Ricketts has shown that the Respondent has breached his duty of care in this case by instructing him to perform work on a scaffold with no railing. The supervisor of maintenance knew that it was likely that a clog in the drain could break free before the Claimant could safely step away, and that being hit by a clog or fluid would cause him to step back on a scaffold that had no railing. Considering that the scaffolding is only four feet wide, it is reasonably foreseeable that this could result in an individual falling from a scaffold.

There is no evidence that the Claimant was negligent in any way. Ricketts, an experienced plumber, testified to the normal procedures for clearing a clogged drain and stated that he followed those procedures. He further testified that normally a drain clog does not become dislodged until the plumber pulls the snake out of the drain, after having stepped out of the way. In this instance, the clog became dislodged unexpectedly soon. There was no evidence that this occurred as the result of any action taken by Ricketts. Ricketts further testified that he felt that if he refused to perform an assigned job, he might be subject to disciplinary action. As is apparent in *Burns*, cited above, the Claimant does not have to prove that he affirmatively requested that a scaffold with a railing be used, since he has shown that precautions were inadequate, and that the condition was known and recognized by those in charge of safety and supervision.

There is no doubt that the negligence of the Respondent was the proximate cause of this injury. There is some

confusion on the part of the Claimant about which leg was broken. This misstatement does cast doubt about the testimony from the Claimant regarding the current problems suffered as a result of the fall. Therefore, we award the Claimant \$2,000 for the nature, extent and duration of the injury, and \$4,000 for pain and suffering, for a total award of \$6,000.

(No. 87-CC-2988—Each of four Claimants awarded \$51,000.)

FRANK W. MACK, Individually and as Administrator of the Estate of JUDITH A. MACK, deceased, DOUGLAS MACK, KIMBERLY MACK and ASHLEY MACK, Claimants, v. THE STATE OF ILLINOIS, Respondent.

Opinion filed October 26, 1995.

Order filed May 13, 1996.

RYAN & RYAN, for Claimants.

JIM RYAN, Attorney General (GREGORY ABBOTT, Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*fatal one-car accident—missing gutter—State liable in wrongful death claims—awards reduced to reflect decedent's comparative fault.* In wrongful death claims filed by the decedent's husband and three children, where eyewitness testimony established that the combination of an insufficient merger lane and a missing concrete gutter caused the decedent to lose control of her vehicle as she attempted to move into a single lane of traffic, the State was found liable for the defective condition of the highway and the four Claimants were awarded damages, but their awards were reduced to reflect the decedent's 49 percent comparative fault.

OPINION

PATCHETT, J.

This claim arose as a result of a traffic accident which occurred on September 5, 1986, on Illinois Route

60. Judith Mack, age 45, was killed when her vehicle collided with a tree. Prior to the collision, Mrs. Mack's vehicle had left the highway as she was traveling east on Illinois Route 60 at the overpass for Illinois Tollway Route 294 in Lake County, Illinois. At that location, Illinois Route 60 had two lanes for eastbound traffic as it approached and crossed the overpass of Tollway 294. The posted speed limit was 55 m.p.h. Eastbound traffic traveled on an incline until reaching the crest of the overpass, and it then declined as the road sloped downward. After crossing the overpass, the curb lane ended with the road tapering from right to left, forcing cars to merge from the curb lane into the lane closest to the center of the street. Next to the paved portion of eastbound Route 60, there was a concrete gutter and gravel shoulder which had deteriorated. Large pieces of the concrete gutter were broken up or missing entirely. These conditions created a drop-off from the paved portion of the roadway which varied in height depending on the location.

As Mrs. Mack crossed over the overpass, she was prevented from being able to merge immediately into the center lane of traffic because there was a vehicle close behind her in that lane of traffic. This vehicle was being driven by Antonio Ortiz. Mrs. Mack's vehicle partially left the roadway. The evidence appears to be uncontradicted that Mrs. Mack attempted to return to the roadway. As she did so, eyewitness testimony of Ortiz established that her tire struck an area where the gutter was missing. Subsequently, Mrs. Mack's vehicle collided with the tree, and she received injuries which caused her death.

The Claimants have urged this Court to find liability on the part of the State based on several alleged defects in the highway. These included the missing gutter previously referred to; the fact that the taper, or that portion of

the roadway in which the two lanes merged into one, was too short; that the speed limit was greater than the State's safety standards allowed; and that a warning sign encountered prior to the area in question was turned upside down.

This case involves highly contested facts presented by zealous advocates for both sides, as it should be. However, this Court is required to make certain findings of fact prior to applying the applicable standards of law in order to resolve this claim.

We find that Mrs. Mack did indeed lose control of her car as a result of attempting to return to the roadway. We further find that the loss of control was caused by her tire striking an area where the concrete gutter was entirely missing. We further find that it was probable that the drop-off in that area was six to eight inches. In making these determinations, we give greater credibility to the eyewitnesses than we do to any of the various accident reconstruction experts and police officers who testified but were not actual eyewitnesses.

In addition, we find that the tapered section of the highway was indeed too short, and it was in fact a defect. We further find that the State had constructive notice of both the missing concrete gutter and the problems regarding the taper.

The issues regarding the speed limit and the sign are much more difficult to resolve. Because we have resolved the issues regarding the taper and the missing concrete gutter, we need not resolve the issues of whether the speed limit was excessive; whether the sign was a defect; and if the State had constructive notice of that defect.

We further find that it was entirely reasonable to assume that vehicles would leave the roadway in the area

involved due to the fact that two lanes were merging into one, and that the area given to drivers in order to accomplish this merger was insufficient.

This Court has considered numerous claims involving alleged defective shoulders. The great majority of these claims have been denied. The Court thoroughly reviewed the law regarding defective shoulders in *Siefert v. State* (1989), 42 Ill. Ct. Cl. 8. There, this Court pointed out that, with only one exception, every such claim brought to the Court of Claims prior to *Siefert* had been denied. The majority of these denied claims were denied on the basis that a simple difference in the level of the shoulder from the roadway would not be considered negligent maintenance or a defect in the highway. In addition, many of these cases considered factual situations in which a driver who had left the roadway was attempting to re-enter the roadway. It should be noted, however, that most of those cases were decided in an era where contributory negligence was an absolute bar to recovery.

In *Siefert*, we granted an award even though the driver attempted to return his vehicle to the highway in violation of several known safety standards. This is a factually similar situation to the one we face in this claim. We find that Mrs. Mack's attempt to return to the highway prior to slowing sufficiently was contributory negligence. We further find the percentage of her comparative fault to be 49 percent. Unlike the earlier cases that this Court has decided in which contributory negligence was a bar, we can apply further standards of law to determine if an award is warranted in this case.

We further find that the defect in this case—a missing section of concrete gutter—is a significantly greater defect than a simple difference in level between a paved highway and a shoulder, whether paved or unpaved. It is reasonable

to assume that chunks or sections of missing concrete will cause a significantly greater impact on a vehicle striking it than a simple difference in the level of the roadway. We therefore find that the combination of the insufficient taper and the missing concrete gutter is a defective condition for which the State could be found liable.

In *Peterson v. State* (1984), 37 Ill. Ct. Cl. 104, this Court considered the effect of comparative fault on an award in the Court of Claims. In that case, the Court established the total damages to be \$500,000. The Court further assessed the deceased with 60 percent of the negligence, thereby establishing damages of \$200,000. The Court there found that there was only one claim to be decided, unlike the present situation in which we have five distinct claims before the Court. The Court therefore applied the statutory \$100,000 limit and awarded that amount.

Mrs. Mack was a 45-year-old homemaker with three children. Her husband and each of her children have filed a wrongful death claim. Based on the facts before the Court, they have each established damages in the amount of \$100,000. The estate of Mrs. Mack has filed a survival action. We find that there was insufficient evidence before this Court to establish conscious pain and suffering by Mrs. Mack after the accident. Therefore, we deny the claim of the estate because the Claimants failed to prove the elements of damage by a preponderance of evidence. We find liability for each of the four individual Claimants on the wrongful death action. We establish damages in the sum of \$100,000 each. That results in a total finding of damages in the sum of \$400,000. Applying the 49 percent comparative negligence of Mrs. Mack, we reduce that figure by \$196,000. We hereby award each of the four Claimants the figure of \$51,000 each.

ORDER

PATCHETT, J.

The Court filed an opinion on October 26, 1995, granting judgment for the Claimants. The Respondent filed a motion to reconsider on November 22, 1995. In the motion the Respondent also asked for additional time to file a brief in support of said motion. The Court has not addressed that request. However, the Court is not convinced that the filing of a brief by the Respondent would be of help in deciding the issues raised by the motion.

The Court has reviewed the file and its opinion carefully. The Court sees no reason to alter its earlier ruling. Therefore, the motion to reconsider is denied.

The Claimant has filed a petition for costs. That petition is denied.

The Claimant has also filed a petition to allow one-third contingency fee plus costs. It appears that the Claimants in this case entered into a contract with their attorneys for a one-third fee. The Court of Claims Act does not normally allow a one-third contingent fee. The Court has considered the amount of work and difficulty involved in this claim. Considering the volume of work and the difficulty involved, the Court is going to allow a one-third contingency fee for three of the Claimants. The evidence, however, clearly established that Kimberly Mack, one of the Claimants who was awarded a judgment, is an incompetent. Since it is unlikely that she knowingly entered into a contract providing for one-third fees, the fees for Kimberly Mack will be set at 25% of the award. Fees for the remaining three Claimants will be set at one-third. The expenses will be allowed to be recovered in an equal amount from each Claimant.

(No. 88-CC-1961—Claim denied; petition for rehearing denied.)

GENE GOVE, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed February 22, 1995.

Order on petition for rehearing filed October 19, 1995.

STORMENT & BATES (PAUL M. STORMENT, JR., of
counsel), for Claimant.

JIM RYAN, Attorney General (JON MCPHEE, Assistant
Attorney General, of counsel), for Respondent.

HIGHWAYS—*failure to maintain sign which is not required does not constitute negligence.* The failure to maintain a sign that is not required to be placed in the first instance in no way constitutes negligence.

SAME—*motorcycle accident—State was not negligent in adopting sign configurations at intersection—claim denied.* There was no support for a motorcyclist's claim against the State alleging inadequate signage at an intersection where he lost control of his motorcycle, since the existing signs were in accordance with Department of Transportation policy and other relevant safety standards, the signing suggested by the Claimant's expert was not required by those standards, and the evidence indicated that the distance from which the Claimant should have seen the intersection and stop sign gave him adequate time to bring his motorcycle to a safe stop.

OPINION

PATCHETT, J.

Claimant seeks an award for serious personal injuries sustained as a result of a motorcycle accident. This occurred on Old Route 50 between Summerfield Road and New Route 50 at the intersection of the two roads.

Claimant's exhibit 1 attached to the transcript in this case is a drawing of the intersection in question. New Route 50 runs in a generally southeast-northwest direction, and it is intersected by old Route 50 on the south. It is a "T" intersection. As Old Route 50 approaches its intersection with New Route 50, it approaches the intersection from a generally southeasterly direction; however, approximately 1,000 feet from its intersection with New

Route 50, Old Route 50 curves to the right and intersects New Route 50 at a right angle. The curve is approximately 1,000 feet from the intersection of the two roads. Claimant was traveling on Old Route 50 approaching the intersection with New Route 50 when the accident occurred. Claimant contends that the Respondent was negligent in not placing or locating signs to adequately protect the safety of persons operating vehicles on Old Route 50 as it approached the "T" intersection. Respondent denies that it was negligent and asserts that there was adequate signing to provide adequate warning. The Respondent maintains that the accident and Claimant's injuries were proximately caused by Claimant's negligence.

The Claimant is a middle-aged man who has lived most of his life in the Mascoutah-Scott Field area of Illinois. Claimant is knowledgeable about the operation of motorcycles, and he has had a motorcycle license since he was 16. On the night of the accident, he was operating a 1200 cc. Harley Davidson motorcycle that was in excellent condition. He had a passenger named Debra Browning who was unavailable for the hearing. The Claimant had previously driven with passengers on long trips.

Prior to the night in question, Claimant had not driven on the road where the accident occurred. The Claimant testified that he had nothing to drink before the accident.

The Claimant was traveling on Old Route 50 toward the intersection and observed a sign indicating a curve to the right and a speed limit of 45 mph. The normal speed limit on the highway was 55 mph. When the Claimant had turned onto Old Route 50, he noticed that it was under some type of construction. Claimant was traveling 40 to 45 mph and was turning to the right as the road turned into a straight stretch. When Claimant first saw the stop sign, he realized he was at the end of the road and grabbed the

brakes on the motorcycle. This caused the motorcycle accident. Claimant testified that he did not observe any “Stop Ahead” sign, and he thought as he passed a “Junction 50” sign that the road continued on in a straight direction.

Claimant noticed the stop sign peripherally. Claimant testified that as far as he could remember, he was about 500 feet from the intersection when he first noticed the stop sign. He was traveling 40 to 45 mph, and he testified, “* * * I actually sat up and tried to see farther on the motorcycle seat to determine what reason a ‘stop’ sign would even be there for.” Claimant looked ahead of himself, “more or less in a strained fashion to try to find the reason for the stop sign.” He further testified, “it only took a couple of seconds to realize that I was simply out of road.” He applied the brakes on his motorcycle in a panic. The wheels on the motorcycle locked and slid, flipping the bike over and pinning Claimant’s left leg under the motorcycle. The motorcycle came to a stop in the middle of the “T” intersection.

The accident occurred near midnight, and Claimant testified that there was no artificial lighting at the intersection. Claimant stated that it was “very dark.” Trooper Mark Bramlet’s testimony was admitted by agreement of the parties through a copy of a discovery deposition attached to the transcript in this case. Bramlet was called at 12:33 a.m., and arrived at the scene at 12:55 a.m. (It should be noted that Bramlet reversed the descriptions of the roads as “Old” and “New” Route 50, in comparison with the testimony of other witnesses. This opinion reverses his descriptions for the sake of clarity.) There were several people standing at the intersection, and a motorcycle was lying in the middle of New Highway 50 slightly in the westbound lanes. The trooper did not speak with the Claimant at the scene.

Upon investigation, the trooper found no skid marks on the pavement. Trooper Bramlet interviewed the Claimant at the hospital. Bramlet noted on his report that the Claimant stated that he was unfamiliar with the roadway, and he lost control of his motorcycle as he attempted to stop at the intersection. Bramlet testified that he found no highway defects in the area. The last 1,000 feet or 750 feet of Old Highway 50 was straight and level. Vision of the intersection was obscured until 750 to 1,000 feet from the intersection.

The signing at the intersection in question was designed by Michael A. Kuhn, an employee of the Department of Transportation. Kuhn designed and supervised the installation of all signing at the intersection. Kuhn used the *Manual of Uniform Traffic Control Devices* and the IDOT policy. Kuhn did not believe that a double arrow sign at the intersection was needed. The original signs at the intersection consisted of a “Stop Ahead,” “Junction 50,” a green board—“Lebanon” to the left, “Carlyle” to the right—and a “Stop” sign with a “Cross Traffic Does Not Stop” underneath it. To the right of the stop sign, there was a U.S. 50 leader with a double arrow underneath it. The Stop Ahead sign was 800 feet from the intersection. The Junction 50 sign was approximately 600 feet from the intersection. The green board sign was 150 to 200 feet from the intersection, and the stop sign was at the intersection.

Most of the testimony in this case involved the necessity or advisability of additional signing, or different signing, at the intersection in question. The expert retained by the Claimant testified that the signing was inadequate and that a double arrow sign was advisable. Approximately three weeks after this accident, Michael Kuhn’s supervisor instructed him to erect a double arrow

sign at the intersection. At the hearing, the supervisor testified that he was simply trying to improve the signing at the intersection. He strenuously asserted that the so-called “double arrow” sign was not required or mandatory under any of IDOT’s policies or the *Manual of Uniform Traffic Control Devices*. The Claimant’s expert witness had never been responsible for designing the signing on a public road, but claimed to have studied manuals. He also had practical experience while employed as an on-site construction worker.

That expert witness, Robert L. Porter, was a civil and structural engineer. He identified road and sign construction as “an area that I’ve involved my professional work.” Porter denied having been hired by any states to do consulting signing. Porter considered his knowledge pertaining to signing of roads to be expertise “based upon practical knowledge that I obtained as a construction worker, my formal educational training, as well as my assessment of various situations relative to the existing standards of care that are well documented.”

At the request of Claimant’s counsel, Porter had examined the intersection in question on three occasions, the first being October 24, 1989. Porter had been furnished with, and made summaries of, discovery depositions of the Claimant, Gene Gove, and IDOT employees Michael Kuhn and Russell Rendleman. Porter stated that he had “taken into account the facts that were stated during those depositions.” Porter conducted a night-time inspection of the intersection on November 20, 1989, and conducted a daytime inspection on January 16, 1990, at which time he performed measurements. His measurements were made with a “roller wheel.” Porter examined the large drawing identified and admitted as Claimant’s exhibit #2 and stated that the sign locations were similar

to what he found although measurements “may not necessarily be exact.”

Oddly, Porter’s measurements in connection with the sign locations in the case at bar were made from the intersection of Old Route 50 with the Summerfield Road toward the intersection of Old Route 50 with New Route 50, where the accident occurred. The sequence of signs encountered by Claimant as he approached the intersection where the accident occurred were related by Porter to be as follows:

First, a “Curve” sign with a 45 mph speed limit designation;

Second, a “No Passing Zone” sign on the left hand side of the roadway;

Third, “Stop Ahead” signs on both sides of the roadway;

Fourth, “Junction 50” sign on the right hand side of the road;

Fifth, green board sign with direction arrows to Lebanon and Carlyle;

Sixth, a “Highway 50” sign and a “Stop” sign (TR-126-128).

Porter recorded the distances from the Summerfield Road on all the signs through the “Junction 50” sign. Although he measured the distances, he did not record his measurements for the distances to the green board-Lebanon-Carlyle sign, or the stop sign. He measured the distance from the green board-Lebanon-Carlyle sign to the stop sign, but he did not record the distance. Porter testified that the green board-Lebanon-Carlyle sign was “in front of the stop sign,” and “it (green board-Lebanon-Carlyle sign) is as far as the distance off the roadway.”

Porter testified that the green Lebanon-Carlyle sign “does block the stop sign during the progress along the road.” Porter did not measure the distance from the roadway to the Lebanon-Carlyle sign, and he did not measure the distance from the roadway to the stop sign.

Porter testified that as you progress westerly along Old Route 50, you can visualize the stop sign at New Route 50 from approximately 600 feet; yet, Porter did not measure that distance. He computed it on the basis of “some alternate set of numbers that deal with the distances off the New Highway 50 going backwards rather than dealing with thousands of feet.” The Commissioner inquired further of Porter’s estimation of the distance, and Porter acknowledged that he didn’t use a mechanical measure but was basing the 600 foot quantity on his experience in having ridden on the road and a general idea of where the signs were at a time when he thought that the stop sign first came into vision.

Porter opined that the signing at the time of the accident was not adequate. Further, Porter stated that the “Stop Ahead” signs that had been installed prior to his inspection were ineffective because they were too far away from the intersection. It was also Porter’s opinion that there was a need for a warning sign that shows a “T” intersection. Porter said that the “T” intersection sign should have been placed approximately 400 to 500 feet away from the intersection on the right hand side of the road. Porter opined that the “Stop Ahead” signs should have been placed 450 feet from the intersection. As placed, the “Stop Ahead” signs were 840 feet prior to the intersection. Porter opined that the green board sign should have been located on the opposite side of Highway 50, thus avoiding any obstruction to the stop sign at the intersection. Further, Porter stated in his opinion, a double arrow sign was a

“must” at the intersection because of the change of configuration and usage of the road. He observed an “oblique” background behind the intersection. Porter also indicated that barricade slat signage of a candy cane configuration in color should be incorporated with a double arrow sign, and produced photographs of such treatments (see Claimant’s exhibits 17, 18, and 19). Porter approved of a placement of the “Curve” 45 sign and the “Junction 50” sign as the intersection is approached. He reiterated that when approaching the intersection from the west, as Claimant approached the intersection, one can first see the intersection at a distance approximately 690 feet from the intersection.

Porter acknowledged that the placement of warning signs such as a “T” intersection sign, or the double arrow signs is a function of engineering judgment.

Under questioning by the Commissioner, Porter stated that the *Uniform Manual on Signing* does not give specific distances or direct applications for the installation of double arrow signs. Further the MUTCD does not require that a double arrow sign be placed at a configuration such as existed at the intersection in question. Porter testified that any “T” intersection sign with a flashing yellow light would not be warranted in this case because of traffic volume and the fact that it was a two-way road; however, Porter stated he had not done any “assertation” of traffic counts at the intersection. Porter was not sure of the speed limit at the location in question because he didn’t “recall seeing signs on Old Highway 50.” Porter admitted that stopping times and distances would be impacted by the speed limit.

Upon questioning by the Commissioner as to special attention relating directly to the signing of vehicular roadways, Porter testified that his original experience was of a practical nature as a construction worker and laborer-foreman. He had poured a lot of concrete. Porter had

experience signing a detour around Cleveland, Ohio, but was essentially following the directions of his superiors. Porter testified he had been responsible for signing of county roads relative to construction work that was going on.

The Claimant has cited to the Court *Consolidated Freightways v. State* (1985), 37 Ill. Ct. Cl. 32. In that case, three of Claimant's trucks had, on three different occasions between April 21, 1974, and November 3, 1974, lost control and crashed on the same road at the same place where they encountered a section of highway which was slippery. On each occurrence, each driver was unable to control his truck. Each truck slid from Route 36 and crashed along an area north of the highway. It was shown that the section of highway in question had a strip of tar which, on becoming wet, became extremely slippery. The State had posted no warning signs alerting the motoring public of this condition. The testimony of police officers who investigated the accidents confirmed that the road became very slippery when wet, and that there had been other accidents from the same condition at the same location. Although the State had considerable notice of this hazard, the State had failed to warn the motoring public. An award was allowed.

The Respondent cited to the Court *Emm v. State* (1965), 25 Ill. Ct. Cl. 213. In *Emm*, the driver of a vehicle was injured when it ran into a bridge abutment that was under construction. The Court there observed that evidence was undisputed that in the 10.2 miles prior to the construction zone, there were nine warning signs indicating that the road was closed, and also indicating an alternate route. Prior to entering the actual construction zone, there were five roads on which to turn and take an alternate route. The construction zone itself began behind a

permanent barricade which extended across the middle of the road and was illuminated by flashing warning lights. The Claimant had gone around the barricade and traveled another 2.8 miles in the construction area. He bypassed two “Bridge Out” warning signs before reaching the scene of the accident. The Court held that there was no liability on the part of the State, and that the accident was the fault of the Claimant.

In *Gramlich v. State* (1981), 35 Ill. Ct. Cl. 19, the driver of a vehicle collided with, and went through, a guard rail and plunged down a steep embankment after traveling 130 feet in the air. There were no eyewitnesses, but the record indicated that the Claimants had been drinking and the driver was intoxicated. The Claimants contended that the State’s failure to erect stop or warning signs at the intersection where the accident occurred proved the State’s negligence. There were no stop or warning signs at the intersection, and there had been no prior accidents. This Court observed that the record was completely void of any notice to the State that this was a dangerous intersection or that there had been any previous accidents at the intersection. A recovery was denied.

The Claimant admits that he saw the stop sign at the intersection approximately two-thirds of the distance away from the intersection to the “Junction 50” sign (approximately 500 feet). He was traveling at 40 or 45 mph. He did not begin to slow or brake his motorcycle, but instead he “strained” to see why there was a stop sign for a couple of seconds. Upon realizing that the road upon which he was traveling required a stop at an intersection, he panicked and heavily applied his front and back motorcycle brakes. As a result of Claimant’s application of the brakes on his motorcycle, the motorcycle flipped on top of him.

There is no question that the Claimant sustained severe and disabling injuries with medical bills in excess of \$42,000.

The Claimant's expert testified that the intersection and stop sign could be seen from 600 feet away. IDOT employee Kuhn testified that the intersection and stop sign could be seen from a distance of 750 feet away. Kuhn's supervisor, Rendleman, testified that the intersection and stop sign could be seen from 1,000 feet away. Claimant's expert says that stopping distance at 40 to 45 mph is 450 feet under bad conditions and 300 feet under good conditions. Neither Claimant, nor any other witness, testified to facts from which it could in any way be concluded that Claimant could not have seen the stop sign at the intersection in adequate time to bring his motorcycle to a safe stop.

The Claimant's expert has opined that the conditions extant at the intersection, in his professional judgment, required additional and different signing, the absence of which created a hazardous condition at the intersection. Clearly, however, Claimant's expert bases his opinion on professional judgment and not on the mandates of either IDOT policy or the *Manual of Uniform Traffic Control Devices*. Expert Porter admits that his suggestions and opinions do not constitute required signing; but instead, the signing and configurations suggested by Porter would have reduced the hazard perceived by Porter to have existed at the intersection.

The issue in this case is not whether additional signing or a different configuration of signs might, or could, have prevented this accident. The question instead is whether the State was negligent in adopting the signing configuration that was present at the date and time of Claimant's accident, and whether that negligence was the proximate cause of Claimant's accident and the injuries and damage sustained by him. We are asked by the Claimant to assume that, if additional signs or a different configuration of signs had been utilized more in keeping

with the opinions of expert Porter, the accident would not have happened. This is a great leap supported almost entirely by speculation. In *Shirar v. State* (1965), 25 Ill. Ct. Cl. 256, there is a statement particularly relevant to the case at hand:

“The Court concludes that it must follow that failure to maintain a sign which was not required to be placed in the first instance, in no way constitutes negligence.”

For the reasons stated above, this claim is denied.

ORDER

PATCHETT, J.

This cause comes before the Court upon the petition for new trial or new hearing filed herein by the Claimant. The Court has carefully reviewed the petition for rehearing. The petition asks for a reversal of the opinion, or for a new trial, on the basis that the original opinion was against the manifest weight of the evidence. There is no new law or cases cited in the petition for rehearing.

The Court carefully considered the evidence and testimony of all the witnesses prior to issuing its original opinion. The Commissioner of this Court who tried this case is in the best position to determine credibility of the witnesses. This Court had reviewed the confidential recommendation of that Commissioner available before issuing its opinion.

There is nothing contained in the petition for rehearing to convince the Court that the original opinion is erroneous either as to facts or as to law. Therefore, the petition for rehearing is denied.

(No. 88-CC-2023—Claim dismissed.)

ODELL THOMAS, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed August 22, 1995.

JANINE L. HOFT, for Claimant.

JIM RYAN, Attorney General (ANNE L. LOEVY, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*negligence—elements of claim.* To prevail on a claim of negligence, Claimant must prove by a preponderance of the evidence that the State had a duty to protect Claimant from harm, that the State negligently breached that duty, and that the negligence was the proximate cause of Claimant's injury, and while the State owes a duty of protection to prisoners and must exercise reasonable care toward them as their known conditions require, the State is not an insurer of the safety of prisoners under its care.

SAME—*back injury—inmate's burden of proof not met—claim dismissed.* Despite an inmate's testimony that, prior to hurting his back while moving a washing machine pursuant to a prison employee's orders, he had informed correctional employees of previous back problems, the inmate's personal injury claim was dismissed because he failed to prove that the State had notice of any specific medical condition that would limit his activities or that the State breached its duty of ordinary and reasonable care.

OPINION

RAUCCI, J.

This matter comes before the Court on the claim by Claimant Odell Thomas alleging that Respondent's negligence caused him to suffer injuries. Claimant alleges that on December 22, 1985, while in the custody of the Department of Corrections, he was ordered to move a dryer and washer to clean behind them. After informing Respondent's employee of medical problems with his back, Claimant attempted to move the appliances. He fell, hurting his back and head. Claimant seeks \$500 for time lost from his prison job, \$15,000 to compensate for continuing back pain limiting his future vocational and recreational activities, and \$15,000 for bodily pain and mental anguish.

At the trial, Claimant Odell Thomas testified that he is 40 years of age and after release from the Department of Corrections (hereinafter “department”) he became, and still is, employed as a truck driver. He entered the custody of the department in August, 1982. When he entered, he explained that he had a history of back problems. The back problem emanated from a fall down an elevator shaft in 1978.

He continued having back problems from 1982 through December 1985. Each time he was transferred from one institution to another, a medical history was taken and he would explain his back problems. He received five to seven “lay-ins” for his back problem.

On December 22, 1985, Claimant was assigned to Centralia Correctional Center (hereinafter “CCC”). He was assigned the job of porter and his duties were to sweep the unit, keep it clean, dump ashtrays and do the windows. He was a porter for four or five months. He was never asked to move large or heavy objects.

On December 22, 1985, an employee, Lt. Hoepker, came to Claimant’s cell. He asked Claimant to sweep the day room and clean the tables. Claimant did what Lt. Hoepker requested and returned to his cell. Approximately 30 minutes after returning to his cell, Officer Bassett told Claimant that Lt. Hoepker had instructed him to tell Claimant to move the washer and dryer. Claimant told Officer Bassett that he had a back problem and was not supposed to move anything heavy. Claimant told Officer Bassett that he could call the health care unit and verify Claimant’s condition. Officer Bassett said he had an order from Lt. Hoepker and Claimant would be written up for refusing it.

Claimant did not want to be written up. He went over to the washer and tilted it towards him. He began to

wiggle the washer and to get it out and his back gave out. He got a pop in his back, his back went out and he hit the floor. The washer was on him and he hit his head. After the washer was lifted off of him, Claimant was in severe pain and crying. He was not able to move. The health unit put him on a stretcher. The nurses took him to the health care unit, noticed he had a lot of swelling in his back and called Dr. Shoaff regarding his back. If Claimant informed him of a back problem, Lt. Hoepker would not have called the health care unit to verify it.

Lt. Hoepker believed it was unreasonable to tilt the washer in an attempt to scoot it. He did not tell Claimant how to move the washer. He acknowledged that the end of the wall (across from the washer), depicted in Respondent's exhibit no. 4, is six to eight inches short of being flush with the left side of the washer. He did not see Claimant under the washer. When Lt. Hoepker helped the medical staff lift him, Claimant appeared to be in pain.

Both parties indicated that they would waive closing arguments at the hearing and present them in their briefs. Neither party filed a brief.

To prevail on a claim of negligence, Claimant must prove by a preponderance of the evidence that the State had a duty to protect Claimant from harm, that the State negligently breached that duty, and that the negligence was the proximate cause of Claimant's injury. (*Starks v. State* (1992), 45 Ill. Ct. Cl. 285, 290.) The State owes a duty of protection to prisoners, and the State must exercise reasonable care toward the prisoners as the prisoners' known conditions may require. However, the State is not an insurer of the safety of prisoners under its care. (*Starks* at p. 290.) In *Starks*, the Court found that Claimant failed to meet his burden and there was no proof of negligence on the part of the State. *Id.* at p. 290.

Claimant testified that he told Respondent of a prior back problem when he was first incarcerated. A review of Claimant's group exhibit no. 1 indicates references relevant to this case, a few of which are (the page references are to the exhibit):

- (a) a physician's examination, dated November 21, 1980, indicates that the spine and musculoskeletal were normal. p. 1;
- (b) On January 20, 1981, the x-ray of his lumbar sacral spine indicated that his vertebrae were intact and normal. p. 5;
- (c) In late January through February 1981, Claimant apparently complained of severe back pain. p. 6-11;
- (d) On June 22, 1984, Dr. Guterrez concluded that Claimant had no abnormal paraspinal soft tissue shadows or calcifications and there were no fractures or dislocations. There were normal intervertebral spaces. p. 41;
- (e) A physician's examination, dated December 6, 1983, indicates discomfort in lower spine. p. 42;
- (f) A December 2, 1983, medical history indicates back trouble. p. 45;
- (g) A January 4, 1984, medical orientation form #1 indicates a back injury in 1978. p. 46;
- (h) Complaints of chronic back pain on January 12, 1984. p. 47; and
- (i) An August 30, 1984, medical screening at Vienna C.C., indicates complaints of broken back in 1978. p. 49.

There are numerous more indications in Claimant's group exhibit no. 1, that Respondent had notice of prior

back complaints. However, a review of the exhibit does not reveal that there are any diagnoses by anyone prior to the accident in question of what the specific back problems were.

After the accident, Dr. Wood apparently concluded in his consultation report dated December 23, 1985, "that there appears to be a lumbar sprain with secondary dorsal muscle spasm syndrome." The report also states that there is no sign of a herniated disc. A CAT scan of his spine apparently showed that certain discs were extending to the left.

Claimant testified that Officer Bassett told him to move the washer and dryer and he told Officer Bassett that he had a back problem. There are no witnesses to this conversation. There were no witnesses to the actual incident.

We are not aware of a claim where a prisoner was ordered to perform a task that was allegedly contrary to his known medical condition.

Although the record indicates that Claimant, on numerous occasions, informed the Respondent of prior back problems and of back pain, we find, as we did in *Komeshak v. State* (1985), 38 Ill. Ct. Cl. 100, that Claimant has not met his burden of proof. We find that Claimant has not shown that Respondent has breached its duty to exercise ordinary and reasonable care. This recommendation is based on Claimant's testimony. He did not indicate that he requested help in moving the washer. Both witnesses for Respondent indicated that a prisoner could, and does, request help to perform certain tasks from inmates or employees. Claimant did not refute or rebut this testimony. Claimant knew his own condition and, if it was such that he could not move the washer by himself, he

should have told Lt. Hoepker or Officer Bassett that he needed help. Claimant was a porter for nearly five months. His cleaning duties required physical activity and Claimant apparently voluntarily performed these duties.

A review of Claimant's group exhibit no. 1 does not reveal that Respondent had notice of any *specific* physical or medical problem that would limit Claimant's activities. There apparently was a procedure to be followed in the event a prisoner was to be limited in his physical activity and there is no evidence that there were any known limitations prescribed for the physical activity which Claimant could perform.

Claimant has not met his burden of proof.

It is therefore ordered, adjudged and decreed that this claim is dismissed and forever barred.

(No. 88-CC-3892—Claim dismissed; petition for rehearing denied.)

JOHN REYES, Special Administrator of the Estate of FRANCIS REYES, Deceased, Claimant, *v.* THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS HOSPITAL, Respondent.

Order filed August 22, 1995.

Order on petition for rehearing filed January 30, 1996.

ASHMAN & ASSOC. (DAVID BAGDADE, of counsel), for Claimant.

KRALOVEC, MARQUARD, DOYLE & GIBBONS (JAMES F. DONOVAN, of counsel), for Respondent.

LIMITATIONS—*Court of Claims must strictly enforce limitations provisions.* It is especially important for the Court of Claims to strictly enforce its limitations provisions, for they are jurisdictional, and the Court does not have equitable jurisdiction to allow a Claimant to utilize defenses such as waiver, estoppel, or laches to overcome the Court's strict limitations provisions.

SAME—*savings statute did not extend time for filing action dismissed for lack of jurisdiction—claim dismissed—petition for rehearing denied.* Where the savings statute in effect at the time of the circuit court's dismissal of the Claimant's tort action for lack of subject matter jurisdiction did not include such dismissals as a basis for extending a plaintiff's time for commencing an action, the Claimant was time-barred from filing a claim in the Court of Claims, the claim was dismissed, and the Claimant's petition for rehearing was denied.

ORDER

FREDERICK, J.

This cause comes before the Court on Respondent's motion to dismiss and motion to compel, and the Court having reviewed the pleadings, and the Court being fully advised in the premises, wherefore, the Court finds:

1. That Claimant filed his complaint as special administrator in the Court of Claims on April 25, 1988.
2. That on May 2, 1995, this Court entered an order requiring an affidavit be filed pursuant to section 2—622 of the Illinois Code of Civil Procedure. 735 ILCS 5/2—622.
3. That Respondent seeks to depose Claimant, John Reyes, and Claimant's expert, Dr. Sam Sugar.
4. That Respondent was not a proper party to the circuit court action entitled, *Reyes v. Dr. Juan Garcia, et al.*, No. 87-L-21119, in the Circuit Court of Cook County, Illinois.
5. That the alleged tortious acts of Respondent occurred, at the latest, on October 7, 1985.
6. That the claim was filed more than two years after the alleged negligent act or acts.
7. That the Claimant filed its original claim in the circuit court on October 1, 1987, and named the Respondent as a party in that case.

8. That in the circuit court action, the Respondent, Board of Trustees, filed a motion to dismiss on the grounds that the circuit court lacked subject matter jurisdiction. On April 4, 1988, the circuit court granted the Respondent's motion and granted plaintiff leave to refile the case in the Illinois Court of Claims.

9. That, pursuant to section 22(g) of the Court of Claims Act (705 ILCS, 505/22(g)), the statute of limitations in this claim sounding in tort is two years from the date the claim accrues.

10. This claim accrued no later than October 7, 1985.

11. Section 13—217 of the Code of Civil Procedure is a savings statute intended to extend the period of limitations under certain circumstances. The version of section 13—217 in effect at the time of the circuit court's dismissal of the prior litigation read:

"§ 13—217. Reversal or dismissal. In the actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, if judgment is entered for the plaintiff but reversed on appeal, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction, then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or entered against the plaintiff, or after the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District court for lack of jurisdiction." 735 ILCS 5/13—217.

Thus, the savings statute in effect at that time provided for the refiling of an action, assuming the otherwise applicable limitations period had run, within one year of any of the following dispositions:

(1) judgment is entered for plaintiff but reversed on appeal;

(2) following a verdict in favor of plaintiff, judgment is entered against plaintiff for the result of a motion in arrest of judgment;

(3) plaintiff voluntarily dismisses the action;

(4) the action is dismissed for want of prosecution; or

(5) the action is dismissed by a United States District Court for lack of jurisdiction.¹ See, e.g., *Mares v. Busby* (7th Cir. 1994), 34 F. 3d 533, 536.

In support of his contentions that section 13—217 of the Code of Civil Procedure should defeat Respondent’s motion, Claimant cites *Roth v. Northern Assurance Co.* (1964), 32 Ill. 2d 40, 203 N.E.2d 415, and its progeny.² *Roth* dealt with an older version of the savings statute which contained the language “if the plaintiff is nonsuited” in the place presently occupied by the language “the action is voluntarily dismissed by the plaintiff.” The *Roth* court construed the “nonsuit” provision as permitting a refiling within one year after a Federal court had dismissed for lack of jurisdiction.³ In so ruling, the Court was careful to stress that it read the savings statute as referring to *involuntary* nonsuits. (32 Ill. 2d at 43, 203 N.E.2d at 417.) Twelve years after the *Roth* opinion, this particular portion of the savings statute was amended by deleting “if the plaintiff is nonsuited” and inserting “the action is voluntarily dismissed by the plaintiff,” to wit:

“§24. In the actions specified in this Act or any other act or contract where the time for commencing an action is limited, if judgment is given for the plaintiff but reversed on appeal; or if there is a verdict for the plaintiff and, upon matter alleged in arrest of judgment, the judgment is given against the

¹ This version of section 13—217 was later amended, effective January 7, 1993, to allow similar refiling of an action dismissed by a United States District Court as a result of improper venue. P.A. 87-1252, section 2.

² The post-*Roth* decisions Claimant cites are: *Williams v. Medical Center Commission* (1975), 60 Ill. 2d 389, 328 N.E.2d 1; and *Edwards v. Safer Foundation, Inc.* (1st Dist. 1988), 171 Ill. App. 3d 793, 525 N.E.2d 987.

³ There was no specific Federal dismissal provision in the savings statute at that time.

plaintiff; or *the action is voluntarily dismissed by the plaintiff if the plaintiff is nonsuited*, or the action is dismissed for want of prosecution then, whether or not the time limitation for bringing such action expires during the pendency of such suit, the plaintiff, his heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or given against the plaintiff, or after the *action is voluntarily dismissed by the plaintiff* ~~plaintiff is nonsuited~~ or the action is dismissed for want of prosecution.” Public Act 79—1358; see, Laws of the State of Illinois, 79th General Assembly, pages 743-744 (emphasis added).

One of the first reported decisions construing the amendment came from the Court of Claims. (*Gunderson and Wosylus v. State* (1980), 33 Ill. Ct. Cl. 297.) The Court noted:

“Under the old statute, a plaintiff whose suit was dismissed involuntarily could commence a new action within one year of the dismissal order where the statute [of limitations] expired during the pendency of the suit.

• • •

It is Respondent’s contention that the new statute affords protection only to plaintiffs whose lawsuits are *voluntarily* dismissed and [that] its protection is [now] unavailable to plaintiffs whose actions are *involuntarily* dismissed.” 33 Ill. Ct. Cl. at p. 298 (emphasis added).

The Court of Claims agreed with the State’s position and dismissed that claim. The Illinois Supreme Court has thoroughly studied these issues and has reached the same conclusion that this Court did in *Gunderson*. (See, e.g., *Hupp v. Gray* (1978), 73 Ill. 2d 78, 82-83, 382 N.E.2d 1211, 1213; *Conner v. Copley Press, Inc.* (1984), 99 Ill. 2d 382, 387-388, 459 N.E.2d 955, 957; and *DeClerck v. Simpson* (1991), 143 Ill. 2d 489, 577 N.E.2d 767.) In short, *Gunderson* accurately assessed the effect of the 1976 amendment. Dismissals for lack of jurisdiction are not voluntary dismissals by the plaintiff but are dismissals by the court on another ground, namely, lack of jurisdiction. Thus, under the amended savings statute, the *Roth* opinion and its progeny are inapposite; the amended section 13—217 did not allow Claimant an additional year to file his complaint in this Court.

In its most recent pronouncement on statutes of limitations, the Supreme Court wrote:

“Our decision produces a harsh result in that it extinguishes liability where such should plainly lie. That is, however, the nature of statutes of limitations. The statutes are inherently arbitrary in their operation in that they attach a complete bar to recovery of a valid claim or the imposition of criminal liability based on no more than the passage of time. While we express sympathy for plaintiff in this case, our duty is to adhere to our clearly established precedent.” *Sepmeyer v. Holman* (1994), 162 Ill. 2d 249, 256, 642 N.E.2d 1242, 1245.

It is especially important for the Court of Claims to strictly enforce its limitations provisions, for they are jurisdictional. (*Illinois Bell Telephone Co. v. State* (1981), 35 Ill. Ct. Cl. 345.) The Court of Claims does not have equitable jurisdiction to allow a Claimant to utilize defenses such as waiver, estoppel, or laches to overcome the Court’s strict limitations provisions. *In re Application of Ward* (1981), 35 Ill. Ct. Cl. 398.

Accordingly, Respondent’s motion to dismiss is allowed.

It is ordered that this claim is dismissed with prejudice.

ORDER

FREDERICK, J.

This cause comes before the Court on Claimant’s motion for rehearing and reconsideration of the Court’s order of August 22, 1995, and the Court having reviewed the motion, the briefs of the parties, the court file, heard oral arguments, and the Court being fully advised in the premises, wherefore, the Court finds:

1. Section 790.40 of the Court of Claims Regulations (74 Ill. Adm. Code 790) specifies that cases are commenced by the filing of a verified complaint with the clerk of the Court of Claims.

2. Section 790.60(a) of the Court of Claims Regulations states that any complaint filed or pending in the Court of Claims shall be continued generally, subject to the provisions of 790.70, until the final disposition of all other claims or proceedings arising from the same occurrence or transaction. (A general continuance granted by this Court is not to be construed as an opinion on the question of jurisdiction in any other court or tribunal.)

3. That pursuant to section 22(h) of the Court of Claims Act (705 ILCS 505/22(h)), all time limitations established under the Act and the rules promulgated under the Act are binding as jurisdictional.

4. That the savings statute interpreted by the supreme court in *Roth v. Northern Assurance Co., Ltd.* (1964), 32 Ill. 2d 35, and *Williams v. Medical Center Commission* (1975), 60 Ill. 2d 389, was substantially different from the savings statute in effect and at issue in this case.

5. That the legislature removed the “if the plaintiff is non-suited” language from section 13—217 of the Code of Civil Procedure. 735 ILCS 5/13—217.

6. That this Court has previously ruled adversely to Claimant’s position on this same issue in *Nikelly v. Board of Trustees of the University of Illinois* (1993), 45 Ill. Ct. Cl. 336.

7. That the Court has carefully reviewed all of the pleadings and the law in regard to the issue in this case and finds the Court’s order of August 22, 1995, to be the correct order.

Therefore, it is ordered that Claimant’s motion for rehearing and reconsideration of order of August 22, 1995, is denied.

(No. 88-CC-4264—Claim denied.)

GILDA SANDERS, Claimant, *v.* BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES FOR CHICAGO STATE UNIVERSITY, Respondent.

Order filed August 22, 1995.

MICHAEL D. POLLARD, for Claimant.

DUNN ULBRICH HUNDMAN STANCZAK & OGAR (DOUGLAS J. HUNDMAN, of counsel), for Respondent.

NEGLIGENCE—*invitee assumes normal risks attendant to use of premises.* An invitee assumes all normal, obvious or ordinary risks attendant to use of the premises.

SAME—*slip and fall on university locker room floor—claim denied.* A claim by a woman who slipped and fell on the floor of a university locker room after attending a swimming class with her daughter was denied, where the Claimant offered no evidence of the State's negligent design, construction or maintenance of the area in question, there was no proof that the water on the floor constituted an unreasonably dangerous condition or that the State had notice of the condition or prior similar incidents, and it was reasonable for the Claimant to assume that the area, which was located adjacent to a swimming pool, would become slippery.

ORDER

JANN, J.

The Claimant, Gilda Sanders, slipped and fell on water on a concrete locker room floor at Chicago State University, 9501 South King Drive in Chicago, Illinois on May 30, 1986. She suffered a fractured tailbone, incurred medical bills totaling \$448, lost \$170 in income by missing 5 half-days at work, and spent several months in pain. The notice of claim was filed May 19, 1987, and the complaint was filed May 20, 1988. Claimant alleges Respondent allowed water to accumulate, did not provide non-slip surfaces and failed to warn persons of the allegedly dangerous condition. A hearing was held before Commissioner Michael E. Fryzel on April 27, 1995.

At the hearing, the Claimant testified that she was coming back from a parent-toddlers swimming class with

her two-year-old daughter. As they were walking through a corridor between the showers and the locker room, she slipped and fell on her coccyx, blacked out, and when she regained consciousness was surrounded by several people offering assistance. On her way out of the building, Claimant stopped at the door and reported the incident to a guard. Later that day, she went to Michael Reese emergency room. She was x-rayed, given pain medication and a donut hole cushion to sit on. Claimant had to sleep downstairs at home for two and a half months because she couldn't climb stairs. Claimant could not work for several days, missing the half-days she normally worked as a nursery school teacher.

The only testimony regarding the condition of the corridor came from Claimant, who testified that there was a "considerable amount of water" and that the water did not seem to be going down the drain. Claimant also stated that there was more water in the corridor than there had been on the four or five previous occasions she had attended the swimming class.

Respondent did not present any witnesses. Respondent argued that the occurrence of an accident does not support an inference of negligence on the part of the State without proof of causation. Claimant must demonstrate proximate cause by establishing within a reasonable certainty that the Respondent's acts or omissions caused her injury.

Claimant presented no evidence of negligence by Respondent in the design, construction or maintenance of the corridor. No testimony was offered that the water in the corridor constituted an unreasonably dangerous condition. There was no evidence as to Respondent's notice of the condition or as to prior incidents occurring in the same area. It is reasonable to assume that the floor

between a shower room and lockers adjacent to a swimming pool will become wet and more slippery than a dry floor. The facts herein are analogous to those in *Fleischer v. State* (1983), 35 Ill. Ct. Cl. 799, and *Duble v. State* (1967), 26 Ill. Ct. Cl. 87. These cases held that an invitee assumes all normal, obvious or ordinary risks attendant to use of the premises.

Based upon the foregoing, we hereby find Claimant has failed to meet her burden of proof to demonstrate negligence by Respondent.

(No. 88-CC-4602—Motion for summary judgment denied;
Claimant awarded \$20,000.)

CANTEEN TOWNSHIP, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed August 30, 1995.

Order filed May 20, 1996.

PHILIP R. RICE, for Claimant.

JIM RYAN, Attorney General (EDWIN PURHAM, Assistant Attorney General, of counsel), for Respondent.

PRACTICE AND PROCEDURE—*when summary judgment is appropriate.* Summary judgment is only appropriate when there is no genuine issue of material fact, and the moving party is otherwise entitled to judgment in its favor as a matter of law, and the evidence under consideration in ruling on a motion for summary judgment is to be strictly construed against the moving party and liberally construed in favor of the opponent.

REAL PROPERTY—*distinction between two forms of street dedication.* A street dedication may be either statutory, which is created by the recording of a proper plat and conveys a fee simple to the public entity responsible for the street, or a common law dedication, which results from other acts of a property owner and merely grants the public entity an easement for street purposes.

SAME—*Claimant township had standing to sue for damage to streets—State's motion for summary judgment denied.* The State's motion for summary judgment was denied in the Claimant township's action alleging that

damage was inflicted by the State to several of the Claimant's streets, since although the State alleged that the Claimant lacked standing because it did not have a fee interest in the subject properties, the plat produced by the State in its memorandum of law did not disclose any defects in the statutory dedication of the streets, and therefore the Claimant had standing to sue.

STIPULATIONS—*property damage claim—settlement reached—award granted*. In a property damage claim brought by a township against the State for alleged damage inflicted upon several of the township's streets, a stipulated settlement was reached, and the Claimant was awarded \$20,000 in full satisfaction of its claim.

OPINION

SOMMER, C.J.

Claimant filed a two-count petition alleging, in the alternative, that Respondent either intentionally or negligently “demolished, tore-up and destroyed” the pavement of five of Claimant's streets—Park, Catherine, Ramey, Elm, and Major Streets—located within the Cahokia Mounds Historic Site. No formal responsive pleading was filed by Respondent to the petition, but Respondent did supply some cursory information about the streets in answering one of Claimant's interrogatories:

- asphalt was removed from Park Street in 1987 and 1988;
- asphalt was removed from Catherine Street in 1989;
- Ramey Street is used as the main driveway to Respondent's new museum;
- no changes were made to Elm Street; and
- Major Street, although platted, has never been constructed and does not physically exist.

Presently pending before the Court is a motion for summary judgment in which Respondent argues:

“Claimant does not hold sufficient legal title in the property in question as a matter of law to entitle them [sic] to any alleged damages.”

No affidavits or deposition testimony have been offered by Respondent to support its motion. Rather, Respondent

has simply tendered a memorandum of law containing a copy of the 1941 subdivision plat which dedicated these five streets. In its memorandum of law, Respondent contends that Claimant is not the owner in fee simple of the streets and, therefore, that Claimant lacks standing to request damages for whatever harm Respondent might have done to the pavement of these streets.

Three basic principles of summary judgment guide a consideration of Respondent's motion:

1. Summary judgment is only appropriate when there is no genuine issue of material fact, and the moving party is otherwise entitled to judgment in its favor as a matter of law¹;
2. The movant has the burden of showing that, as a matter of law, it is entitled to summary judgment in its favor.²
3. The evidence under consideration in ruling on a motion for summary judgment is to be strictly construed against the moving party and liberally construed in favor of its opponent.³

Those principles of summary judgment in hand, the next area of law relates to the ownership ramifications which result when a street is dedicated to the public use.

The dedication of a street can take either of two forms: (1) a statutory dedication, which is created by the recording of a proper plat; or (2) a common law dedication, which results from other acts of a property owner. (*Kirnbauer v. Cook County Forest Preserve* (1st Dist. 1991), 215 Ill. App. 3d 1013, 1020, 576 N.E.2d 168, 173.)

¹ *Wright v. St. John's Hospital* (4th Dist. 1992), 229 Ill. App. 3d 680, 682-83, 593 N.E.2d 1070, 1072.

² *Id.*

³ *Smith v. Armor Plus Co., Inc.*, (2nd Dist. 1993), 248 Ill. App. 3d 831, 839, 617 N.E.2d 1346, 1352.

The distinction between the two types of dedication is critical, for a statutory dedication conveys a fee simple to the public entity responsible for the street, while a common law dedication merely grants the public an easement for street purposes. (*Id.*, 215 Ill. App. 3d at 1020, 576 N.E.2d at 174.)⁴ Here, the 1941 subdivision plat is determinative: if it strictly complied with the provisions of the Plat Act in effect at that time, it is a statutory dedication; but if it failed to comply with all of the Act's requirements, a common law dedication resulted. Ill. Rev. Stat. 1941, chap. 109, par. 3; see also I.L.P. Dedication sec. 36.

Respondent has not specified how it believes the 1941 subdivision plat failed to comply with the relevant provisions of the Plat Act, and a review of the plat does not disclose any patent defects. The plat purports to be signed by the owners of the land, seems to have been prepared and certified by a licensed surveyor, appears to contain all of the technical descriptions and specifications called for by the Act, and was recorded in the appropriate office.

Given the legal standards by which motions for summary judgment are considered, it cannot be said as a matter of law at this point that the 1941 dedication was anything other than a proper, statutory dedication. As such, this dedication must be presumed to have conveyed a fee simple in the five streets to the public entity responsible for maintaining them. Since Respondent has not demonstrated that some other body besides Claimant was, or is, the entity responsible for maintaining these streets, there is no option but to infer, for purposes of this motion, that

⁴ Respondent's arguments about a "qualified fee" are inapposite. "Qualified fee" refers to the fact that Claimant is not legally capable of conveying its fee; in other words, all Claimant is allowed to do is to vacate the streets in accordance with the statutory provisions. But that legal principle has no bearing on this claim of alleged damage to the pavement of Claimant's streets, for Respondent has not attempted to argue that Claimant ever vacated those streets.

Claimant does have standing to bring this claim for the damage which Respondent allegedly did to the pavement of the streets.

Accordingly, the Court finds that Respondent has not sustained its burden of proof, and it is ordered that Respondent's motion for summary judgment is denied.

ORDER

SOMMER, C.J.

This cause comes before the Court on the parties' joint stipulation for settlement which states:

This claim arises from damages by Canteen Township because of the State's incorporation of statutorily dedicated Canteen Township streets into the Cahokia Mounds State Historic Site.

The parties have investigated this claim, and have knowledge of the facts and law applicable to the claim, and are desirous of settling this claim in the interest of peace and economy.

Both parties agree that an award of \$20,000 to Canteen Township is both fair and reasonable in exchange for Canteen Township's passage of a formal ordinance vacating all publicly dedicated streets which currently fall within the boundaries of the Cahokia Mounds State Historic Site.

Claimant agrees to pass a formal ordinance as described in the parties' joint stipulation for settlement and agrees to accept, and Respondent agrees to pay, \$20,000 to Canteen Township in full and final satisfaction of this claim and any other claims against Respondent arising from the events which gave rise to this claim.

The parties hereby agree to waive hearing, the taking of evidence, and the submission of briefs.

This Court is not bound by such an agreement but it is also not desirous of creating or prolonging a controversy between parties who wish to settle and end their dispute. Where, as in the instant claim, the agreement appears to have been entered into with full knowledge of the facts and law and is for a just and reasonable amount, we have no reason to question or deny the suggested award.

It is hereby ordered that Claimant Canteen Township is awarded \$20,000 in full and final satisfaction of this claim.

(No. 89-CC-0157—Estate of Donna Hills awarded \$26,784; Claimant Betty Hightower awarded \$60,000; Claimant Vincent Hills, Jr. awarded \$18,000; Claimant Troy Hills awarded \$30,000; Claimant Michael Miller awarded \$18,000; motion to add interest to awards denied.)

BETTY HIGHTOWER, Individually, and as Special Administratrix of the Estate of DONNA HILLS and as personal representative of DONNA HILLS, Deceased, for the use and benefit of BETTY HIGHTOWER, VINCENT HILLS, JR., TROY HILLS, and MICHAEL MILLER, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 25, 1996.

Order filed April 15, 1996.

JAMES T. J. KEATING, for Claimants.

JIM RYAN, Attorney General (DAVID RODRIGUEZ, Assistant Attorney General, of counsel), for Respondent.

DAMAGES—bathub drowning at institution—awards granted to estate and family members—request for interest denied. After entry of a default judgment against the State on the issue of liability, damages for loss of society were awarded to the mother and siblings of a mentally retarded woman who drowned after being left alone in a bathtub at a State institution, and compensation was also granted to the decedent's estate for decedent's pain, suffering and funeral expenses, but the Claimant's motion to add interest to the awards was denied.

OPINION

FREDERICK, J.

This cause comes before the Court on the issue of damages, the Court having previously found liability on the part of Respondent. The history of this case dates back to 1986. On October 12, 1986, Donna Hills, a severely mentally retarded woman, was placed at the Lude-man Developmental Center in Park Forest, Illinois. Donna Hills, who required 24-hour supervision, was left alone in a tub of water and drowned. Donna Hills was born on July 7, 1964. Claimants filed a verified complaint in this matter in a timely fashion. On October 18, 1993, the Court entered a default judgment against Respondent, on the issue of liability only, for failure of the Respondent to comply with orders relating to discovery and remanded this matter to the Commissioner assigned to the case for a hearing on damages.

On May 20, 1994, a proposed joint stipulation to settle this matter for four hundred twenty-five thousand dollars (\$425,000) was filed with the Court. That joint stipulation was rejected by the Court on September 30, 1994, because there was no evidence or information to indicate how the settlement figure was reached, how the award was to be divided among the heirs, or whether there was any basis in law to support the award. Claimants filed a motion to reconsider that order which was subsequently denied. Accordingly, a hearing on damages was held and the following testimony was adduced.

Dr. Brian Kern, who is board certified in emergency medicine, testified that he examined Donna Hills on October 12, 1986. Dr. Kern indicated that Donna Hills died from drowning in a bathtub on that date. According to Dr. Kern, before Ms. Hills died she had some pain and

suffering even though she was profoundly mentally retarded because she was still able to feel. Specifically, Dr. Kern indicated that Claimants' decedent would have been gasping for breath and able to see out of the bathtub. However, she would not have been able to integrate the necessary information in order to get out of the tub and save herself. According to Dr. Kern, the pain would have lasted five to ten minutes before Donna Hills lost consciousness.

Betty Hightower, the mother of Donna Hills, testified that Donna became mentally retarded at the age of three and a half years old. Before that time she was a "normal little girl, playful and cheerful." After Donna became mentally retarded, Ms. Hightower and her family continued to care for her at home for six and a half years, from approximately 1967 to 1974. Since Donna was profoundly mentally retarded, she required involved, 100% care, including taking her to the bathroom, washing her, dressing her, feeding her, and entertaining her, and other care. Ms. Hightower was assisted in taking care of Donna by Donna's siblings, Claimants Michael Miller, Vincent Hills, Jr., and Troy Hills.

In 1974, Donna was placed in a State home because her seizures had increased and the family could no longer take care of her at home. Donna was first placed at Reed for approximately five months. Ms. Hightower visited Donna three times during the time Donna was at Reed.

After Donna left Reed, she was placed at Dixon for five years. Ms. Hightower would visit Donna about every four months. She could not visit more often because she did not own a car. While Ms. Hightower requested that Donna come home on visits, she was advised that it was too far for her to come on the train. Ms. Hightower would call the staff at Dixon to inquire about Donna on a regular basis. Since Donna could not speak, she did not speak to

her, and because of the arrangements at Dixon, Donna was not able to hear Ms. Hightower's voice on the telephone.

Ms. Hightower was not satisfied with the care and treatment Donna was receiving at Dixon and therefore she asked for Donna's transfer. Donna was subsequently transferred to the Ludeman Center in 1979. The Ludeman Center was closer to Ms. Hightower's residence. While Donna was at Ludeman, Ms. Hightower would bring Donna home for two to three week intervals about every four months. In addition, Ms. Hightower and her children would visit Donna at Ludeman and would call Donna so she could hear their voices. According to Ms. Hightower, she was planning on bringing Donna home to live with her.

Also, according to Ms. Hightower, Donna knew her and was happy when she came to visit. When they were together, they would hug and rock. Donna would be sad when Ms. Hightower left.

Ms. Hightower learned that Donna was dead after she received a call and went to the hospital. When she learned how Donna had died, she felt hurt and betrayed. Ms. Hightower loved Donna and misses her. She thinks about Donna all of the time.

Troy Hills is Donna's younger sister. Troy was 20 years old when Donna died. Troy was approximately six years old when Donna was first placed in an institution. While Donna lived at home, Troy would help with the day-to-day activities (including washing and feeding Donna) to the best of her ability. She also played with Donna. Troy was also the only one Donna would let fix her hair. When other people tried, Donna would cry or throw a tantrum.

After Donna was institutionalized, Troy would visit her several times a year. Also, when Donna started coming home to visit, Troy and her brothers would take care of

Donna while their mother was at work. Troy enjoyed caring for Donna. While Donna was placed at Ludeman, Troy would call so Donna could hear her voice. Troy loved her sister and misses her. Troy named her own daughter Donna, after her sister's name. Troy still thinks about her sister.

Michael Miller is Donna's older brother. He was nine years of age when Donna was born. Michael lived at home with Donna until 1972 when he left to enroll in the Job Corps. During the time he was at home, he helped his mother take care of Donna by feeding her, dressing her, and under certain circumstances, restraining her.

Michael would return home to visit for three to four days at a time when Donna was home to visit. During that time period he would help take care of Donna. Donna recognized him when he came to visit and would be happy. The fact that Donna was mentally retarded encouraged him to obtain a bachelor's degree in social work. When Michael found out his sister had drowned, he was "angry, hurt and numb." Michael loved his younger sister and misses her.

Vincent Hills is Donna's younger brother. He was 22 years old when Donna died. Before Donna was institutionalized, Vincent would help with Donna's everyday activities. He also played with her. Vincent would visit Donna at Ludeman every two to three months and helped to take care of her when she came home on extended visits every three to four months. Vincent loved his sister and misses her.

According to Michael and Vincent, their mother, Betty Hightower, has been overprotective of them since Donna died.

Donna's funeral cost one thousand seven hundred eighty-four dollars (\$1,784). According to standard mortality

tables, the deceased and the Claimants had more than 30 years left in which to enjoy each other's companionship at the time of Donna's death.

In this matter there are five Claimants: the estate of Donna Hills; Betty Hightower, the mother of the decedent; Troy Hills, the sister of the decedent; Michael Miller, the older brother of the decedent; and Vincent Hills, the younger brother of the decedent. The claim of the estate is for Donna's conscious pain and suffering before her death and funeral expenses. The other claims are for loss of society. Under Illinois law, all of the claims are compensable. (*Copeland v. Illinois Department of Mental Health and Developmental Disabilities* (1989), 41 Ill. Ct. Cl. 125; *Drew v. Gobel Freight Lines* (1991), 197 Ill. App. 3d 1049.) All of the Claimants in this matter have presented evidence as indicated herein to support their respective claims.

Respondent in this matter does not dispute that Claimants have established their respective claims. However, Respondent disputes Claimants' request for the maximum amount of damages by arguing that all instances of loss of society should not be valued at the statutory maximum. It is always a very difficult task measuring pain and suffering and loss of society. In this case we have a severely mentally retarded decedent who could not work, speak or integrate ideas. The decedent's mother, Claimant Betty Hightower, visited with the decedent less than 65 days a year. The two brothers and one sister saw the decedent less often. A maximum award is not indicated under the peculiar facts of this case.

Based on the foregoing, it is the finding of the Court that the estate of Donna Hills be awarded the sum of twenty-six thousand seven hundred eighty-four dollars (\$26,784) for pain and suffering and funeral expenses. The evidence established that the decedent endured between

five and ten minutes of conscious suffering and had a funeral bill of one thousand seven hundred eighty-four dollars (\$1,784). Betty Hightower, the Mother of the decedent, should be awarded sixty thousand dollars (\$60,000) for loss of society. The evidence established that Ms. Hightower had spent time taking care of her daughter, loved her and missed her. Troy Hills, the sister of the decedent, should be awarded thirty thousand dollars (\$30,000) for loss of society. The evidence established that Ms. Hills had a relationship with her sister, spent time taking care of her, loved her and missed her to the extent that she named her daughter Donna, after the deceased. Michael Miller, the older brother of the decedent, and Vincent Hills, the younger brother of the decedent, should each be awarded eighteen thousand dollars (\$18,000) for loss of society. The evidence established that Mr. Miller and Mr. Hills had relationships with their sister, spent time taking care of her, loved her and missed her.

For the foregoing reasons, it is the order of the Court that twenty-six thousand seven hundred eighty-four dollars (\$26,784) is awarded to the estate of Donna Hills; sixty thousand dollars (\$60,000) is awarded to Betty Hightower, mother of the decedent; eighteen thousand dollars (\$18,000) is awarded to Vincent Hills, Jr., the brother of the decedent; thirty thousand dollars (\$30,000) is awarded to Troy Hills, the sister of the decedent; and eighteen thousand dollars (\$18,000) is awarded to Michael Miller, the brother of the decedent, in full and final satisfaction of all of the Claimants' claims.

ORDER

FREDERICK, J.

This cause comes before the Court on the Claimants' motion to add interest to awards, and the Court having

reviewed the court file, and the Court being fully advised in the premises, wherefore, the Court finds:

1. That Supreme Court Rule 219(c)(vii) should not apply to the facts of this case retroactively.

2. That the imposition of interest would not be appropriate.

Therefore, it is ordered that Claimants' motion to add interest to awards is denied.

(No. 89-CC-0782—Motion for summary judgment denied; claim denied.)

FIRST OF AMERICA BANK a/k/a UNITED BANK OF ILLINOIS,
Claimant, *v.* THE STATE OF ILLINOIS; ILLINOIS FARM
DEVELOPMENT AUTHORITY, Respondents.

Order for summary judgment filed March 24, 1992.

Opinion filed May 6, 1996.

HINSHAW, CULBERTSON, MOELMANN, HOBAN &
FULLER (GEORGE GILLESPIE, of counsel), for Claimant.

JIM RYAN, Attorney General (KAREN MCNAUGHT,
Assistant Attorney General, of counsel), for Respondents.

PRACTICE AND PROCEDURE—*Respondent's affidavit stricken due to deficiencies—Claimant's motion for summary judgment denied.* Although the Court of Claims struck, as deficient, an affidavit which the Respondent sought to file in response to the Claimant's motion for summary judgment, the Claimant's unrebutted summary judgment motion was nonetheless denied in its breach of contract claim against the Respondent, because factual issues remained concerning the conditions under which the Respondent could revoke its guarantee of the Claimant's loan to a third party, pursuant to the parties' agreement.

CONTRACTS—*fraud—when contract may be rescinded.* To constitute fraud warranting a court of equity to rescind a contract, a misrepresentation must be in the form of a statement of material fact, made to induce another party to act, and the party making the statement must know it to be false, whereas the person to whom the misrepresentation is made must be ignorant

of the falsity, reasonably believe it to be true, and reasonably rely thereupon to his damage.

SAME—*fraud—absolute defense by State*. Fraud in itself is an absolute defense which can be asserted by the State of Illinois in the Court of Claims.

SAME—*State fraudulently induced to guarantee Claimant's bank loan to third party—claim denied*. In a bank's claim against the State alleging that the Illinois Farm Development Authority breached its contract with the bank by revoking the State's guarantee of the bank's loan to a third party, the claim was denied based on clear and convincing evidence that the bank knowingly misrepresented the third party's financial position and holdings, and intended that the State rely upon those misrepresentations in guaranteeing the loan.

ORDER

RAUCCI, J.

This cause coming on to be heard on Claimant's motion for summary judgment, the Court having heard oral argument, finds that at the oral argument, the Respondent sought to file a written response. Because we previously had granted four extensions of time to file a response, we denied leave to file the belated response, but we did allow Respondent leave to file the affidavit of Donald K. Cochran, the current director of the Illinois Farm Development Authority (IFDA). Claimant has moved to strike that affidavit.

The affidavit will be stricken.

The affidavit is deficient in many respects. The affidavit is conclusory, does not identify the documents upon which the affiant's opinions are based, does not attach any documents, concludes that Claimant violated section 11.01 of the Tri-Party Agreement while no affirmative defense raising that issue has been pled, and makes assertions about information being "discovered" by IFDA but does not reveal that basis for the discovery or the affiant's personal knowledge of it.

We proceed to consider the un rebutted motion for summary judgment. The motion asserts that Respondent

IFDA guaranteed a \$300,000 loan made by Claimant to Laurence and Carolyn Richardson whereby Respondent agreed to pay Claimant 85% of the outstanding principal and interest in the event of a default under the loan.

On March 19, 1987, Respondent purported to revoke the guarantee under section 7 of the Tri-Party Agreement which, pursuant to section 7.03, became effective 90 days after receipt by Claimant. The Claimant received the notice of revocation on March 24, 1987. Therefore, the effective date of revocation was June 25, 1987.

On April 29, 1987, the Richardsons filed a bankruptcy petition. This constituted an act of default pursuant to section 8.01.

At oral argument, Respondent asserted that the act of default was not complete until the end of the 90-day cure period provided in section 8.01. We need not decide this issue since the State Guarantee provides in pertinent part:

“This State Guarantee is hereby issued to Lender in accordance with all of the terms and conditions of the Tri-Party Agreement, * * *

1. Provided that Lender has complied with all of the provisions of the Tri-Party Agreement, *and no condition exists which would allow the Authority to revoke the State Guarantee as provided in Section 7.01(a), (b), or (c) of the Tri-Party Agreement* the Authority hereby guarantees the prompt payment, when due, whether by an acceleration or otherwise, of a portion of the Loan * * *.” (Emphasis added.)

The letter of March 19, 1987, notifying the Claimant of the revocation referred only to section 7.01. The letter was signed by Ronald L. Bailey who was then the executive director of IFDA. In his deposition, Mr. Bailey asserted that the violation of subsection (a) was the basis for the notice of revocation.

Thus, the State Guarantee only requires payment if in fact “* * * no condition exists which would allow the Authority to revoke the State Guarantee as provided in Section 7.01(a) * * *.”

We previously denied the Respondent's motion for summary judgment because genuine issues of fact exist in this case. Those factual issues still exist.

It is therefore ordered:

1. The affidavit of Donald K. Cochran is stricken.
2. The Claimant's motion for summary judgment is denied.

OPINION

JANN, J.

This matter was heard by Commissioner Bruno P. Bernabei on November 19, 1992. Final briefs were not received until March 30, 1994. Oral argument was requested and held before the Court on May 5, 1995.

Claimant, United Bank of Illinois, a/k/a First of America Bank (hereinafter referred to as "Bank"), brought this action against Respondent, Illinois Farm Development Authority (hereinafter referred to as "IFDA"), alleging that Respondent breached a contract by revoking a guarantee after determining that Bank had made material misrepresentations on the financial statement submitted in support of the guarantee application.

The Bank alleges that IFDA breached the contract when it revoked the guarantee since the contract did not allow for such revocation; that the written notice of revocation was defective and that the IFDA improperly refused to pay the guarantee after the occurrence of a bankruptcy by the borrowers.

In its defense, the IFDA has asserted that because Claimant fraudulently induced it into making the guarantee, the contract is void; that the guarantee could be revoked if the collateral was insufficient and that the revocation of the guarantee became effective prior to Claimant's demand for payment.

Laurence and Carolyn Richardson, who were engaged in farming, had been customers of the Bank for many years prior to 1985. Ken May, executive vice-president of the bank, testified that he served the Richardsons on many agri-business loans for many years and that he was familiar with the farm equipment purchased and owned by them, as well as farm equipment owned by John Richardson, son of Laurence Richardson.

In late 1985, the IFDA announced the State guarantee program for restructuring agriculture debt and started a program to target farmers who were in distress, but not so in debt that they could not recover financially. To be eligible for the guarantee, the debt-to-asset ratio of the borrower was required to be between 40 percent and 65 percent. To receive an 85 percent State guarantee on a loan, a lender such as the Bank, would promise to lend the borrower money at a reduced rate of interest. In consideration of the promises made by borrower and lender, the IFDA agreed that the lender would be guaranteed 85 percent of the loan plus accrued interest if the borrower defaulted.

The Richardsons, through the Bank, made an application to IFDA for a State-guaranteed loan, which application was among the first to be processed in 1986. The application was submitted to IFDA on February 10, 1986, and was accompanied by a letter from Ken May pledging that the Bank would continue to provide the Richardsons with a line of credit so that they could sustain their hog raising operation and further that the Bank was setting up a "special savings account" to insure timely payments. The letter further stated that the borrowers had been long-time customers of the Bank and that the writer was familiar with the Richardson operation and further that the Bank was interested in the Richardson

farm operation and was willing to cooperate with the borrowers. There is no question that the Bank was aware that the IFDA could and would rely upon the truthfulness, accuracy and completeness of all documents submitted to it by the borrower or by the lender.

The first application from the Richardsons exceeded the 65 percent debt-to-asset ratio and thereafter, on March 13, 1986, another application was submitted by the Bank with a debt-to-asset ratio of 64.996764 percent, barely within the limits prescribed by the IFDA guidelines. Ken May, the Bank's executive vice-president, assisted the borrowers in preparation of the loan application, made representations that the financial statements were true and correct and surely intended that the IFDA rely upon said representations.

In the first financial statement submitted to the IFDA on or about February 10, 1986, the borrowers and the Bank did not list a one-half interest in a home owned by Richardson's parents. Mr. May made a copy of an unrecorded copy of a deed of the parents' home purporting to convey an interest to the borrower and submitted said copy with the second application to IFDA on or about March 13, 1986. The testimony was that Mr. May submitted the copy of the deed, even though he was told that the deed had been destroyed within one week following February 25, 1986. Although the Richardsons told Mr. May they did not have an interest in the parents' home, the Bank did nothing to advise the IFDA of this important fact until March 10, 1987, more than one (1) year after the Bank and the borrower had listed the interest on the financial statement. There is no question that the interest shown on the financial statement played a part in inducing IFDA to guarantee the \$300,000 loan.

At oral argument, the Bank's counsel argued that Mr. May was not aware of the purported one-half interest in

the home until so advised in a financial statement dated December 1, 1986, from the M & I Bank in Beloit, Wisconsin, and that Mr. May did disclose this interest in a timely manner. Counsel argued that contrary statements made by Mr. Richardson were motivated by revenge as a result of his bankruptcy.

Mr. May also suggested to the borrower that since he had co-signed a loan with his son, and eventually paid for certain equipment, he could list the son's equipment on the financial statement being submitted. It was testified to that at least eight (8) items of equipment belonging to the son were listed on the borrowers' application for the IFDA guarantee.

At oral argument, Claimant's counsel alleged that the Bank had taken blank U.C.C. statements on equipment from both the father and son and that the assets were not specifically identified until the senior Richardson's bankruptcy.

Prior to the IFDA application, the Richardsons had transacted business with the Bank and dealt with Ken May for many years. Mr. May made hundreds of loans to the Richardsons over the course of their business relationship and when the Richardsons initially set up their hog operation and were in need of short term loans, the Richardsons would see May at least once or twice a month.

Mr. May testified that he sent a cover letter with the application under date of February 7, 1986, stating that the Bank would provide the borrowers with a line of credit so that they could be able to repay IFDA. The guaranteed loan was approved May 1, 1986, and the Bank made one more loan to the Richardsons on May 14, 1986, but did not make any more loans thereafter and cut off the line of credit to the borrowers. The Bank did not tell

IFDA until December 10, 1986, that the borrowers line of credit had been revoked. In fact, the line of credit was cut off during the period between 14 days and 35 days after the loan had been guaranteed. At no time did the Bank notify IFDA that the special savings account, as represented, had not been set up. The net result of the revocation of the line of credit and the failure to set up the special savings account was a negative cash flow and the lack of available funds for loan payments, thus preventing continuation of the farm operation.

Although the Bank had concerns about the Richardsons' farming operation in June of 1986, being a mere 35 days after the commitment was given to guarantee the loan, Claimant did not deem it proper to inform IFDA about the money problems until December 10, 1986, or possibly as late as January 14, 1987. It is important to note that when Mr. May contacted IFDA, he did not inform them of the line of credit revocation or the failure to set up the special account which it had promised to do.

Although IFDA revoked the guarantee of the loan on or about March 19, 1987, Claimant did not give notice of the default until June 26, 1987.

The issue before the Court is whether sufficient and credible evidence was introduced to sustain Respondent's position that IFDA was induced to guarantee the loan to the borrower through fraudulent misrepresentation and that, therefore, the guarantee of the loan was void.

As set out in Respondent's brief, to constitute fraud warranting a court of equity to rescind a contract, a misrepresentation must be in the form of a statement of material fact, made to induce another party to act; it must be false and known by the party making it to be false or not actually believed by him on reasonable grounds to be

true; and the one to whom the misrepresentation is made must be ignorant of the falsity, must reasonably believe the falsity to be true, must act thereupon to his damage and, in so acting, must rely upon the truth of the statement. *Wilkinson v. Appleton* (1963), 28 Ill. 2d 184, 187, 190 N.E.2d 727, 729-30; *Roda v. Berko* (1948), 401 Ill. 336, 339-40, 81 N.E.2d 912, 924.

Fraud in itself is an absolute defense which can be asserted by the State of Illinois in the Court of Claims. (See *Metal Air Corp. v. State* (1977), 32 Ill. Ct. Cl. 103.) “Whenever any fraud against the State of Illinois is practiced or attempted by any Claimant in the proof, statement, establishment, or allowance of any claim or any part of any claim, the claim or part thereof shall be forever barred from prosecution in the court.” 705 ILCS 505/14.

There is no dispute that fraud perpetrated by a Claimant will bar a claim, and the State has the burden of proving such a defense by clear and convincing evidence.

In the instant case, the IFDA relied upon the misinformation given to it by the Bank, through Ken May and Laurence Richardson.

Evidence of fraud by Bank and borrower reared its ugly head a number of times. It must be remembered that Mr. May assisted in preparing the loan application and prepared the balance sheet and other documents which listed a one-half interest in the home hereinabove mentioned. The unrecorded deed to the home was destroyed and it appears Mr. May was so advised, but nevertheless, the non-existent interest was never removed from the loan application which was forwarded to IFDA and which was approved on May 1, 1986. In addition to the non-existent interest in the real estate, Mr. May listed a

number of items of farm equipment on the loan application that did not belong to the borrowers but, in fact, were items owned by John Richardson. Mr. May had been a loan officer and had transacted business with the borrower over many years and had also made a number of loans to John Richardson who had given the Bank a security interest on equipment owned by him but which was actually listed on the borrower's list of farm equipment. By his own testimony, Mr. May stated that he was familiar with the equipment owned by each of the Richardsons.

Claimant's counsel asserted that no inference of fraud may be made if there was laxity by a bank vice-president in monitoring a loan. After oral argument, Claimant submitted a copy of *Brazell v. First National Bank and Trust Co. of Rockford* (7th Cir. 1992), 982 F.2d 206. In this case, guarantors of an auto dealer's floor plan loan brought a fraud action against the bank for breach of contract. The bank counterclaimed, seeking to enforce the guarantor's guarantee of the dealership's debt to the bank. Judgment was entered against the bank on the jury's finding of fraud and rejection of the counterclaim. Appeal was taken and the court found there had been no evidence that the bank made any representations to the Brazells to induce them to issue the guarantee. The Brazells' case was based primarily on the bank's negligence in monitoring the collateral, i.e., the floor plan for the dealership. The court found, "Carelessness by itself, however, cannot support an inference of fraud. Otherwise the tort of fraud would be little if anything more than a special case of the tort of negligence." *Brazell* at 207-208.

In what seems to be an attempt by the Claimant loan officer to transform a bad loan into a good loan, Mr. May made, what is without question, material misrepresentations

to IFDA. This was done in order to secure a guaranteed loan for the customer, thus saving the Bank a substantial loss.

In his testimony, Laurence Richardson admitted that he provided false information to IFDA because he was in a desperate position and believed his banker when he was told that his line of credit would be cut off. His testimony implicated Mr. May in the scheme and sequence of events undertaken by the Bank and the borrower. We find the evidence is clear and convincing that the Claimant Bank intended for IFDA to rely upon the misrepresentation concerning the borrower's interest in the real estate, the listing of equipment not owned by the borrower, as well as the failure to establish the special savings account from the sale of hogs to insure loan payments. This constitutes fraud.

Because of the fraud and misrepresentation as hereinbefore noted by Claimant as well as the borrower, the claim for damages in the amount of \$167,802.30 is denied.

(No. 89-CC-1550—Claimant awarded \$10,000.)

CLEMENT LEE, Claimant, *v.* BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES FOR CHICAGO STATE UNIVERSITY,
Respondent.

Opinion filed August 22, 1995.

CHARLES E. LINDELL, for Claimant.

DUNN, BOEBEL, ULBRICH, MOREL & HUNDMAN
(DAVID S. DUNN, of counsel), for Respondent.

NEGLIGENCE—*State owes duty of reasonable care—Claimant's burden of proof.* Although the State is not an insurer of the safety of persons visiting its buildings, it owes a duty of reasonable care in maintaining the premises, and a Claimant bears the burden of establishing by a preponderance of the evidence that the State breached its duty of reasonable care, that the breach proximately caused the injury, and that the State had actual or constructive notice of the dangerous condition.

SAME—*Claimant injured when chair broke—State had notice—damages awarded.* The Claimant was awarded damages in her claim for injuries sustained in a fall from a chair in a university library since, prior to the Claimant's accident, the chair had broken and been removed to a hallway for repair but was returned to service before being fixed, and the State's failure to remove the broken chair from the premises constituted a breach of its duty of reasonable care.

OPINION

PATCHETT, J.

This is a negligence claim seeking recovery for injuries suffered as a result of the collapse of a chair located at the Respondent's library. On May 31, 1988, the Claimant, Clement Lee, who was employed as a computer operator for the Board of Governors, left her office and went to the Chicago State University Library. She went there to enroll in a swimming class, and she was accompanied by a friend, Aljean Richardson. Upon arrival at the library, Lee obtained an enrollment form from a university employee. She was directed to proceed to another room to complete the form. The room was filled with chairs and desks. Lee sat in one of the available chairs. Prior to sitting in the chair, she did not notice anything unusual about it. After sitting in the chair for approximately one minute, the chair collapsed. As a result of the chair's collapse, Lee fell to the floor. She injured her left foot, left ankle, head, neck and lower back. As she was laying on the floor, she observed that the broken leg of the chair had previously been taped with black tape.

The paramedics were called to the library, and Lee was transported to the South Chicago Community Hospital.

At the emergency room, she complained of headache, back, ankle and neck pain. She was prescribed pain medication and x-rays were taken. She was admitted to the hospital and remained there until her discharge on June 2, 1988. During her stay in the hospital she was given physical therapy and traction. Heat packs were applied to her back, and pain medication was utilized.

Following her June 2, 1988, discharge from the hospital, Lee did not return to work until August 9, 1988. She testified that her rate of pay at the time of the accident was \$1,275.42 per month. Therefore, she has a total lost wage claim of \$2,942. Lee's medical expenses were as follows: Dr. Samowitz \$85, Dr. Egwele \$335, Dr. Patel \$225 and the hospital \$1,378.06, for a total of \$2,023.06.

Lee's friend, Aljean Richardson, testified at the trial of this matter that she was with Lee at the time of the accident. Her testimony was consistent with, and confirmed the details of, Lee's version of the chair's collapse. The parties stipulated to the evidence of Dr. Howard Patel, Dean of Continuing Legal Education at Chicago State University. Via the stipulation, his testimony was that prior to the incident in question, the chair had been taken out of service for repair. The chair was set up in the hallway and turned upside down awaiting repair. No evidence was produced by either party as to how the chair was returned to service prior to the collapse.

Lee's treating physicians testified via evidence depositions. Dr. Patel, a specialist in internal medicine, testified that he examined Lee at the emergency room and observed swelling of the left ankle and left elbow, a cerebral concussion from head trauma, and trauma to the lumbosacral spine and cervical spine, left ankle, and left elbow. Dr. Patel prescribed bed rest, pain medication, heating pad, and physical therapy. Dr. Richard Egwele,

an orthopedic surgeon, testified that he treated the Claimant on June 1, 1988. He diagnosed a sprained left ankle, lower back strain, and observed some scratches on her right arm. Dr. Egwele prescribed heat applications, traction, and medication.

After her release from the hospital, Lee returned to Dr. Egwele for five visits. The doctor observed gradual improvement of the condition. He allowed her to return to work on light duty on August 8, 1988.

At the trial of this case, Lee testified she continues to experience pain in her lower back. She further testified the injury has caused her to be unable to participate in bowling and golf, her former hobbies. However, she does manage to perform daily household tasks.

It is clear that the State is not an insurer of the safety of the persons visiting its buildings. However, the State owes a duty of reasonable care in maintaining the premises. (*Berger v. Board of Trustees of the University of Illinois* (1988), 40 Ill. Ct. Cl. 120, 124.) The Claimant bears the burden of establishing by a preponderance of the evidence that the State breached its duty of reasonable care, that the breach proximately caused the injury, and that the State had actual and constructive notice of the dangerous condition. *Secor v. State* (1991), 44 Ill. Ct. Cl. 215, 217.

In this case there is no question the State had actual notice of the defective condition of the chair. As indicated earlier, the facts do not establish how, when, or by whom the chair was returned to service. However, the Claimant had a reasonable expectation that when she used the chair, it would be in a safe condition. The Respondent's failure to remove the broken chair from the premises constituted a breach of duty of reasonable care owed to

the Claimant. That breach was clearly the proximate cause of the injuries suffered by Lee.

As previously indicated, Lee lost \$2,942 in lost wages and medical expenses of \$2,023. She clearly established, in addition, a claim for pain and suffering and some permanency of injury.

We hereby award the Claimant ten thousand dollars (\$10,000).

(No. 89-CC-2491—Claimant awarded \$75,000;
Respondent's motion for reconsideration denied.)

MARK ALSOBROOK, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed May 10, 1995.

Order for motion for reconsideration filed November 1, 1995.

BARCLAY, DAMISCH & SINSON (MARK DAMISCH, of
counsel), for Claimant.

JIM RYAN, Attorney General (DANIEL FITZGERALD,
Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*State's duty of reasonable care.* The State has no duty to be an insurer of its highways, but does have a duty to keep them safe for the purposes for which they were intended.

SAME—*negligence—notice.* A Claimant in a negligence action against the State must prove either actual or constructive notice in order to recover.

SAME—*rut in highway caused motorcycle accident—constructive notice—award granted with reduction for Claimant's comparative fault.* Although there was no proof that the State had actual notice of long, narrow ruts in the highway which caused the Claimant to lose control of his motorcycle and sustain injuries, the nature of the defect indicated that it had most likely been present for a sufficient amount of time to charge the State with constructive notice of its existence, and an award was granted to the Claimant as a result of the State's negligence, but damages were reduced to reflect the Claimant's 40 percent comparative fault.

OPINION

PATCHETT, J.

The Claimant, Mark Alsobrook, filed this claim as a result of a motorcycle accident which occurred on July 14, 1988. Mr. Alsobrook had been riding motorcycles for 15 years. He had purchased a 1980 Suzuki approximately four months before the accident. The accident occurred at 8:00 p.m. on Interstate 290, approximately one-half mile north of Biesterfield Road. He and a friend of his, Steve Widdle, were both headed south on Interstate 290.

At that location, there were three lanes of south-bound traffic. Widdle was riding ahead of Alsobrook and was on the in-ramp to get onto the interstate. There was a slow-moving car on the ramp ahead of Widdle. Widdle and Alsobrook changed lanes to pass this car and then moved from the far right-hand lane to the middle lane. This took one to two seconds. Alsobrook described the roadway at this point as "rough." As Alsobrook was in the middle lane behind Widdle, he struck a rut and lost control of his motorcycle. Widdle's motorcycle at the time was 30 to 80 feet in front of Alsobrook, but on the right side of the lane. Alsobrook states that he was doing 55 mph at the time of the accident.

Alsobrook stated that he struck the ruts one second after seeing them. His motorcycle traveled 50 to 80 feet during that time. He could not turn left because of traffic. He stated that the first rut grabbed the front tire and yanked it to the left. The second rut yanked the motorcycle out of his hand. Alsobrook submitted photographs of the area which show extremely long and narrow broken concrete with some degree of ruts. These photographs were taken three weeks after the accident while Alsobrook was present.

A State trooper, Officer Wagner, was called as a witness by Alsobrook. He testified that the pavement was separated by a dropoff of one to two inches. He further testified that a scruff mark originated in the lane closest to the median and traveled approximately 100 feet to where the motorcycle came to rest. The trooper stated that a scruff mark is a tire mark made by a tire rolling sideways as opposed to skid mark caused by braking action.

Widdle testified for Alsobrook. He testified that he was riding his motorcycle in front of Alsobrook at a speed of 55 mph. He testified that Alsobrook hit the rut in the center lane, and that Alsobrook's pictures were an accurate description of the rut that he hit. Widdle further testified that Alsobrook was 50 to 100 feet behind him, and he went over the handlebars after the motorcycle went sideways. He stated that Alsobrook ended up on the shoulder of the road.

It appears that the Claimant has proved by a preponderance of the evidence that the ruts identified in the photographs were indeed the cause of the accident in question. They were both the actual cause and the proximate cause. The State obviously has no duty to be an insurer of its highways, but does have a duty to keep the highways reasonably safe for the purposes for which they were intended. These purposes include the riding of motorcycles.

The Claimant, however, must prove either actual or constructive notice of the defect by the State of Illinois in order to be able to recover. (*Berger v. State* (1988), 40 Ill. Ct. Cl. 120.) Actual notice has not been proven.

Constructive notice, therefore, is the ultimate issue in this case, as it is in many highway defect cases. It always creates a difficult burden for a Claimant to meet. Unlike weather-related cases, it is difficult to prove by circumstantial evidence that the State indeed had notice of the defect.

The two general methods for proving constructive notice of a defect are the length of time that the defect has existed and/or the defect being so obvious that constructive notice could be imputed by the nature of the defect itself.

In this case, based on the facts presented, this is a very close question. It was impossible for the Claimant to prove the length of time that the defect existed due to the lack of records available to him with which to do so, and the fact that it was not a weather-related defect.

We therefore turn to the nature of the defect in question. Widdle's testimony confirms Alsobrook's testimony that the photographs accurately depict the ruts which caused the accident. The State has produced no evidence to directly contradict this. A close review of the ruts in question indicate from the nature and extent of the rut, that we can impute constructive notice of the rut in question to the State. While it is possible, and probably likely that large trucks do cause traumatic potholes by striking patches in the pavement, it is extremely unlikely that the long, narrow defects in the concrete in this case were caused by one or two vehicles over a short period of time. Therefore, we find that the State had constructive notice of this particular defect. If this defect were significantly different, or even moderately different, then we might, and probably would, reach a different result.

As a result of this injury, Alsobrook was seriously injured. His total medical bills were \$15,200, and he had lost wages of \$4,680. In addition, the evidence was uncontradicted that Alsobrook suffered significant pain and suffering, scarring, short term memory loss, and restrictions as to his physical abilities which he did not have prior to the accident.

There was no direct evidence presented to the Court of contributory or comparative fault; however, the Court has carefully reviewed the testimony of Alsobrook as to his actions immediately prior to leaving the motorcycle. We believe there is some degree of comparative fault.

We find liability on the part of the Respondent and establish damages in the amount of one hundred twenty-five thousand dollars (\$125,000). We find Alsobrook to be forty percent (40%) at fault, and we reduce the damages by fifty thousand dollars (\$50,000) and award the Claimant the amount of seventy-five thousand dollars (\$75,000).

ORDER

PATCHETT, J.

This cause comes before the Court upon the motion for reconsideration filed by the Respondent.

The Court has carefully considered the motion for reconsideration. However, there is nothing alleged in the motion which convinces the Court that its initial determination of the facts or application of the law was in error.

Therefore, the motion for reconsideration is denied.

(No. 89-CC-3009—Claimant awarded \$50,000.)

JEAN SIMIONI, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed March 30, 1993.

Opinion filed April 12, 1996.

MATTHEW J. BERARDI, for Claimant.

JIM RYAN, Attorney General (KENNETH LEVINSON,
Assistant Attorney General, of counsel), for Respondent.

LAW ENFORCEMENT OFFICERS AND FIREMEN COMPENSATION—*definition of “killed in the line of duty.”* Under the Law Enforcement Officers and Firemen Compensation Act, “killed in the line of duty” is defined as losing one’s life as a result of injury received in the active performance of duties as a fireman if the death occurs within one year from the date the injury was received and if that injury arose from violent or other accidental cause.

SAME—*heart attack—determination of whether decedent was killed in line of duty.* In determining whether an officer was killed in the line of duty when the cause of death was a heart attack, if the decedent was on duty and performing strenuous physical activity at the time of the heart attack, the Court has consistently granted awards, but where the decedent was not performing strenuous physical activities, the Court examines whether the decedent’s performance of duties prior to the time of the fatal heart attack may have precipitated the attack.

SAME—*fireman suffered fatal heart attack at fire station—award granted.* Based upon evidence indicating that the decedent fireman had been on duty for 23 hours preceding his fatal heart attack, and during that time he had responded to emergency calls and been exposed to carbon monoxide which contributed to his death, the Court of Claims determined that the fireman was killed in the line of duty, and compensation was awarded to his widow.

OPINION

FREDERICK, J.

Claimant filed her claim for death benefits under the Law Enforcement Officers, Civil Defense Workers, Civil Air Patrol Members, Paramedics and Firemen Compensation Act on March 24, 1989. On April 19, 1989, the Attorney General filed his report which indicated the Attorney General was unable to determine whether or not the death of Lt. Simioni meets the statutory requisite of being “killed in the line of duty.” On July 7, 1989, the cause was assigned to a Commissioner with directions to hold a hearing so the Court could determine whether the decedent was killed in the line of duty. The cause was set for trial before Commissioner Michael Kane. In lieu of presenting evidence, Claimant filed a memorandum of law in support of petitioner’s claim.

On February 5, 1989, Aldo Simioni, a Chicago fireman, had a heart attack at about 7:00 a.m. During the 24

hours preceding his attack, he had been on at least two emergency calls. However, no evidence was presented as to the calls or as to decedent's involvement in the calls. Also included in the file is the medical examiner's certificate which states decedent's death was caused by acute myocardial infarction of hours duration and which also indicated that the underlying cause of the infarction was arterial hypertension of years duration.

An award may be granted under the Act if it is shown that a fireman was killed in the line of duty as defined by the Act. The Act provides, in relevant part, that "Killed in the line of duty means losing one's life as a result of injury received in the active performance of duties as a * * * fireman, if the death occurs within one year from the date the injury was received and if that injury arises from violence or other accidental cause."

The Claimant has the burden of proving her claim by a preponderance of the evidence. (*In re Application of Schaffer* (1989), 42 Ill. Ct. Cl. 218.) This Court could not make a determination on July 7, 1989, as to whether decedent was killed in the line of duty based on the Attorney General's report. After the requested hearing, we have no new evidence upon which to make a decision. The hearing was the time for Claimant to present evidence and prove her case. While we sympathize with Claimant, we regretfully must find, that based on the foregoing, Lieutenant Aldo Simioni was not "killed in the line of duty" as is required by the Act. (Ill. Rev. Stat. 1985, ch. 48, par. 282.) for an award to be granted, since it has not been proven by a preponderance of the evidence that his unfortunate death resulted from his duties as a fireman.

Wherefore, it is hereby ordered that this claim be denied.

OPINION

FREDERICK, J.

Claimant, Jean Simioni, filed her claim pursuant to the Law Enforcement Officers and Firemen Compensation Act (Ill. Rev. Stat. 1987, ch. 48, par. 281 *et seq.*) on April 19, 1989. Claimant is the surviving spouse of Lieutenant Aldo Simioni who died on February 5, 1989. Lieutenant Simioni was a firefighter for the city of Chicago. Claimant was designated by the decedent to be the sole beneficiary of any benefits payable under the Law Enforcement Officers and Firemen Compensation Act pursuant to a designation of beneficiary form filed with the Court.

Michael J. Garritz, the supervising officer of the decedent, reports that Lieutenant Simioni had been on duty for approximately 23 hours and had responded to emergency calls during that time. Claimant collapsed and died at the fire station. The medical examiner's certificate of death states that the decedent died at Swedish Covenant Hospital on February 5, 1989. The immediate cause of death is recorded as acute myocardial infarction of hours duration. The underlying condition which gave rise to the immediate cause of death is described as arterial hypertension of years duration. There is nothing in the circumstances of Lieutenant Simioni's death to indicate that his death was caused by willful misconduct or intoxication.

On July 7, 1989, the Court entered an order requiring a hearing to determine if the decedent was "killed in the line of duty" as defined in the Act. The issue of whether a person was killed in the line of duty where the cause of death is a heart attack is perhaps the most difficult issue to be decided by the Court.

The trial was held before Commissioner Michael Kane on July 10, 1995. The evidence indicates that Lieutenant Simioni reported to work on February 4, 1989. He did respond to fires on February 4, 1989. In the 23 hours preceding his death, Lieutenant Simioni did make emergency calls in which the firemen in Battalion 89 were under stress and tension. In addition, the decedent had a long-standing history of hypertension which had been controlled with medication. The decedent took his job very seriously as he was a supervisor and responsible for the lives of his firefighters. The night prior to his death, he had been out at a fire and not feeling very well. The decedent, the next morning, was found dead at the firehouse. Additionally, an evidence deposition of Dr. V. R. Kuchi-Pudi was taken on September 12, 1995, and submitted into evidence. Dr. Kuchi-Pudi is an internist. He reviewed the medical records and was of the opinion that the stress of Lieutenant Simioni's job, combined with the fact that he had been exposed to carbon monoxide during the 23 hours prior to his death, caused the decedent's death.

This is a very close case. "Killed in the line of duty" as defined in the Act is "losing one's life as a result of injury received in the active performance of duties as a * * *, fireman * * * if the death occurs within one year from the date the injury was received and if that injury arose from violence or other accidental cause * * *." *In re Application of Ryan* (1994), 46 Ill. Ct. Cl. 321, at 322.

In determining whether an officer has been killed in the line of duty when the cause of death was a heart attack, the Court has set standards for the determination of whether the decedent was killed in the line of duty. In those cases where the decedent has been on active duty and has been performing strenuous physical activity at

the time of the heart attack, the Court has consistently granted awards. In those cases where the decedent was not performing strenuous activities when the heart attack was suffered, the Court carefully reviews the decedent's performance of duties prior to the time of the fatal heart attack to determine if the performance of duties may have precipitated the heart attack. (*In re Application of Cardwell* (1991), 44 Ill. Ct. Cl. 288.) Based on the evidence presented, and particularly Dr. Kuchi-Pudi's testimony regarding carbon monoxide, we find that Lieutenant Simioni was killed in the line of duty. We find that Claimant has, therefore, met all requirements for an award under the Act.

It is therefore ordered that Claimant's claim be and hereby is allowed and Claimant, Jean Simioni, the surviving spouse of Lieutenant Aldo Simioni, is awarded \$50,000 pursuant to the Law Enforcement Officers and Firemen Compensation Act, as she is the surviving spouse of a fireman who was killed in the line of duty.

(No. 89-CC-3348—Claim denied.)

TAKAKO DINGES, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed May 17, 1996.

JOHN FISK, for Claimant.

JIM RYAN, Attorney General (IAIN JOHNSTON, Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*duty to maintain*—*State must have notice of defect*. While the State owes a duty of ordinary care in the maintenance of its highways, it is not an insurer of the safety of persons traveling upon them, and a Claimant must establish that the State had actual or constructive notice of a defect involving the highway, and the mere fact that a defective condition existed is

not, in and of itself, sufficient to constitute an act of negligence on behalf of the State.

SAME—*when State may be charged with constructive notice.* The State may be charged with constructive notice of a dangerous condition when, from all the circumstances of a case, it is determined that the State should have been aware of the existence of a condition in the exercise of reasonable care and diligence, and if the dangerous condition existed for an appreciable length of time, then the State can be charged with negligence in not ascertaining and correcting the situation.

SAME—*downed stop sign—State not charged with constructive notice—claim denied.* The Claimant could not prevail in her negligent highway maintenance claim seeking compensation for injuries sustained when the car in which she was riding was involved in a collision at a rural intersection where a stop sign was down, since there was no evidence that the State had actual notice of the downed stop sign, and the Claimant failed to prove that the condition existed for a sufficient length of time to charge the State with constructive notice.

OPINION

PATCHETT, J.

On April 26, 1987, the Claimant was a passenger in an automobile driven by a Myong Gabardi. The vehicle was headed westbound on Big Timber Road, an east-west highway. The highway intersected with Illinois Route 47, a north-south highway. Both roads were asphalt two-lane highways. Stop signs controlled eastbound and westbound traffic on Big Timber Road at the Route 47 intersection. The intersection is in an area of rural farmland. Big Timber Road was neither a primary nor a heavily traveled road. A traffic count conducted on the road in 1987 showed that less than 900 vehicles traveled westbound on Big Timber Road within a 24-hour period. Maintenance of traffic controls at the intersection was clearly the responsibility of the Illinois Department of Transportation (“IDOT”).

Some time prior to the accident in question, the stop sign controlling westbound traffic for Big Timber Road had been knocked down. As the Gabardi vehicle entered

the intersection at approximately 4:05 p.m. on the day of the accident, it was involved in an accident with another vehicle. Duane Johnson, a local resident who traveled the intersection daily, testified that the stop sign had been down at least three days prior to the collision. He did not report his observation to any authorities.

The Illinois Department of Transportation had examined the entire length of Route 47 on February 25 and 26, 1987. They did not note anything unusual regarding the sign in question. On April 2, 1987, sign maintenance crews were in the immediate area of the intersection in question, but they did not notice the downed stop sign. IDOT was first notified of the downed stop sign on April 26, 1987, subsequent to the accident.

As a result of the accident, the Claimant was pinned in the automobile and suffered extensive personal injuries. These included a right hip fracture, fractures of the third and fifth right ribs, a lateral clavicle fracture, a right orbital fracture, cuts, bruises, and lacerations. The Claimant was transported to Sherman Hospital where she was admitted and treated for more than one month. Her medical expenses were in excess of \$39,000. Her treating physician testified as to the permanence of the injuries and anticipated future medical expenses. In addition, the Claimant testified as to lost wages in excess of \$10,000. She had previously settled an action against the driver of the vehicle for \$25,000.

The primary issue in this case is whether the Claimants have met their burden of proof that the Respondent had notice of the downed stop sign. This Court has repeatedly held that, while the State does owe a duty of ordinary care in the maintenance of its highways, it is not an insurer of the safety of persons traveling upon them. (*Hollis v. State* (1981), 35 Ill. Ct. Cl. 86, 88.) A Claimant

must establish that the State had actual or constructive notice of a defect involving the highway. (*Scroggins v. State* (1991), 43 Ill. Ct. Cl. 225, 227.) The mere fact that a defective condition existed is not, in and of itself, sufficient to constitute an act of negligence on behalf of the State. *Palmer v. State* (1964), 25 Ill. Ct. Cl. 1, 2.

There is no evidence of actual notice in this claim. The State may be charged with constructive notice of a dangerous condition when, from all the circumstances of a case, it is determined that the State should have been aware of the existence of a condition in the exercise of reasonable care and diligence. If the dangerous condition existed for an appreciable length of time, then the State can be charged with negligence in not ascertaining and correcting the situation. *Skinner v. State* (1975), 31 Ill. Ct. Cl. 45, 49-50.

The factual situation in *Skinner* was very similar to the one we face herein. Two cars collided at an intersection at which a stop sign was missing at the time of the accident. The Court found that the stop sign had been down for less than two days. The Court ruled that the condition must have existed for a sufficient length of time before the Respondent could be charged with negligence for not ascertaining or correcting the condition. The Court concluded in *Skinner* that two days was an insufficient amount of time to start to charge the State with constructive notice.

It is always difficult to apply such a subjective standard. However, it is clear that the precedent set by this Court is that before the State can be charged with constructive notice, it must be proven that the sign was down for a sufficient amount of time, considering the locale, the amount of traffic involved, and the nature of the roads involved for the State to be liable.

In this case, the Claimant has simply failed to meet her burden of proof that the State should have known of the missing stop sign by exercising ordinary due diligence. Therefore, we must deny this claim.

(No. 89-CC-3369—Claims denied; petition for rehearing denied.)

JEFFREY C. OLSON and MONICA K. OLSON, Claimants, *v.*
THE STATE OF ILLINOIS, Respondent.

Opinion filed June 9, 1995.

Order on petition for rehearing filed September 29, 1995.

ZAMPARO & GOLDSTEIN (ROGER ZAMPARO, of counsel), for Claimants.

JIM RYAN, Attorney General (PAUL CHO, Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*State's duty of reasonable care.* The State is not an insurer of all accidents which occur on its highways, but it does have an obligation to keep its highways in a reasonably safe condition, and the State's duty to exercise reasonable care in the maintenance and care of its highways is so that defective and dangerous conditions likely to injure persons using highways should not exist.

SAME—*proving negligence—notice.* A Claimant in a negligence action must prove that the State had a duty towards him, that Respondent breached that duty, and that the breach was the proximate cause of Claimant's injury, and the State is not liable unless the Claimant proves that the State had either actual or constructive notice of the dangerous condition for a sufficient length of time prior to the injury to have taken corrective action.

SAME—*negligence—driver's duty to use ordinary caution in crossing dangerous place.* It is the duty of persons about to cross a dangerous place to approach it with the care commensurate with the known danger, and when one on a public highway fails to use ordinary precaution while driving over a dangerous place, such conduct constitutes negligence.

SAME—*snow mound obscured driver's vision—failure to use caution barred recovery—claims denied—petition for rehearing denied.* Notwithstanding that the State had constructive notice of a snow mound created by State plowing vehicles on a median at an intersection, and despite the fact that the mound caused a partial sight obstruction for motorists approaching

the intersection, the Claimants were denied recovery for the husband's personal injuries and the wife's loss of consortium, where the husband drove into the partially obscured intersection without stopping, and his failure to use caution was more than 50 percent of the cause of his injuries; and the Claimants' petition for rehearing was also denied.

OPINION

FREDERICK, J.

This case comes before the Court on a two-count complaint sounding in tort filed by Claimants, Jeffrey C. Olson and Monica K. Olson, against the Respondent, State of Illinois. Count I of the complaint seeks \$1,000,000 for severe and permanent injuries suffered by Jeffrey Olson. The Claimants allege that Respondent's employees plowed a large amount of snow into the median at the intersection of Route 132 (also referred to as "Grand Avenue") and Oakwood Drive in Warren Township, Lake County, Illinois. They also allege that on January 3, 1988, at 6:20 p.m., Jeffrey Olson was operating his motor vehicle in an easterly direction on Route 132 approaching Oakwood Drive. When he attempted to turn north onto Oakwood Drive, a vehicle proceeding west on Route 132 struck his vehicle. Mr. Olson complains that the large mound of snow at the intersection completely obstructed all lines of vision and Respondent was negligent for creating an unsafe condition or for allowing that condition to remain.

Count II of the complaint prays for judgment in the sum of \$200,000 for Monica Olson for the deprivation of Mr. Olson's affection, society, companionship and consortium. A bill of particulars itemizes \$95,130.16 in medical and hospital expenses incurred by Jeffrey Olson.

The Respondent's affirmative defenses are:

Jeffrey Olson failed to keep a proper lookout and failed to take appropriate action and therefore was more than 50% of the proximate cause of his injuries;

If contributory fault is less than 50% of the proximate cause, damages should be diminished proportionately;

Monica Olson's loss of consortium claim is derivative and should be acted upon consistently in relation to the first and second affirmative defense; and

Any award should be offset. The Department of Public Aid certified that direct medical payments in the sum of \$18,888.85 were paid on behalf of Jeffrey Olson between January 4, 1988, through August 1, 1988.

Each party presented an expert witness and challenged the qualifications and testimony of the opposing party's expert witness. Paul Box was qualified as an expert to testify on behalf of Claimants. Roger Barrette was Respondent's expert. Mr. Barrett's testimony was limited pursuant to an order in limine entered by the Commissioner.

The Evidence

Claimants' Case

Claimant, Jeffrey C. Olson, testified that he resided at 18525 Geier Road, Gurnee, Illinois, that he was 42 years of age and had been married to Claimant, Monica K. Olson, for 13 years. He had four children, ages 9 through 15. He had been unemployed for three years. After the accident he worked for SPI in Lake Bluff as a pipefitter for insulation. He could not handle the work because of his injuries and only worked there for three months. He could not lift or bend.

On January 3, 1988, he was traveling home from McDonald's when he was involved in a motor vehicle accident at the intersection of Oakwood and Grand (Route

132). He was driving a Vista Cruiser station wagon on Grand in an easterly direction, approaching Oakwood Drive. As he approached Oakwood, he pulled into the left-hand turn lane and stopped. The turn lane was clear of snow, but across the intersection was a mound of snow that was higher than his automobile.

At the time he entered the left-turn lane and made his first stop, he was facing east and could not see traffic westbound on Route 132. After he stopped at the end of the median and looked, he inched forward approximately ten feet. He still couldn't see a thing so he turned a little more and inched up a third time, started turning north for a few feet, stopped, and could not see. After stopping a third time, he still could not see so he inched forward a few more feet in a northerly direction. The fourth time he moved forward is when he got hit, according to Claimant.

Claimant does not recall being hit and the first thing he remembers is waking up at Condell Memorial Hospital. Claimant was informed that he had a broken neck and was being placed in a helicopter for transport to Milwaukee Hospital. He had vague recollections of his first three weeks in the hospital. He initially could not sit or stand and was in pain and he was experiencing a dull ache in his neck and lower back.

Mr. Olson underwent surgery on his neck. Claimant has a scar on the right side of his neck, a scar on the back of his neck, and another scar on his hip. Claimant also has a tracheotomy scar because he went into respiratory arrest. He had a bone taken out of his hip which was fused to one in his neck to replace the bone that was shattered.

Mr. Olson suffered total paralysis for three days. He was a patient at Froedent Hospital in Milwaukee from

January 4 to February 16, 1988. When he was discharged, he had difficulty walking and had an intravenous feeding tube until late May, 1988.

Mr. Olson received occupational, physical and speech therapy for approximately one year. He testified he could not swallow until late May.

Because of the accident, he cannot help his wife around the house and cannot do anything with his children. He cannot bend down to pick anything up and cannot run, skip, hop, jump or climb. He was diagnosed as being permanently disabled and he is receiving social security (disability) and a VA disability pension.

On cross-examination, Mr. Olson testified that he was unemployed for three and one-half months prior to the accident.

Mr. Olson further testified on cross-examination that on January 3, 1988, the roadway was clear of snow and that, while traveling to McDonald's from his house, he had a good view of the snow mound and thought it to be six or seven feet high.

When Mr. Olson entered the left-turn lane, he testified he was going about 10 to 15 miles per hour and came to a complete stop at the end of the median. He was stopped for 30 seconds while he looked north on Oakwood Drive and east on Grand Avenue. He then pulled forward about ten feet and stopped for 30 seconds to one minute. He inched forward two or three feet and stopped for approximately 30 seconds. While he was stopped, he looked north and east. While stopped at the intersection for a minute and a half to two minutes, he observed cars proceeding west on Grand Avenue but did not see any cars proceeding south on Oakwood Drive. After the third

stop, he inched forward and got hit. At the intersection, westbound Route 132 is two lanes of through traffic and a left-turn lane and right-turn lane. The front end of his car was in the inside through lane (referred to as “fast lane”) of westbound Route 132 when it was hit. He started his turn from his third stopped position. Although stating that the front of his car was hit, Mr. Olson admitted that the whole right side of his car was damaged. He never saw the car that hit him.

James Klafeta, a 29-year employee and engineer of operations for the Illinois Department of Transportation (“IDOT”), was called as an adverse witness. He was responsible for snow removal on highways. On the date of the accident, he was an operations engineer and was in charge of snow removal.

Mr. Klafeta stated that there is a Snow and Ice Manual containing the rules and regulations regarding snow removal in the district.

Although familiar with the Snow and Ice Manual (“SIM”), Mr. Klafeta was not familiar with Route 132. He did believe IDOT had the responsibility for snow removal on Route 132. He described the basic procedures that IDOT follows in plowing routes similar to Route 132. Normally, IDOT wants all snow pushed to the right. Although there might be circumstances when snow is plowed onto a median, it would depend on the size and type of the median, but normally snow is not plowed onto medians.

Piles of snow on the pavement create a hazard for the public and are undesirable according to the SIM as snow piles can cause sight obstructions. In the event IDOT personnel were aware of a snow pile, SIM required

that the pavement would be cleared by pushing the snow to the right-hand shoulder with a plow.

On cross-examination, Mr. Klafeta agreed with the proposition that after a storm had been cleared before a holiday weekend, IDOT employees would not be required to inspect roads over a holiday or weekend for snow mounds, absent a complaint.

Nick Vincich, a retired employee of IDOT, was called as a witness by Claimant. He was employed as a highway maintainer, and one of his duties was snow and ice removal. He was assigned to Route 132 from December, 1987, through January, 1988. Mr. Vincich described the plowing procedures for Route 132.

Mr. Vincich explained that he would push the snow from the left lane of Route 132 to the left into the median. When he came to a left-turn lane on Route 132, he would reverse his plow and plow the snow to the right, away from the median. He was familiar with, and identified, the intersection at issue.

When approaching an intersection while plowing the left lane of Route 132, Mr. Vincich would reverse his plow and push snow forward and to the right, but still leave a residue of snow in the intersection. After cleaning the routes, the department cleaned intersections, sometimes pushing snow into the nose or front of a median. He testified that there were times when he and the other plowers pushed snow along the curb or nose of the median in the intersection in question and at times left the snow there.

On cross-examination, Mr. Vincich stated that January 3, 1988, was a Sunday. Although he did not recall whether he worked that day, highway maintainers did not routinely work on Sundays, Saturdays or holidays.

Mrs. Donna Olson, mother of Jeffrey Olson, was presented as a witness. She went to Condell Hospital the night of the accident and noticed that Mr. Olson could not move his arms or hands and was peppered with little glass cuts from the windshield. She saw her son the next day in the neurological intensive care unit at Froedent Memorial Hospital in Milwaukee. His head was bolted to the bed in a “halo” and he still could not move his arms or hands. He was in the hospital for six and one-half weeks and she went to see him almost every day. During this time she noticed he had a tracheotomy, he would choke on his saliva because his throat was paralyzed, he was unable to sleep, and some days he was delirious. Claimant told her that his neck hurt.

Prior to the accident, Mr. Olson played with his children and helped with the housework. Now he cannot bend or stoop, walks with difficulty and falls frequently. He used to like swimming, billiards and bike riding but cannot now do these activities.

Claimant, Monica K. Olson, identified her four children and stated that the oldest was adopted by Jeffrey prior to the accident. The youngest child has Down’s Syndrome. Monica is a housewife.

After the accident, Mr. Olson was experiencing respiratory arrest. She described the “contraption” that was bolted to his head. She noticed that Mr. Olson was in pain. He was in intensive care for three weeks and then at the rehabilitation center for three weeks and he was depressed.

After six weeks, Mr. Olson came home from the hospital in a brace but could not eat for a month or two. She had to dress him, help him with his medicine, and help

him with everything for a couple of months. He was very uncomfortable because of the NG-tube in his nose. Mr. Olson lost 40 to 50 pounds.

Mr. Olson visited Dr. Steiner, his family doctor, for check-ups during the recovery period. He had nerve damage and could not feel anything in his fingers as well as other places. Dr. Steiner treated him for impotence for six months after the accident. Prior to the accident, he did not experience sexual problems, was in good health, and was an equal partner in the housework. Prior to the accident, Mr. Olson could play sports, walk, and go to the store with the children, but he cannot do those things now. He cannot walk around the block without getting tired. He can watch TV, or play cards or board games but he cannot do anything that requires physical movement. His general health is getting worse. Monica Olson said it was like taking care of five children instead of four.

On cross-examination, Mrs. Olson agreed that there currently was no decrease in Claimants' sexual relations.

Currently, Mr. Olson does not have any respiratory problems. Mrs. Olson agreed that her husband did not, prior to the accident, participate in an array of activities. Mr. Olson can drive but cannot turn his neck enough to see traffic. Mrs. Olson and all of the children receive social security benefits.

Mr. Paul C. Box, a traffic engineering consultant and president of Paul C. Box and Associates, testified as an expert witness on behalf of Claimants. Mr. Box reviewed polaroid photographs taken by the police the next day, the police accident report, and the complaint. He also conducted a survey of the scene on July 13, 1989. The survey was conducted because it was impossible to tell

the extent of the sight obstruction. Mr. Box did a graphic analysis of determination, which entails doing an accurate survey and drawing and plotting lines of sight on the drawing. He described the method utilized in conducting the survey and estimated the height of the snow mound based upon the photographs taken the day after the accident. He prepared a base drawing which shows basic conditions as he measured them. He then prepared a drawing with details involving estimates of the snow bank and lines of sight plotted in relation to an eastbound left-turning driver facing a westbound vehicle.

Mr. Box explained that the bottom edge of the snow bank in the eastbound left turn lane would affect the lateral or south positioning of Mr. Olson's vehicle. He explained his positioning of the snow in the westbound left-turn lane and the positioning of an eastbound left-turning vehicle and two car fronts westbound, one in the inner lane and the other in the outer lane. There is no way of knowing precisely where Mr. Olson's car was located when he started the left turn. Mr. Box assumed that Mr. Olson began turning left within five feet or so of the estimated end of the snow mound. Although Mr. Box stated that the starting point of the turn could be five feet east or west from where he assumed it to be, the actual starting point was irrelevant as it would not change any opinion he had. Mr. Box then assumed a turning arch or a diagonal path. He determined the height of the snow pile by measuring the height of the sign on the end of the island and looked at the relative position of the snow versus the height. Mr. Box estimated the height of the snow at about 4.3 feet.

Mr. Box drew a line of sight from the assumed driver's eye of the eastbound left-turning driver (Mr. Olson)

to a point where one-third the width of each westbound vehicle could be seen. He then scaled the distance. He determined that the sight line for the eastbound left-turning driver, relative to a westbound vehicle in the inner lane, was about 190 feet. The sight line for the vehicle in the outer lane was about 360 feet.

Mr. Box used references and policies from the American Association of State Highway and Transportation Officials (AASHTO) Policy on Geometric Design of Street and Highways. He utilized an equation taking into consideration the travel distance for the turning vehicle to clear the lane and the posted speed limit of 50 miles per hour. AASHTO policies are utilized by IDOT. A vehicle traveling 50 miles an hour travels 73 feet per second. Mr. Box disregarded that witness Colleen McGrain stated that she was traveling 45 miles per hour because he felt it proper to use posted time. AASHTO policies include a chart to calculate acceleration times for the turning vehicle to clear the westbound lane. Mr. Box also considered driver reaction time. The reaction time of Mr. Olson involved three elements: perception—seeing the oncoming vehicle; and intersection—making the decision to pull out; and volition—actually pushing his foot down to accelerate. One study found 1.1 seconds is a typical reaction time. Although AASHTO recommends two seconds as reaction time, Mr. Box uses one second in his conservative calculations because Mr. Olson did not have to look in both directions.

Mr. Box testified that a car making a left turn from the eastbound turn lane would have to travel 35 feet to clear the inner lane of westbound traffic. According to AASHTO, an average vehicle takes about four seconds to accelerate from a stop to travel 35 feet, not including reac-

tion time. Utilizing the one second reaction time and the four seconds to safely clear oncoming traffic, the AASHTO policy of geometric design recommends sight distance of about 365 feet for safe crossing under the subject conditions. Mr. Box calculated that 190 feet of sight distance was available to Mr. Olson. Mr. Olson's testimony, and prior depositions, did not impact Mr. Box's calculations because he was determining sight distance for a normal driver driving a standard full-size car. Mr. Box's depiction of the location of the snow bank is only an estimate. He believed witness, Mr. Barrette, calculated a sight distance of 220 feet which he does not believe is a safe distance. Mr. Box opined that the snow bank caused a sight obstruction for Mr. Olson.

On cross-examination, Mr. Box acknowledged he did not interview Mr. Olson or the occurrence witness. He began his analysis and review of material on or about July 10, 1989. He acknowledged that there was no way for him to know precisely where Mr. Olson started his turn and the variance could be five feet east or five feet west. He assumed a turning radius of 50 to 55 feet. He estimated the snow mound to be 4.3 feet in height and that the peak was up to 12 inches north of the hazard sign at the end of the median. He assumed that oncoming vehicles had headlights illuminated. He also assumed the height of Mr. Olson's eye level. Although there are four components to reaction, in this instance Mr. Box did not consider one component, emotion, as a factor in computing reaction time. AASHTO recognizes that the avoidance of accidents depends on the judgment, capability and response of the individual driver.

On redirect examination, Mr. Box indicated that had he used Ms. McGrain's estimate of her speed, 45 miles

per hour, the recommended sight distance would be 330 feet instead of 365 feet for 50 miles per hour, which still did not provide a safe sight distance in this instance because only 190 feet of distance was available. The emotional component of reaction time was not used because he only used half of the recommended value for reaction time. He testified that being that conservative nullifies the effect of many unknown elements.

Respondent's Case

John Anderson testified that he was a deputy sheriff for the Lake County Sheriff's Department. He was on duty on January 3, 1988, and responded to a call on the subject accident. At the scene of the accident, Mr. Olson told Deputy Anderson that he was attempting to turn left on Oakwood and he could not see around a pile of snow. Deputy Anderson returned to the scene the next day and took photographs. The photographs admitted into evidence depict the subject intersection facing east approximately 80 to 100 feet to the west, the left-turn lane eastbound on Grand Avenue, the intersection from the end of the guardrail facing east, from the end of the left-turn lane, the intersection facing east, almost at the beginning of the left-turn lane of the westbound lanes of Grand Avenue, and the snow mound on the east side of the intersection.

On cross-examination, Deputy Anderson acknowledged that he took pictures of the scene the next day because the snow mound was something out of the ordinary in his experience investigating accidents. Deputy Anderson does not have any special training in accident reconstruction and did not attempt to calculate the distance the vehicles depicted in the photographs were from the camera.

The testimony of Ms. Laurie Ellen Bird, formerly known as Laurie Poole, was presented by virtue of an evidence deposition taken on August 16, 1993. On January 6, 1988, between 6:00 p.m. and 6:30 p.m., she was driving southbound on Oakwood intending to cross Route 132 to Knowles Road. As she was approaching the stop sign on Oakwood, she looked to the left and saw a car westbound in the left lane traveling at approximately 50 miles per hour. She looked to the right to view eastbound traffic and saw a station wagon approaching the left-turn lane at a fast rate of speed. She saw the station wagon in the left-turning lane going too quickly to stop. She felt she was going to be in an accident, so she slammed on her brakes. The station wagon turned in front of the westbound vehicle. The station wagon came into the left-turn lane, traveling very quickly and completely turned without stopping.

She indicated that she had approached the same “intersection several times that season, and knowing that intersection and that there was snow in the median, you had to pull into the intersection before you turn, stop, creep out a little ways, and then make the turn.” She described the turning maneuver that she made in that intersection during that season on previous occasions, because a pile of snow existed at the same location as in the case at bar, that caused her to creep around it to see oncoming traffic. She testified that the station wagon did not creep around the snow.

The westbound car hit the station wagon on the passenger side door and front panel. She stayed at the scene approximately 25 minutes until the sheriff arrived. She testified that the eastbound car was driven by a man.

On cross-examination, Ms. Bird testified that she was approximately 50 feet north of the stop sign on Oakwood

when she viewed the accident. She stated that there was snow piled all along the median adjacent to the turning lane used by the station wagon. She testified that the snow was a foot and a half to two feet high.

Roger William Barrette testified as an expert witness on behalf of Respondent. Mr. Barrette explained the method of his survey used to produce a diagram of the subject intersection. His diagram depicts the area covered by snow and he agreed with, and used, Mr. Box's placement and measurements of the snow mound. He and Mr. Box agree the peak height of the snow mound was 4.3 feet. The plan of profile map supplied by the Illinois Department of Transportation specified a 45-foot turning radius. He and Mr. Box also agreed that while in the left-turning lane, Mr. Olson's vehicle was approximately two feet from snow along the median. He placed Mr. Olson's vehicle a few inches from the westbound white lane, as indicated in his deposition.

Mr. Barrette videotaped approximately 35 vehicles making left turns from westbound Grand Avenue to northbound Oakwood to determine the amount of time it took for the vehicles to clear the eastbound lane. He believed five of the vehicles made turns consistent with the turn described by Mr. Olson. It took the five vehicles an average of 2.58 seconds to clear the left lane of westbound traffic.

Mr. Barrette determined that Mr. Olson's line of sight was 220 feet for the left lane of westbound traffic and 420 feet for the right lane of the westbound traffic. A vehicle proceeding in the westbound traffic at 45 miles per hour (66 feet per second) would have travelled 170 feet in 2.58 seconds. If Mr. Barrette used a 50-foot turning radius, instead of the 45-foot radius per IDOT's profile, it would

have decreased Olson's sight line and taken him longer to clear the lane.

On cross-examination, Mr. Barrette acknowledged that he had to make assumptions in determining the location of Mr. Olson's car because there is not any way of determining its exact location. Mr. Barrette acknowledged that the videotape of the five vehicles he used in determining the clearing time was based on his interpretation of what Mr. Olson said in his deposition and he acknowledged that his assumptions and estimates might be wrong. When Mr. Barrette took his videotape it was daylight and there was not a snow mound present. He also did not consider reaction time in his calculations. The determination of 170 feet of sight is not the same as the determination of safe sight distance. Mr. Barrette agrees with Mr. Box's required safe sight distance. On redirect examination, Mr. Barrette indicated that daylight does not affect acceleration rates. He did not consider reaction time because once Mr. Olson placed his foot on the accelerator, there was no hazard to react to.

Colleen Marie McGrain testified that she and a passenger were involved in an accident at the intersection of Route 132 and Oakwood at approximately 6:20 p.m. on January 3, 1988. She was driving a 1984 Buick Regal on dry pavement with her headlights on. She was proceeding west on Route 132 at 45 miles per hour in the left lane closest to the median. She hit a car that approached the left-turn lane for the eastbound traffic. The car approached, hesitated, and then pulled in front of her. She immediately stepped on the brakes and tried to swerve to the right to avoid the car. She estimated that probably a second elapsed from the time the vehicle pulled in front of her to impact. She hit the right passenger side door and wheel well area of a gray with wood panel Oldsmobile

station wagon. She testified that the driver of the station wagon was bleeding in his face and head area and complained of his left arm being numb and tingling. The windshield was shattered and the vehicle's headlights were on. She suffered contusions, bruises, cuts and minor abrasions. She made impact on her steering wheel, windshield and dash.

William Virmond, a maintenance methods manager at IDOT, explained the steps taken by IDOT to clear roads of snow and ice. The clearing of through lanes of traffic are given priority. The shoulders are pushed back to a safe condition. IDOT then goes into a "clean-up operation" and clears medians and other areas where snow might accumulate. Clean-up operations are done during daylight hours. If a citizen called in a complaint about a snow mound after clean-up, IDOT would investigate and clear, if needed, during a regular workday, weekend or holiday. After reviewing a photograph of the subject intersection, Mr. Virmond thought the snow mound was obstructing the left-turn bay for the westbound traffic. Based upon the way it was formed, he thought the plow that put it there appeared to have pushed it from the north in a southerly direction.

IDOT has a budget for winter operations and it does not allow for continuous inspection or monitoring of the roads on weekends or holidays. IDOT has someone on call 24 hours a day the year round.

Mr. Virmond stated that winter storm 11 began December 27, 1987, and ended on December 29, 1987. Storm 12 began on December 30, 1987, and ended on the 31st.

Mr. Virmond monitors the maintenance management information system ("MMIS").

IDOT's personnel do not normally work on holidays, including January 1, 1988. IDOT records indicate IDOT employees did engage in snowplowing on Friday, January 1, 1988. On Saturday, January 2, 1988, three employees worked; one for 4.5 hours (starting at 7:30 a.m.), and the other two for 4.5 and 3.5 hours (starting at 7:30 p.m. and 8:30 p.m.). There are not any recorded entries for work performed on Sunday, January 3, 1988, for snowplowing.

On cross-examination, Mr. Virmond indicated that IDOT's Snow and Ice Manual says that snow is to be kept 300 feet from each side of an intersection of "important intersecting roads." However, he was not familiar with Route 132 and Oakwood Drive.

Also admitted into evidence was the certification by Director Wright of the Illinois Department of Public Aid constituting a lien for medical benefits paid on behalf of Mr. Olson for January 4, 1988, through August 1, 1988, in the sum of \$18,888.85.

Claimant's Rebuttal

Mr. Box stated that although AASHTO policies are not binding on IDOT, the policies apply to existing highways regarding sight distances and not just new highway designs. He further testified that it was not proper to calculate sight distance without using driver reaction time.

Testimony Via Joint Exhibit Numbers 1, 2 and 3

Frank G. Thomas, highway commissioner for Warren Township Highway District ("WTHD"), testified that the WTHD plows snow on Oakwood Drive. WTHD plows where Oakwood Drive meets Grand Avenue, but does not plow the medians. WTHD also plows Knowles Road. Apparently some WTHD personnel worked until 3:00 p.m. on December 31, 1987, but no one worked on January 1, 1988. No work was performed by WTHD personnel on

January 2 or 3, 1988. WTHD personnel are told not to plow across the intersection of Route 132.

Dennis Whiston was working for WTHD on the date of the accident. He would have been responsible for plowing Oakwood Drive and Knowles Road during that date. His procedure was to go from east to west to clear the intersection on Oakwood by pushing snow north. When plowing Knowles Road, he plows north toward Route 132 and pulls the snow to the east side of Knowles and south to Grand. He did not go out into Route 132 and never crosses Route 132 with the plows down.

John Rudd was working for WTHD on the date of the accident. He would have plowed Oakwood Drive and Knowles Road during any snow removal operations between December 25, 1987, and January 1, 1988. He plows snow on Knowles Road while traveling north and pushes snow to the edges of the road. He always lifted his plow to cross Route 132, as required by Frank Thomas; otherwise he would have been fired. After crossing Route 132, he cleans the point where Oakwood Drive meets Route 132 by pushing the snow east to west without going onto Route 132. He never plowed snow from Oakwood Drive onto Route 132.

Claimants' Argument

Claimants argue that the Respondent had a duty to the Claimants to maintain the intersection of Route 132 and Oakwood Drive by not creating an unsafe sight obstruction for drivers making a left turn. They further argue that the State of Illinois had actual or constructive knowledge of the snow mound at the median of the intersection of Route 132 and Oakwood Drive. Claimants' expert, Mr. Box, testified that AASHTO recommends a sight distance of 330 to 365 feet, depending on whether

45 miles per hour or 50 miles per hour is used. However, Mr. Olson only had 190 feet of available sight distance at the time of the accident. They argue that obstructing the line of sight at an intersection constitutes negligence on the part of the State and that the act of creating the snow mound, or the omission in failing to remove it, was the proximate cause of the accident. Claimants deny that Mr. Olson was comparatively negligent and argue that the pain and suffering experienced by Mr. Olson justifies an award of the statutory maximum of \$100,000. Claimants request an award to Mrs. Olson in the sum of \$100,000 for loss of consortium.

Respondent's Argument

Respondent argues that Claimants failed to establish that Respondent created the snowbank, and that the snowbank did not create a sight obstruction. Respondent's expert, Mr. Barrette, testified that Mr. Olson had 220 feet of needed sight distance, which was more than enough to see the McGrain vehicle 170 feet east of the intersection. They also argue the State did not have reasonable time to remove the snowbank and that Claimant Jeffrey Olson's contributory negligence was the proximate cause of the accident and operates as a bar to Monica Olson's derivative consortium claim. They also argue that Mr. Olson could have traveled to his home by a safer alternative route. The Respondent claims a set-off in the sum of \$18,888.85 for medical assistance paid by the Illinois Department of Public Aid from January 4, 1988, through July 11, 1988.

Claimants assert, in a motion to strike, that Respondent inappropriately referred to certain documents and other material in its brief which were barred by a written prehearing order dated September 24, 1993, and move to strike certain pages of the brief. To the extent Respondent

refers to previously barred information, the Court has disregarded same in rendering this opinion. Claimants also seek to strike the “safe” alternative argument raised by Respondent and to strike any reference to injuries suffered by persons other than the Olsons. The Court does not consider those matters in rendering this opinion.

The Law

There is no dispute that the accident took place, that a snow mound partially obscured the vision of both Mr. Olson and Ms. McGrain, that Mr. Olson suffered severe and permanent personal injuries, and that the snow mound was in a position that did not comply with the snowplowing procedure of either IDOT or WTHD.

However, the State is not an insurer of all accidents which occur on its highways. The State does have an obligation to keep its highways in a reasonably safe condition. (*Interstate Bakeries Corp. v. State* (1974), 29 Ill. Ct. Cl. 446.) The duty to exercise reasonable care in the maintenance and care of its highways is so that defective and dangerous conditions likely to injure persons using highways should not exist. *Webee v. State* (1985), 38 Ill. Ct. Cl. 164.

The act of removing snow from State highways is surely in furtherance of the legal duty imposed upon the State to keep highways reasonably safe for use as highways. (*Hewitt v. State* (1981), 35 Ill. Ct. Cl. 288.) A Claimant in a negligence action must prove that the State had a duty towards him, that Respondent breached that duty, and that the breach was the proximate cause of Claimant’s injury. (*Phillips v. State* (1991), 44 Ill. Ct. Cl. 89.) The Court has also ruled that the State is not liable

unless the Claimant proves that the State has either actual or constructive notice of the dangerous condition for a sufficient time prior to the injury to have taken corrective action. *Webee, supra*, at 168.

Claimants acknowledge that they must show that Respondent had actual or constructive knowledge of the dangerous condition complained of, namely the snow mound. (*Pigott v. State* (1968), 26 Ill. Ct. Cl. 262.) Claimants assert that the State had actual notice of the snow mound since it was the IDOT snowplowing personnel who created the mound. Although the record includes testimony of Mr. Vincich, an IDOT employee, that he was responsible for plowing Route 132 within the weeks prior to the accident, the record does not contain any admission that an IDOT employee created the snow mound. Mr. Vincich testified that he plowed snow which fell during storms #11 and #12 but all removal operations were completed before the end of December 31, 1987.

Mr. Vincich did indicate that when cleaning an intersection, he would at times push snow from the intersection into the nose of the median. Claimants argue that the circumstantial evidence establishes that IDOT employees created the mound.

Negligence may be shown by circumstantial evidence but liability may not be based upon surmise or speculation as to what might have happened to cause Claimant's injury. (*Phillips, supra*, at 91.) The Court noted in *Phillips* that the Claimants cannot rely on the doctrine of *res ipsa loquitur* as Respondent did not have management and charge of Claimant's automobile. (*Phillips*, at pages 92-93.) No witnesses stated that IDOT created the mound.

There is no evidence that IDOT was aware of the snow mound prior to the accident. There is no evidence in

the record that purports to identify when the snow mound was made. The evidence only indicates the WTHD personnel worked until 3:00 p.m. on December 31, 1987, and did not return to work until after the accident date. Several IDOT employees worked in the general area on January 1 and 2, 1988, but there is no indication of where work was performed and what was accomplished.

Claimants argue in the alternative that Respondent had constructive notice of the snow mound. There is no hard and fast rule in determining when it can be said that the State had constructive notice of a dangerous condition and each case must be decided on its own particular facts. *Bugle v. State* (1967), 26 Ill. Ct. Cl. 173.

Claimants, citing *Smith v. State* (1990), 42 Ill. Ct. Cl. 19, argue that the creation of the snow mound, or the omission of the State in failing to remove it, created a sight obstruction for Mr. Olson, preventing him from safely crossing the intersection and these two facts are the proximate cause of the accident in question. In *Smith*, the Court determined that the State had actual notice of dangerous conditions, i.e. an ice ramp, based upon eight different vehicular occurrences reported in the press and to the police over a few weeks prior to the accident. The *Smith* Court concluded that the State's plowing ultimately resulted in the ice ramp and the State should have, at a minimum, warned persons of the dangerous condition.

The Respondent relies on *Louis v. State* (1983), 35 Ill. Ct. Cl. 741 in requesting denial of the claim. However, the *Louis* Court found that the Respondent had notice of the snow mound but did not have sufficient time to clear the condition.

There are two relevant facts in the record that may show that Respondent had constructive notice of the

snow mound. Ms. Bird testified that she “had approached that intersection several times that season, and knowing that intersection and that there was snow in the median, you had to pull into the intersection before you turn * * *.” She knew there was snow in the median from her several approaches to the intersection that season, but there is no indication that she was referring to the same snow mound complained about here.

The other relevant factor is a review of the photographs taken by Deputy Anderson on the date after the accident. It is clear that snow, other than the mound, was piled onto the median. A review of the photographs shows snow covering a large portion of the pavement in the eastbound turn lane of Route 132 utilized by Mr. Olson. Although the testimony of IDOT personnel, Klafeta and Vincich, seems to represent that plowing into a median is not favored by IDOT, in this instance it appears that snow was plowed onto the median adjacent to the eastbound turn lane.

The question of whether the Respondent had constructive notice of the snow mound is more difficult to discern. The earliest known time and date of observation of the snow mound, in the record, is the testimony of Mr. Olson that he saw the snow mound from his vantage point while turning west on Route 132 from Oakwood Drive. This view was at 6:00 p.m. on Sunday, January 3, 1988, approximately 20 to 30 minutes prior to the accident.

Based on the evidence, we find that the Respondent had constructive notice of the snow mound and that Respondent created the snow mound. However, two questions remain. First, it is necessary to resolve the degree that the snow mound created a sight obstruction and

caused the accident. To determine the degree of sight obstruction, the pertinent facts are presented by Mr. Olson, Ms. McGrain, the analyses provided by Mr. Box and Mr. Barrette, and the photographs in Respondent's group exhibit number 2 and Respondent's group exhibit number 6. The second question necessary for determination is whether Mr. Olson was negligent and the extent of negligence. To determine his degree of negligence, if any, the pertinent facts are presented by Mr. Olson, Ms. McGrain and Ms. Bird.

On the question of degree of sight obstruction, the Court finds that the snow mound partially obscured both Mr. Olson's and Ms. McGrain's vision. Mr. Box, Claimants' expert, testified that Mr. Olson only had 190 feet of available sight distance at the time of the accident but needed 330 to 365 feet between him and the approaching McGrain vehicle to travel across the inner lane of traffic and avoid the accident. Mr. Barrette, the Respondent's expert, testified that Mr. Olson had 220 feet of needed sight distance and could easily see the approaching McGrain vehicle when it was as close as 170 feet. The Court finds that, based upon the evidence presented, Mr. Olson's estimated range of vision did not exceed 190 feet and that he needed a minimum of 330 feet of distance between his vehicle and the approaching McGrain vehicle in order to safely cross the inner lane of traffic.

In asserting that Mr. Olson's conduct in stopping and inching forward three times shows that he was not negligent in any way, Claimants contend that the testimony of Ms. McGrain supports his testimony. In *Schuett v. State* (1984), 36 Ill. Ct. Cl. 61, the Court entered an order of award for the Claimant. The *Schuett* Court noted that Respondent admitted plowing snow onto a median of a divided highway. Claimant was in a left-turn lane on

Route 72 where she stopped for a red light at the intersection with Barlett Road. She believed the snow was piled up to eight feet high and blocked her entire view of oncoming traffic. When her light turned green, Claimant proceeded to slowly move her car into the intersection apparently stopping every few feet. The *Schuett* Court held that Claimant was not contributorily negligent in moving “inch by inch” through the intersection.

On the question of Mr. Olson’s negligence, the Court gives substantial weight to the testimony of Ms. Laurie Bird, the only non-interested occurrence witness. Her testimony was that Mr. Olson did not stop at the intersection. This is in direct contradiction to Mr. Olson’s testimony that he stopped three times and proceeded slowly. Ms. Bird testified she thought the Olson vehicle was traveling too fast to stop. Also of significance is Ms. McGrain’s testimony that she saw Mr. Olson’s vehicle approach the intersection when Mr. Olson testified he did not see her vehicle as he approached the intersection. Additionally, Ms. McGrain stated that she struck the passenger side door and front wheel well of Mr. Olson’s vehicle. Based upon the testimony of Mr. Olson, Ms. Bird and Ms. McGrain, the Court finds Mr. Olson did not literally “inch” his way into Ms. McGrain’s lane such that the principles in *Schuett, supra*, would apply. We find the facts in this case to be very similar to those presented in *Aetna Insurance Co. v. State* (1981), 34 Ill. Ct. Cl. 167 where the Court found that Claimant did not “inch out” into the intersection and barred recovery.

The Court further finds, based on the testimony of Ms. Bird, that the snow pile only partially blocked the sight line and that Claimant’s negligence was more than 50% of the cause of Claimant’s injuries. We find Ms. Bird’s testimony to be credible and therefore, the testimony of

Claimant Mr. Olson, as to his driving at the intersection, to be incredible. As Mr. Olson failed to stop and did not inch out into the intersection, his negligence was the proximate cause of his injuries and we so find.

As in *Aetna Insurance Co., supra*, the proximate cause of the collision in the case was the negligence of Claimant driving out into the intersection when he did not know if there was any oncoming traffic. Claimant did not inch out into the intersection but rolled on out into the intersection without stopping. It has long been the rule in this State that it is the duty of persons about to cross a dangerous place to approach it with the care commensurate with the known danger, and when one on a public highway fails to use ordinary precaution while driving over a dangerous place, such conduct is by the general knowledge and experience of mankind condemned as negligence. (*Mounce v. State* (1951), 20 Ill. Ct. Cl. 268.) If Claimant would have inched out into the intersection, he would have avoided the collision. It is clear from Ms. Bird's testimony that Claimant did not inch out and use as much caution as possible.

While Mr. Olson's injuries are severe and his plight sympathetic, Ms. Bird's testimony shows clearly that Claimant's failure to use care and caution at a partially obscured intersection was the cause of the collision. He did not inch out slowly and carefully. He did not stop. He pulled out in front of the oncoming vehicle. As Mr. Olson's negligent driving was the cause of this collision, he is barred from recovering under the law. As Mrs. Olson's claim is a derivative claim for loss of consortium, her claim must also fail against Respondent.

For the foregoing reasons, it is hereby ordered that the claims of Claimants be and hereby are denied.

ORDER

FREDERICK, J.

This cause comes before the Court on Claimants' petition for rehearing, and the Court having reviewed its opinion and heard oral arguments, and the Court being fully advised in the premises, wherefore, the Court finds:

1. That there is nothing raised in the Claimants' motion which would lead the Court to change its findings and opinion.

2. That the opinion of the Court was the proper decision.

Therefore, it is ordered that the petition for rehearing is denied.

(No. 89-CC-3761—Claimant awarded \$5,134.08.)

ALBIN CARLSON & COMPANY, Claimant, *v.*
THE STATE OF ILLINOIS, Respondent.

Order filed March 12, 1996.

SORLING, NORTHRUP, HANNA, CULLEN & COCHRAN
(CRAIG BURKHARDT, of counsel), for Claimant.

JIM RYAN, Attorney General (LAWRENCE RIPPE, Assistant Attorney General, of counsel), for Respondent.

CONTRACTS—time provisions of contract are to be judged from its terms—ambiguities construed against drafting party. The time provisions of a contract are to be judged from its terms, and an ambiguous contract is construed against the party who drafted it, since he chose the language, and is therefore responsible for the ambiguity.

SAME—bridge repair contract—State failed to timely deny contractor's waiver requests under minority business provisions—damages awarded. Damages were awarded to a contractor as a result of the State's breach of contract and withholding of full payment for bridge repair work completed

by the contractor, where the State's denial of the Claimant's request for waiver of the minority business provision in the parties' contract was well beyond the 20-day period for denial of waivers established by the contract and the Administrative Code.

ORDER

MITCHELL, J.

The Claimant filed its complaint in the Court of Claims on June 21, 1989, later amending the complaint on November 22, 1991, claiming \$5,134.08 in damages as a result of the State's breach of contract and withholding of full payment for work completed on a certain bridge repair.

A hearing was held on March 27, 1992. The evidence consists of the hearing transcript and copies of the following: The contract, the rules and procedures for waiver of minority business enterprises provisions, the requests for waiver from MBE provision, the denials of waiver requests, the contract changes eliminating certain work, the guidelines for good faith compliance with the provision and the DBE/WBE utilization plans. Both Claimant and Respondent filed briefs in this matter.

Facts

On April 3, 1987, the Illinois Department of Transportation and Albin Carlson & Company, Claimant, entered into contract number 42402 whereby the Claimant was to act as general contractor for certain bridge repair work in DuPage County, Illinois. A contractual provision required Claimant to subcontract an identified percentage of the total dollar amount of the contract to approved minority business enterprises or disadvantaged business enterprises (hereinafter "MBE provision"). The two parties had reached a suitable MBE provision plan when work began on the project.

Shortly after beginning the work, the Claimant was informed by Respondent that certain change orders were being implemented, thereby eliminating some of the work the Claimant had subcontracted out to disadvantaged business enterprises and women owned business enterprises (hereafter DBE and WBE). The Claimant did not replace the eliminated MBE percentages with new work for the DBE and WBE subcontractors.

The dispute in this case centers on Claimant's belief that it properly complied with the MBE provision as set forth in the contract and the Respondent's belief that it did not comply. The Respondent withheld \$5,134.08 from the final payment due to Claimant, which amount the Respondent states should have been subcontracted pursuant to the MBE provision of the contract.

The MBE provision in the contract was subject to a waiver provision as set out in the contract and in the Administrative Code at 44 Ill. Adm. Code, section 645.50. This Code section requires that, before final payment, the general contractor must demonstrate compliance with the special provision and may state reasons for waiver or modification of the special provision if he has not complied. If the equal employment opportunity officer, Bureau of Construction, does not agree that the general contractor has utilized good faith efforts to secure the minority contractors necessary to comply with the special provision or that some other reason exists for waiver or modification of the special provision, the officer shall compile a determination. The officer shall then notify the general contractor by registered or certified mail of the determination and shall provide the general contractor with all information supporting or tending to support the determination. Failure of the officer to mail notification of this determination to the general contractor

within 20 business days of receipt of the general contractor's report shall be deemed a waiver of any objection, related to compliance with the special provision, to payment of the contract price.

The Claimant requested a waiver of the provision on January 14, 1988. The request was sent to Ralph C. Wehner, the district engineer of IDOT, Division of Highways district one, in Schaumburg, Illinois, attention Mr. Alden Chapital. This is the district office of the Bureau of Construction, Equal Employment Opportunity and Labor Compliance Section, IDOT district one. The Respondent argues that the Claimant sent the waiver request to the wrong office, that it should have been sent to the Springfield office. The code requires the request be sent to the equal employment opportunity officer, Bureau of Construction. It does not specify which office of the bureau.

The waiver requests were stamped received by the Bureau of Construction January 19, 1988, Equal Employment Opportunity and Labor Compliance Section, IDOT district one. The Respondent argues that the proper "officer" did not receive the waiver requests until the date stamped on the back of the request, June 28, 1988, Bureau of Small Business Enterprise. The request was then denied by Mr. S. Rown Woolfolk, bureau chief of Small Business Enterprises, on June 29, 1988, based on the claim that the Claimant had not made good faith efforts to comply with the MBE provision.

The Claimant contends that the denial was well outside the 20-day notification period since it made its requests on January 14, 1988, and the denial was made June 29, 1988. The Respondent contends that the denial should be upheld because it was made one day after the request was received by Mr. Woolfolk and that the basis of denial was lack of good faith effort to comply with the

provision. The Claimant does not deny that it made no further effort to comply with the provision after the work changes were made by the Respondent. The Claimant feels it had good reason not to comply because the substitute enterprises were not available and the work was something it did itself or would be overburdensome to supervise as a result of the changes.

Law

The Claimant bases its claim on the theory that the Respondent did not deny the waiver on time and it did not give legitimate consideration of “other existing good reasons” for waiving the provision in the alternative to the good faith provision. The Respondent focuses primarily on the fact that it believes that the Claimant did not make a good faith effort to replace the lost MBE work caused by the contract changes. This Court feels that the good faith aspect of the MBE provision stressed by the Respondent, while compelling and a legitimate concern, cannot be used in denying the full payment to the Claimant because of the department’s failure to deny the waiver within the 20-day time limit.

The time period within which the waiver determination must be delivered should be strictly construed. The contract is clear that the Respondent’s right to deny the waiver expired after 20 days of receipt of the request by the equal employment opportunity officer, Bureau of Construction. The time provisions of the contract are to be judged from its terms. (*Zempel v. Hughes* (1908), 235 Ill. 424, 433, 85 N.E. 641.) The waiver was effectively granted, and Respondent’s argument that the 20-day period did not begin until June 28, 1988, when the request was received by the bureau chief of Small Business Enterprises, does not coincide with the rules that the Respondent set forth itself in the code section 645.50,

whereby “the officer” is meant to be the equal employment opportunity officer, Bureau of Construction. The Respondent set forth the terms of the contract and it must be held to those terms.

The Respondent claims that the request was denied by the correct officer, even though that officer is no longer located in the Bureau of Construction. This confusion of which office the request should be sent to appears to be one of the Respondent’s own making, in making ambiguous terms in the contract. An ambiguous contract is construed against the party who drafted it, since he chose the language, and is therefore responsible for the ambiguity. *Epstein v. Yode* (1st Dist. 1979), 72 Ill. App. 3d 966, 391 N.E.2d 432, 29 Ill. Dec. 169, 174-175.

The Court hereby awards the Claimant damages in the amount of \$5,134.08, due to the Respondent’s failure to comply with the time limit of 20 days for denial of waiver requests as set up in the contract and in the Administrative Code, section 645.50.

(No. 90-CC-0014—Claim denied.)

GREGORY A. PAINTER, Claimant, *v.* THE STATE OF ILLINOIS,
DEPARTMENT OF TRANSPORTATION, Respondent.

Opinion filed May 17, 1996.

PRATT & CALLIS, for Claimant.

JIM RYAN, Attorney General (PAUL CHO, Assistant
Attorney General, of counsel), for Respondent.

HIGHWAYS—*State not insurer of accidents on its highways—liability for negligence.* The State is not an insurer of all accidents which may occur by reason of the condition of its highways, but it is liable for positive acts of negligence; knowledge of a dangerous condition in the highway and failure to repair or give adequate warning; and constructive knowledge of a dangerous condition in the highway and failure to repair or give adequate warning.

SAME—*negligence—constructive notice*. Constructive notice is imputed to the State where a condition, by its evident nature, duration, and potential for harm, should necessarily have come to the attention of the State, so that the State should have made repairs, but a defective condition is not in itself negligence on the part of the State, and the Claimant bears the burden of establishing by a preponderance of the evidence that the State breached its duty.

SAME—*motorcycle accident at unmarked intersection—claim denied*. In a claim by a motorcyclist who was struck by a vehicle at an unmarked intersection, although the Claimant alleged that the State negligently removed a stop sign, failed to reinstall it, and failed to warn motorists of the danger, the claim was denied because there was no evidence that the condition was caused by, or known to, the State where workers testified that they did not remove the stop sign, there were no prior complaints, and nothing suggested that the State should be charged with constructive notice; and the Claimant's own contributory negligence in accelerating when he saw an approaching vehicle could have barred his recovery in any event.

OPINION

JANN, J.

Gregory A. Painter, Claimant, brings this cause of action for compensatory damages pursuant to section 8(d) of the Illinois Court of Claims Act. (705 ILCS 505/8(d).) Claimant asserts that he was injured as a direct and proximate result of negligence committed by the State of Illinois at Morgan County Road 1950 North and Illinois Route 78 in Morgan County, Illinois.

On August 27, 1988, at approximately 5:45 p.m., Claimant was riding a 1978 Harley Davidson FLH, Electric Glide motorcycle, westbound on County Road 1950 North near its intersection with Illinois Route 78 in Morgan County, Illinois. This was the first time Claimant had traveled on County Road 1950 North in a westerly direction. Claimant was traveling at between 30 and 35 m.p.h. and did not see a stop sign or other traffic control device as he approached the intersection with Illinois Route 78. Claimant was unaware he was approaching the intersection until he was about 30 feet from the intersection and

saw an automobile traveling north on Illinois Route 78. Claimant, believing that if he applied his brakes on the gravel road, the motorcycle would slide into and under the approaching vehicle, accelerated his motorcycle to avoid hitting the automobile, but the automobile struck him in the left side of his body. Claimant states the road was also wet from rainfall that day.

After the accident, Morgan County sheriff's deputies found that the stop sign regulating westbound traffic on County Road 1950 North was lying face down in a ditch at the northeast corner of the intersection. The sign was attached to a wooden post that had no visible signs of damage.

Claimant is seeking \$46,190.33 for medical expenses incurred in treating his injuries, and \$44,800 in lost income. In addition, Claimant seeks the value of his motorcycle, which he estimated at \$6,000 at the time of the accident.

A hearing was held before Commissioner Clark on November 3, 1994, at which time Claimant testified and photographs of the scene were submitted into evidence. In addition, the parties submitted evidence depositions of three doctors who treated Claimant, two Morgan County sheriff's deputies who were at the scene immediately following the accident, and five Illinois Department of Transportation workers who had been clearing the ditches on either side of Illinois Route 78 near the location of the accident from August 22-24, 1988. Claimant submitted a brief, while Respondent did not.

Claimant contends that Respondent's negligence was the direct and proximate cause of the accident because agents or employees of Respondent removed the stop sign for westbound traffic, failed to reinstall the stop sign, and failed to warn motorists that they had to stop at the intersection.

The Department of Transportation workers testified at depositions that their normal practice is to remove only those traffic control signs that are in the ditches they are grading and to replace them when their work for the day is completed. The stop sign in question was not in the ditch in which the crew was working and would not have been removed, the workers stated. In addition, each of the workers who was clearing the ditches at that location testified that he had not removed the stop sign and did not notice that a stop sign was down.

As a matter of law, the State is not an insurer of all accidents which may occur by reason of the condition of its highways. Nevertheless, it is liable for positive acts of negligence; knowledge of a dangerous condition in the highway and failure to repair or give adequate warnings; constructive knowledge of a dangerous condition in the highway; and failure to repair or give adequate warning. *Whitehouse Trucking Co. v. State* (1955), 22 Ill. Ct. Cl. 126.

Constructive notice is imputed to the State where a condition, by its evident nature, duration, and potential for harm, should necessarily have come to the attention of the State, so that the State should have made repairs. (*Scroggins v. State* (1991), 43 Ill. Ct. Cl. 225.) In addition, a defective condition is not in itself negligence on the part of the State, and the Claimant bears the burden of establishing by a preponderance of the evidence that the State breached its duty. *Scroggins, supra*.

The State has been found negligent in cases where warning signs have been damaged or removed. In *Whitehouse Trucking Co.*, the State had excavated sections of a highway, and workers had erected barricades and put out flares to warn oncoming vehicles of the dangerous condition of the highway. However, by the time of the accident,

the flares were put out by the rain, and the barricades had blown over in a wind. The Court found that when the State removes a section of the pavement, and thereafter leaves the excavation open at the end of a day's work, it is duty bound to see that adequate warning devices are installed about the work area. In addition, the Court stated that once the warning devices are in place, it is the duty of the State to take reasonable precautions to see that such warning devices remain in place and are in working order. *Whitehouse, supra*.

In another case, the State was found negligent after a barricade protecting motorists from a flooded road had been moved by unknown persons, and a motorist drove into the flooded area and drowned. *Linebaugh v. State* (1981), 34 Ill. Ct. Cl. 63.

The key difference between these cases and the instant case is that, in the cases cited above, the hazards the State failed to warn against either were created by the State or were known to the State. In *Whitehouse Trucking Co.*, the State had created that hazard and had an additional duty to ensure that warning signs remained effective. In *Linebaugh*, employees of the State were aware that persons unknown were removing the barricade.

In the instant case, there is no evidence that the hazard complained of, an unmarked intersection, was caused by Respondent or was known to Respondent. There was no evidence of any complaints to Respondent regarding the stop sign, and the Department of Transportation workers testified that while they were working in the area just days before the accident, they did not remove the sign or notice that it was missing.

Furthermore, Claimant has produced no persuasive evidence to show that the condition was of such a nature

as to have been evident, nor evidence to show the duration of the hazard, in order to show constructive knowledge of the hazard. Although the Morgan County deputies testified that the grass under the sign had turned yellow, there was no evidence to show how long the metal sign had to lie in the sun in August to turn grass yellow.

In addition, Claimant may have been contributorily negligent for attempting to accelerate his vehicle when he saw the approaching vehicle, which could bar him from recovering even if Respondent were found to be negligent.

Based upon the foregoing, we hold that Claimant's claim is denied because he failed to show Respondent had created the hazard in question, that Respondent had actual or constructive notice of a dangerous condition, or that Respondent's action or inaction was the proximate cause of Claimant's injury.

(No. 90-CC-0361—Claimant awarded \$50,000.)

In re APPLICATION OF KARIN L. DEGELMAN.

Opinion filed May 23, 1995.

Order filed August 16, 1995.

HERRING & HOCHÉ (WILLIAM HERRING, of counsel),
for Claimant.

JIM RYAN, Attorney General (DEBORAH BARNES, Assistant Attorney General, of counsel), for Respondent.

LAW ENFORCEMENT OFFICERS AND FIREMEN COMPENSATION—*definition of "killed in the line of duty."* Section 2(e) of the Law Enforcement Officers and Firemen Compensation Act defines "killed in the line of duty" as losing one's life as a result of injury received in the active performance of duties as a law enforcement officer, if the death occurs within one year from the

date the injury was received and if the injury arose from violence or other accidental cause.

SAME—officer fell from pick-up truck while moving furniture—narcotics surveillance—award granted. A police officer who died after he fell from the bed of a State-owned pick-up truck while moving furniture for a fellow officer was “killed in the line of duty,” and his widow was awarded compensation upon the filing of a death certificate, where, although it was a violation of department rules for police to participate in moving an officer’s personal belongings in a State vehicle, on State time, the decedent was acting pursuant to orders and as a part of an undercover narcotics surveillance.

OPINION

FREDERICK, J.

This cause comes before the Court on Claimant’s motion for summary judgment and Respondent’s cross motion for summary judgment. The Court has carefully reviewed the motions, the briefs in support of the cross motions for summary judgment, all of the pleadings, all of the exhibits, the application for benefits, and the entire Court file.

This claim is before the Court by reason of the death of Gary K. Degelman, who was a special agent with the Illinois State Police. Agent Degelman’s widow, Karin L. Degelman, seeks compensation pursuant to the terms and provisions of the Law Enforcement Officers and Firemen Compensation Act. 820 ILCS 315/1 *et seq.*

The report of the Attorney General filed April 13, 1992, indicated that Special Agent Degelman died within one year of receiving injuries he sustained in a fall from the bed of a moving pick-up truck on May 4, 1989. Claimant, Karin L. Degelman, the widow of the decedent, is the designated beneficiary of Gary R. Degelman. The report also indicated that Special Agent Degelman’s death was not the result of willful misconduct or intoxication. The only contested issue was whether Special Agent Degelman was killed in the line of duty as defined by the

Act. Section 2(e) of the Act provides a definition of “killed in the line of duty” as follows:

“(e) ‘Killed in the line of duty’ means losing one’s life as a result of injury received in the active performance of duties as law enforcement officer, civil defense worker, civil air patrol member, paramedic or fireman if the death occurs within one year from the date the injury was received and if that injury arose from violence or other accidental cause.”

This case comes before the Court in the posture of cross summary judgment motions. The issue of whether a policeman was killed in the line of duty is an often-heard issue in this Court and is perhaps the hardest issue this Court must consider. In every case a policeman has died and generally his widow or children are seeking benefits under the Act. It is very difficult not to be sympathetic to the Claimants in these cases but as a Court, the case law is clear that the issues are to be decided based on the facts of each case, and we as a Court put sympathy aside.

This case is particularly difficult. The report of the Attorney General indicated the following facts which are not in dispute: On May 4, 1989, shortly after 4:00 p.m., Gary R. Degelman, a special agent with the Illinois State Police, was riding in a bed of a pick-up truck owned by the State Police and being driven by acting Master Sergeant James K. Comrie. At that time, Special Agent Degelman was on his normal duty shift and was dressed in civilian clothes which was his normal duty attire. At the time of the fall resulting in his death, Special Agent Degelman and acting Master Sergeant Comrie were engaged in moving household goods belonging to Captain William R. Collins, zone commander of Division of Criminal Investigations zone 14. The household goods were being moved from Collins’ residence at 10 Richmond Road, to 108 Borsi in Macomb, Illinois. This move was done using a state-owned vehicle and on-duty State employees, in apparent violation of rules and regulations of

the Illinois State Police. Collins was the supervisor of both Degelman and Comrie. The Attorney General believed there was conflicting evidence whether, at the time of the fall, Special Agent Degelman was engaged in a narcotics surveillance in the vicinity of Collins' residence at 10 Richmond Road. It is the opinion of the Attorney General, after investigation of the facts and circumstances of Special Agent Degelman's death, that at the time of the fall Special Agent Degelman and acting Master Sergeant Comrie had terminated any involvement they may have had in narcotics surveillance and were solely engaged in transporting the household goods of Captain Collins for the use and benefit of Captain Collins. The Attorney General believed that at the time of the fall, Special Agent Degelman was not engaged in any law enforcement activity which would place him in the line of duty as defined by section 2(e) of the Act. The evidence indicates that immediately prior to his fall, Special Agent Degelman was standing in the bed of a moving pick-up truck guarding metal shelving units belonging to Captain Collins so that they would not fall from the truck as they had earlier.

Claimant has presented, with her motion, testimony of witnesses relating to the material facts of this matter given in a hearing before the United States Department of Justice with respect to an application for public safety officers benefits. The findings of hearing officer Eugene A. Dzikiewicz in the appeal regarding the initial denial of paying public safety officers benefits (28 C.F.R. 32.2c) were that "It is clear that at the time of the accident which resulted in his death, Special Agent Degelman was involved in an activity which clearly fits within the definition 'Line of Duty' as set forth in 28 C.F.R. 32.2(c)." The Public Safety Officers Benefits Act requires that an officer's death result from a line of duty action that he or she

is authorized or obligated to perform by law, rule, regulation, or condition of employment. While the standard of the proceeding may not be exactly the same as the present proceeding, the testimony presented is relevant to our decision.

Claimant also presented the relevant testimony of witnesses relating to the material facts of this case given in a hearing before the Illinois State Police Review Board in regard to disciplinary proceedings against Captain William Collins.

From the sworn testimony aforesaid, we find the following facts:

(a) On May 4, 1989, Special Agent Gary R. Degelman was on active duty in DCI zone 14 of the Illinois State Police at Macomb, Illinois;

(b) Master Sergeant James Comrie was advised by Special Agent Larry Kniel that a confidential source would be available during the afternoon of May 4, 1989, for the purpose of attempting to purchase narcotics at 70 N. Yorktown, Macomb, Illinois;

(c) Captain William Collins, the commanding officer of the DCI zone 14, was residing in Macomb, Illinois, in an apartment at 10 Richmond Road in the Georgetown Apartments, less than 200 feet from the residence of Mark Herrick at 70 N. Yorktown, Macomb, Illinois, and was planning to move to a house at 108 Barsi Street, Macomb, Illinois, after working hours on May 4, 1989;

(d) During the afternoon of May 4, 1989, Master Sergeant James Comrie, in consultation with other special agents, formulated a plan to use the moving of Captain Collins' household furniture and effects as a cover for a close surveillance of the suspect's residence at 70 N. Yorktown Road, Macomb, Illinois;

(e) During the afternoon of May 4, 1989, Master Sergeant James Comrie assigned Special Agents Gary R. Degelman, Larry Knicl and John Liggett, officers under his command, to duties in a narcotics investigation of three suspects, including one Mark Herrick who resided at 70 N. Yorktown Road, Macomb, Illinois;

(f) Master Sergeant Comrie then directed Special Agent Degelman to drive him to a Macomb bank where Sergeant Comrie cashed an official advance funds check in the sum of \$2,000 to provide funds for the purchase of the narcotics;

(g) Master Sergeant Comrie decided to use a pick-up truck of the Illinois State Police as one of the surveillance vehicles because it was equipped with a two-way State police radio and would blend into the cover activity of moving furniture and personal property from the apartment near the residence of the suspect;

(h) Captain Collins returned from Quincy, Illinois, at 2:45 p.m. the afternoon of May 4, 1989, and after being advised of the plan, approved the surveillance plan previously formulated, whereupon the captain, Master Sergeant Comrie and Special Agents Degelman and Liggett began moving furniture and other household goods from the 10 Richmond Road apartment to 108 Barsi Street, Macomb, Illinois, during which time the suspects were observed entering the residence at 70 N. Yorktown Road;

(i) Before the buy, a second surveillance meeting was conducted at which time Captain Collins advised that he had seen suspects entering 70 N. Yorktown Road while he was returning to the second surveillance meeting in which Master Sergeant Comrie assigned Special Agent Degelman the duty of riding in the surveillance truck and to be in the closest surveillance position to the Herrick residence and other special agents were given their duty assignments as well;

(j) Special Agent Knicl was assigned the duty of attempting to make a hand-to-hand purchase of narcotics from the suspect at 70 N. Yorktown Road, Macomb, Illinois, to be paid for from a portion of the official advance funds which Master Sergeant Comrie and Special Agent Degelman obtained from the bank in preparation for the planned police operation. Inspector Shirey was assigned the duty to transport the confidential source to his undercover car and adopt a roving surveillance position in support of the narcotics investigation;

(k) After the duty assignments were made, Sergeant Comrie and Special Agent Degelman left 108 Barsi Street and returned to 10 Richmond Road where they loaded a TV set, a chair, and two metal shelving units in the bed of the State police truck, and the vehicle was then parked on North Yorktown Road near the front of the Herrick residence. Since the suspects had previously been observed entering the residence at 70 N. Yorktown, Sergeant Comrie then repeatedly attempted to reach Special Agent Knicl by State police radio to advise him to proceed with the planned narcotics purchase;

(l) Sergeant Comrie and Special Agent Degelman received no responsive communication from Special Agent Knicl, and after a time, Sergeant Comrie concluded that radio communication was ineffective because their location was in a deep valley on the westerly side of Macomb, Illinois. Comrie decided to move to a higher location and drove the truck out of the valley up a hill to the east. On May 4, 1989, gusty winds were blowing from 12-22 miles per hour at Macomb, Illinois. At that time a gust of wind blew one of the metal shelving units out of the bed of the pick-up truck. They stopped and Special Agent Degelman placed the shelving unit back into the bed of the truck and advised Sergeant Comrie that he would ride in the bed of the truck in an effort to stabilize the load;

(m) Communication with Special Agent Kniel was achieved after the State police truck reached the high ground. The sergeant then directed Kniel to proceed to 70 N. Yorktown Road and notified Inspector Shirey, another surveillance officer, that he had moved the truck from the close surveillance position and directed Shirey to move from his roving surveillance position to the primary position where the pick-up truck had been parked;

(n) Sergeant Comrie and Special Agent Degelman performed the roving surveillance duties initially assigned to Inspector Shirey and while driving in the vicinity of West Jackson Street in Macomb, Illinois, on May 4, 1989, at 4:00 p.m., another gust of wind caused the shelving units to be blown about, at which time Special Agent Degelman, who was crouched down in the bed of the surveillance truck, endeavored to keep the shelving units from blowing out of the bed of the truck at which time he accidentally fell backwards from the bed of the surveillance truck and struck his head on the pavement, thereby incurring severe closed head injuries including a severed brain stem which resulted in his death;

(o) The narcotics purchase from the suspect was accomplished shortly after 4:05 p.m. on May 4, 1989, when Special Agent Kniel entered the Herrick residence. The accident, which occurred during the roving surveillance, occurred a few minutes before Special Agent Kniel entered the Herrick residence. The hand-to-hand narcotics purchase resulted in a conviction of Herrick;

(p) Captain Collins was suspended for 60 days for his actions;

(q) That Captain Collins violated the rules of conduct of the Illinois State Police by authorizing Illinois State Police officers to participate in the move of his personal

belongings while on Illinois State Police time and while utilizing an official Illinois State Police vehicle;

(r) That the officers, including the decedent, were engaged in surveillance activities in aid of a drug enforcement buy;

(s) That the route taken by the truck just prior to Agent Degelman falling from the truck was exactly the same route being taken to deliver the furniture to Captain Collins' new apartment.

It is apparent to the Court from the sworn testimony provided by Claimant that there are no material issues of fact. Even though Special Agent Degelman was moving the property of Captain Collins in violation of rules of the Illinois State Police, he was doing so pursuant to orders and as part of a drug surveillance. There is no question that as part of the surveillance, Agent Degelman was carrying out the ruse of being a mover of personal property. It is impossible to separate the two activities as the Respondent argues because the two activities were so inter-related. However poorly thought out the plan, however much Comrie and Collins must accept their role in the death of Agent Degelman, the fact remains that Agent Degelman was on duty and doing his duty as ordered. We find there are no material issues of fact and that Special Agent Degelman was killed in the line of duty albeit a duty in violation of department rules and regulations. The Claimant is therefore entitled to summary judgment.

We find that there is nothing in the circumstances to indicate that Special Agent Degelman's death was caused by willful misconduct or intoxication. He did not order the conduct. It was ordered by his superior. We further find that the foregoing circumstances fall within the terms and provisions of the Law Enforcement Officers

and Firemen Compensation Act, *supra*, and the facts reported herein comply with the requirements for an award under the Act.

We must note for the record that our review does not find a death certificate for Special Agent Gary K. Degelman filed with the Court. This is a requirement of the Court for an award. We hereby direct Claimant to file a certified death certificate with the clerk of the Court within 21 days. Upon Claimant filing the death certificate, we will again take up the cause and enter an award if the cause of death is shown to be the injuries sustained on May 4, 1989.

ORDER

FREDERICK, J.

This Court entered its opinion on May 23, 1995. In the opinion, the Court withheld making an award until Claimant filed a death certificate for Gary R. Degelman. The appropriate death certificate was filed on June 13, 1995.

Therefore, it is ordered that Claimant, Karin L. Degelman, is awarded fifty thousand dollars (\$50,000) pursuant to the Law Enforcement Officers and Firemen Compensation Act.

(No. 90-CC-0593—Claim denied; motion for sanctions denied.)

DEMETRIUS BLANKENSHIP, Claimant, *v.*
THE STATE OF ILLINOIS, Respondent.

Opinion filed December 27, 1995.

ROTMAN, MEDANSKY & ELOVITZ (ROBERT D. ROTMAN, of counsel), for Claimant.

JIM RYAN, Attorney General (CORINTH BISHOP II,
Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*duty to provide reasonably safe conditions—users of smooth-surfaced floors must use caution.* The State of Illinois owes a duty to inmates of penal institutions to provide reasonably safe conditions, but smooth surfaces on floors are necessary so that the premises can be cleaned and made sanitary, and users are expected to conduct themselves with awareness of conditions where terazzo or other smooth-surfaced floors are encountered.

SAME—*slip and fall in prison shower—inmate was contributorily negligent—claim denied.* The evidence in an inmate's claim arising out of a slip and fall in a prison shower showed that the inmate was more than 50 percent contributorily negligent in failing to proceed with due care on the wet shower floor, there was no indication that he slipped on a small piece of soap as alleged, and his feet and legs were not shackled or restrained in any way, and on that basis his claim was denied.

SAME—*failed discovery deposition of correctional officer—motion for sanctions denied.* After a State correctional officer's deposition was rescheduled several times without Claimant's counsel issuing a new notice, there was no basis for granting the Claimant's motion for sanctions which was filed after the Respondent inadvertently produced the officer at the wrong location, since without the Claimant's amended notice being sent, it was understandable that confusion could arise.

OPINION

SOMMER, C.J.

Claimant seeks recovery for injuries sustained as an inmate in a slip and fall which occurred when he was entering a shower at the Sheridan Correctional Center on April 3, 1989. Claimant was confined to a segregation unit for disciplinary reasons at that time and was therefore subject to heightened security measures which essentially required him to be constantly handcuffed behind the back anytime he was not confined to a cell. Even the shower stall on the unit was specially constructed as a type of cell. The correctional officer accompanying Claimant from his cell to the shower explained the procedure utilized for escorting a handcuffed prisoner into the shower area:

“Q: Okay. In April of ’89, what was the procedure once you had left the cell area and you were reaching the shower area?”

A: Once I reach the shower area, I look in the shower and make sure there is nothing out of the ordinary, more or less make a sweep of the area. They have vents—we have problems. We have a vent that sometimes they want to take the vents out, the louvers, and they can make homemade shanks out of it, just make a quick search of the area and then I proceed to let them in.

Q: What do you do after you open the door and let the inmate in?

A: I open the door, I have the inmate step in and then I secure the door and I have the inmate step back to the door. He sticks his hands through the—we have a little door that he sticks his hands out and we release the handcuffs and then he goes on and he can take his ten-minute shower.”

Claimant slipped and fell at the point that the officer was closing the shower cell door. Claimant contends that he slipped on “a small piece of soap,” but the officer testified that his inspection of the shower area both before and after Claimant’s fall did not reveal the presence of any pieces of soap or other hazardous residue from prior showers. Claimant admitted that he did not look at the floor of the shower prior to his fall, and there is no testimony or other evidence corroborating Claimant’s statements about the “small piece of soap.”

Claimant’s counsel argues that it is negligence *per se* to keep an inmate handcuffed as he is entering a shower stall:

“We believe that the State’s failure through the Sheridan Correctional Officer to remove the behind-the-back handcuffs or any handcuffs for that matter from an inmate before walking into a shower that is wet and soapy is negligent * * * .

* * *

[I]t’s reasonably foreseeable that incidents could easily occur and people could easily fall in a wet shower when they are handcuffed and they have no balance and no way to catch their fall.”

This Court has considered numerous penitentiary shower slip and fall cases in the past and has been reluctant to find them compensable absent significant aggravating circumstances:

“This Court has held repeatedly that the State of Illinois owes a duty to inmates of penal institutions to provide reasonably safe conditions. *Reddock v. State* (1978), 32 Ill. Ct. Cl. 611. Surfaces such as terrazzo in shower rooms, dormitories, public buildings, *etc.*, are necessary so that the premises can be cleaned and made sanitary. The smooth finish of these surfaces allows for cleaning, but also makes the materials slippery at times. Persons * * * using such surfaces know the nature of them and must conduct themselves accordingly. Therefore, falls on such surfaces are often not compensable, absent aggravating circumstances.

* * *

[U]sers are [expected] to conduct themselves with awareness of conditions where terrazzo or other smooth surfaced floors are encountered.” *Connors v. State* (1988), 40 Ill. Ct. Cl. 112, 116-117.

Examples of aggravating circumstances which have rendered prison shower-related slip and falls compensable in the past are: an unprotected ventilation fan which precipitated finger lacerations;¹ mandatory usage of the shower area as a corridor or passageway;² and chronic flooding beyond the confines of the shower area.³ However, even in those situations where the aggravating circumstances were present, substantial comparative fault was attributed to the inmates in each instance for having lost their balance on a known slippery surface. A prisoner’s failure, as here, to look at the shower floor before stepping in has caused this Court to take an especially dim view of this type of claim. (*Wilcoxon v. State* (1994), 46 Ill. Ct. Cl. 280, 283.) Accordingly, absent sufficient aggravating circumstances, recovery cannot be had where the wet condition of the shower floor was, or should have been, readily apparent to the inmate. *Rodriguez v. State* (1994), 46 Ill. Ct. Cl. 290, 292.

Here, Claimant’s counsel candidly acknowledges the dubious state of the evidence concerning the alleged “small piece of soap,” and counsel has instead chosen to frame the issue by focusing on the presence of the handcuffs. In other words, did the fact that Claimant was

¹ *Thomas v. State* (1987), 40 Ill. Ct. Cl. 188.

² *Coley v. State* (1991), 44 Ill. Ct. Cl. 153.

³ *Karry v. State* (1992), 45 Ill. Ct. Cl. 328.

handcuffed either cause or contribute to his fall, thereby creating an aggravating circumstance? We do not find the handcuffs to be the proximate cause of this Claimant's fall. Claimant's feet and legs were not shackled or restrained in any manner, and there is nothing in the evidence to indicate that the presence of the handcuffs played a role in his loss of footing. Rather, it appears that Claimant was simply not paying attention to the floor, misstepped, and lost his balance. Claimant was fully aware of the wet condition of the shower and had a duty to proceed with due care. As Claimant's contributory negligence was more than 50% responsible for this slip and fall, he is barred from a recovery by the provisions of section 2—1116 of the Code of Civil Procedure. (735 ILCS 5/2—1116.) It is therefore ordered that this claim is denied.

Aside from the merits of this matter, there is a pending motion for sanctions stemming from a failed deposition of Respondent's correctional officer. The deposition had initially been noticed to take place on April 15, 1991, at a court reporter's office in Joliet, but it was rescheduled several times without claimant's counsel issuing a new notice. Confusion eventually resulted on July 10, 1991, when Respondent's counsel inadvertently produced the deponent at the wrong location, leading to yet one additional rescheduling of the deposition. Had an amended deposition notice been issued by Claimant's counsel for the July 10, 1991, setting, a sanctionable situation would probably exist. However, without such a notice, it is understandable that problems could arise. Certainly there is nothing in the record to indicate that Respondent intentionally produced the deponent at the wrong location. Accordingly, the motion for sanctions is denied.

(No. 91-CC-0088—Claim dismissed; petition for rehearing denied.)

SANDRA STACY, Claimant, *v.* THE BOARD OF GOVERNORS OF
STATE COLLEGES AND UNIVERSITIES, Respondent.

Opinion filed September 15, 1995.

Order on petition for rehearing filed November 30, 1995.

LONNY BEN OGUS, for Claimant.

DUNN, GOEBEL, ULBRICH, MOREL & HUNDMAN
(MARK T. DUNN, of counsel), for Respondent.

EMPLOYMENT—*voluntary resignation is binding on public employee.* Where a resignation by a public employee is voluntary, it is effective and binding for all time when received by the State, and a voluntary resignation divests an individual of any legal interest in his former employment.

SAME—*forced resignation constitutes discharge.* When a person is severed from his employment by coercion, the severance is effected by the supervisor and not by the will of the employee, and a person forced to resign is in reality discharged and not a person who exercises his will to end his employment voluntarily.

SAME—*wrongful termination claim—Claimant voluntarily resigned—claim dismissed—petition for rehearing denied.* Where the Claimant's administrative position at a State university was specifically subject to the university's rules and regulations which provided that she served at the pleasure of the university's president, and the Claimant's non-retention was accomplished in accordance with those rules and regulations, and she tendered her resignation and accepted another job elsewhere before the effective date of her non-retention, the Court found that the Claimant voluntarily resigned and was not wrongfully discharged for cause or deprived of due process, thereby warranting dismissal of her claim and denial of her petition for rehearing.

OPINION

FREDERICK, J.

Claimant, Sandra Stacy, filed her complaint in the Court of Claims seeking fifty thousand dollars (\$50,000) for loss of income she claims is due her for wrongful termination from Governors State University. Claimant alleges that she was employed by Governors State University from January 2, 1986, until August 14, 1987, as Director of Career Planning and Placement. Claimant further alleges that she was wrongfully terminated without cause, in violation

of regulations and the administrative and professional personnel handbook. The Respondent, in its answer, averred that the Board of Governors of State Colleges and Universities was the only entity with statutory power to make rules, regulations and bylaws for the government and management of the five universities which the board operates. The answer further admitted that at the time of the decision not to retain her, Claimant was an administrative employee of the board of Governors State University known as a category A, level IV administrative employee. The Respondent avers that Claimant served at the pleasure of the GSU President and, unless terminated for cause, was entitled only to the notice prescribed in paragraph 5d(1), (2) and (3) of the Board of Governors Regulations. The board admits Claimant was not terminated for cause.

The cause was tried before the Commissioner on a joint stipulation of facts. Those facts are set forth herein as follows:

On October 31, 1983, Ms. Sandra Stacy ("Stacy"), was offered a temporary appointment at Governors State University ("GSU") as a counselor/coordinator of counseling and guidance ("counselor/coordinator") in the GSU Office of Student Development. Her contract was for a term beginning November 1, 1983, and ending October 31, 1984, at a salary of \$21,000. Stacy accepted that position on November 1, 1983.

Stacy's immediate supervisor was Mr. Burton Collins ("Collins"). Collins was Associate Dean for Student Development at GSU. Stacy had daily contact with Collins. As counselor/coordinator, Stacy was responsible for meeting with students individually and in groups to help them decide what their career plans would be after GSU. She also acted as the "outreach person" for faculty and other staff for the same issues.

Before or at about the time that Stacy signed her first contract, she read a document entitled *Governors State University Administrative and Professional Personnel Handbook* (October, 1980), (the “handbook”). The handbook provides, among other things, that it was developed to define the relationship of administrative and professional personnel to the university. It also provides that:

“In all cases, Board of Governors *Governing Policies and Regulations* shall prevail in the event of any contradiction or inconsistency between University policies and procedures and Board *Governing Policies and Regulations*.”

The handbook has never been approved or adopted by the board. Part VI of the handbook also provides an employee evaluation process.

Part VI, paragraph D of GSU’s handbook provides for employees to prepare a self-evaluation by February 1st of each year. Stacy’s first self-evaluation (for the period November 1, 1983, to February 20, 1984) is dated March 5, 1984. She typed that self-evaluation and delivered it to Collins. Collins signed Stacy’s self-evaluation and provided her with a positive evaluation as her supervisor. Up to that point, Stacy thought that she and Collins enjoyed a good, healthy working relationship.

On March 8, 1984, Collins recommended that Stacy be retained in her counselor/coordinator position and Stacy acknowledged that recommendation the same day. The handbook provided that “[b]y March 31, the President will notify Administrative and Professional employees of retention and non-retention decisions.” However, GSU’s president did not approve Stacy’s retention until April 20, 1984. Stacy realized that such decisions were normally late. Stacy has testified under oath, “Within my five-year history at the university, typically that is how things were done. We were rarely on time with things such as evaluations in my five-year history with the university.”

Nothing remarkable happened during the balance of Stacy's year of temporary employment.

On November 1, 1984, Stacy accepted a probationary appointment as a student development counselor and university professor of counseling in the Office of Student Development at GSU. This contract was for a term beginning November 1, 1984, and ending August 31, 1985. In signing that contract, Stacy understood that she was then a tenure track employee. Stacy's duties remained the same, but she understood that her evaluation would then be made pursuant to a collective bargaining agreement between the Board of Governors of State Colleges and Universities and the University Professionals of Illinois. As a bargaining unit employee, Stacy was required to prepare a retention folder and she was provided written guidelines about what material had to be accumulated for her to be evaluated.

During her first year of employment as a tenure track employee, Stacy kept the same duties she had as counselor/coordinator. For the period November, 1983, to November, 1984, Stacy's title remained counselor/coordinator. For the period November, 1984, until at least August, 1985, her title was outreach counselor/professor. The only practical difference was that when Stacy became a tenure track employee, she was given a professorship title. Throughout her temporary employment and her first year on tenure track, Stacy had no problems or disputes with Collins. Stacy's relationship with Collins was very good.

In 1985, Stacy learned that GSU was going to conduct a regional search for a person to fill the job of Director of Career Planning and Placement. In Stacy's view, this position was an attempt to create a new administrative division at GSU. Because the directorship was an administrative position, the person who filled the job would no longer be a union unit member. Thereafter Stacy participated in a

so-called “search and screen” process and on October 15, 1985, Collins and GSU’s Dean of Student Affairs recommended Stacy for the new directorship. Up through that time, Stacy’s relationship with Collins remained very good.

On October 31, 1985, GSU’s president, Leon Goodman-Malamuth, appointed Stacy Director of Career Planning and Placement at GSU beginning January 1, 1986. Stacy continued as a union unit member until January 1, 1986, but, thereafter, she was no longer subject to the collective bargaining agreement. Stacy understood that during her first year of employment, her evaluations were made subject to the handbook. During the second year, her evaluations were subject to the collective bargaining agreement. After January 1, 1986, Stacy was again to be evaluated subject to the handbook.

After becoming Director of Career Planning and Placement, Collins remained Stacy’s supervisor. According to Stacy, in the middle of January, 1986, shortly after she started her new position as director, her relationship with Collins changed. About that time, Stacy submitted a 34-page document to Collins outlining the work she had set up over the Christmas 1985-1986 holiday. This document included what Stacy thought Collins should be aware of in terms of progress in the area of career planning and placement. Collins had not requested this document but Stacy thought Collins should be kept abreast of what she was doing. When she delivered the document to Collins, Stacy felt that his behavior was “uncooperative.”

On or about February 10, 1986, Collins wrote to Stacy asking her to meet with him to discuss her work plan agreement. The work plan agreement is described generally in the GSU handbook. The next day, Stacy sent Collins a memorandum with a draft work plan agreement.

Stacy did not meet with Collins as requested before submitting her first work plan agreement.

In February, 1986, the union wrote to the board concerning the new directorship which was then held by Stacy. Prior to that letter, the union verbally advised the board that the new directorship should be a bargaining unit position. The union's letter merely confirmed earlier oral discussions. Stacy was not originally aware of the union's position.

On February 24, 1986, Stacy submitted another copy of her draft work plan agreement. This was the same work plan agreement that Stacy had submitted to Collins on February 11, 1986.

According to Stacy, from the middle of January, 1986, until February 24, 1986, she had no disagreements or confrontations with Collins, but she felt that Collins was acting "mysterious." Because she felt Collins had "pulled back on his support," Stacy made sure that she put everything in writing. She doesn't recall discussing these circumstances directly with Collins but Stacy did have several informal discussions with fellow employees and they decided "just to make sure that we cover our butts. Make sure that we put everything in writing * * *."

On March 12, 1986, Stacy met with Collins. After that meeting, she sent another memorandum to Collins concerning their March 12th meeting. Stacy appended a third copy of her work plan agreement and copied Collins' supervisor, Dean Catherine Taylor, on her cover memorandum. Stacy intended to send a message by copying Dean Taylor. This act was a reflection of Stacy's deteriorating relationship with Collins.

Sometime about March 26, 1987, Stacy met with GSU's provost, David Curtis, Dean Taylor and Collins to

discuss her position as director. The meeting lasted about an hour. This meeting was intended to help prepare the provost to discuss whether Stacy's position would fall under the UPI or under administrative guidelines. Stacy did not care one way or another about this subject. After this meeting, Stacy prepared a job description and submitted it to Dean Taylor. On April 1, 1986, Stacy sent another memorandum to Dean Taylor concerning her administrative duties.

After the March 26, 1986, meeting, a second meeting was held at Dean Taylor's office. Taylor, Collins, Stacy and the union's representative were all present at this April 3, 1986, meeting. Stacy was present as an "observer." Taylor, Collins and Stacy all assured the union's representative that two separate work plan agreements would be prepared relating to Stacy's job as director.

On April 8, 1986, Stacy sent yet another memorandum to Collins with her attached work plan agreement. Even though Stacy had been present during two meetings about her duties as director, there was no difference between Stacy's fourth work plan submission and the first three. By that time, Stacy felt that the time period for approval of her work plan agreement had passed and that GSU's handbook had been violated. However, she did not file any sort of grievance or complaint because she did not want to "rock the boat."

On or about April 29, 1986, Stacy received a memorandum from Collins with a redrafted work plan agreement. In his memorandum, Collins explained that his redrafted plan corresponded to the "areas of responsibility which we negotiated with Dr. Charles Olson (i.e., the union's representative) regarding the conflict" between Stacy's new position as director and her previous position as a career counselor. Collins stated that Stacy's previous

drafts could not be used and asked Stacy to contact him if she had any questions. By that time, Stacy understood that GSU had been engaged in negotiations with the union to define just what her job as director could and could not properly include. However, her view remained unchanged. She thought that a work plan agreement should have already been in place as provided in the GSU handbook.

Almost one month after the April 3, 1986, meeting, on May 2, 1986, Stacy delivered a memorandum to Collins with two attached work plans. One of the attached work plans was effective through June 30, 1986, and eliminated career counseling as agreed on April 3, 1986. The second attached work plan was effective after July 1, 1986, and included career counseling. Ten days later, Stacy sent yet another memorandum to Collins together with the same material previously forwarded to him on May 12, 1986. In addition, Stacy forwarded all the foregoing memoranda directly to Collins' supervisor, Dean Taylor.

On May 22, 1986, Collins forwarded a marked-up version of Stacy's work plan agreement to Dean Taylor. In his memorandum he said, "It is my opinion that these methods are steps necessary to reorganize the office * * *." Stacy was not aware of the changes to her work plan proposed by Collins. However, on June 9, 1986, Collins wrote to Stacy advising her that the proposed work plan agreement scheduled to begin after July 1, 1986, had not been signed. Collins advised Stacy that "[i]t is the rationale of the Dean that it [i.e., the final work plan] should be delayed until September, 1986, when all other WPAs will be developed and 'problem solving or innovative goals' can be more effectively identified and developed."

Stacy was not satisfied with Collins' June 9, 1986, memorandum. She wrote directly to GSU's provost via a

June 12, 1986, memorandum. She wrote to the provost because she was startled to see that consideration of her work plan agreement would be delayed until September, 1986, and she felt the provost “could straighten it out * * *.” Although Collins had asked Stacy to contact him if she had questions about his June 9, 1986, memorandum, she did not contact Collins before writing to the provost. Stacy felt that it was “impossible” to talk to Collins.

After her June 12th memorandum, Stacy was called to a meeting with the dean and Collins. This meeting took place at the dean’s office from 3:15 p.m. until 5:07 p.m. Stacy says that the dean proceeded “just to scream at me about don’t I have anything else better to do with my time other than write memos.” According to Stacy, this meeting was an “excruciating painful experience.” Stacy recalls the dean telling her that Collins was doing his best and that the message conveyed was “don’t write any other memos.” Stacy felt that Collins misrepresented what was really happening. She felt that she had memos to prove she had done what Collins had asked. Stacy says that she just sat back and listened and then went out to dinner.

About June 20, 1986, Stacy received a memorandum from Dean Taylor approving her work plan. Dean Taylor advised Stacy that a work plan for the academic year 1986-1987 would be developed in conjunction with the process for all administrative and professional staff after July 1, 1986. Stacy remained concerned that approval of her work plan was several months late and this made her “fearful” of how she would be evaluated.

When the 1986-1987 academic year began, Collins wrote to Stacy, David Sparks and Pam Zener concerning their work plan agreements. Sparks and Zener were counselors in the GSU learning assistance center. Collins asked that draft work plans be submitted by September

19, 1986. Stacy noted that Collins' memorandum was in direct agreement with Dean Taylor's June 20th memorandum. She concluded that Dean Taylor and Collins had decided to override the handbook.

Stacy decided not to file a grievance about this issue and complied with Collins' request. However, when Stacy submitted her work plan, it was initially not delivered to Collins. By September 25, 1986, the lost work plan was found and memoranda exchanged.

Collins reviewed Stacy's proposed work plan and sent her a memorandum suggesting changes. Collins also scheduled a meeting with Stacy for October 10, 1986. Stacy considered Collins' memorandum as "picking." She also felt that development of a work plan was "out of sync again."

On October 10, 1986, Stacy wrote yet another memorandum to Collins advising him that she was "confused" and found his "words difficult to decipher." Stacy never went to talk to Collins as he had scheduled. She just wanted to make sure she had "documentation" in writing.

On October 23, 1986, Collins provided Stacy with an example of a work plan that met his standards. Stacy marked up Collins' draft and she admits that her comments were "picking."

On October 31, 1986, Stacy sent Collins her revised work plan with a cover memorandum.

A review of Stacy's work plan demonstrates that it does not follow the format provided by Collins. Therefore, on November 12, 1986, Collins wrote to Stacy stating:

"Over the past two months, you have been provided information to assist you in the development of your 1986-1987 Work Plan Agreement. I have sent information to you that included a description of the acceptable format, a descriptive explanation for each section of the format, and an example of a completed Work Plan Agreement. I have received two drafts of a Work Plan

Agreement from you. Neither of them are acceptable since they do not set forth goal statements establishing what you expect to accomplish, and there is no indication of what is to be evaluated. Given these facts, it is apparent to me that a continuation of this interaction will not result in a Work Plan Agreement that is acceptable.

As the Associate Dean for Student Development, I am ultimately responsible for the achievements of the functional areas of the unit. Therefore, I am assigning the attached work plan to you. (See the attached Work Plan Agreement).

If you have any further questions regarding this matter, please arrange an appointment with my secretary.”

After this memorandum, Stacy was not satisfied. According to her, she had “wanted to work cooperatively” on a work plan. Stacy also thought that she had to agree to a work plan. She felt that the activities from September, 1986, through November 12, 1986, did not amount to “consultation” as provided for in the GSU handbook.

On Tuesday, January 27, 1987, Collins reminded Stacy that self-evaluations were called for by the handbook by February 1st. Stacy had already started working on her self-evaluation because it was a pretty lengthy document. She didn’t deliver her self-evaluation until after February 1st because that day fell on a Sunday and she felt it was acceptable to wait until Monday. Stacy’s self-evaluation was delivered with a short cover memorandum.

Early in February, 1987, Collins asked Stacy for a list of individuals whom she felt could best evaluate her performance. Stacy forwarded her list on February 10, 1987, as requested. Collins decided to add some names to Stacy’s list and so advised her the next day. Stacy felt the addition of new names by Collins was appropriate and some of the people listed were her “pretty close friends.” According to Stacy, in her division it was more or less general knowledge that she was not getting along with Collins.

In late February, 1987, Stacy met with Collins in his office to discuss her evaluation. Their meeting lasted

about five minutes. Collins informed Stacy that he had decided not to retain her. Stacy asked why Collins was recommending her nonretention and he said it was in writing and was being typed by his secretary. He said, "I've just decided I'm not going to recommend you for retention." Given what had happened with the memos and the screaming, Stacy was not surprised.

On March 2, 1987, Collins advised Stacy in writing that her evaluation was ready for review at his office. But Stacy would not go to Collins' office because she found that to be "highly irregular." By "highly irregular" she meant that she would have felt very uncomfortable under those circumstances. At Stacy's request, she was allowed to pick up the evaluation and take it out of Collins' office.

Stacy received her written evaluation on Monday, March 2, 1987. Stacy refused to sign the evaluation because the handbook provided that supervisor evaluations were to be submitted by March 1st. March 1st was a Sunday in 1987. Stacy acknowledges that her self-evaluation was not provided until Monday, February 2, 1987. However, she would not sign off on Collins' evaluation because she considered his evaluation late. Therefore, technical parts of the original evaluation prepared by Collins had to be modified in order to satisfy Stacy.

The complete evaluation prepared by Collins is ten single-spaced pages in length. The first four pages of the Collins document analyze Stacy's self-evaluation. That analysis concludes:

"In conclusion, when the self-evaluation and the analyzed data are compared to the goals of the two work plan agreements, they are found to be related in part. Many of the stated goals and methods of achievement in both work plan agreements are not addressed in the self-evaluation. Regardless, the self-evaluation does provide information regarding many of the primary functional areas of the GSU Career Planning and Placement Office. This information reflects a low volume activity in the number of on-campus interview, appointments with employers, students, and faculty, and the number of

workshops offered. Furthermore, little or no information is provided to help determine the effectiveness of efforts to develop new job listings, participation in the job fair and the alumni outreach program, the credential forwarding service, and the number of publications developed for students. That information provided does reflect a limited number of job listings in the area of Business and Public Administration and Arts and Sciences. The majority of the listings reported correspond to areas in Education, or areas where no degree is required or no specific major is required. What is more, the Director reports she had 53 appointments with potential employers over the course of twelve months of 1.2 appointments per week, or 4.4 appointments per month. Information is not provided to indicate the level of participation of GSU students in the job fair. It is reported that 247 students from four schools did attend the fair and 25 employers were available. We do not know how many of these students were from GSU, how much the program cost, and even more important, how many students were hired by the participating companies. Consequently, the absence of this and other information presents an informative and summary evaluation of this and similar job fair information regarding the effectiveness. Likewise, information regarding the effectiveness of the alumni outreach program is not provided. In fact, I have never been provided with information which describes the program procedures nor has information been made available to me regarding any job placements which have resulted from this activity. The total number of credentials forwarded is reported. I do not know, however, from the self-evaluation how many new credential files were established by students during this twelve month period, how many alumni remain active, or how many persons requested their credentials to be forwarded. This kind of empirical information is minimally necessary in order to evaluate program effectiveness and to help determine the future resource requirements of the unit. I currently do not have this information. More importantly, that information which is provided is quantitative and descriptive only. There has been no effort to provide any assessment/evaluation or inferred recommendations regarding the unit's programs and activities."

The next four pages of Collins' evaluation address Stacy's peer evaluations. That analysis provides, in part:

"Each of the three internal evaluators selected by the Director provided an overall evaluation of the Director's performance in the following order:

1. Poor
2. Excellent
3. Fair

A great deal of weight was given to the first internal evaluator because of the close working relationship on a frequent basis " " " ."

and concludes:

"In conclusion, a great deal of weight was given to the evaluation comments of the one internal evaluator selected by the Director, who indicated a close work relationship on a frequent basis. These comments were most relevant because these statements related to the goals of the work plan agreements and the responsibilities of the Director. Cited were statements related to the

performance of on-campus interviews, workshops, and job development. While the evaluation statements of external persons, and those persons selected by me provided information, they were not accorded as much weight because of the occasional[ly] frequency of their work relationship with the Director.”

The final two pages of Collins’ evaluation consist of Collins’ own evaluation. He observed that Stacy had engaged in “consistent behavioral incidents that were unprofessional, uncooperative, and unresponsive.” Collins concluded:

“The information reported in the self-evaluation confirmed what I had suspected regarding the performance of the Director. The self-evaluation reflects the low volume of activity in many of the functional areas of responsibility. A low degree of effort is reflected in the volume of appointments with students, employers, and faculty, and the effectiveness of the effort is not addressed. This assessment is consistent with comments by an internal evaluator selected by the Director, who was the only member of the peer evaluation pool who indicated closely working with the Director, often. I am also concerned regarding the performance of responsibilities which violate an agreement with the UPI to refer students needing career counseling to the counseling area of Student Development. Meetings were held with a representative of the UPI to inform the Director of this agreement. A meeting was held with Dr. Diane Kjos, counseling staff, to develop a student referral process. Performance of these counseling duties was not done in a single incident, but rather occurred many times.

In addition, I must also note consistent behavioral incidents that were unprofessional, uncooperative, and unresponsive. One example which supports the charge of unprofessional behavior is her failure to assist in the final preparation of her FY 87 unit budget. Mrs. Stacy submitted a proposed budget submission and it was found to be unacceptable. In an attempt to meet with her on the Friday of the designated week, I telephoned the Career Planning and Placement Office for the purpose of meeting with her and received the message that she had left for the day. Neither my secretary nor I received a message of the fact she would be leaving the University, and Mrs. Stacy had not completed an official vacation request for that day. Her absence made it necessary for me to develop the FY 87 Career Planning and Placement budget. The official Career Planning and Placement budget was allocated on July 1, 1986, as requested. However, it should be noted that Mrs. Stacy expended her total travel allocation, has spent the total contractual allocation of \$2,000 and had a \$312 deficit, and her commodities line had been expended from a level of \$850 to \$321. The majority of her allocated budget had been expended in the period of the first four months of the budget year. An incident which supports my charge of uncooperativeness was her refusal to provide me with detailed information regarding the alumni outreach program. On December 16, 1983, I sent Mrs. Stacy a memo requesting detailed information regarding this program after reading an article in the Alumni News

which announced the existence of the program. I had not been informed that such a program was being developed or initiated, and therefore, I requested further information regarding its operation. On January 9, 1987, Mrs. Stacy responded to my December 16, 1986, memo and stated, 'be advised that the Office of Career Planning and Placement neither wrote the article nor generated the headline. If you have a concern, I would suggest that you speak with the author of the article.' To date, I have not received any information from Mrs. Stacy regarding the operational details of this program; yet she cited it as an operational activity in her self-evaluation. In support of my charge of unresponsiveness, I cite the example of her failure to respond to my request to develop a written description of the programs and activities of the Career Planning and Placement unit. On June 13, 1986, another memo was sent to her requesting this information and again received no response. After not receiving a response to these two requests, I formally assigned this responsibility to her as a part of her work plan agreement for 1986-1987. Since formally assigning this responsibility as part of her work plan agreement, I have attempted to discuss the matter in our scheduled individual meetings, but received no information regarding the progress of this activity. Yet, in her self-evaluation, she states that this activity should be a goal for 1987-1988.

Based on her failure to perform her assigned duties, which is manifested in the low volume of activity, low degree of performance efforts, the failure to assess the effectiveness of efforts, consistent incidents of unprofessional, uncooperative and unresponsive behavior that detracts from the performance of assigned duties and goals, I am making the following recommendation:

Recommendation:

I recommend that Mrs. Sandra Stacy not be retained in the position of Director of Career Planning and Placement at Governors State University."

Stacy acknowledged receipt of this document on March 4, 1987. Claimant indicated that she wanted to file a grievance of the non-retention recommendation. She didn't actually fill out a grievance because, according to the handbook, she was supposed to try to settle the situation without an official grievance *per se*. She expected the situation would follow the grievance procedure outlined in the GSU handbook.

"The grievance procedure provides, in part:

In appeals of decisions to terminate an administrative employee, the obligation of the Administrative and Professional Grievance Committee is to limit itself to reviewing the process through which judgment and recommendations have been made to determine if they have been made fairly and in accordance with unit, University and Board policy and procedures. The Committee will not substitute its judgment for that of the appropriate administrator as to

the quality of performance or any other substantive matters contained in the termination. Appeals of terminations for cause are handled under the provisions of BOG *Regulations* 11.B. A record of this appeal will be retained in the individual's personnel file."

Stacy understood that the handbook grievance procedures were not intended to deal with the "facts of the non-retention recommendation * * *." She realized that the grievance committee could not change the substantive recommendation. Stacy felt that the recommendation process had to stop at some point if she filed a grievance.

According to Stacy, there were three failings in her 1987 evaluation/grievance process: (1) the dates set out in the handbook were not followed, (2) the tapes of her grievance hearing were not destroyed, and (3) she was treated like "an invisible person."

On March 12, 1987, GSU's provost wrote to the university president to point out certain internal conflicts in the GSU handbook. Stacy was advised about the conflict but she had been aware of it way back in February of 1986.

On March 13, 1987, the president wrote to Stacy:

"I recognize a conflict of time schedules for the evaluation process and the grievance process. Therefore, in the event you initiate formal proceedings and in order to assure you of fair and equitable treatment within the parameters of the grievance procedures, I will suspend the March 31, deadline for my notification of a retention or non-retention decision until ten (10) days after receipt of the findings and recommendations of the Administrative and Professional Grievance Committee."

Stacy thought the president's response was the best he could do at that time.

After the president's March 13, 1987, memorandum, Stacy proceeded with the grievance procedures outlined in the handbook.

On March 20, 1987, she wrote a memorandum to Dean Taylor asking for a meeting to discuss her grievance.

On March 20, 1987, Stacy met with Collins. That meeting with Collins lasted about five minutes and took place at Collins' office. Stacy recalls telling Collins that she wanted to discuss the possibility of working the situation out. She recalls that Collins told her that there was nothing to talk about and that he was not going to change his mind.

Dean Taylor was out of town when Stacy asked for her meeting. Ms. Suzanne Prescott was designated to serve as Dean Taylor's proxy in a meeting with Stacy. Stacy's meeting with Ms. Prescott was very short. During that meeting, Stacy introduced herself, told Prescott that she had already visited Collins with no success and that she was, therefore, meeting with the next highest administrator. Ms. Prescott told Stacy that she was not in a position to work things out and the process went forward from there. This meeting took place on Friday, March 27, 1987, at 9:00 a.m. and was later memorialized in a memorandum prepared by Ms. Prescott.

On April 2, 1987, Provost Curtis wrote to the chairperson of GSU's Administrative and Professional Grievance Committee. He advised the chairperson that Stacy wanted to grieve a non-retention recommendation and explained how Stacy's supporting materials would be provided to the committee chairperson.

A few days later, the committee chairperson, Thomas W. Call, wrote to Dean Taylor and Collins advising them that the Professional Grievance Committee had received a formal grievance from Stacy and asking them to prepare a written response to Stacy's grievance within five working days. On April 5, 1987, Dean Taylor and Collins responded in writing to Stacy's grievance. This written response includes a "chronology of events" relating to Stacy's 1987 performance evaluation.

Chairperson Call sent Stacy a copy of Dean Taylor's and Collins' written response on April 17, 1987. In addition, Chairperson Call scheduled a hearing for May 4, 1987, at 10:00 a.m. in the GSU administrative conference room.

The grievance hearing was held as scheduled. Stacy admits that her peers who served on the hearing committee provided a full opportunity for her to talk, explain her view, and to cross-examine witnesses. She also admits that, after the grievance hearing, the committee decided that GSU's handbook had not been violated. A copy of the tape-recorded hearing is submitted. Stacy expressly objects to the relevancy of trial exhibit 52 and the Court sustains that objection.

On May 8, 1987, Chairperson Call wrote to President Goodman-Malamuth concerning the findings and recommendations of the grievance committee. The committee found:

"Having reviewed the materials submitted by the grievant and the respondents Ms. Taylor and Mr. Collins, and having heard their testimony on May 4, 1987, it is the opinion of the Committee that the evaluation process which led to the non-retention recommendations was fair and did not violate the spirit and intent of the University Administrative and Professional Personnel Policy."

The board has delegated to President Goodman-Malamuth non-retention decisions. The president is the final decision maker.

On May 15, 1987, President Goodman-Malamuth wrote to Stacy by certified mail, return receipt requested, advising her that he had reviewed the findings of the Administrative and Professional Grievance Committee and concurred with their recommendation that Stacy's grievance be denied. The president further provided Stacy with six additional months of employment with a termination date set for November 18, 1987. Stacy's husband

signed for this letter on May 20, 1987. Shortly thereafter, she read the letter and understood the president's decision.

In making his decision whether or not to terminate Stacy, President Goodman-Malamuth, allegedly using his academic judgment, relied on a number of factors including the recommendations of the unit head (Collins), the dean (Taylor), the provost (Curtis), Stacy's responses thereto, and the findings and recommendations of the Administrative and Professional Grievance Committee. The findings and recommendations of the Administrative and Professional Committee were done pursuant to its charge which states:

"In appeals of decisions to terminate an administrative employee, the obligation of the Administrative and Professional Grievance Committee is to limit itself to reviewing the process through which judgments and recommendations have been made to determine if they have been made fairly and in accordance with unit, University and Board policy and procedures. The Committee will not substitute its judgment for that of the appropriate administrator as to the quality of performance or any other substantive matters contained in the termination."

The findings were:

"The Administrative and Professional Personnel Grievance Committee has considered the grievance filed by Ms. Sandra Stacy contesting the non-retention recommendation issued with her annual performance evaluation. Having reviewed the materials submitted by the grievance and the respondents Ms. Taylor and Mr. Collins, and having heard their testimony on May 4, 1987, it is the opinion of the Committee that the evaluation process which led to non-retention recommendation was fair and did not violate the spirit and intent of the University Administrative and Professional Personnel Policy.

The Committee finds that the processes related to the annual evaluation of performance, as defined in the Administrative and Professional Personnel Handbook (Section VI, Evaluation of Performance), did occur, although not in all cases in strict accordance with published time frames in development of work plan opinion of the Committee, these deviations had no impact upon the decisions made in the process and did not adversely affect the grievant.

Based upon information submitted by both the grievant and respondents, the Committee concluded that measurable goals and objectives were established, and that these goals formed the basis for evaluating Ms. Stacy's developing the work plan and that due process was afforded her throughout this process."

The Recommendation was:

“The Committee recommends that the grievance be denied.”

According to Stacy’s evaluation by Collins and Taylor, the president found that Stacy “was not meeting the specifications of her job.” Based only on these evaluations, the president “decided that her quality of performance was not up to what was required of her.”

Based on everything available to President Leo Goodman-Malamuth, the recommendations of Collins, Taylor, Curtis and the findings and recommendations of the Administrative and Professional Grievance Committee, it was his final decision to uphold the recommendations of non-retention.

Based on the foregoing, President Goodman-Malamuth determined that the termination was not a for-cause termination.

Under the regulations of the Board of Governors, after her non-retention, Stacy was entitled to six additional months of employment as a category A, level IV administrative employee.

GSU’s president had previously advised Stacy that he would delay his decision until after the grievance process ended.

According to board regulations, category A, level IV administrative employees are appointed by the president after consultation with appropriate constituencies. All level IV administrative employees of the board are employed by, and serve “at the pleasure of,” their respective university presidents. Except for terminations for cause, such employees may be terminated upon written notice of the university president as follows:

“(2) In the second through fifth year of appointment, not later than six (6) months prior to the termination date specified in the notice.”

By May, 1987, Stacy was in her second year of employment as a category A, level IV employee. She received the specified six-month notice for termination in cases not involving cause.

Stacy continued to serve the university after her notification from GSU's president. Her employment relationship, however, was not completely satisfactory. For example, Collins asked her to meet with him to discuss her duties and responsibilities. Stacy refused to meet with Collins except on five days notice and with her attorney present.

Finally, on August 10, 1987, Stacy submitted her resignation effective Friday, August 14, 1987. About ten days after her resignation, Stacy began working at a new job at a university located in Platteville, Wisconsin.

At no time during this entire process did Stacy assert that her termination was for "adequate cause" under the Board of Governors' regulations. At no time did Stacy request a termination hearing under the Board of Governors' regulations.

Thomas Layzell, chancellor of the Board of Governors, the chief executive officer of the system of five universities, has stated that the Board of Governors regulations, section 2, faculty administrative & civil service employees were in existence during Stacy's employment and apply to employees like Stacy.

Layzell states that if Stacy was terminated for "cause," Stacy "would have had to have been given a statement of what the reasons were for her dismissal" and that these were not given to Stacy. The regulations of January 17, 1980 ("Conditions of Employment, Subsection [b]") would have had to have been followed for Stacy if she was terminated for cause.

Leo Goodman-Malamuth, president of Governors State University, admits that if Stacy's termination had been for "cause," a different process would have been required and that process was not given to Stacy.

Leo Goodman-Malamuth states that his decision ends the matter, though the employment might continue for awhile.

If an employee such as Stacy is terminated for "cause," then such an employee is entitled by board regulations to the procedures set out in the board's applicable regulations. Those procedures include:

- a. at least one meeting with the employee to discuss possible remedial action or settlement;
- b. a written statement of the purpose for such a meeting;
- c. a notice of intent to seek termination containing a statement of reasons;
- d. a right to a form hearing before a committee of five, two of which were selected by Stacy and two by the president with those four to select a fifth;
- e. the right to present witnesses and confront and cross-examine witnesses; and
- f. the burden of proof on the employer to establish the cause by clear and convincing evidence.

There is no rule, policy or regulation that (a) allows the board to call a "for cause" termination a "not for cause termination" or (b) describes how an agent of the board or GSU is to choose which of the two procedures to follow.

The Board of Governors wrote all the rules, policies and regulations that applied to Stacy and disseminated them to her.

The board avers that Stacy was terminated for reasons other than “cause.” [Note: See the board’s answer, par. 12.]

The board’s regulations define adequate cause as “one or more acts or omissions which, singly or in the aggregate, have directly and substantially affected or impaired an employee’s performance or fulfillment of his/her duties.”

The regulations apply to Stacy. Stacy read them and understood them.

The grievance process accorded Stacy by the board only reviews whether the appropriate procedures were followed from initial evaluation on up to the review period. The grievance process does not contemplate review of factual misstatements. The grievance panel cannot substitute its judgment for that of the appropriate administrator as to the quality or performance of substantive matters contained in the termination.

After being terminated with six months’ notice effective November 18, 1987, which would have been in the middle of a school year, Claimant found a job which started August 24, 1987, and resigned, effective August 14, 1987, due to her “being fired * * * and my need to seek new employment” so that she could move to Platteville, Wisconsin, site of her new job.

Based on the evidence, we find that Claimant was not terminated for cause and Claimant did not receive the hearing required for a termination for cause. The Claimant would prevail unless there was another valid method to terminate Claimant’s employment. When Claimant signed her contract, she received the *Governors State University Administrative and Professional Personnel Handbook*. The Respondent and Claimant both acted

as though the handbook was a part of Claimant's employment contract by participating in the evaluation procedures and grievance procedures.

It is also clear that the handbook's provisions on evaluation and termination are not contrary to, or inconsistent with, the governing policies and regulations but merely supplement the general policies and regulations. Claimant understood that after January 1, 1986, her employment evaluations were subject to the handbook. In February, 1987, Claimant prepared a self-evaluation pursuant to the handbook.

When the non-retention recommendation was made by Mr. Collins, Claimant did not fill out a grievance because, according to the handbook, she was supposed to try to settle the situation without an official grievance. Claimant expected the situation would follow the grievance procedure outlined in the GSU handbook. Claimant proceeded with the grievance procedure outlined in the handbook after the president's March 13, 1987, memorandum. Claimant filed a formal grievance in regard to the non-retention determination. Claimant's peers who served on the hearing committee provided a full opportunity for Claimant to talk, explain her view, and to cross-examine witnesses. The board had delegated to the president non-retention decisions. On May 13, 1987, the president of the university wrote to Claimant and advised her that he had reviewed the findings of the Administrative and Professional Grievance Committee and agreed with their recommendation. The president also provided Claimant with six additional months of employment with a termination date of November 18, 1987.

The parties have stipulated that based on everything available to President Goodman-Malamuth, the recommendations of Collins, Taylor, Curtis, and the findings and

recommendations of the Administrative and Professional Grievance Committee, it was the president's decision to uphold the recommendation of non-retention. President Goodman-Malamuth determined that the termination was not a for cause termination. The parties have stipulated that Claimant was a category A, level IV administrative employee and that all such employees are appointed by the president after consultation with appropriate constituencies. All persons at that level are employed by, and serve at the pleasure of, their respective university presidents. Except for terminations for cause, such employees may be terminated upon written notice of the university president. Such persons as Claimant, in their second through fifth year of employment, receive six months notice of termination. Claimant received the specified six-month notice of non-retention. Claimant submitted her resignation on August 10, 1987, and started a new job about ten days later.

Claimant argues that this was really a for cause termination, that Claimant did not receive the proper hearing for a for cause termination, and that Claimant should be reinstated and be awarded back pay. We disagree. Claimant's administrative position as Director of Career Planning and Placement in the Office of Student Development at GSU was specifically subject to the governing policies and regulations of the Board of Governors of State Colleges and Universities *and* Governors State University policies and procedures. Based on the stipulation and exhibits, we find that the ending of Claimant's employment was a properly executed non-retention. Claimant served at the pleasure of the president of the university. After review of Claimant's evaluations, the president chose not to retain Claimant in her administrative position. Claimant received the required six months' notice.

There is an obvious distinction between a for cause termination and non-retention. If the university had

wanted to terminate Claimant immediately without further pay, they would have had to prove cause and give Claimant the required for cause termination hearing. This they did not do. Instead, pursuant to the terms of Claimant's employment, the university chose not to retain Claimant pursuant to the non-retention provisions and gave her six months' notice.

The non-retention provisions were part of Claimant's employment package which she knew about when she accepted the position. She knew she could be out of a job at any time with certain notice, depending on the pleasure of the president. This is the employment Claimant accepted. The Respondent and Claimant followed the procedures for a non-retention grievance and while the Claimant does not appreciate the result, we find the non-retention was proper. Claimant had no right to continued employment beyond the pleasure of the president of the university. *Stone v. State* (1975), 31 Ill. Ct. Cl. 126.

Claimant has the burden of proving by a preponderance of the evidence that she had contractual and/or due process rights which were different than those afforded to her by the Respondent prior to her resignation. The Claimant must also prove that such contractual or due process rights were violated by Respondent and that she suffered damages thereby. For the reason that Claimant did resign, a threshold question concerning the voluntariness of the resignation must be addressed prior to considering any other issue. If the Claimant's resignation was voluntary and not coerced, she cannot recover and we do not reach the issues as to contractual or procedural rights, a violation of those rights and damages.

There is no question from the evidence that Claimant resigned. If the resignation was voluntary by this public employee, then it was effective and binding for all

time when received by Respondent. (*Weber v. Board of Fire and Police Commissioners* (1990), 204 Ill. App. 3d 358; *Stearns v. Board of Fire and Police Commissioners* (1978), 59 Ill. App. 3d 569.) “When one voluntarily submits a resignation, he thereby divests himself of any legal interest in his former employment.” *Whitaker v. Pierce* (1976), 44 Ill. App. 3d 148.

We recognize that a resignation can be involuntarily coerced and therefore legally equivalent to a discharge. When a person is severed from his employment by coercion, the severance is effected by the supervisor and not by the will of the employee. A person forced to resign is in reality discharged and not a person who exercises his own will to end his employment voluntarily. (*Piper v. Board of Trustees* (1981), 99 Ill. App. 3d 752.) The issue is whether Claimant’s judgment was merely influenced or whether her mind was so dominated by Respondent as to prevent the exercise of an independent judgment. (*Piper, supra*, at 758.) If an individual’s will was overborne or if his resignation was not the product of a rational intellect and free will, then his resignation is a discharge. The question of whether a resignation is voluntary depends on the circumstances under which it is made.

From a thorough review of the evidence in this case, we find that the Claimant has failed to prove that her resignation was involuntary, coerced or the product of duress.

Because the non-retention was valid under the procedures of the university, Claimant was not pressured or coerced into resigning. She could have worked the last six months and received a full six months of remuneration. From the record, it appears Claimant voluntarily accepted employment elsewhere before the end of the six-month period to further her career.

Claimant also had the burden of proving a breach of contract. Based on the evidence, we find the non-retention was proper, Claimant was not wrongfully discharged, and her due process rights were not violated. *Maher v. State* (1976), 31 Ill. Ct. Cl. 137.

The Claimant accepted a position with a term at the pleasure of the president. That position required six months' notice of non-retention. Claimant received that notice as she was entitled. The Claimant argues the Court should find that Claimant's non-retention was in reality a faulty termination for cause. This we cannot and will not do because Claimant was offered the six months' notice of non-retention as required.

For the foregoing reasons, it is hereby ordered that this claim be and hereby is dismissed.

ORDER

FREDERICK, J.

This cause comes before the Court on Claimant's motion for rehearing, and the Court having reviewed the court file, all pleadings, testimony, the response to the petition, the reply to the response, and the Court's opinion, and the Court being fully advised in the premises, wherefore, the Court finds:

1. That nothing presented by Claimant leads the Court to believe its opinion was erroneous in any way.
2. That the Court's opinion of September 15, 1995, was the proper decision.

Therefore, it is ordered that the petition for rehearing is denied.

(No. 91-CC-0557—Claim dismissed; petition for rehearing denied.)

NORMAN DALE SLOAN, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed September 5, 1995.

Order on petition for rehearing filed November 16, 1995.

WOMACK & ASSOCIATES (MARK A. ATKINS and GENE
A. TURK, of counsel), for Claimant.

JIM RYAN, Attorney General (DAVID RUMLEY, Assis-
tant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*duty owed to invitees—proof of negligence.* The State is not an insurer of the safety of invitees but rather must only exercise reasonable care for their safety, and in order to recover damages as a result of defects on State property, the burden is upon the Claimant to prove, by a preponderance of the evidence, that the State breached its duty of reasonable care, and that the State had actual or constructive notice of the defect that caused the injury, but the mere fact that a defective condition existed is not, in and of itself, sufficient to constitute an act of negligence.

SAME—*wheelchair overturned on fairgrounds roadway—no proof of negligence—claim dismissed—petition for rehearing denied.* A man who sustained injuries when his wheelchair overturned on a fairgrounds roadway after he allegedly struck a pothole could not recover in his negligence claim against the State, and his petition for rehearing was also denied, where neither the Claimant's companion or the paramedics who responded at the scene observed the defect, the Claimant offered no other evidence corroborating its existence and, even assuming the presence of a dangerous hole, there had been no prior complaints or other proof indicating that the State had actual or constructive notice of the condition.

OPINION

RAUCCI, J.

Claimant is a handicapped person who was present at the DuQuoin State Fairgrounds property on September 3, 1989. Claimant's motorized wheelchair struck a pothole in a roadway and Claimant was caused to fall when the chair tipped over. Claimant contends that he sustained a traumatic injury to his buttocks which, due to his paralysis, did not heal properly, and for which the Claimant received considerable medical attention and hospitalization.

At the time of the accident, Claimant was accompanied by his brother-in-law, John Nelson. Claimant was in a scooter type vehicle. They walked (rode) through the gate and were sightseeing while traveling down a fairgrounds road. It was twilight and vehicles did not have headlights on. Two golf carts were coming down the road and Claimant and Nelson moved to the right side of the road. Nelson was walking to the left of, and ahead of, Claimant. Nelson was talking to Claimant and when he did not get an answer from Claimant, he turned to discover that Claimant's wheelchair had turned over on the right and Claimant was half in and half out of the wheelchair.

The accident happened on a road area by the stables. The accident happened in the middle of the block. With the help of some concession campers, Nelson got Claimant back into his wheelchair and turned him upright. An ambulance was called. Claimant was upset, had sustained scratches and scrapes, and was embarrassed. The emergency medical technicians (EMTs) with the ambulance examined Claimant but did not examine his lower torso. They left the scene. Claimant did not leave in the ambulance.

Nelson and Claimant continued traveling around the fair and met with their wives and looked around the fairgrounds. About an hour after the incident, Claimant began complaining of pain in his butt area. Nelson stated that Claimant was "starting to sweat."

On cross-examination, Nelson testified that the roadway was an asphalt type paved surface with curves "in parts of it." Nelson did not recall a curve at the location of the accident. The margin between the edge of the paved area and the unpaved area was ragged where the pavement "had chunks out of it." Nelson looked at the road briefly after the accident and observed that it was rough.

Nelson was asked the following questions and gave the following answers:

“Q. Okay, now, you use the word ‘pothole,’ I think in your testimony. Was there a hole near the area where you saw Mr. Sloan come out of his scooter?”

A. There was not—I am talking about the edge of the road didn’t have holes; it had areas that were out.

Q. Okay.

A. But the road itself toward the edge had potholes in it.

Q. Did you look at the road after you saw Mr. Sloan on the ground?

A. Just briefly.

Q. Did you see anything that could have caused him to come out of the chair?”

A. The road, you know, was all I could see was rough.

Q. And you mean ‘rough’ by an uneven surface?”

A. A jagged surface where the asphalt has—the side of the road where it falls off, you know.” (R-29-30)

Nelson testified that at the area where Sloan came into contact with the pavement there was small gravel. Nelson did not see any particular pothole that Nelson felt caused the scooter to tip over. There was a jagged edge but there were no potholes on the side.

After the accident, Nelson, Claimant and members of their family stayed at the fairgrounds until midnight.

The accident happened as the Claimant and Nelson went from the gate after parking their vehicle. On examination by the Commissioner, Nelson testified that he did not observe any particular condition in respect to the rough edge of the road that he thought might have caused Claimant to fall, but just the general condition of asphalt breaking away from the edge of the road.

Claimant testified that he had been in incomplete quadriparesis since 1975, and had been confined to a wheelchair. At the time of the accident, he was operating a Rascal scooter that he had for three years. This is a specialized

piece of equipment that Claimant used to go deer hunting. The scooter was in good working condition at the time of the accident. Claimant testified that as he and Nelson left the parking lot it had rained and there were a lot of holes and ruts in the parking lot itself which gave Claimant no problem. Claimant was able to negotiate the cornfield and had no problem getting to the paved area.

The roadway that Claimant was operating his scooter on was asphalt and Claimant did not pay particular attention to it. From the gate into the fairgrounds where the accident happened would have been about 100 yards or a little more than that. The road was straight.

Claimant testified that the photograph marked as plaintiff's exhibit #4 revealed the location where he tilted over "in front of this horse buggy." The horse buggy was not there but the photograph fairly and accurately represents the condition of the area because it was filled up with water at the time of the accident.

At the time of the accident, Claimant testified there were "thousands of people walking west" because that was the route to get into the fair. Claimant testified that one of the back wheels of his scooter hit a pothole or a hole. Claimant was going slow because his brother-in-law, Nelson, was walking next to him. Claimant was proceeding at a walking pace. Claimant felt the scooter lean over and he was flipped or thrown completely out. The surface Claimant fell on was loose gravel. Claimant saw a hole that had been filled up with gravel that was two or two and one-half feet in diameter. The hole was not perfectly circular. Claimant testified the hole was deep enough to cover up a ten-inch wheel.

Claimant contends that the Respondent breached its duty to Claimant as an invitee and asserts that Respondent, as a property owner, must use reasonable care and

caution to maintain its premises in a reasonably safe condition for the use of its invitees, and to warn of any defects that are not readily apparent. Claimant cites *Ratts v. State* (1986), 38 Ill. Ct. Cl. 183. In *Ratts*, Claimant, an A.B. Dick Printing Press repairman, was called to the offices of the Department of Transportation to fix a printing press. While there, the Claimant testified he was working on the machine and asked one of the department's employees to "run another master on the camera." The employee testified that he thought the Claimant had told him to "run more copies" and that after turning on the machine for the purpose of running more copies, the employee heard a funny noise and turned to find that Claimant's hand had been injured. The testimony of the Claimant and the employee of the Department of Transportation were in direct conflict. This Court stated that the State was not an insurer of the safety of invitees, but must only exercise reasonable care for their safety. (*Fleischer v. State* (1983), 35 Ill. Ct. Cl. 799.) The burden is upon Claimant to prove, by a preponderance of the evidence, that the State breached its duty of reasonable care. (*Ratts, supra*, at 185.) Under the circumstances extant in the *Ratts* case, this Court denied the claim and held that the Claimant had failed to prove that the State had breached its duty of reasonable care and that the Court could only speculate as to how Claimant's injury had occurred. Claimant cites *Nolen v. State* (1983), 36 Ill. Ct. Cl. 194. In *Nolen*, Claimant was walking with a friend near the Stratton Building in Springfield, and while walking across the patio approaching a door, she tripped over a handicapped ramp and injured her ankle. She testified the area was dark and she was unfamiliar with the area. State employees testified that they had not received any complaints concerning the sufficiency of the lighting in the area and there had been no complaints of injuries due to insufficient lighting or because

of the existence of the handicapped ramp in the area. This Court held that the Claimant in *Nolen* was an invitee, and that the State had a duty to use reasonable care and warn its invitees of defects not readily apparent. This Court observed that the ramp had been in existence for sixteen years, that there had been no accidents, and that the State is not an insurer against accidents that may occur by reason of the condition of a State highway. In *Bloom v. State* (1957), 22 Ill. Ct. Cl. 582, 584, the Court held that the same rule is applicable to sidewalks maintained by the State. The State has a duty to exercise reasonable care in the maintenance of its highways so that dangerous conditions likely to injure persons lawfully there shall not exist. In *Sewell v. Board of Trustees of Southern Illinois University* (1979), 32 Ill. Ct. Cl. 430, 433, we observed that the Court had held on many occasions that in order for a Claimant to recover damages arising from defects in the roadway (or sidewalk), the Claimant must prove the State was negligent and that such negligence was the proximate cause of the injury. This Court has also held that in order for Claimant to recover, Claimant must prove that the State had actual or constructive notice of the defect that caused the injury. See *Weygandt v. State* (1957), 22 Ill. Ct. Cl. 478, 485.

The record in this case is completely devoid of any actual or constructive notice of any defect in the area where the accident took place, with the sole exception of Claimant's testimony that a hole existed and that the hole caused his scooter to tip over. Even Claimant's brother-in-law, Nelson, did not testify to the existence of a "hole" at the area of the accident, but only as to an uneven surface along the edge of the paved portion of the asphalt road where pieces of asphalt had broken away. Two employees of the State familiar with the condition of the roads on the DuQuoin Fairgrounds testified that there were no holes of

the type described by Claimant in the area where Claimant contends he was injured. Even if one were to assume that the Claimant was correct that a hole did exist of the size and dimensions stated by Claimant, the mere existence of such a hole does not establish either actual or constructive notice to the State of the existence of this condition.

In *Cotner v. State* (1987), 40 Ill. Ct. Cl. 70, Claimant brought a tort action against the State claiming that he was riding a motorcycle on a State-maintained road when he went over a bump, losing control and falling to the pavement receiving severe injuries. A companion cyclist testified that the bump was six inches high and that a year earlier he had run over the same bump and it jarred his tape player so that the tape fell to the ground. The Claimant's companion never complained about the bump and never notified the Illinois Department of Transportation. An investigating police officer found the bump and estimated that it was approximately four inches high. Claimant's father measured the bump at 4 and 3/4 inches high. An IDOT field technician estimated the height of the bump as between 1 and 3 inches. Department of Transportation personnel testified that they made visual inspections of the area and did not see such a bump. Local police departments had not received public complaints and no IDOT agency employees reported any deficiency in the road surface. This Court held that Respondent was not an insurer of the safety of users of its highways. The burden is upon Claimant to show that the State had actual or constructive notice of defects that caused injuries. (*Norman v. State* (1982), 35 Ill. Ct. Cl. 693, 695.) "The mere fact that a defective condition existed if, in fact, it did exist, is not in and by itself sufficient to constitute an act of negligence on the part of the Respondent." *Palmer v. Northern Illinois University* (1964), 25 Ill. Ct. Cl. 1; *Cotner v. State* (1987), 40 Ill. Ct. Cl. 70, 72.

In the case at bar, as in *Cotner, supra*, the State conducted investigations of the roadway in question on a regular basis. No defects were observed. No complaints were received. According to the record in this case, the accident which injured Claimant represents the only reported accident at this area of the roadways on the DuQuoin State Fairgrounds. In *Cotner, supra*, there was evidence from Claimant's companion of the existence of the bump one year earlier, but this Court held such evidence to be insufficient to establish constructive notice of the existence of the bump, or of a dangerous condition. There is no serious contention that Claimant's buttocks were not injured and that he has not had severe problems in obtaining a complete healing of the area over a long time after he fell from his scooter. The issue is whether the Respondent can, on the basis of the evidence adduced at trial in this case, be held accountable for allowing an unreasonably dangerous condition to exist which proximately resulted in Claimant's injury. There is simply no evidence whatsoever that Respondent had actual or constructive notice of this allegedly dangerous condition. Indeed, the testimony of Claimant's brother-in-law, who was present at the time of the accident, simply does not confirm the existence of this rather large pothole or hole as described by the Claimant in Claimant's testimony. To the contrary, the brother-in-law's testimony was only to the effect that the edges of the asphalt's surface on the road were uneven or jagged where pieces of asphalt had broken off. This testimony alone certainly does not establish the type of unreasonably dangerous condition which must be shown in order for Claimant to recover.

Counsel for Claimant argues that Claimant presented a *prima facie* case that the Respondent's premises were unsafe. We do not agree. Counsel alludes to Claimant's testimony. That testimony established that after the accident,

Claimant observed the roadway where he fell. Claimant said he saw a hole that had been filled up with gravel. The hole was maybe two feet or two and one-half feet in diameter and was not perfectly circular. Claimant testified that the wheels on his scooter were ten inches and the hole “covered the wheel up” so that the wheel was completely underneath the surface of the hole. Counsel for Claimant argues that this testimony was confirmed by the brother-in-law, John Nelson. Nelson’s testimony was, in pertinent part, that after the accident, the scooter was off the side of the road. Nelson was asked if he saw any particular pothole that he felt had caused the scooter to tip. Nelson replied that “these weren’t potholes on the side. This was a jagged edge * * *.” Thus, counsel’s conclusion that Nelson’s testimony confirmed the testimony of Claimant is not correct. Counsel also alludes to the testimony of EMT Brumley. Brumley was the EMT who arrived with the ambulance. Brumley’s testimony was that he had absolutely no recollection of the incident, but identified his report. The report attached as exhibit #1 to the Brumley deposition does not allude in any way to the cause of this accident, but recites only that the Claimant had fallen out of his wheelchair. Counsel’s conclusion that Brumley’s deposition testimony lent weight to the conclusion that Respondent’s premises were not reasonably safe is misplaced. The only evidence of what might be perceived as a dangerous condition which proximately caused the Claimant’s injuries came from the Claimant’s testimony alone. There was no corroboration of the existence of the dangerous hole, even through the testimony of Claimant’s companion present at the time of the accident. Nevertheless, if this Court accords Claimant’s testimony sufficient weight to establish the existence of the pothole, there remains no proof whatsoever that Respondent had actual or constructive notice of the condition.

It is therefore ordered, adjudged and decreed that this Claim is dismissed and forever barred.

ORDER

RAUCCI, J.

This cause coming on to be heard on the Claimant's petition for rehearing and/or for new trial, the Court being fully advised in the premises, the Court finds: the petition for rehearing should be denied.

It is therefore ordered that the Claimant's petition for rehearing is denied.

(No. 91-CC-1477—Claim denied.)

ROBERT LUCIUS, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed April 15, 1996.

ROBERT M. HODGE, for Claimant.

JIM RYAN, Attorney General (BRIAN FARLEY, Assistant Attorney General, of counsel), for Respondent.

EXHAUSTION OF REMEDIES—*exhaustion requirement.* The exhaustion of remedies provisions of the Court of Claims Regulations are an inescapable requirement, and a Claimant must exhaust his remedies against a known tortfeasor before seeking final disposition of his claim in the Court of Claims.

PRISONERS AND INMATES—*inmate injured when fellow inmate drove over foot—failure to exhaust remedies against tortfeasor—claim denied.* In an inmate's claim seeking compensation for injuries sustained when another inmate drove a truck over his foot as they were baling hay, the claim was denied because the proximate cause of the Claimant's injury was the negligence of the fellow inmate, and the Claimant failed to exhaust his remedies by first suing the other inmate.

OPINION

FREDERICK, J.

The Claimant, Robert Lucius, filed his claim sounding in negligence in the Court of Claims on November 29, 1990. Claimant, who was at the time of the occurrence an inmate in the Illinois Department of Corrections, alleged that he suffered injury while working at the Vandalia Correctional Center farm in September of 1990. The Claimant seeks damages in the amount of thirty thousand dollars (\$30,000).

The Commissioner set the cause for trial on May 11, 1993. Two days prior to trial, the Respondent filed a motion to dismiss alleging Claimant's failure to exhaust his remedies pursuant to section 790.60 of the Court of Claims Regulations, 705 ILCS 505/25. Pursuant to section 790.90 of the Court of Claims Regulations, failure to exhaust remedies shall be grounds for dismissal. The Court denied the motion to dismiss on June 25, 1993, because the record before the Court was insufficient to grant the motion. The motion to dismiss was not supported by affidavit. The record at that time was bare as to whether there was an available administrative remedy for Claimant's injury. The record was bare as to whether there was an alleged known tortfeasor. If the Respondent had filed an affidavit indicating that there was a known alleged tortfeasor and some facts to show some negligence on the part of the known tortfeasor, the claim would have been dismissed at that time. The Court did order that the Respondent could raise the issue of exhaustion of remedies at trial. The Court, in numerous decisions, has required that the remedy be a real remedy. The court has required there be an alleged known tortfeasor for Claimant to sue.

At trial, Claimant testified that during the summer of 1990, he was an inmate of the Illinois Department of

Corrections and was assigned to work at the farm at Vandalia Correctional Center. In August of 1990, he was a member of a four-man crew assigned to bundle and load bales of freshly cut hay. The crew's supervisor, Ed Bowman, was a State of Illinois employee who, at times, accompanied the crew out in the field.

The four-man crew was composed of inmates. One inmate drove the truck, one inmate stacked the bales of hay in the tractor, and Claimant and another inmate threw the bales onto the tractor. Claimant testified that he had never received any training for this job. The inmate driver was named James Maxwell. Inmate Robert Hayes threw the hay up on the trailer and inmate Clyde Dubose stacked the bales on the trailer.

The truck trailer was about 25 to 30 feet long with two wheels on each side in the middle of the trailer. The wheels on each side were about one and one-half feet apart.

Claimant testified that he had previously complained to Supervisor Bowman that the inmate driving the truck was driving too fast. Claimant stated that one week prior to the incident of Claimant's injury, another inmate's foot was run over by the same driver. Claimant further stated that no action was taken in regard to the complaints against the driver by Supervisor Bowman.

On September 4, 1990, the day of the incident, the Claimant testified that he began work at 7:00 a.m. and that he was wearing State issue work boots. He further explained that, in the beginning, the crew loaded the hay on the rear end of the trailer but as the trailer filled up, it became necessary for the Claimant to step in front of the trailer wheels to load the hay onto the trailer. Claimant had to stand between the tractor and the two wheels on

the flat bed. He testified that he asked the inmate driver, James Maxwell, to slow down several times but that Claimant's requests were ignored.

Claimant stated that as James Maxwell proceeded to drive the truck and trailer, Claimant and inmate Robert Hayes, would throw the bales of hay up onto the truck. Claimant testified that it was necessary to put his foot in front of the tire to throw the 80 to 100 pound bale up onto the truck and then he had to quickly move out of the way. At approximately 3:45 p.m., the incident occurred. Claimant stated that he threw a bale of hay up onto the truck and he wasn't able to move out of the way quickly enough. Both trailer wheels ran over the Claimant's ankle. It was necessary for the driver to back the trailer up to release the Claimant's ankle from underneath the second tire.

Claimant was treated at the infirmary and an x-ray revealed a fracture. He was transferred to the hospital in Centralia the following day. At Centralia, Claimant was given a walking cast and returned to non-working status at Vandalia. Claimant took Motrin for pain four times a day for one week. The cast remained on for approximately three months and Claimant relied on crutches for six months. Claimant testified that he had pain at the time of, and immediately following, the incident. He also described pain for the three months following the incident. Claimant reported some lost range of motion in the ankle and that activities such as baseball have been limited.

Claimant was released from the Illinois Department of Corrections in January, 1991, and at the time of the hearing was employed as a handler for the U.S. Postal Service.

Claimant testified that he had not filed a grievance with the Illinois Department of Corrections and that he had

not sued the inmate driver of the truck. Claimant submitted a group exhibit consisting of the incident report and medical records. Respondent did not present any witnesses.

The Law

This Court has consistently held that the exhaustion of remedies provisions of the Court of Claims Regulations are an inescapable requirement. (*Burns v. State* (1990), 43 Ill. Ct. Cl. 323; *Boe v. State* (1984), 37 Ill. Ct. Cl. 72.) In the instant case, it is clear that inmate James Maxwell injured Claimant through his negligence or willful misconduct and Claimant failed to sue Mr. Maxwell. Claimant was aware of the identity of the driver of the vehicle and chose not to sue him. We cannot presume Mr. Maxwell to be judgment-proof without any evidence presented by Claimant. It was, therefore, incumbent on Claimant to exhaust his remedies against James Maxwell before seeking final disposition of his claim in this Court. *Patton v. State* (1988), 41 Ill. Ct. Cl. 77.

Claimant argues that the Court has allowed claims without enforcing the exhaustion of remedies requirement for inmate claims of work-related injuries where another inmate was negligent but the proximate cause of the injury was the Respondent's failure to supervise. Claimant cites *Hughes v. State* (1984), 37 Ill. Ct. Cl. 251 and *Tucker v. State* (1989), 42 Ill. Ct. Cl. 72 as authority. *Hughes, supra*, is distinguishable in that there was no evidence that the other inmates were negligent and the proximate causes of Hughes' injury were the lack of supervision and the faulty equipment provided by the State. *Tucker, supra*, is also distinguishable. In that case, the State's farm superintendent ordered Tucker to sit on the front of a tractor as it was driven down a road the superintendent knew was in poor condition. There was also no evidence the driver was negligent.

In the present case, the proximate cause of Claimant's injury was the fast driving of James Maxwell and his failure to slow the vehicle after Claimant requested he slow down. Claimant also exhibited some comparative negligence. While the lack of supervision by the State is a factor, the negligence of James Maxwell was the proximate cause of Claimant's injury. Under these circumstances, Claimant should have sued James Maxwell and had the claim against Respondent placed on general continuance. This he did not do.

For the foregoing reasons, it is the order of the Court that Claimant's claim be and hereby is denied.

(No. 91-CC-2735—Claimant awarded \$4,150.)

ORBIT TRANSPORT, INC., Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed March 19, 1996.

Supplementary order and award filed May 13, 1996.

LOEWENSTEIN, HAGEN, OEHLERT & SMITH, P.C.
(GARY L. SMITH, of counsel), for Claimant.

JIM RYAN, Attorney General (JENNIFER JOHNSON, Assistant Attorney General, of counsel), for Respondent.

ATTORNEY FEES—*Administrative Procedure Act—liability for attorney's fees.* Pursuant to section 10—55(a) of the Administrative Procedure Act, any allegation made by an agency without reasonable cause and found to be untrue shall subject the agency making the allegation to the payment of the reasonable expenses, including attorney's fees, actually incurred in defending against that allegation by the party against whom the case was initiated.

SAME—*unfounded allegation that Claimant knowingly violated Hazardous Material Transportation Act—attorney's fees awarded.* A trucking company was awarded attorney's fees under the Administrative Procedure Act as a result of an unfounded charge by the Illinois Department of Transportation that the company knowingly violated the Hazardous Material Transportation Act by driving a truckload of hazardous materials with one of

the required placards missing, since there was nothing in the record providing a reasonable basis for IDOT's allegation that the company's driver had actual or constructive knowledge of the missing placard.

OPINION

EPSTEIN, J.

This is a claim against the Respondent's Department of Transportation ("IDOT") for litigation expenses pursuant to section 10—55(a) of the Illinois Administrative Procedures Act (the "APA"). (5 ILCS 100/10—55(a).) This Court has jurisdiction of this claim under section 8(i) of our Act. 705 ILCS 505/8.

The statutory fee-shifting provision that is invoked here by the Claimant is paragraph (a) of APA section 10—55, which applies, insofar as material here, to a "contested case initiated by any agency that does not proceed to Court for judicial review * * *." The standard of liability for litigation expenses in APA section 10—55(a) reads as follows:

"* * * any allegation made by the agency without reasonable cause and found to be untrue shall subject the agency making the allegations to the payment of the reasonable expenses, including attorney's fees, actually incurred in defending against that allegation by the party against whom the case was initiated. A claimant may not recover litigation expenses when the parties have executed a settlement agreement that, while not stipulating liability or violation, requires the claimant to take corrective action or pay a monetary sum."

Claimant Orbit Transport, Inc. ("Orbit") alleges that IDOT made an allegation of "knowing" conduct in an administrative enforcement complaint against it "without reasonable cause" and that the allegation was "found to be untrue" by the IDOT hearing officer. (IDOT did not seek administrative review of the hearing officer's decision, and no settlement agreement was involved in those proceedings.)

This fee claim is based on an IDOT administrative "notice of probable violation" against the Claimant, a

trucking company, that alleged a “knowing” violation of the Illinois Hazardous Material Transportation Act, 430 ILCS 30/1, *et seq.* (the “Act”). IDOT alleged that Claimant knowingly violated IDOT’s placard regulations for transporting hazardous materials on Illinois highways that were adopted under the Act by driving a truck containing hazardous commodities when one of the several required placards had (somehow) come off the truck while traveling our highways. IDOT sought to impose civil penalties on the Claimant for this alleged violation. Following a stipulation between Orbit and IDOT that the Orbit driver did not have “actual knowledge” of the missing placard, the case was tried to an IDOT administrative hearing officer on a theory of “constructive knowledge.” The hearing officer found the charges unproven.

The critical issue before us on this fee claim is whether IDOT’s allegation of a “knowing” violation of the placard rules was, or was not, made with “reasonable cause.” This is not quite as straightforward a question as it initially might seem, given the shifting meaning of the key word.

At the outset, it is clear that: (1) the Act allows civil penalties only against a “person * * * [who] *knowingly* committed an act that is a violation of this Act or any rule or regulation issued under this Act,” 403 ILCS 30/11, and that (2) IDOT accused Claimant of “knowingly” driving a truckload of hazardous materials with at least one of the required placards missing, and (3) the IDOT hearing officer found that IDOT had “failed to prove that the Respondent engaged in a knowing violation of the Act * * *.” *In the Matter of Orbit Transport, Inc.*, CP 89-1438 (October 30, 1990) (C.R. Draper), at 9.

The unusual twist in this case is that the meaning of “knowingly”—the allegedly false allegation—was itself a disputed issue in the administrative proceeding. The

Claimant took the position then, and adheres to it now, that IDOT's stipulation that Orbit's truck driver did not have "actual knowledge" that the placard was missing is terminally dispositive of the violation charge. On Claimant's view, the "knowingly" allegation meant, and under the Illinois statute and IDOT regulations had to mean, "actually knew" and that that was admitted to be false by IDOT's stipulation.

IDOT takes the view that "knowingly" was intended by IDOT to mean "constructively knew," and that it clearly and explicitly confirmed that by the pre-trial stipulation. Under that "constructive knowledge" interpretation, IDOT contends that its allegation of "knowingly" was reasonable under the circumstances, as well as a reasonable and properly aggressive attempt to obtain a stricter judicial interpretation of the statute that would be more favorable to enforcement of the Act. IDOT argues strenuously that it ought not be penalized—or at least not forced to pay Orbit's litigation expenses—because it sought to advocate a legally plausible, but unsuccessful, interpretation of the law.¹ Respondent urges that it acted reasonably at all stages of the administrative proceeding, and that APA section 55(a) requires a much more egregious behavior on the part of the agency before liability is imposed.

Both sides agree that the administrative action proceeded to trial on IDOT's legal theory that the Act and regulations should be construed only to require "constructive knowledge" that the placard was missing, i.e.,

¹ IDOT's constructive knowledge theory was based on at least one judicial decision so construing a parallel Federal statute. IDOT concedes, however, that that decision relied on a Federal administrative rule that defined the required "knowledge" element to include constructive ("should have known") knowledge, but that no parallel Illinois administrative rule has been adopted by IDOT (assuming *arguendo* that one could be, consistent with the language of the Act itself). In any event, the decision on which IDOT relied was not rendered by an Illinois court and was not a construction of the Illinois statute or of IDOT regulations; and no Illinois court has directly addressed this issue.

that the Orbit driver was somehow negligent or derelict of his duty in not determining that the placard had somehow come off the side of the truck during the first few hours of driving that day (after undisputedly leaving the dock with all signs in place). It appears that the IDOT hearing officer accepted this theory, or at least applied it in this case.

As Claimant emphasizes, the hearing officer applied the lower “constructive knowledge” standard of scienter to this case and found it unproven by IDOT, which Claimant contends is tantamount to a finding that the allegation was untrue.

Under the circumstances presented here, we do not find it necessary to reach several of these interesting issues raised by the parties, including the issues of whether or not the “untrue allegation” liability of APA section 10—55(a) includes allegations of law as well as allegations of fact, a point on which neither party has produced precedent or analysis.

Our following findings suffice for us to decide the dispositive issue under the section 10—55(a) standard of liability for “untrue allegations” in IDOT’s charge against this Claimant:

1. IDOT’s administrative complaint alleged “knowing” misconduct under an Illinois statute that, on its face, and as then construed to date, required actual knowledge in order to trigger a civil penalty; no regulatory gloss purported to alter that statutory standard of scienter; IDOT’s complaint sought a civil penalty against the Claimant and thus invoked the “knowingly” standard;

2. In order to plead its “constructive knowledge” theory of Claimant’s liability, IDOT’s complaint could have, but did not, allege “constructive knowledge” as a

fact conclusion and could have, but did not, allege facts known or thought to be known to the Claimant (i.e., to its driver or other personnel) that might support a conclusion of such constructive knowledge; this traditional pleading technique was not utilized by IDOT in this case;

3. From the time of the IDOT-Orbit stipulation, Claimant was not, and knew it was not, defending a charge of “actual knowledge” of the missing placard; but this case does not involve bad faith or intentional deception by IDOT;

4. The IDOT administrative hearing officer accepted the “constructive knowledge” application of the Act insofar as he applied that construction of the “knowing” element to the facts presented by IDOT at the administrative hearing, and found that IDOT failed to prove that Orbit (i.e., Orbit’s driver) had constructive knowledge of the missing placard;² in the absence of complicating factors, this finding is tantamount to a determination that the charge was untrue;

5. In this Court and in the administrative hearing below, IDOT failed to make any significant showing of a factual basis for its allegation of “constructive knowledge” of the missing placard. IDOT failed to show a reasonable basis for alleging that the Orbit driver, at any time during approximately two hours of highway driving after leaving his departure point with all required hazardous material placards duly affixed in compliance with the IDOT regulations, and affixed in a manner that met IDOT regulations, knew facts that should have indicated to him, or otherwise had reason to know, that one hazardous materials placard had come off of the truck.

² This Court need not and does not intimate any opinion as to the proper interpretation of the “knowledge” element of the Act and, correspondingly, of the IDOT hazardous material transportation regulations.

These findings require us to conclude that IDOT has breached the standard of section 10—55(a) by its factual allegation of “knowing” violation, under both an actual knowledge and a constructive knowledge interpretation. Either way, the allegation was not reasonably made in this case. Claimant is entitled to an award of litigation expenses under the statute.

However, in awarding litigation expenses under this statute, we are commanded to award only such expenses, including attorney’s fees, that were “actually incurred in defending against the [offending] allegation * * *.” Because of the shifting meaning of the critical allegation during the administrative proceedings, our award determination requires further comment.

Ordinarily, the defense of an allegation would seemingly require the allegation to have been made. Ordinarily, recoverable defense expenses based on an improper allegation would exclude defense efforts preceding the making of the allegation. However, under the peculiar procedural facts involved in this administrative action, where the legal and factual issues are so closely intertwined, where the first (“actual knowledge”) as well as the second (“constructive knowledge”) interpretative version of the unreasonable/false allegation was false, and where the administrative Respondent from the outset had to defend itself against baseless charges, we are not inclined to draw fine lines to demark the onset of the recoverable defense expenses, and we are not persuaded that Claimant’s knowledge of the intended meaning of the charge is a reason to reduce its recompense in these circumstances.

Accordingly, we will award Claimant his requested litigation expenses, consisting of attorney’s fees based on 19.5 hours of time in the administrative hearing process (at \$100 per hour), including pre-trial and pre-stipulation

time, as set forth in Claimant's bill of particulars. We will add to the award Claimant's counsel fees for the filing, briefing and hearing in this Court, as allowed by the statute and conceded to be appropriate by the Respondent.

The Court finds liability in favor of the Claimant. Claimant shall file a supplementary bill of particulars covering its litigation expenses in this court within 14 days after this order. Respondent may file objections within 14 days after its receipt thereof.

Judgment is entered for Claimant and against the Respondent. An award will follow.

SUPPLEMENTARY ORDER AND AWARD

EPSTEIN, J.

On March 19, 1996, the Court issued its opinion in this case granting this claim and entered an order directing supplemental submissions by the parties on the Claimant's attorney's fees in this court. Claimant filed its supplementary bill of particulars, requesting \$2,200 in attorney's fees (and no other litigation expenses) in addition to the \$1,950 in attorney's fees previously approved in the Court's opinion, and the Respondent has not interposed any objection.

Accordingly, pursuant to our opinion and order of March 19, 1996, it is hereby ordered: Claimant Orbit Transport, Inc. is awarded the sum of \$4,150 in full and complete satisfaction of all claims presented in this matter.

(No. 91-CC-3047—Claimant awarded \$73,352.15
subject to legislative appropriation.)

THOS. M. MADDEN CO., Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed January 23, 1996.

Order filed May 7, 1996.

MCNEELA & GRIFFIN, LTD. (PAUL A. BROCKSMITH,
of counsel), for Claimant.

JIM RYAN, Attorney General (SEBASTIAN DANZIGER,
Assistant Attorney General, of counsel), for Respondent.

CONTRACTS—*additional work performed under bridge construction contract—partial summary judgment granted for contractor.* Where the language contained in the parties' bridge construction contract provided that the Claimant contractor was obligated only to keep the construction area free of water and imposed a duty to protect private property that was contiguous to the work, the contractor's performance of additional dewatering work stemming from unknown subsurface conditions and resulting drainage problems on neighboring farmland, constituted "additional work" not required under the original contract, and the Claimant was entitled to additional compensation for the work which it performed at the direction of the Illinois Department of Transportation.

SAME—*damages awarded subject to legislative appropriation of funds—request for pre-judgment interest denied.* Although a contractor's request for pre-judgment interest was denied in its claim arising out of a bridge construction contract, the Court of Claims determined that the contractor had sustained actual damages in the amount of \$73,352.15 and, since it was unclear whether sufficient lapsed appropriations were available to pay the award, the Court recommended that the General Assembly appropriate said amount as compensation for the Claimant.

OPINION

EPSTEIN, J.

This is a contractor's claim against the Illinois Department of Transportation ("IDOT") for \$73,352.15 of alleged additional work ordered by IDOT on a 1989 construction contract. This case arises out of IDOT contract no. 80340 for the construction of a double box culvert and removal of the old two-span concrete bridge on Illinois Route 47 over Rob Roy Creek (the "creek") at U.S.

Route 30 in Kane County, Illinois (original contract price \$756,254.41).

The Claimant, Thos. J. Madden Co. (“Madden”), was hired by IDOT to build a new bridge over an old creek. The construction required diversion of the creek around the work site. To everyone’s great surprise, however, the creek diversion caused water to back up underground into the surrounding farm fields through drainage tiles located under those fields. Both IDOT and the contractor were blissfully unaware of the tiles until angry farmers complained that they could not plant their mysteriously wet fields. In response to the angry neighboring farmers’ complaints, IDOT ordered additional “dewatering” or diversion of the creek flow to reduce the water level to an altitude lower than that of the farmers’ fields (specifically, below elevation 651.0). The issue in this case is who pays the \$73,000+ cost of the “additional” diversion.

Procedural Posture of this Claim

Thos. M. Madden Co. (“Claimant” or “Madden”) filed a one count complaint, sounding in contract, claiming \$73,352.15 of additional compensation for the equipment, labor and miscellaneous costs of the “additional” dewatering work ordered by IDOT. The Respondent did not answer, which our rules permit, but filed its Departmental Report as allowed under our rules and later amended that report. The Claimant moved for summary judgment and the Respondent tardily moved to dismiss the claim for failure to state a cause of action, asserting that the contract failed to provide a basis for Claimant to recover.

Because both parties’ motions squarely contend that this claim is determinable on the face of the contract and the pleaded facts, and because both parties maintain that the relevant contract provisions are unambiguous and

only require interpretation and application to the undisputed facts, we directed, without objection, that the motions would be treated as cross-motions for summary judgment. (order of May 24, 1995.)

Contentions of the Parties

The Claimant, Madden, contends in essence that it had already met its dewatering and creek diversion duties under the contract terms when IDOT ordered the additional dewatering and that the added work was not required by any provision of the contract and is an “extra” that is separately compensable under the additional work provisions. Alternatively, Madden contends the unknown subsurface drainage problem was a changed condition that warrants additional compensation. Madden maintains that neither party in fact knew about the underground tiles in the area, that in any case it was IDOT’s responsibility to inform the contract bidders of any such condition, and that as a bidder and contractor it was unable to determine the existence of the tiles in off-site areas beforehand because drainage tiles are not of record and because contractors lack access to private offsite properties and therefore cannot make inspections or subsurface tests.

The Respondent disputes Madden’s claim in its entirety, contending that the additional dewatering was the contractor’s responsibility under the original contract terms and was within the scope of the contracted work. Respondent urges that the contractor is responsible for hidden underground conditions as well as avoidance of damage to private property under express contract terms, and was obliged by the contract to inspect the adjacent areas as well as the contract site. IDOT disputes the applicability of the “changed condition” clause. IDOT concedes that both parties were in fact unaware of the existence of the underground drain tiles, but claims that such tiles are

commonplace in certain areas of Illinois and contends that this is sufficient to put the contractor on notice.

The Contract Issues

The interpretation issues presented concern the *application* of contract language to an unexpected circumstance—the presence of underground drainage tiles in areas adjacent to the construction site—in this construction job. It is undisputed that neither IDOT nor Madden actually knew beforehand that the subsurface drain tiles were there. Neither side contends that the off-site water backup was caused by subsurface conditions on the site itself. Both parties concede that underground drain tiles are commonplace in some areas of the State, at least in farm areas with certain soil conditions. A question of some precedential significance, therefore, is presented by this issue of who bears the responsibility for unknown underground tiles in IDOT construction projects under IDOT's standard specifications for road and bridge construction ("Standard Specifications") which are part of most if not all IDOT construction contracts.

Of course, in construing this or any construction contract, it is axiomatic that the specific contract provisions directed at the particular project ordinarily take precedence, as a matter of interpretation, over the standard specifications, which are general provisions by their nature, to the extent that the two may be inconsistent or in conflict. However, it is also true that the law of interpretation of contracts mandates that provisions be reconciled insofar as possible and practicable, so that findings of conflicts are minimized. We are also mindful, especially in cases of complex government construction jobs, that the language of the contracts is almost always drafted by the State and is almost always written in terminology and style comports with the standard conditions.

The primary contract provisions on which the Claimant relies, are as follows:

“It shall be the responsibility of the Contractor to divert the stream flow during construction in order to keep the construction areas free of water. The method of water diversion shall be subject to the approval of the Engineer and the cost shall be included in the unit bid price * * *.” Culvert Details, specifications sheet no. 2 of 8 sheets.

“9. The undersigned further agrees that the Engineer may at any time during the progress of work covered by this contract order other work or materials incidental thereto and that all such work and materials as do not appear in the proposal or contract as a specific item accompanied by a unit price, and which are not included under the bid price for other items in the contract, shall be performed as extra work, and that he will accept full compensation therefor as provided in the specifications.” Madden Bid Proposal (on IDOT prescribed form).

The primary contract provisions on which the Respondent relies, all of which are provisions of the standard specifications, are as follows:

“502.01 *Description*. This work shall consist of the excavation required for the construction of all structures including all bailing, draining, pumping, sheeting; the construction of cofferdams, or temporary cribs if found necessary, and their subsequent removal; the disposal of all material obtained from such excavation; and backfilling to the level of the ground surface as it existed before any excavation was made by the Contractor.

* * *

102.05 *Examination of Plans, Specifications, Special provisions and Site of Work*. The prospective bidder shall, before submitting a bid, carefully examine the proposal form, plans, Specifications, Special Provisions and form of contract and bond. The bidder shall inspect in detail the site of the proposed work and be familiar with all the local conditions affecting the contract and the detailed requirements of construction. If his/her bid is accepted, the bidder will be responsible for all errors in the proposal resulting from his/her failure or neglect to comply with these instructions. The Department will, in no case, be responsible for any change in anticipated profits resulting from such failure or neglect.

When the plans or Special Provisions include information pertaining to subsurface exploration, borings, test pits and other preliminary investigation, such information represents only the best knowledge of the Department as to the location, character or quantity of the materials encountered and is only included for the convenience of the bidder. The Department assumes no responsibility whatever in respect to the sufficiency or accuracy of the information, and there is no guaranty, either expressed or implied, that the conditions indicated are representative of those existing throughout the work, or that unanticipated developments may not occur. All soil information upon

which the design was prepared is available for examination by all prospective bidders * * *.

* * *

107.19 *Protection and Restoration of Property.* If corporate or private property interferes with the work, the Contractor shall notify, in writing, the owners of such property, advising them of the nature of the interference and shall arrange to cooperate with them for the protection or disposition of such property. The Contractor shall furnish the Engineer with copies of such notifications and with copies of any agreements between the Contractor and the property owners concerning such protection or disposition.

The Contractor shall take all necessary precautions for the protection of corporate or private property, such as walls and foundations of buildings, vaults, underground structures of public utilities, underground drainage facilities, overhead structures of public utilities, trees, shrubbery, crops and fences contiguous to the work, of which the contract does not provide for removal. The Contractor shall protect and carefully preserve all official survey monuments * * * or other similar monuments * * *.

The Contractor shall be responsible for the damage or destruction of property of any character resulting from neglect, misconduct, or omission in his/her manner or method of execution or nonexecution of the work, or caused by defective work or the use of unsatisfactory materials, and such responsibility shall not be released until the work shall have been completed and accepted and the requirements of the Specifications complied with.

Whenever public or private property is so damaged or destroyed, the Contractor shall, at his/her own expense, restore such property to a condition equal to that existing before such damage or injury was done by repairing, rebuilding or replacing it as may be directed, or the Contractor shall otherwise make good such damage or destruction in an acceptable manner * * *.

* * *

The cost of all materials required and all labor necessary to comply with the above Provisions will not be paid for separately, but shall be considered as incidental to the contract.”

Discussion

This contract dispute presents two predicates of liability for our consideration. First is the Claimant’s argument that the additional dewatering work is a simple extra outside the scope of the original contract work (i.e., the dewatering specified in the contract), but within the scope of the “additional payment” provision of the contract (section 9 of the bid). Second is the contractor’s alternative theory that the unknown underground drain tiles constituted a changed condition within the scope of

article 104.04 of the standard provision. The parties' arguments all fall within these two theories.

The contractor's argument about its inability to ascertain the existence of the subsurface tiles—because they are not of record and are located on private property to which bidders and IDOT itself normally lack access for onsite inspection—relates to the changed condition theory of the case. Similarly, two of IDOT's contentions similarly relate to the changed condition analysis and its allocation of responsibility for undisclosed or unknown conditions affecting performance of the contract: the article 102.05 duty of the contractor to inspect the site and be informed about the local conditions; and the article 102.05 provision making the bidder responsible for errors in his bid.

Similarly, IDOT's arguments about the contractor's article 107.19 contract duty to avoid damage to property and its article 502.01 contract duty to drain and pump excavation sites both relate to the issue of whether the "additional" pumping ordered by IDOT was within the scope of the contracted work.

Having sorted out the issues, it becomes clear that the two issues presented are alternative theories factually as well as legally, and that the threshold question for our determination is the scope of work dispute. This is because the two legal theories have fundamentally different and inconsistent factual predicates.

The "extra" work theory is based on the factual/contractual premise that the additional disputed work, and thus the additional disputed compensation, was *not* the responsibility of the contractor under the original contract. In such event, the disputed work became a duty only because of a supplemental work order which in effect became an amendment to the contract that was previously

contemplated and authorized by the parties in their original contract. Where that is the case (i.e., if the additional work is found to be supplemental to the contract-specified work) then the dispute is resolved by straightforward application of the payment provisions to the additional work. In that circumstance, the “changed condition” analysis does not apply, because the “additional” work is an add-on that was not covered by the terms of the original contract at the time it was bid or let.

On the other hand, where the disputed work is within the scope of the original contract, the “changed condition” analysis is applicable—under the contractual changed conditions clause—as the primary contract term that governs unknown conditions and similar surprises. The changed condition analysis pertains to the conditions and circumstances that affect the performance of the contracted work. The court must emphasize, however, that contrary to the Respondent’s arguments in this case, it is well settled that there are *two* (not one) kinds of changed conditions, as we recently analyzed in our opinion in *Fru-Con Corp. v. State* (1996), no. 86-CC-0870, scheduled for publication in 49 Ill. Ct. Cl.

“The standard specifications contained articles which are commonly referred to as changed conditions provisions. Article 104.04 recognizes two classes of changed conditions. The first type of changed condition is a subsurface or latent physical condition which differs materially from that which is indicated by the contract documents. The second type of changed condition occurs where the contractor encounters a subsurface or latent physical condition which differs materially from that which is ordinarily encountered and generally recognized as inherent in the work of the character provided for in the contract documents.”

Changed conditions provisions typically allocate the risks of unknown conditions and are especially important when encountering, as here, unknown and possibly unknowable subsurface conditions and structures. The competing considerations are important both in individual cases, and in the general case, because the allocation of

risk for unknowns as between the contractor and the State affects the bid price of all projects let by the State:

“The starting point of the policy expressed in the changed conditions clause is the great risk, for bidders on construction projects, of adverse subsurface conditions: ‘no one can ever know with certainty what will be found during subsurface operations.’ *Kaiser Indus. Corp. v. United States*, *supra*, 340 F. 2d at 329, 169 Ct. Cl. at 323. Whenever dependable information on the subsurface is unavailable, bidders will make their own borings or, more likely, include in their bids a contingency element to cover the risk. Either alternative inflates the costs to the Government. The Government therefore often makes such borings and provides them for the use of the bidders, as part of a contract containing the standard changed conditions clause.

Bidders are thereby given information on which they may rely in making their bids, and are at the same time promised an equitable adjustment under the changed conditions clause, if subsurface conditions turn out to be materially different than those indicated * * *. The two elements work together; the presence of the changed conditions clause works to reassure bidders that they may confidently rely on the logs and need not include a contingency element in their bids. Reliance is affirmatively desired by the Government, for if bidders feel they cannot rely, they will revert to the practice of increasing their bids.

The purpose of the changed conditions clause is thus to take at least some of the gamble on subsurface conditions out of bidding. Bidders need not weigh the cost and ease of making their own borings against the risk of encountering an adverse subsurface, and they need not consider how large a contingency should be added to the bid to cover the risk. They will have no windfalls and no disasters. The Government benefits from more accurate bidding, without inflation for difficult subsurface work only when it is encountered and was not indicated * * *.” *Foster Const. C.A. & Williams Bros. Co. v. United States* (1970), 435 F.2d 873, 887 (U.S. Ct. Cl.).

We thus turn to the analysis of whether the “additional” dewatering work was, or was not, within the scope of the work of the original contract. Madden cites the dewatering language of the contract (quoted in full above), and emphasizes that it was required to, and did, submit a specific dewatering plan that the IDOT engineers approved, and claims that this satisfied its dewatering and creek diversion obligations under the original contract.

The Respondent contends, initially, that Madden was required “to divert the flow of the creek during construction to prevent water from invading the construction

area” and that this diversion was “intended * * * to be included in the contractor’s price.” Respondent emphasizes that the standard specification for excavation, article 502.01, makes it clear that Madden had the duty to perform all pumping and draining “necessary for the satisfactory completion of the project.” Secondly, the Respondent contends that the contractor’s duty to avoid damage to private property under article 107.19, which specifically includes “crops,” imposed a duty on Madden to effect sufficient diversion of the creek to avoid the situation that, in fact, occurred.

On the first component of the analysis, which turns on the contract specifications of the dewatering/diversion work, we find that Madden clearly had the duty to perform such dewatering of the site as was necessary “in order to keep the *construction areas* free of water” (emphasis added) and nothing more. Madden was *not* contractually bound to meet any other standard of performance and its contract obligation was *not* with reference to any area beyond the construction site itself.

Article 502.01, cited by the Respondent, is immaterial: it adds nothing to the analysis, as it is purely descriptive and sets forth no performance standards whatsoever. The fact that IDOT approved a specific dewatering plan that contemplated a particular flow diversion that was less than a 100% diversion of the creek is just icing on this particular cake. IDOT could have, but did not, specify a dewatering standard in its contract specifications—which could have been a water-flow standard or a percentage of the creek flow standard or, as IDOT finally chose in its supplemental work order, an elevation standard. But having elected not to impose a specific standard on this dewatering work, and having failed to show or even to contend that the contractor failed to meet the only standard

identifiable in this contract—the “dry construction site” standard—IDOT cannot now claim that the contract terms required more work than Madden performed with its own approval.

The second component of the scope of work analysis is a closer question. Article 107.19 of the standard specifications, imposing a duty to protect private property, including crops, that are “contiguous to the work,” which the Respondent cites to us, is plainly an imposition of an important duty on IDOT construction contractors and is clearly germane here. However, we are not persuaded that this provision is broad enough or strong enough to reach the facts presented in this case, for several reasons.

First, the private property that was here affected by the contractor’s performance was not merely contiguous to the work site, but extended considerable distances from the creek and bridge; this “contiguous” property language is simply not aimed at, and does not encompass, non-adjacent drainage problems as are involved in this case. Second, a reading of the entire article 107.09 indicates that its focus is on physical damage due to movement or alteration of structures and ground. Although the language is broad enough to encompass water damage caused by construction activities, the language is just not broad enough or specific enough to reach the kind of underground drainage problems that are not specific to the construction site. Indeed, if this language were construed to reach drainage problems on non-adjacent properties, it would impose a substantial and unpredictable risk on every contractor in every urbanized or suburbanized area of the State—where water delivery and drainage systems are always present—and in every rural project where a local water source is present. Imposition of such far-reaching risks without specific language mandating them is not

our province. We find no such language in any of IDOT's standard specifications to which we have been directed.

IDOT is free to alter its standard specifications to impose such extensive drainage responsibilities on its contractors, if it chooses, notwithstanding Madden's protest that it—like all bidders and contractors—lacks the knowledge and the access to obtain the knowledge of underground conditions on off-site properties from which it could calculate a reasonable risk-cost to include in its bid. That is a policy decision for IDOT to make. We find, however, that the current provision at issue here just does not reach or encompass the kind of drainage backup problem on adjacent and non-adjacent farmlands as occurred in this case. Accordingly, we again find that the "additional" dewatering work directed by IDOT was not work that was required under the terms of the original contract.

Conclusion

For these reasons, we find that the additional dewatering work directed by IDOT was a contract addition under the terms of the original contract, and that the Claimant is entitled to additional compensation for its additional performance.

Given this finding, and in accordance with our analysis above, there is no need to decide the alternative "changed condition" theory of liability. We observe, in passing, however, that the applicability of the changed condition doctrine is at least seemingly inapplicable to this claim, as neither party has even alleged that the subsurface drainage "condition" had any impact on the performance of the construction work, and in light of our rejection of the contention that the contractor was contractually responsible for these off-site property damages.

Although the Respondent has not disputed the damages claimed by the Claimant in its summary judgment motion, the focus of the parties' motions has been on the liability issue, and we are reluctant to foreclose the Respondent or to remit it to a petition for rehearing on the damages issue, particularly in light of the parties' failure to advise the Court as to the status of the appropriation from which this project was to be paid, and in light of the Claimant's request for pre-judgment interest which has not been addressed by either party. We are unable now to determine if we can enter judgment on this claim.

The Court grants partial summary judgment to the Claimant on the issue of liability.

The Respondent is directed to file a supplementary submission setting forth (a) any legal or factual objections to the Claimant's claim of \$73,352.15 in contract damages and (b) any legal objections to Claimant's request for pre-judgment interest, and (c) a report on the status of the appropriations relevant to this claim, within 28 days of the entry of this opinion and order.

The Claimant may file a reply to the Respondent's supplemental submission within 21 days after it is filed and served on Claimant's counsel.

The Court will enter an appropriate award or judgment upon receipt of the foregoing submissions.

ORDER

EPSTEIN, J.

On January 23, 1996, this Court issued an opinion in this case granting summary judgment as to liability on this claim. The Court did not make an award, but granted the Respondent time to submit any objections to Claimant's damages and pre-judgment interest claims, and directed

the Respondent to report on the status of the appropriations germane to this claim so that an appropriate award might be made if lapsed appropriations authority in fact would support an award. The State has not complied with our order, and has failed to file anything in response to our directive. The Claimant, understandably, has not filed further pleadings.

Because we are not advised as to the status of the appropriations and lapses, the Court cannot make an award on this claim. However, we will not allow this claim on a 1989 IDOT construction contract, having been adjudicated in favor of the Claimant, to go unpaid because of the State's unresponsiveness. Accordingly, on our own motion, it is hereby ordered:

1. Claimant's demand for pre-judgment interest is denied;
 2. Claimant's actual damages are found to be \$73,352.15; and
 3. No award is made solely due to the uncertainty of the existence of proper supporting lapsed appropriations to IDOT; and
 4. It is recommended that the General Assembly appropriate the sum of \$73,352.15 to Claimant, Thos. M. Madden Co. as full and complete compensation for its claim herein.
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(Nos. 91-CC-3559, 92-CC-0604 cons.—Claims denied.)

SARGENT & LUNDY and THE EARTH TECHNOLOGY CORP.,
Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 30, 1996.

MCDERMOTT, WILL, & EMERY (RICHARD SANDLER,
of counsel), for Claimants.

CLAUDIA LOVELETTE, for Respondent.

CONTRACTS—*presumption against creating rights in third-party beneficiary.* Under Illinois law, there is a strong presumption against creating rights in a third-party beneficiary, and to overcome this presumption, the intent to benefit a third party must affirmatively appear from the language of the instrument and the circumstances surrounding the parties at the time of its execution.

SAME—*construction of waste disposal facility—subcontractors were not third-party beneficiaries of contract between State and contractor—claims denied.* In consolidated claims by two subcontractors who provided services in connection with the construction of a radioactive waste disposal facility, the Claimants could not recover as third-party beneficiaries of a contract between the State and the project's general contractor, since that agreement specifically stated that it did not create third-party rights in any person who was not a signatory to the contract, and there was no basis on which such rights could be implied.

OPINION

FREDERICK, J.

This case comes before the Court on Respondent's motion to dismiss and for summary judgment. These two cases have been consolidated for trial purposes. The Court has carefully reviewed all of the pleadings in this case, and the Court has heard the oral arguments of counsel for all of the parties.

The Facts

Pursuant to the Low-Level Radioactive Waste Policy Act of 1980, 42 U.S.C., 2021b, *et seq.*, the Respondent, State of Illinois, was designated by the Central Midwest Interstate Low-Level Radioactive Waste Commission as

the entity responsible for providing a low-level radioactive waste disposal facility for the State of Illinois and the Commonwealth of Kentucky. Acting through the Illinois Department of Nuclear Safety (“IDNS”), the State of Illinois entered into a contract with Westinghouse Electric Corporation (“Westinghouse”) after Westinghouse submitted a proposal for the design, development, construction, and operation of a low-level radioactive waste disposal facility on land to be selected and acquired by IDNS for that purpose. The contract between the State of Illinois and Westinghouse was executed effective September 1, 1988.

In May of 1989, Westinghouse abandoned the project. Westinghouse failed to make substantial progress in any phase of the work. After Westinghouse’s abandonment of the project, the Respondent was forced to start the project over again with a new contractor. At the time Westinghouse stopped work on the project, the State had paid Westinghouse and its subcontractors, including Claimants, Sargent & Lundy and The Earth Technology Corporation, in excess of \$1.85 million for unusable work. Also, at the time Westinghouse stopped working, it had submitted invoices in excess of \$1.6 million which the Respondent has declined to pay. Westinghouse has never sued the State of Illinois to recover this \$1.6 million from the State of Illinois.

On February 6, 1989, Claimant, The Earth Technology Corporation, executed a subcontract with Westinghouse to provide environmental studies in connection with the low-level waste facility project. In early May of 1989, just weeks before Westinghouse abandoned the project, Claimant, Sargent & Lundy, signed a subcontract with Westinghouse to provide design and engineering services. The Respondent did not participate in the negotiations of these two subcontracts with Westinghouse. A

memorandum prepared by R.J. Suslick, Sargent & Lundy's project manager, indicated the State was purposely excluded from these negotiations. The memorandum stated, "IDNS had expressed an interest to Westinghouse to participate in their subcontract negotiations with Sargent & Lundy. Westinghouse denied this request."

The Claimants claim that they are owed money for work they did prior to Westinghouse's abandonment of the project. The Earth Technology Corporation chairman and CEO, Jack Schoustra, repeatedly threatened to sue Westinghouse but The Earth Technology Corporation never acted on those threats, and neither Claimant has sued Westinghouse to recover any monies.

In these consolidated actions, Sargent & Lundy and The Earth Technology Corporation, subcontractors to Westinghouse, seek to recover directly from the State for unpaid invoices that they submitted to Westinghouse. There is no dispute that neither Sargent & Lundy nor The Earth Technology Corporation had a contract with the State. Both Sargent & Lundy and The Earth Technology Corporation were subcontractors of Westinghouse and received payment from the State based on invoices they submitted to Westinghouse. The contract between Westinghouse and the State did specify that the State would pay Sargent & Lundy and The Earth Technology Corporation directly and not through Westinghouse. It is uncontradicted that this procedure was adopted for the benefit of the State in an effort to save the State the cost of Westinghouse's substantial mark-up.

The Respondent's contract with Westinghouse provides that Westinghouse was to be paid on a cost plus basis. The State's contract with Westinghouse provided:

"B. The services of all Subcontractors, other than of Sargent & Lundy and Earth Technology, in performance of the Work and the costs of all materials

used by (Westinghouse) or any Subcontractor, other than Sargent & Lundy and Earth Technology, in performance of the Work shall be invoiced to the Department at one hundred ten percent (110%) of the sum of actual cost plus (Westinghouse's) general and administration cost as hereinafter defined ('G&A'). (Westinghouse's) G&A rate for 1988 shall be forty-eight percent (48%) * * *.

- C. The services of, and the costs of all materials used by, Sargent & Lundy and Earth Technology shall be invoiced to the Department at face value. In addition, (Westinghouse) may invoice the Department for a fee of not more than ten percent (10%) of any amount invoiced to the Department for Sargent & Lundy and Earth Technology, and any additional direct costs actually incurred by (Westinghouse) in managing and administering the Sargent & Lundy and Earth Technology Subcontracts, using the rates specified in part (A) above."

The State refuses to pay Claimants.

The Law

Although Claimants have no privity of contract with the Respondent, the Claimants have failed to sue Westinghouse with whom they have privity of contract. Because there is no privity of contract with the State and because this Court will only imply a contract in very limited emergency situations, the Claimants seek to recover against the State of Illinois as third-party beneficiaries. This is not an emergency situation where this Court would consider finding an implied contract. There is no other basis upon which Claimants could recover on their claims before this Court at this time.

Therefore, the only way the Claimants could possibly recover is if Claimants are found to be third-party beneficiaries of the agreement between the State of Illinois and Westinghouse which was a public contract in existence prior to the two subcontracts. However, the public prime contract between the State of Illinois and Westinghouse specifically states, "Nothing in this agreement, however, shall create or be deemed to create any third-party beneficiary rights * * *." Under Illinois law, there is a strong presumption against creating rights in a

third-party beneficiary. (*Midwest Concrete Products Co. v. LaSalle National Bank* (1981), 94 Ill. App. 3d 394.) To overcome this presumption, the intent to benefit a third party must affirmatively appear from the language of the instrument and the circumstances surrounding the parties at the time of its execution. (*Bates & Rogers Construction Corp. v. Greeley & Hansen* (1985), 109 Ill. 2d 225.) The Court in *Bates & Rogers, supra*, stated:

“Only third parties who are direct beneficiaries have rights under a contract. It is not enough that the third party will reap incidental benefits from the contract. The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract. A third party is a direct beneficiary when the contracting parties have manifested an intent to confer a benefit upon the third party.

With respect to construction contracts this court has held that it is not enough that the parties to the contract know, expect or intend that others will benefit from the construction of the building in that they will be users of it. The contract must be undertaken for the plaintiff's direct benefit and the contract itself must affirmatively make this intention clear. *155 Harbor Drive Condominium Ass'n. v. Harbor Point, Inc.* (1991), 209 Ill. App. 3d 631; *Altevogt v. Brinkoetter* (1981), 85 Ill. 2d 44.”

Neither Sargent & Lundy nor The Earth Technology Corporation can satisfy this burden because the prime contract between IDNS and Westinghouse expressly bars third-party beneficiaries, and the direct payment provision in the IDNS contract was intended to benefit the State, by avoiding Westinghouse's substantial mark-up of charges that it paid. There is no benefit that Claimants can claim from the fact that payment was directly from the Respondent rather than from Westinghouse.

The contract between the State and Westinghouse expressly negates any intent to benefit either Sargent & Lundy or The Earth Technology Corporation. Paragraph 29.11 of the prime contract provides in express and unqualified terms that:

“Nothing in this Agreement, however, shall create or be deemed to create any third-party beneficiary rights in any Person not a signatory party to this Agreement.”

Claimants have provided no authority to the Court which indicates there can be a third-party beneficiary in the face of this specific language prohibiting third-party beneficiary status. Claimants want the Court to rewrite the prime contract to add the language “except for Sargent & Lundy and The Earth Technology Corporation” at the end of Paragraph 29.11 of the contract between the State of Illinois and Westinghouse. This we cannot do. This was a public contract in existence at the time the Claimants entered into their subcontracts. Neither Sargent & Lundy nor The Earth Technology Corporation is a signatory to the prime agreement. Neither Sargent & Lundy nor The Earth Technology Corporation has the right to sue the State as third-party beneficiaries of this prime agreement.

The Court does not accept Claimants’ argument that they are unable to sue Westinghouse for their work. Claimants may have a claim against Westinghouse but in the event they do not, it is solely the result of poor contract language in the face of the express bar to third-party beneficiary status in the Westinghouse-State prime public agreement. Anyone who deals with the State must understand that you do not work on a handshake or hope of third-party beneficiary status. *New Life Development Corp. v. State* (1992), 45 Ill. Ct. Cl. 65.

This Court must construe the prime contract as it exists and will not rewrite the contract. Absent any authority to the contrary, the bar to third-party beneficiary rights will be upheld.

Additionally, there is no manifest intention from which to imply such rights. As clearly shown in the provisions of the contract excusing the State from paying Westinghouse’s 48 percent G&A rate of these subcontractors’ invoices, the direct payment provision of the IDNS-Westinghouse contract was intended to benefit the State and

not Sargent & Lundy and The Earth Technology Corporation. By separately processing the payment of the invoices of these two subcontractors, the State could potentially save millions of dollars. The State, not Sargent & Lundy and The Earth Technology Corporation, was the intended beneficiary of this provision.

In *Ables v. United States* (1983), 2 Cl. Ct. 494, *aff'd* 732 F.2d 166 (Fed. Cir. 1984), the United States Court of Claims reviewed a similar factual situation and concluded that a provision requiring payment to a third party did not create third-party beneficiary rights in that third party.

The contract at issue in *Ables* was an arbitration agreement between the Air Force and a labor union, and the Claimant was an arbitrator who performed services for the parties. The Claimant sought recovery based upon a provision in the arbitration agreement that stated, "Each party shall pay the costs and expenses of the [arbitrator] they [sic] select. The parties shall share equally the costs and expenses of the neutral member." (2 Cl. Ct. at 500.) The Court ruled that the payment provision did not create a third-party beneficiary relationship, reasoning that the agreement contemplated that payment would emanate from separate agreements between the parties and the arbitrator.

As in the pay arrangement in *Ables*, the contract between the IDNS and Westinghouse also contemplated a separate agreement creating contract rights in the purported third-party beneficiary, Sargent & Lundy. If Sargent & Lundy and The Earth Technology Corporation signed agreements without the State's participation or approval that they now believe impair their right to payment from Westinghouse, this action did not create a third-party beneficiary relationship between Sargent &

Lundy and The Earth Technology Corporation and the State.

We find there are no material issues of fact. The two Claimants are not third-party beneficiaries of the contract between the State of Illinois and Westinghouse. The specific language of that prime contract prohibits third-party beneficiary status for Claimants. We cannot ignore or strike out paragraph 29.11. While the prime contract is an unusual contract, the prohibition of third-party benefits is clear. Based on the foregoing, the Respondent, State of Illinois, is entitled to a judgment as a matter of law and the Respondent's motion for summary judgment should be allowed. Because we are entering judgment in favor of Respondent, the Court need not consider the Respondent's motion to dismiss for failure of Claimants to exhaust remedies for failure to sue Westinghouse and failure to file a lien pursuant to the Public Funds Lien Act.

Therefore, it is ordered:

A. The Respondent's motion for summary judgment is granted against both Claimants.

B. Judgment is entered in favor of Respondent and against Claimants, Sargent & Lundy, an Illinois general partnership, and The Earth Technology Corporation, on Claimants' amended complaint.

C. That the claim of Claimant, Sargent & Lundy, an Illinois general partnership, is denied.

D. That the claim of Claimant, The Earth Technology Corporation, is denied.

(No. 92-CC-0388—Claim dismissed.)

DANA VAN DER HEYDEN, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed April 11, 1996.

MURPHY, HUPP, FOOTE, MIELKE AND KINNALLY
(TIMOTHY D. O'NEIL, of counsel), for Claimant.

JIM RYAN, Attorney General (BRIAN K. FARLEY, As-
sistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*pedestrian tripped over barricade at State park—claim dismissed.* In a claim by a pedestrian who was injured when he tripped over a barricade which had been installed near a State park entrance in order to deter trespassers, the Claimant failed to establish either that a dangerous condition existed or that the State knew the barricades, which consisted of concrete-filled drums and attached cable, represented a hazard to park users, where there had been no prior complaints of injury in the 12 years since the barricades had been installed, other barricade systems had been ineffective in preventing criminal trespass, and, prior to tripping over the barricade, the Claimant cut across established trails and tried to circumvent the entrance gate.

OPINION

RAUCCI, J.

This matter comes before us after hearing before the Commissioner. On Labor Day weekend, September 3, 1989, Claimant, Dana van Der Heyden (“Claimant”), his wife and several friends visited Starved Rock State Park (“Starved Rock”) near Ottawa, Illinois. After approximately an hour hiking on the trails, Claimant, his wife and one of his friends were trying to find their way back to their van in the parking lot near the Riverside entrance. When they spotted a vehicle entrance, they left the trail and cut across a wooded area to a grassy area near the vehicular entrance gate. At the side of the 32-foot double gate, the park administration had constructed barricades designed to keep motorcycles, four-wheel drive and utility vehicles and other off-road vehicles from gaining access to the park during the times when the gates, and

thus the park, are closed. The barricade, built in 1977, consists of 55-gallon drums sunk approximately two-thirds of the way into the ground, allowing about 12 inches of exposed barrel to remain above ground. The drums are filled with concrete and have a cable strung in continuous fashion from the edge of the steel gate to each drum at spaced intervals, with the cable terminating by being wrapped around the trunk of a tree and tied. The cable runs approximately 10 to 12 inches off the ground. In negotiating his way back to the parking lot, Claimant has testified that he tripped over the cable, causing him to fall on his elbow, striking the concrete "lid" in the middle drum of five situated on the east side of the entrance. Claimant sustained serious injury to his elbow, necessitating multiple surgeries and causing Claimant to lose several months of work. Claimant also alleges that his inability to "lock" his elbow has curtailed his career as an HVAC (heating, ventilating and air conditioning) installer, permanently depressed his earning power, and caused him embarrassing disfigurement, pain and suffering, and permanent injury.

The Court does not doubt that Claimant suffered an injury and that it might well have been caused by Claimant's striking a concrete-filled barrel at the park. The question is whether Claimant proved by a preponderance of the evidence that (a) a dangerous condition existed; (b) that the State knew of the condition; and, (c) that the condition caused the fall.

Because the State erected the barricade in question, the State was obviously aware of the existence of the barricade. The question becomes one of whether the barricade, as originally erected and as maintained, presented an unreasonably dangerous condition on July 3, 1989. The question of liability ultimately is whether the State

should have *reasonably foreseen* that pedestrians using the park would decide to cut across established trails, circumvent the gate and would not recognize that a cable had been strung between the barrels used as a barricade.

Claimant relies on the testimony of his expert, Francis W. Biehl, an engineer. Mr. Biehl testified that he relied upon guides used in setting up snowmobiling and skiing trails as well as general forest management guides. It was Mr. Biehl's opinion that the park could have utilized other methods and materials at the accident scene, giving as examples, four-foot upright timbers spaced apart, wooden posts with an upright steel cable hung between, and even using fallen trees or brush. However, the testimony of complex superintendent Jon Blume is compelling. Wooden gates and posts had been used prior to 1977. Motorcycle gangs and other people intent on violating the park's curfew and substance abuse laws, or on committing acts of vandalism would drive over the wooden gates smashing them, use chain saws on other wooden barricades, use winches to tear down post-and-upright barricades, rip trees from the ground, and set fire to brush or logs used as barricades. Only the concrete-filled barrels and cable have effectively deterred lawbreakers. Given the potential for crime and mischief and the State's duty to protect campers from criminal conduct and forest fires, the State's solution is neither draconian nor unreasonable. Mr. Biehl suggested that the cable should have been placed at a higher level, possibly four feet or eye level; however, he had earlier stated that he testified in Michigan concerning a snowmobile decapitation. Mr. Biehl further admitted that during the considerable time he spent observing the barricade and the surrounding area, he saw no one attempt to walk over the barrier as Claimant had attempted.

Finally, Blume and Vecchi, the site superintendent, testified that neither of them have any record or recollection of any report of injury or complaint regarding the barricaded area. Much was made by Claimant of the question of what color the cable was on the day of the injury. We accept the testimony of Claimant's expert that it was a "grayish steel color." Whether the State should have painted the cable a bright yellow or orange is speculation, and does not indicate that a different color cable would have prevented this accident.

Claimant hurt his credibility in at least two instances. First, Claimant's attempts to prove lost wages were lamentable. Claimant admitted that he made about \$19,000 to \$20,000 in 1988, but reported only \$12,703 for 1989, the year in which the injury occurred. This \$12,703, representing eight months wages, only extrapolates, at best, to about \$19,000, but Claimant stated that \$12,703 was that *high* because he had had a "good summer. I made a lot of money." Claimant further testified that during his rehabilitation, his father helped out with checks drawn on the company which employed Claimant, meaning the \$12,703 was further inflated from the amount Claimant actually would have earned in 1989 and 1990. The record indicates Claimant would have earned no more than \$16,000 to \$20,000 per year during the lost time, not \$31,000 to \$32,000 as Claimant testified. Further, Claimant testified that he had been "made a manager" in 1980, and ostensibly was not an installer, upon which he based his income testimony.

Second, Claimant testified that the cable was dangerous because it was totally obscured by leaves. This would have required leaves piled up to almost ten inches in depth. The difficulty with this reasoning is: (1) Labor Day weekend marks the end of summer and is usually

still extremely warm. The leaves would not have changed color by then, much less fall in the quantities needed to accumulate a layer ten inches deep; and, (2) Claimant's own pictures, taken either "shortly after the accident" or "within one week after the accident," which should, being deeper into the fall, show more fallen leaves, instead show insufficient leaves to cover the grass, much less canopy the cable in question.

The barricade and cable system installed by the State of Illinois at Starved Rock near the main vehicular entrance and in four other areas of the park, was designed to ameliorate a serious problem of criminal trespass to park grounds after curfew. Its design and execution are reasonable under such circumstances. More importantly, the State had no notice that its barricades represented a dangerous condition to park users. The lack of incidents in the 12 years after installation of the barricade but prior to the Claimant's injury, and in the nearly five years after the injury but prior to the trial, indicates to the contrary.

It is therefore ordered, adjudged and decreed that this claim be, and it is hereby, dismissed with prejudice and forever barred.

(No. 92-CC-0834—Claim denied.)

KRYSTAL JOHNSON, a minor, by her Mother and Next Friend,
DORIS JOHNSON, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed May 15, 1996.

WILLIAM E. REYNOLDS and PHILLIP J. BARTOLE-
MENTI, for Claimant.

KRALOVEC, MARQUARD, DOYLE & GIBBONS (MICHAEL R. CLARKE, of counsel), for Respondent.

NEGLIGENCE—*what Claimant must establish.* In order to maintain an action in negligence, the Claimant must establish by a preponderance of the evidence that the Respondent owed the Claimant a duty, that the duty to Claimant was breached by a negligent act or omission to act, and that the negligence proximately caused the compensable injury.

SAME—*child fell from swing at university day-care center—no evidence of defect—claim denied.* Although the minor Claimant testified that, prior to letting go of a swing and falling to the ground at a university day-care center, she had asked the teacher who was pushing the swing to stop, there was no evidence in the record to corroborate the child's testimony, and the Claimant's failure to produce proof in support of her allegation that the swing was defective or in disrepair, or to allege and prove the State's failure to properly supervise the child, required that the claim be denied.

OPINION

JANN, J.

This is a claim brought by Claimant Krystal Johnson, a minor against the State of Illinois, University of Illinois Children's Center, seeking damages for personal injury she sustained after falling from a swing at the University day-care center.

Trial was held in this matter on September 9, 1994. On the trial date Respondent made an oral motion to exclude the testimony of Claimant due to the fact that she was three and one-half years old at the time of the incident. The Commissioner denied the motion since Claimant was offering testimony as to her current physical condition relevant to the issue of damages, and further, that the court could weigh the credibility of the incident testimony. As there would not be any resulting prejudice to the Respondent's case, the Claimant was granted leave to testify.

The facts are as follows:

Doris Johnson, Claimant's mother, testified that on April 5, 1990 she was working for the University of Illinois

Nutritional Services and her daughter Krystal was enrolled in day-care at the University of Illinois Children's Center. At approximately 11:00 a.m., Doris Johnson was at work when she received a phone call that Krystal had fallen and that she appeared to be all right, so Doris finished her work shift and proceeded to pick Krystal up at approximately 2:45 p.m.

When Doris arrived, she observed Krystal lying on her cot. Krystal was crying and complained of pain in her shoulder and on her whole right side. Doris took Krystal to the hospital and x-rays determined that she had suffered a broken collarbone and her arm was put in a sling. Krystal wore the sling for four to six weeks and her play activities were restricted during that period. Krystal required assistance eating, dressing herself and going to the washroom. Krystal complained of throbbing pain, she took Motrin and soaked in a warm tub for relief. Doris testified that Krystal complained of pain as recently as the weekend prior to the trial date.

On cross-examination, Doris acknowledged that Krystal was again treated at the emergency room for an injury to her right collarbone when she fell out of bed in December, 1990. She further admitted that Krystal had not received any treatment for her shoulder from May 18, 1990 (approximately one month after the first incident) to December, 1990 when she was treated for her fall from bed.

The Claimant, Krystal Johnson, testified that at the time of the trial she was eight years old. She identified a picture of the Children's Center, related some of the activities she was involved in at the center and identified her teachers, David and Linda, in the courtroom.

She testified that on the day of the incident she was on the tire swing with two other girls. She said that she

had her feet in the hole and her hands on the chains. David, the teacher, was pushing the swing in a circular motion. She had been on the swing with David pushing on prior occasions.

She testified that in a “normal” voice she asked David to take her off the swing because she was getting sick and dizzy, but that David didn’t respond because he was talking to the other teacher.

She stated that she asked him to take her off a second time and then she fell off the swing. She said that she fell on her right side and that she was crying and experiencing a “throbbing” pain. She went to take her nap and stayed on the cot for the rest of the day until her mother came to pick her up.

Krystal related the trip to the hospital and receiving pain medication and a sling for her arm. She testified that she couldn’t play or feed herself and that she experienced pain during the period she had the sling on her arm. She testified that she still experiences pain when she plays in gym or lays on her right side or occasionally when she reaches for something. She testified that she did not have any recollection of falling out of bed.

On cross-examination, Krystal said that she was “coming up on three” years old at the time of the accident. She testified that she was at the Children’s Center for approximately a month prior to the incident and that she went on the tire swing approximately every other day. She stated that she did let go of the tire swing because she got “dizzy, and it got out of control,” and that the swing was not broken.

She testified that the injury doesn’t hurt her very often and she participates in gym class and plays on the football team at school.

The Claimant submitted medical bills in the amount of \$356.25. The Respondent called Linda Sims Johnson, child development supervisor at the Children's Center. She testified that in April of 1990, she was one of two supervisors for 15 children at the University of Illinois Children's Center. She stated that she was present, standing at a distance of about ten feet, and observed David pushing Krystal and two other children on the tire swing just prior to Krystal's accident on April 5, 1990. She testified that she was not talking to David at the time of the incident. She recalled David pushing the children back and forth in a safe manner. She observed the children holding the chains and that they appeared to be having fun. She did not hear any of the children call out to stop the swing. The witness did not see Krystal fall from the swing.

The Respondent also called David Martines. He testified that he is currently a classroom teacher in the Head Start School Program in Milwaukee, Wisconsin. At the time of trial he had been in the child development field for ten years and received his master's degree in early childhood development in 1990. David testified that the tire swing was fun for children and encouraged socialization. He stated that he would typically push the children by holding the chains in two spots and initiating a circular motion and that he frequently reminded the children to hold on to the chains.

At the time of Krystal's accident, Mr. Martines pushed the swing as he normally would, the children appeared to be having a good time and he did not hear Krystal ask to stop the swing. David testified that they were on the swing for approximately one minute when Krystal let go of the swing and he saw her fall backwards.

David estimated that while he was pushing the swing, the highest point the swing would have reached

was about three feet. He confirmed that he was not talking to Linda at the time of Krystal's fall but stated that he had turned his back slightly to clear his body from the motion of the swing. He concluded that there was nothing he could have done to prevent Krystal from falling.

Neither party submitted a brief in support of their claim.

The law is well established that in order to maintain an action in negligence the Claimant must establish by a preponderance of the evidence that the Respondent owed Claimant a duty, that the duty to Claimant was breached by a negligent act or omission to act, and that the negligence proximately caused the compensable injury. *O'Neill v. State* (1983), 46 Ill. Ct. Cl. 146, 148.

In this case it is clear that, as a minor child in the charge of the State-operated facility, Claimant was entitled to an expectation of reasonable care. The Claimant's complaint alleges that the State was negligent by allowing the swing to be in a defective condition and by failing to warn Claimant of the defect. However, at hearing the Claimant did not offer *any* evidence that the swing was defective or in disrepair.

The issue at the hearing primarily centered on an alleged failure by the caretakers or teachers to properly supervise the young students, although those allegations were never made in the complaint.

The facts are basically uncontested that there were two qualified teachers physically present and supervising a group of 15 children in the play lot of the Children's Center. One of the teachers was pushing Claimant and two other children in a reasonable and usual manner for about one minute when the four-year-old Claimant became

frightened or dizzy and let go of the chains, causing her to fall backwards from the swing.

Both the Claimant and the teacher established that the Claimant had been on the swing many times prior to the date of her fall without incident.

Clearly, the injury to the Claimant was an unfortunate incident, but there is not credible evidence to establish that the Respondent or its agents were in any way negligent by act or omission. The teachers acted reasonably and with due care for the Claimant. The Claimant, even at age eight, is a soft-spoken, mild-mannered young lady and it is clear that if she did, in fact, ask David to stop the swing, he did not hear her.

The Claimant in this case has failed to meet her burden of proof. This claim is hereby denied.

(No. 92-CC-1579—Claim denied; petition for rehearing denied.)

SAMUEL A. BARNES, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed August 25, 1995.

Order on petition for rehearing filed November 16, 1995.

CARL M. WALSH and LONNY BEN OGUS, for Claimant.

JIM RYAN, Attorney General (CARA L. SMITH and COLLEEN MCMCLOSKEY VON OHLEN, Assistant Attorneys General, of counsel), for Respondent.

EXHAUSTION OF REMEDIES—*all remedies must be exhausted prior to bringing action in Court of Claims.* Section 25 of the Court of Claims Act requires an exhaustion of all available remedies prior to bringing an action in the Court of Claims.

EMPLOYMENT—*discharge of employee arrested on drug charges did not violate personnel handbook—failure to exhaust remedies—claim denied.* Although the Claimant's failure to exhaust his remedies constituted a sufficient

basis for denying his claim alleging that he was wrongfully terminated from his carpentry job with the State after being arrested on drug charges, the evidence provided further grounds for upholding the termination, since the Claimant, an at-will employee, was properly found to have possessed drugs in such a manner as to bring adverse criticism to his employer, which was a stated ground for discharge in the personnel handbook, and the Claimant further failed to provide competent evidence of damages.

OPINION

FREDERICK, J.

Claimant, Samuel A. Barnes, brought this cause of action against the Respondent, State of Illinois, seeking mandamus and alleging breach of contract. Claimant alleged that on May 14, 1990, his employment was terminated by the Illinois Department of Mental Health and Developmental Disabilities (hereinafter "Department"), and that his termination was in violation of the Illinois Administrative Code and the appropriate employee handbook.

A hearing was conducted on this matter before Commissioner Hanley.

The Facts

The department made a decision to terminate the Claimant, Samuel Barnes. An employee's handbook entitled *The Policies and Regulations Affecting Personnel of the Department of Mental Health and Development Disabilities Employee Handbook* (hereinafter the "handbook") was given to Mr. Barnes at the time he was hired. Mr. Barnes certified that he received a copy of the handbook on April 1, 1987, and that he understood that compliance with these policies and regulations was a condition of employment and he further understood that violations of any department policy or regulation could result in disciplinary action up to and including the loss of his job. The introduction page of the handbook stated that Mr. Barnes was expected to know these policies and

abide by them, that certain types of behavior could lead to discharge, and that the handbook was in effect in May of 1990 and applied to Samuel Barnes.

Mr. Barnes violated provisions in the handbook which led to him being terminated on or about May 14, 1990. He violated the policy at page 14 which states that the employee may be discharged if the employee uses or possesses narcotics or alcohol or other habituating drugs while on duty or while off duty in such manner as to bring adverse criticism on the department.

Several people in addition to Mr. David Himpelmann, the labor relations administrator, contributed to the decision to fire Mr. Barnes, including the acting director of the department, William Murphy; chief of the employee and labor relations section in the central office, Phil Moore; Della Klevs, the facility director; Dale Awick, physical and support director at the Kiley Center; and Carl Baker, Claimant's immediate supervisor. These named persons had a copy of a newspaper article which indicated Claimant had been arrested for possession of, and dealing, cocaine. The department's internal security investigator provided them with a case number or an arrest warrant number and a copy of the warrant. There was no evidence of Mr. Barnes possessing or using alcohol or narcotics or other habituating drugs while on duty. They knew that he was not on duty when he was arrested and the newspaper article did not mention where Mr. Barnes worked.

Mr. Barnes was not referred by Mr. Himpelmann or anyone else in the department to the employee's assistance program coordinator for treatment. Paragraph 2 under "Procedure" (referring to the handbook) specifies that an employee who demonstrates a problem with alcohol, narcotics or other habituating drugs shall be referred

to the substance program coordinator. A letter was sent to Mr. Barnes asking him to appear for a predisciplinary meeting on May the 9th, which was held on May 11th at Claimant's request. At the meeting, no reason for Mr. Barnes' termination was stated except for his arrest.

David Himpelmann was the labor relations administrator of the Ann M. Kiley Center and had been for roughly 13 years. Mr. Himpelmann identified the form entitled *Recommendation for Suspension/Discharge of an Employee*, which he completed, recommending discipline. He corrected paragraph 2 by noting that suspension pending judicial verdict does not apply to an exempt employee. There was no mention of adverse criticism of the department.

Mr. Carl Baker, plant maintenance engineer, had served in that position for 10 years and was Mr. Barnes' supervisor on May 1, 1990. Mr. Baker identified and acknowledged that he had signed the recommendation for discharge form where it says, "Home Manager/Immediate Supervisor." He was at the May 11, 1990, meeting with Carl Walsh, Claimant's attorney. The meeting was conducted by David Himpelmann.

Mr. Baker identified a memo to him from Mr. Summerford giving him the status of Mr. Barnes on May 4, 1990. The memo does not contain anything about adverse criticism to the department concerning Mr. Barnes' arrest.

Upon cross-examination, Mr. Baker testified that Mr. Summerford was in the habit of sending him memorandums concerning his employees in the department. The memo states that a copy of the warrant is attached and that he actually saw the warrant. Mr. Summerford called Lake County Court and found out the status of his employee and passed it on.

Claimant testified that he started working for the State of Illinois in the department in Waukegan from May of 1979 until he was terminated on May 14, 1990.

Mr. Barnes identified his signature on the certification page for receiving the handbook. He was given the handbook at the time he was asked to sign the certification page and he read through the handbook when he received it. The handbook gave him conditions of his employment. It said things he was expected to do and not to do and told him when he might be fired. It had a list of various things which were against policy that allowed for disciplinary action leading to dismissal. The handbook goes through a whole list of various conduct which could lead to discharge. He did not start looking for any other jobs because he could meet those guidelines and do a good job. The handbook meant that he had an agreement with the State for employment.

Mr. Barnes testified that in May, 1990, he was making approximately \$20.25 per hour. He now makes \$22.60 per hour as a union carpenter. After May 11, 1990, he was ready, willing and able to go back to work.

Carl Baker testified for the Respondent that he had been employed by the Department of Mental Health for 30 and a half years. His current title is plant maintenance engineer 2 and he started at the Kiley Center, a 55-building, 430-bed retardation center in Waukegan, in 1974. The facility serves mentally retarded patients and some dual-diagnosis mentally retarded and mentally ill patients. There are 48 residential homes, each consisting of four bedrooms, living room, dining room, kitchen, two bathrooms and a nurse's station. Medical nurses are in these facilities and medication is kept in each home and in the pharmacy and administration building.

Mr. Baker supervises carpenters and they are allowed to go in residential homes to perform their duties. He knew Claimant when Claimant first started working there in 1979 and when Claimant came back in 1987. From 1987 until Claimant's discharge in 1990, he was Claimant's direct immediate supervisor. He was aware of Claimant's job performance and observed him daily. In his opinion, Claimant did not stay within the guidelines of the employee handbook. Mr. Barnes was referred to the employee assistance program coordinator for counseling for alcoholism two or three months before May.

Mr. Baker identified a three-page Respondent's group exhibit number 1. The first page was a memorandum dated October 13, 1989, from Mr. Baker to Sam Barnes. It was Mr. Baker's practice to keep this memorandum in the regular course of business. He had a problem with Claimant's absenteeism and put him on the proof of status for three months from the date of the memorandum. He continued the proof of status for another three months.

The third page of Respondent's group exhibit number 1 is a written reprimand for misuse of time. The memorandum serves as documentation of the days when Claimant had an unauthorized absence or was tardy. Unauthorized absence is when someone is absent and has not been authorized and they do not have the time on the books to take off. "XA" is unreported absence or is when someone is off and they don't call in. The memo shows that Claimant had two unauthorized absences, two unreported absences, and 22 instances of tardiness.

Mr. Baker identified Respondent's exhibit number 2 as a May 5, 1990, written reprimand to Barnes for pushing a co-worker in a confrontation on April 28, 1989.

Mr. Baker identified Respondent's exhibit number 3 as an October 13, 1989, memo he had written to Claimant. Two other tradesmen had told him that Claimant had thrown a drill against the wall and it no longer worked. Claimant violated a rule against destruction of State property.

Mr. Baker identified Respondent's exhibit number 4 as a written reprimand for Mr. Barnes for leaving the grounds for 21 minutes without punching out on October 13, 1989.

Mr. Baker was aware that Claimant was discharged from the Department of Mental Health for possession and dealing of narcotics. He found out that Mr. Barnes was arrested for the possession and dealing of narcotics from Mr. Summerford.

Upon cross-examination, Mr. Baker testified that none of the prior disciplinary actions listed on Respondent's exhibit numbers 1, 2, 3 and 4 were listed as a cause for the discharge. He was at the meeting on May 4, 1990, and at that meeting none of those documents were shown to Claimant nor were they discussed.

Samuel Barnes, the Claimant, identified Respondent's exhibit number 5, a CMS-2 form, with his signature on the bottom. In box number 7 of the form, under the transaction on line 1, it says "exempt appointment." He understood an exempt appointment to be one in which he didn't have to take an exam to get the job.

Mr. Barnes testified that on May 1, 1990, he was arrested for the possession of a controlled substance and unlawful delivery of that substance. The substance was cocaine and he pled guilty to that offense. His sentence was four years and he served 18 months of that sentence. It was a felony conviction.

Mr. Barnes is familiar with the employee policy that you are not to abuse alcohol or any narcotics while on duty and you are not to bring any adverse criticism to the department. His arrest was publicized in one newspaper which did not mention where he worked.

The employee handbook governed the conditions of his employment and he understood that as long as he stayed within those conditions, he would remain employed. He did not go back to work the day after his arrest which was May 2, 1990. Claimant was not sure if his sister called in and said he was sick. He was in the Lake County jail until 10 o'clock in the morning and he was ill with emotional distress.

Mr. Barnes was familiar with the policy regarding damage to State property and the wall he threw the drill at was a wooden wall. Claimant testified that the drill did not get damaged so that it would not work any longer because he repaired the drill himself.

Mr. Barnes did not grieve the discharge with the department. He did not appeal his grievance to the Department of Central Management Services. Mr. Barnes testified that based on his knowledge of the handbook he believed that, because he was not a union carpenter, he did not have the opportunity to pursue a grievance.

Mr. Barnes did not talk to David Himpelmann or anybody to clarify exactly what his position as an exempt status was with the center because he felt he understood his rights and responsibilities as contained in the handbook.

Upon cross-examination, Mr. Barnes testified that he has seen only one newspaper report concerning his arrest. It did not mention anything about his working for the State of Illinois or any department thereof. He acknowledged receiving a letter dated May 4, 1990, notifying him

of a predisciplinary meeting. He believed he might be terminated. On May 11, 1990, he went to the meeting with his attorney, Mr. Walsh.

Mr. Barnes testified that at the predisciplinary meeting, no one said he did anything wrong. The facility director was Della Klevs. The letter dated May 4, 1990, from Della Klevs to him said she was giving him this opportunity to respond to the charges at the predisciplinary meeting.

Dave Himpelmann testified that he had been employed by the department a little over 17 years. A labor relations administrator, a position he has held for approximately 13 to 15 years, served as the liaison between management supervisory staff and employees and their representatives, primarily trying to resolve problems that occur based on conditions of employment.

Mr. Himpelmann testified that he is familiar with the different categories of employees at the facility and is basically familiar with the definition of an exempt employee. An exempt employee is one who serves at the will of the department. They serve in an exempt status which means that they can be terminated for almost any reason.

The event which led to the discharge of Barnes was his arrest on May 1, 1990. His act warranted discharge because the department believed, in general and through discussion with the central office and relations chief, it was the type of an arrest that can bring adverse criticism on the department and that it raises reasonable doubts about that person's ability of continued employment. The center is responsible, and has to answer, to parents of all of the recipients of service at the facility. It needs to comply with standards of accreditation by the accreditation counsel for the Department of Mental Disabilities, the

Department of Public Health, Department of Public Aid, and also the Health Care Finance Administration of the Federal government.

He identified Respondent's exhibit number 6 as a copy of the May 4, 1990, letter from Della Klevs to Samuel Barnes setting up the predisciplinary meeting. He signed Della Klevs' name with her authority and he later crossed out "suspension pending judicial verdict," and entered the notation, "Error: Note discussion does not apply to an exempt employee," then initialed it. Barnes did not have the option of a suspension pending judicial verdict. He gave Barnes the option of going on a general leave of absence until the matter of his arrest was resolved.

Claimant did not file a grievance.

Mr. Himpelmann identified a May 16, 1990, letter from Claimant's attorney indicating he received it. He did not do anything after receiving the letter.

Mr. Barnes was discharged because the department feared that adverse criticism would follow. The May 4, 1990, letter states that his arrest raises reasonable doubt concerning his suitability for continued State employment. The letter does not mention adverse criticism because of his arrest. The handbook requires that an employee is entitled to know the reason for any disciplinary action against him. Mr. Barnes never was sent a corrected version of the May 4, 1990, letter. On redirect examination, Mr. Himpelmann stated that he told Barnes on May 7, 1990, that the "suspension pending judicial verdict" did not apply to him as an exempt employee.

The Law

Claimant argues that the employee handbook created an employment contract between Claimant and Respondent. (*Duldulao v. St. Mary of Nazareth* (1987), 115

Ill. 2d 482, 505 N.E.2d 314.) Mr. Barnes signed a certification of receipt for the handbook. The certification states that, “compliance with these policies and regulations is a condition of employment” and that “violations of any Department policy or regulations could result in disciplinary action up to and including loss of job.”

Mr. Barnes argues he could only be discharged in compliance with the handbook. The handbook contains a section, under part IV, personal conduct, in relation to its policy towards employees possessing or using narcotics or other habituating drugs. The policy statement is as follows:

“Department employees who possess or use alcohol, narcotics or other habituating drugs while on duty, or those employees while off-duty who use alcohol, use or possess narcotics or other habituating drugs in such a manner as to bring adverse criticism on the Department, may be discharged.”

It also contains “procedures” that shall be followed in relation to employees who demonstrate a problem with narcotics or other habituating drugs.

The parties agree that Mr. Barnes did not use or possess narcotics while on duty. Therefore, Claimant argues that Respondent discharged him because he violated the policy against the off-duty use or possession of narcotics or other habituating drugs in such a manner as to bring adverse criticism on the department. The only newspaper article about the arrest does not mention where Mr. Barnes is employed. The Respondent has not produced any evidence of adverse criticism of Barnes’ off-duty use or possession of cocaine. Respondent’s agents testified that they feared such criticism. The handbook does not specify that an employee could be discharged for the fear of adverse criticism.

Although the Respondent discharged Barnes because of his arrest, at that time he was presumed innocent. *Coffin v. United States* (1885), 156 U.S. 432, 39 L.

Ed. 481, 15 S. Ct. 394; *People v. Layhew* (1990), 139 Ill. 2d 476, 564 N.E.2d 1232.

The other instances of alleged misconduct by Claimant are not relevant to the discharge because they were never mentioned to Claimant prior to the trial in this cause. Claimant argues the Respondent is asking that the contract be rewritten to provide that a “fear” of adverse criticism is sufficient to discharge an employee after his arrest for use or possession of cocaine. In support of the proposition that this contract only allows discharge when there is actual criticism, Claimant cites *Mitchell v. Jewel Food Stores* (1990), 142 Ill. 2d 152, 568 N.E.2d 827.

There was no stated cause for the discharge of Claimant. The cause of discharge changed since the May 11, 1990, meeting from suitability of continued employment to fear of criticism.

Claimant was an exempt employee. Exempt employees serve at the will of Respondent, are not certified, and can be terminated for almost any reason. A certified employee is covered by jurisdiction B of the Personnel Code.

Mr. Himpelmann stated that Claimant Barnes’ arrest for possession with intent to deliver cocaine warranted discharge because that type of arrest can bring adverse criticism upon the Respondent and raised doubts about his suitability for continued State employment.

Claimant was an employee at will. Exempt employees are defined in the handbook as, “any person appointed to a position not covered under Jurisdiction B of the State Personnel Code.”

Respondent argues that Claimant was an employee at will. Respondent also argues that Claimant failed to exhaust his remedies under the handbook he alleges is a contract. Claimant failed to pursue the grievance procedures.

The grievance procedures referred to by Respondent indicate that an employee: should first attempt to resolve the concern with the immediate supervisor; then refer it to the facility director, or her designee; then a designee of the director of the department; and finally, an appeal to the director of Central Management Services, and, in certain cases, an impartial arbitrator. Mr. Himpelmann testified that Barnes did not file a grievance regarding the discharge. Section 25 of the Court of Claims Act requires an exhaustion of all available remedies prior to bringing an action in the Court of Claims. *Boe v. State* (1984), 37 Ill. Ct. Cl. 72.

Claimant has failed in his burden of establishing that he exhausted his remedies.

Further, Claimant has not presented evidence entitling him to damages. The only reference in the record to damages is Claimant's testimony that he was making \$20.25 per hour in May, 1990. There is no evidence of how long he was unemployed or the circumstances affecting his unemployment, other than his own testimony that he was incarcerated for 18 months.

The Claimant does not reference any provision of the statutes or regulations, other than those included in the handbook, to support his contention that his discharge was improper. Therefore, the primary question is whether the handbook created terms of employment. If not, the parties would be subject to terms determined by law. Neither party cites any Court of Claims cases to support or refute the theory that the handbook created a contract between Claimant and Respondent. Claimant relies on *Duldulao* for the proposition that the handbook created a contract. Mr. Himpelmann did testify that the handbook applied to Claimant. The handbook was delivered to Claimant and he signed a certification.

Barnes does not dispute that he was an exempt employee not covered by the State Personnel Code.

The handbook does define “exempt employee” but does not indicate that exempt employees are not covered by the handbook. Respondent apparently argues that Claimant is exempt from the handbook that that is not expressed. We believe the handbook set terms of employment.

The Respondent had the right to discharge Claimant Barnes for a violation of its policy against use or possession of narcotics and other habituating drugs in two circumstances. Claimant could be discharged for:

(a) possession or use of narcotics or other habituating drugs *while on duty*; or

(b) while off-duty, he used or possessed narcotics or other habituating drugs, *in such a manner* as to bring adverse criticism on the Respondent.

The question is whether the Respondent had to wait for actual criticism to be brought forth, or could discharge Claimant based upon the belief that the possession or use was “*in such a manner*” as to potentially bring adverse criticism in the future. Although there is no evidence presented on the intent of the language in question, it is apparent from the plain and ordinary meaning of the words that the Respondent was trying to avoid the harm caused by adverse criticism. This is understandable given the nature of the department’s function, namely, providing residences, medication and treatment for disabled individuals.

To adopt Claimant’s construction, the Court would have to rule that Respondent could take no action prior to adverse criticism being leveled at the department. Taking this argument to the extreme would mean that the

Respondent could not discharge Claimant even after Claimant was convicted and sentenced, unless it was the recipient of adverse criticism. This construction does not allow for the avoidance of harm. The better construction is that the Respondent could make the decision to discharge if Claimant's use or possession of narcotics was "in such a manner" as to bring adverse criticism. A felony arrest would be such a manner. The Court accepts the judgment of Claimant's supervisors in deciding that Claimant's use or possession of cocaine, and his arrest for "intent to deliver," was *in such a manner* as to bring adverse criticism.

It is also Claimant's burden to demonstrate loss. (*Grant v. State of Illinois* (1993), Ill. Ct. Cl. 24.) Claimant has presented virtually no evidence concerning damages except his hourly rate at time of discharge, the fact he was incarcerated for 18 months, and that his current hourly rate at his new employment exceeds the rate at the time of discharge. We cannot make a finding of damages on this evidence.

We therefore find that Respondent properly terminated Claimant, an at-will employee, pursuant to the terms of the handbook. Claimant further failed to exhaust his administrative remedies and failed to present competent evidence of damages. Claimant, as an at-will employee, had little job protection. He seeks protection from the terms of the handbook. However, Claimant failed completely to take advantage of the grievance procedures within the handbook. Claimant cannot have it both ways. His failure to exhaust remedies standing alone is a sufficient ground upon which to deny this claim. *Neylon v. State* (1986), 39 Ill. Ct. Cl. 63.

For the foregoing reasons, it is the order of this Court that Claimant's claims be and hereby are denied.

ORDER

FREDERICK, J.

This cause comes before the Court on Claimant's petition for rehearing, and the Court having reviewed the court file, all of the pleadings, the Court's opinion, and the Court being fully advised in the premises, wherefore, the Court finds:

1. That the Court's opinion of August 25, 1995, cites three separate grounds for denial of Claimant's claim.
2. That Claimant raises nothing before the Court which would lead the Court to change or modify its prior opinion.
3. That upon review, the Court believes that its prior opinion was the proper decision.

Therefore, it is ordered that the Claimant's petition for rehearing is denied.

(No. 92-CC-2057—Claimants awarded \$25,000.)

AARON T. OLIN, a minor, and DAVID A. and KIMBERLY OLIN, his parents, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed May 13, 1993.

Order filed April 5, 1996.

BARASH, STOERZBACH & HENSON (RICHARD A. DAHL, of counsel), for Claimants.

JIM RYAN, Attorney General (ALIX ARMSTEAD, Assistant Attorney General, of counsel), for Respondent.

STATUTES—*Recreational Use of Land and Waters Act—premises liability.* Under the Recreational Use of Land and Waters Act, an owner of land owes no duty of care to keep the premises safe for entry or use by any person for recreational or conservation purposes; however, the Act does not limit liability which otherwise exists for willful and wanton failure to guard or warn against a dangerous condition, use, structure, or activity.

TORTS—*willful and wanton conduct—children*. Willful and wanton conduct can only be found once there is a finding of a duty owed, and whether such a duty exists toward a child with respect to playground equipment depends upon whether the child could appreciate the risk involved in the particular playground apparatus.

SAME—*child injured in fall from hand trolley device—question of fact existed on issue of willful and wanton conduct—State’s motion to dismiss denied*. The State’s motion to dismiss was denied, and the Claimants, a minor child and his parents, were granted leave to file their amended complaint in their claim based on injuries received by the child in a fall from a hand trolley device, since a question of fact existed as to whether the State’s conduct with respect to the unusual device was willful and wanton.

STIPULATIONS—*child injured at State park—award entered pursuant to parties’ stipulated settlement*. Pursuant to the parties’ joint stipulation of dismissal and settlement, an award was entered in a claim filed by parents and their minor child for injuries sustained by the child in a fall from a trolley device at a State park, and the claim was dismissed with prejudice.

ORDER

SOMMER, C.J.

This cause comes to be heard on the Respondent’s first motion to dismiss, the motion of the Claimant to file a first amended complaint, and the Respondent’s second motion to dismiss directed toward the first amended complaint, the parties having argued this matter in oral argument before the Court on February 18, 1993, and this Court being fully advised, finds:

1. That the injured party, an 11-year-old child, fell from a hand trolley device erected in Argyle Lake State Park by State employees.
2. That the statute addressing the situation is the *Recreational Use of Land and Waters Act*, 745 ILCS section 65/1, formerly Ill. Rev. Stat. ch. 70, section 331.
3. That section 65/3 of said Act states “Except as specifically recognized or provided in section 6 of this Act, an owner of land owes no duty of

care to keep the premises safe for entry or use by any person for recreational or conservation purposes * * *.”

4. That section 65/6 of said Act states in part as follows: “Nothing in this Act limits in any way any liability which otherwise exists:
 - (a) For willful and wanton failure to guard or warn against a dangerous condition, use, structure, or activity.”
5. That in the case of *Cozzi v. North Palos Elementary School District* (1992), 597 N.E.2d 685, the First District Appellate Court held that willful and wanton conduct can only be established once there is a finding of a duty.
6. That in *Cozzi*, the Court determined that whether there was a duty depended upon whether a child could appreciate the risk involved in the particular playground apparatus.
7. That if there is a finding of a duty owed the injured party, there must be an additional finding that the conduct of the State, through its agents, was willful and wanton.
8. That the trolley device was unique and not a normal piece of playground equipment.
9. That whether an 11-year-old child could appreciate the risk is a question of fact concerning the device.
10. That whether the State’s conduct was willful and wanton is a question not necessarily of intentional harm but can be one of reckless disregard of substantial danger or consequences; and such, though a difficult standard to meet, is a question of fact.

11. That the Claimant has stated such facts concerning prior injuries, that it may be possible for the Claimant to prove willful and wanton conduct.

It is therefore, ordered that the Respondent's motions to dismiss are denied and the Claimant's motion for leave to file the amended complaint is granted; and the amended complaint is deemed filed.

ORDER

SOMMER, C.J.

This cause coming to be heard on the parties joint stipulation of dismissal and settlement therein, due notice having been given, and this Court being fully advised, finds that the parties having agreed to settle this claim for personal injuries for \$25,000, and that this Court desiring to encourage the amicable settlement of disputes, does hereby order that the proposed joint stipulation of dismissal is approved; and that the Claimants are awarded \$25,000 in full and complete satisfaction of this claim; and that this claim is dismissed with prejudice.

(No. 93-CC-0083—Claim dismissed.)

ROSCOE TAYLOR, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed October 27, 1995.

NELSON I. DUNITZ, for Claimant.

JIM RYAN, Attorney General (ROBERT T. LANE, Assistant Attorney General, of counsel), for Respondent.

JURISDICTION—*jurisdiction of Court of Claims.* Section 8(a) of the Court of Claims Act provides that the Court has exclusive jurisdiction to hear

and determine all claims against the State founded upon any law of the State of Illinois, or upon any regulation thereunder by an executive or administrative officer or agency, other than claims arising under the Workers' Compensation Act or the Workers' Occupational Diseases Act, or claims for expenses in civil litigation.

SAME—claim for attorney's fees due to State's false pleading in circuit court action dismissed for lack of jurisdiction. In a claim for attorney's fees brought pursuant to Supreme Court Rule 137, despite the Claimant's allegations that the State wrongfully withheld his tax refunds for six years and filed multiple false pleadings in a nonexistent proceeding regarding his purported liability for child support, the Court of Claims was without subject matter jurisdiction to entertain the claim for fees, since the legislative history and language of section 8(a) of the Court of Claims Act indicated that claims for such civil litigation expenses were outside the Court's jurisdiction.

OPINION

EPSTEIN, J.

This is a claim for attorney's fees for a false pleading by a State agency in the circuit court, which the Claimant has brought pursuant to Illinois Supreme Court Rule 137. This claim is before us on the Respondent's motion to dismiss which asserts three grounds: (1) failure to exhaust remedies (as required by section 25 of the Court of Claims Act (705 ILCS 505/25), and our rules); (2) failure to state a cause of action; and (3) lack of subject matter jurisdiction over this claim.

The allegations of the complaint are egregious. Claimant alleges that his tax refunds were withheld for six years and remitted to the Respondent's Department of Public Aid ("IDPA") based solely upon a false "affidavit of service of order for withholding" and a false "notice of delinquency" that were filed in the circuit court by IDPA personnel in a mistaken effort to collect child support from him when he was not liable for any child support obligations. Claimant alleges that these documents were false both in asserting the Claimant's obligation and in asserting that an underlying adjudication against him had been made, when in fact there was not even a case pending

against the Claimant. Claimant alleges, in effect, that the IDPA filed multiple false pleadings in the circuit court in a nonexistent proceeding.

After filing his claim in this Court, which originally sought return of the wrongfully withheld money as well as attorney's fees, Claimant successfully recovered his tax refunds from the Respondent. Claimant now seeks recovery here under Rule 137 for \$17,880 of attorney's fees allegedly incurred in obtaining the order for the return of his tax refunds, as well as his costs and punitive damages.

As offensive as the allegations in this case are, this Court is constrained to agree with the Respondent's third point—which ought to be the first point raised—that this court lacks jurisdiction over this Rule 137 claim over an allegedly false pleading in another proceeding in another court, as we have previously held. (*Oder v. Board of Trustees of University of Illinois* (1991), 45 Ill. Ct. Cl. 152.) In addition to *Oder*, which was based on that Claimant's inability to locate a statutory jurisdictional basis, there are several reasons for our conclusion.

First, as Respondent correctly points out, the general jurisdictional grant in our Act expressly excludes "claims for expenses in civil litigation" (section 8(a), Court of Claims Act; 705 ILCS 505/8(a)). We recognize that the statutory language of section 8(a) is facially ambiguous: the "civil litigation" phrase is susceptible of being read both within the jurisdictional grant as well as within the exception. However, the ultimate conclusion, informed by legislative draftsmanship, English grammar, the canons of statutory construction and, ultimately, by the apparent intent of the 80th General Assembly that added this phrase to section 8(a), is necessarily that claims for civil litigation are *not* within our section 8(a) jurisdiction.

The language of section 8(a) of our statute, in context, is as follows:

“§8. Court of Claims jurisdiction. The court shall have exclusive jurisdiction to hear and determine the following matters:

- (a) All claims against the State founded upon any law of the State of Illinois, or upon any regulation thereunder by an executive or administrative officer or agency, other than claims arising under the Workers' Compensation Act or the Workers' Occupational Diseases Act, or claims for expenses in civil litigation.”

The ambiguity, of course, lies in the placement of the disjunctive phrase “or claims for expenses in civil litigation” at the very end of the sentence, where it may be read as part of the antecedent exclusion that commences with “other than * * *,” or where it may be read as a continuation of the beginning litany of claims over which jurisdiction is being granted.

The grammatical structure of the phrase suggests that it is part of the exclusion. The subject of the phrase is “claims for expenses” or, more narrowly, “claims.” This is parallel to the construction of the exception clause, which excludes various “claims.” This is not parallel to the construction of the jurisdictional grant, which does not repeat the term “claims” but instead contains a short litany of legal foundations for claims. Thus the draftsmanship tends to support reading the civil litigation expense provision as an exception to our jurisdiction.

Another aspect of the draftsmanship of section 8(a), the location of the phrase at the end of the sentence, is also persuasive. The placement of this phrase after the “other than” exclusion language invites an exclusionary interpretation; this placement makes sense only if the drafter's intention were to add it to the exclusion. If the intention had been to add this phrase to the jurisdictional granting clause, there is no apparent reason not to have placed the phrase before the exclusion and thus clearly within the granting language.

More convincing, however, is the analysis of the specific legislation that added this phrase to section 8(a) in 1977. The 80th General Assembly enacted House Bill 1502 over the veto of the governor in November, 1977, which thereby became Public Act 80-1097. This amendatory act made two distinct changes in the law.

Public Act 80-1097 amended section 41 of the [former] Civil Practice Act to authorize, for the first time, fee awards against the State and State agencies for false pleadings and, in connection with that change, added the “or claims for expenses in civil litigation” phrase to section 8(a) of the Court of Claims Act. These related changes were added to H.B. 1502 by Senate Amendment number 1, in which the House of Representatives later concurred. (Not relevant here, P.A. 80-1097 also amended section 9 and section 22 of the Court of Claims Act to make time limits and rules in this Court jurisdictional; that was the original purpose of H.B. 1502 as introduced in the House.)

Initially, it is clear that the insertion of the “civil litigation expenses” phrase into section 8(a) by the Senate amendment was an integral part of its purpose in extending the former section 41 fee sanction remedy to the State. In this context, it would have made no sense and served no purpose for the legislature to have amended section 8(a) in order to *grant* jurisdiction to the Court of Claims over the newly-authorized fee claims against the State. This follows because in the absence of any change to the section 8(a) language, that section *already* would have provided just such jurisdiction, through the operation of its existing language “claims against the State founded upon any law of the State of Illinois.” The amended section 41 would become a substantive law authorizing a claim against the State, and the general clause of our section 8(a) jurisdictional grant would have applied

to it. Thus, the subject phrase—if read as a grant of jurisdiction—would be redundant and superfluous. We are instructed by the canons of statutory construction not to adopt a superfluous interpretation of statutory language, as the legislature is presumed to speak all statutory words with effect.

This analysis militates strongly for a reading of the “civil litigation” phrase as an exclusion from our jurisdiction—an exclusion made necessary by the pre-existing language of section 8(a), which otherwise would have given our Court *exclusive* jurisdiction over these section 41 fee claims and would thus have precluded jurisdiction in the circuit court. The General Assembly made an election as between this Court and our courts of general jurisdiction for the disposition of section 41 fee claims against the State and opted for the other courts. This conclusion is further supported by the language of section 41 to the effect that its provisions are to apply to the State “in the same manner” as other parties (P.A. 80-1097, section 1, amending section 41 of [former] Civil Practice Act).

This conclusion is confirmed by the *Legislative Synopsis and Digest of 1977* (spring and fall sessions), a publication of the General Assembly itself (by its Legislative Reference Bureau) which is a non-authoritative guide to pending legislation’s contents and status. The digest was published weekly during legislative sessions. The digest entry for Senate Amendment number 1 to House Bill 1502 reads, in material part, as follows:

“* * * Excludes from jurisdiction of the Court of Claims, claims for expense in civil litigation. Amends the Civil Practice Act and provides that the State of Illinois or any agency thereof shall be subject to the provisions of this Section in this Section [sic] in the same manner as any other party. * * *.”

While not necessarily dispositive, this contemporaneous staff digest, which was before the enacting 80th General Assembly unchanged throughout the legislative history of

H.B. 1502 following the adoption of the Senate amendment, including the veto-override vote, is compelling.

Thus we conclude that “claims for expenses in civil litigation” are outside of the section 8(a) jurisdiction of this Court. This, of course, only excludes this subject matter from the section 8(a) jurisdiction of this Court, and is potentially not the last word on the subject of our subject matter jurisdiction. A complete jurisdictional analysis requires consideration of the remaining provisions of the Court of Claims Act, particularly section 8, and of other Illinois statutes which might provide a jurisdictional basis here.

However, this secondary analysis is brief indeed. The remaining provisions of section 8 of our Act plainly fail to grant jurisdiction to us to award attorney’s fees for a false circuit court pleading under Rule 137 or otherwise. Finally, neither Claimant’s nor our own research have disclosed any arguable jurisdictional basis in any other Act for this Rule 137 claim.

Third, and dispositively—but as the Respondent fails to point out—Rule 137 itself expressly restricts jurisdiction under the rule to the “same proceeding” and thus the same court (or a reviewing court) in which the allegedly false pleading was filed:

“All proceedings under this rule shall be within and part of the civil action in which the pleading, motion, or other paper referred to has been filed, and no violation or alleged violation of this rule shall give rise to a separate cause of action, or another cause of action within the civil action in question, by, on behalf of or against any party to the civil action in question, and by, on behalf of or against any attorney involved in the civil action in question.”

This provision of Rule 137 precludes relief in another court in another action, which is precisely what the Claimant seeks by this claim. In this case, the rule remits the Claimant to the circuit court for his remedy. This, finally, ends the analysis.

We appreciate that the allegations before us state that there was no underlying circuit court proceeding, at least initially, in which the false pleading was filed, and thus there was arguably no legitimate “civil action” in which the Claimant could have presented his attorney’s fee petition within the strict language of Rule 137. Nevertheless, that fact cannot and does not give this Court jurisdiction. Moreover, the Claimant also alleges that he was able to secure a court order for the return of his tax funds. It is unexplained why Claimant was unable, or failed, to bring his Rule 137 claim in that proceeding, in the proper court, rather than here. What is clear is that as sympathetic as we may be with the Claimant’s story (assuming, of course, as we must at this stage, that his allegations are true), this Court lacks the subject matter jurisdiction to entertain his Rule 137 claim for fees.

Because we hold that we lack jurisdiction over this claim, it is unnecessary to reach or decide the other issues advanced in the Respondent’s motion.

This claim is dismissed for want of subject matter jurisdiction.

(No. 93-CC-0220—Claim dismissed; petition for rehearing denied.)

JOAN HICKEY, Individually and as Special Administrator for the Estate of RICHARD J. HICKEY, deceased, Claimant, *v.* THE STATE OF ILLINOIS *ex rel.* State Trooper ROBERT A. HUBER, Respondent.

Opinion filed May 23, 1995.

Order on petition for rehearing filed January 30, 1996.

WILDMAN, HARROLD, ALLEN & DIXON (LEONARD A. KURFIRST, of counsel), for Claimant.

JIM RYAN, Attorney General (ANDREW N. LEVINE, Assistant Attorney General, of counsel), for Respondent.

LIMITATIONS—*strict enforcement of Court of Claims limitations provisions.* It is especially important for the Court of Claims to strictly enforce its limitations provisions, for they are jurisdictional, and the Court of Claims does not have equitable jurisdiction to allow a Claimant to utilize defenses such as waiver, estoppel, or laches to overcome the Court's strict limitations provisions.

SAME—*savings statute did not allow Claimant additional year to file claim after circuit court dismissal for lack of jurisdiction—claim dismissed.* The savings statute in effect at the time the circuit court dismissed the Claimant's tort action for lack of jurisdiction did not give the Claimant an additional year beyond the two-year limitations period to file her claim in the Court of Claims and her claim was dismissed with prejudice, because the language extending the limitations period where a plaintiff voluntarily dismissed an action did not apply to circuit court dismissals for lack of jurisdiction, which are involuntarily imposed.

SAME—*tort action against State—petition for rehearing denied.* In a claim filed by a woman whose husband was killed when his car was struck by a State trooper's vehicle, the woman's petition for rehearing, filed after her claim was dismissed as untimely, was denied, because the arguments advanced in support of her petition had either been addressed or were without merit.

OPINION

SOMMER, C.J.

Claimant filed a two-count complaint seeking recovery for injuries sustained by her husband in a collision involving the husband's vehicle and that of an Illinois State trooper. The incident occurred on September 18, 1986, and her husband eventually died on December 22, 1989. The complaint was filed with this Court on August 3, 1992, almost six years after the collision and more than two and one-half years following her husband's death.

Respondent has filed a motion to dismiss this claim based on the expiration of the two-year statute of limitations set forth in section 22(h) of the Court of Claims Act. Claimant argues that the two-year statute of limitations should be overridden by the savings statute in section 13—217 of the Code of Civil Procedure inasmuch as her complaint was filed herein within one year of the date that similar proceedings had been dismissed by the Cook County Circuit Court for lack of jurisdiction.

First, a look at the underlying facts as reported in the appellate court's opinion affirming the Cook County dismissal:

"On September 18, 1986, Huber, responsible for the northern Illinois area, was assigned to patrol U.S. Interstate 290 and to control traffic on that highway. Huber's field training officer, Tony Morrison, accompanied Huber on this assignment. Both Morrison and Huber stated that they received two radio reports over the Illinois State Police Emergency Radio Network which announced that suspects from an armed robbery had been observed heading east on Cermak Road. The report instructed units to "look out" for a metallic green car without license plates. At the time of the broadcast, Huber and Morrison were travelling south on Harlem Avenue toward Interstate 290. Huber drove to Cermak Road, and as he waited to turn left onto Cermak, both he and Morrison saw a car fitting the description drive through the intersection. Huber turned onto Cermak Road with siren, mars lights, and flashing "wig-wag" lights activated and began chasing the car. However, the green car, attempting to elude the squad car, increased its speed. The green car proceeded through the intersection of Cermak Road and Home Avenue. The light for the Cermak Road traffic was green. As Huber began to enter the intersection, Hickey, travelling on Home Avenue and apparently oblivious to the siren, entered the intersection against the light. Huber attempted to brake, but could not avoid hitting Hickey's car." (*Hickey v. Huber* (1st Dist. 1994), 263 Ill. App. 3d 560, 561, 635 N.E.2d 791, 792.)

In affirming the trial court's dismissal of the suit, the appellate court held that the doctrine of sovereign immunity applied to bar a claim against the trooper in circuit court because the trooper had been performing one of his official functions in pursuing the robbery suspects. Thus, in accordance with article XIII, section 4, of the Illinois Constitution of 1970 and the provisions of the State Law-suit Immunity Act (745 ILCS 5), the appellate court ruled that the Court of Claims had exclusive jurisdiction over any litigation.

Section 13—217 of the Code of Civil Procedure is a savings statute intended to extend the period of limitations under certain circumstances. The version of section 13—217 in effect at the time of the circuit court's dismissal of the prior litigation read:

"§13-217. Reversal or dismissal. In the actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is

limited, if judgment is entered for the plaintiff but reversed on appeal, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction, then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or entered against the plaintiff, or after the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction.” (735 ILCS 5/13-217.)

Thus, the savings statute in effect at that time provided for the refiling of an action, assuming the otherwise applicable limitations period had run, within one year of any of the following dispositions:

- (1) judgment is entered for plaintiff but reversed on appeal;
- (2) following a verdict in favor of plaintiff, judgment is entered against plaintiff as the result of a motion in arrest of judgment;
- (3) plaintiff voluntarily dismissed the action;
- (4) the action is dismissed for want of prosecution; or
- (5) the action is dismissed by a United States District Court for lack of jurisdiction.¹

See, e.g., *Mares v. Busby* (7th Cir. 1994), 34 F. 3d 533, 536.

In support of her contentions that section 13—217 should defeat Respondent’s motion, Claimant cites *Roth v. Northern Assurance Co.* (1964), 32 Ill. 2d 40, 203 N.E.2d 415 and its progeny.² *Roth* dealt with an older version of

¹ This version of section 13—217 was later amended, effective January 7, 1993, to allow similar refiling of an action dismissed by a United States District Court as a result of improper venue. P.A. 87-1252, section 2.

² The post-*Roth* decisions Claimant cites are: *Williams v. Medical Center Commission* (1975), 60 Ill. 2d 389, 328 N.E.2d 1; and *Edwards v. Safer Foundation, Inc.* (1st Dist. 1988), 171 Ill. App. 3d 793, 525 N.E.2d 987.

the savings statute which contained the language “if the plaintiff is nonsuited” in the place presently occupied by the language “the action is voluntarily dismissed by the plaintiff.” The *Roth* court construed that “nonsuit” provision as permitting a refiling within one year after a Federal court had dismissed for lack of jurisdiction.³ In so ruling, the court was careful to stress that it read the savings statute as referring to *involuntary* nonsuits. (32 Ill. 2d at p. 43, 203 N.E.2d at p. 417.) Twelve years after the *Roth* opinion, this particular portion of the savings statute was amended by deleting “if the plaintiff is nonsuited” and inserting “the action is voluntarily dismissed by the plaintiff,” to wit:

“§24. In the actions specified in this Act or any other act or contract where the time for commencing an action is limited, if judgment is given for the plaintiff but reversed on appeal; or if there is a verdict for the plaintiff and, upon matter alleged in arrest of judgment, the judgment is given against the plaintiff; or *the action is voluntarily dismissed by the plaintiff* ~~if the plaintiff is nonsuited~~, or the action is dismissed for want of prosecution then, whether or not the time limitation for bringing such action expires during the pendency of such suit, the plaintiff, his heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or given against the plaintiff, or after the *action is voluntarily dismissed by the plaintiff* ~~plaintiff is nonsuited~~ or the action is dismissed for want of prosecution.” Ill. Rev. Stat. ch. 83, par. 24a; Public Act 79-1358; see, Laws of the State of Illinois, 79th General Assembly, pages 743-744 (emphasis added).

One of the first reported decisions construing the amendment came from the Court of Claims: *Gunderson and Wosylus v. State* (1980), 33 Ill. Ct. Cl. 297. The Court noted:

“Under the old statute, a plaintiff whose suit was dismissed involuntarily could commence a new action within one year of the dismissal order where the statute [of limitations] expired during the pendency of the suit.

It is Respondent’s contention that the new statute affords protection only to plaintiffs whose lawsuits are *voluntarily* dismissed and [that] its protection is

³ There was no specific Federal dismissal provision in the savings statute at that time.

[now] unavailable to plaintiffs whose actions are *involuntarily* dismissed.” 33 Ill. Ct. Cl. at p. 298 (emphasis added).

The Court of Claims agreed with the State’s position and dismissed that claim. Although Claimant has assailed the *Gunderson* ruling as little more than an “aberration with no precedential value” (see Claimant’s 9/14/94 objections, p. 7), the Illinois Supreme Court has thoroughly studied these issues and has reached the same conclusion that this Court did in *Gunderson*. (See, e.g., *Hupp v. Gray* (1978), 73 Ill. 2d 78, 82-83, 382 N.E.2d 1211, 1213; *Conner v. Copley Press, Inc.* (1984), 99 Ill. 2d 382, 387-388, 459 N.E.2d 955, 957; and *DeClerck v. Simpson* (1991), 143 Ill. 2d 489, 577 N.E.2d 767.) In short, *Gunderson* accurately assessed the effect of the 1976 amendment. Dismissals for lack of jurisdiction are not voluntary dismissals by the plaintiff but are dismissals by the court on another ground, namely, lack of jurisdiction. Thus, under the amended savings statute, the *Roth* opinion and its progeny are inapposite; the amended section 13—217 did not allow Claimant an additional year to file her complaint in this Court.

In its most recent pronouncement on statutes of limitations, the supreme court wrote:

“Our decision produces a harsh result in that it extinguishes liability where such should plainly lie. That is, however, the nature of statutes of limitations. The statutes are inherently arbitrary in their operation in that they attach a complete bar to recovery of a valid claim or the imposition of criminal liability based on no more than the passage of time. While we express sympathy for plaintiff in this case, our duty is to adhere to our clearly established precedent.” (*Sepmeyer v. Holman* (1994), 162 Ill. 2d 249, 256, 642 N.E.2d 1242, 1245.)

It is especially important for the Court of Claims to strictly enforce its limitations provisions, for they are jurisdictional. (*Illinois Bell Telephone Co. v. State* (1981), 35 Ill. Ct. Cl. 345.) The Court of Claims does not have equitable jurisdiction to allow a Claimant to utilize defenses such as waiver, estoppel, or laches to overcome the

Court's strict limitations provisions. *In re Application of Ward* (1981), 35 Ill. Ct. Cl. 398.

Accordingly, Respondent's motion to dismiss is allowed. It is ordered that this claim is dismissed with prejudice.

ORDER DENYING PETITION FOR REHEARING

SOMMER, C.J.

Claimant's petition for rehearing argues: (1) that her circuit court filing satisfied the limitations provisions of section 22(h) of the Court of Claims Act even though there was no concurrent filing with this Court; (2) in the alternative, that section 13—217 of the Code of Civil Procedure permitted her late filing in this Court notwithstanding our reasoned opinion to the contrary; and (3) that, should she fail to succeed with her first two arguments, she has been "victimized" by the Illinois Supreme Court and must therefore be allowed to pursue her untimely claim herein.

Section 22(h) Argument

While it is true that there is *dicta* from an Illinois Supreme Court opinion which would purportedly bolster Claimant's first argument, scrutiny of the case law on which that *dicta* is premised reveals it to be without a viable foundation. The language in question is from *Williams v. Medical Center Commission* (1975), 60 Ill. 2d 389, 396, 328 N.E.2d 1, 5:

"Our decision in *Roth v. Northern Assurance Co.* [citation omitted] is authority for the proposition that the filing of the present action, although it was filed in the Circuit Court rather than in the Court of Claims, satisfies any statutory requirement of notice and filing."

This *dicta* cites to a portion of *Roth* which, in turn, cited to *Geneva Construction Co. v. Martin Transfer and Storage Co.* (1954), 4 Ill. 2d 273, 289-90, 122 N.E.2d 540, 549.

Neither *Geneva Construction* nor *Roth* involved a Court of Claims matter. *Geneva Construction* concerned the propriety of a post-limitations amendment of a circuit court pleading¹ to substitute a new party plaintiff based on principles of common law subrogation, and the supreme court's analysis was limited to a straightforward review of the procedural statute involved. It must be emphasized that the statute in question in *Geneva Construction* allowed only for a post-limitations amendment of a *pleading*, not an amendment of the *forum*. *Roth*, as explained in our initial opinion, dealt with the intricacies of a now defunct predecessor to the present section 13—217 of the Code of Civil Procedure, a totally different procedural statute than was at issue in *Geneva Construction*. Nonetheless, the *Roth* Court rationalized that the purposes of the two statutes were similar and, using equitable powers, held:

“[W]hen a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of the opinion that a liberal rule [circumventing the statute of limitations] should be applied.” *Roth*, 32 Ill. 2d at 49-50, 203 N.E.2d at 420, quoting from Mr. Justice Holmes in a United States Supreme Court opinion.

Unlike the United States and Illinois Supreme Courts, this Court of Claims is devoid of equitable jurisdiction; our limitations provisions are jurisdictional and cannot be disregarded under any circumstances. Accordingly, despite the Supreme Court *dicta* to the contrary, we are unable to recognize Claimant's erroneous circuit court filing as a “surrogate” filing with this Court. Claimant simply did not meet the filing deadline prescribed by section

¹ *Geneva Construction* involved a predecessor of the present section 2—616 of the Code of Civil Procedure:

“[The amendment] shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted if the time prescribed or limited had not expired when the original pleading was filed and if * * * the cause of action * * * in the amended pleading grew out of the same transaction or occurrence set up in the original pleading * * *.”

22(h) of the Court of Claims Act, and she is therefore barred from now bringing her claim to this Court.

Section 13—217 Argument

The Court's previous, thorough analysis of section 13—217 of the Code of Civil Procedure is self-explanatory, and Claimant offers no new argument to substantively challenge it. Further, there is additional precedent supporting our ruling: *Nikelly v. Board of Trustees* (1992), 45 Ill. Ct. Cl. 336, 338. Thus, we again find that section 13—217 did not allow Claimant additional time to file her claim with this Court.

“Victimization” Argument

Claimant complains bitterly about the application of *Currie v. Lao* (1992), 148 Ill. 2d 151, 592 N.E.2d 977 to her circuit court case, but such an argument can only be properly directed to the reviewing courts, if any, presently having jurisdiction over those issues; they are not part of the instant Court of Claims litigation. From a practical standpoint, we do note that Claimant and her husband had filed preliminary notices with this Court and the Attorney General pursuant to section 22—1 of the Court of Claims Act. Thus, they were aware of the potential Court of Claims jurisdiction and could have easily proceeded to concurrently file a timely claim in this Court when initiating the Cook County case. Such a strategy is commonly employed by counsel practicing before this Court, and it would have protected Claimant from the limitations risk which naturally resulted here from the decision to file in only one of the potentially available fora.

Accordingly, inasmuch as we see no reason for further oral argument, it is ordered that Claimant's petition for rehearing is denied.

(No. 93-CC-0306—Claim dismissed.)

KERRY L. BASS, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Order filed December 27, 1995.

KERRY L. BASS, *pro se*, for Claimant.

JIM RYAN, Attorney General (JULIE A. SMITH, Assistant Attorney General, of counsel), for Respondent.

PRACTICE AND PROCEDURE—*Court of Claims had no authority to transfer claim to circuit court—motion to transfer denied—claim dismissed.* Where the Claimant sought to have his claim transferred from the Court of Claims to the small claims section of the circuit court because he mistakenly sued the State rather than a county as intended, the Court of Claims had no authority to transfer the claim to another court, and therefore, the Claimant's motion to transfer was denied and the claim was dismissed.

ORDER

EPSTEIN, J.

This claim is before the Court on the Claimant's motion to transfer this matter to the small claims section of the Circuit Court of Cook County, for the reason that he has sued the wrong party and, instead of State personnel, intends to sue Cook County or some of its personnel. As this Court has previously held, we are unaware of any authority for transferring a claim from this Court to other courts. (See *First Baptist Church of Lombard v. State*, 47 Ill. Ct. Cl. 423.) Accordingly, it is hereby ordered:

1. Claimant's motion to transfer is denied;
2. This claim is dismissed without prejudice.

(No. 93-CC-1308—Claim dismissed.)

POLLY JACOBS, Claimant, *v.* THE STATE OF ILLINOIS,
RESPONDENT.

Order filed June 18, 1996.

STELLIS, FAULBAUM & FIELD (JACK A. STELLIS, of
counsel), for Claimant.

JIM RYAN, Attorney General (DEBORAH L. BARNES,
Assistant Attorney General, of counsel), for Respondent.

EMPLOYMENT—*what necessary to state section 1983 claim.* A claim brought pursuant to 42 U.S.C. 1983 must have been under color of State law, and have deprived a person of rights, privileges and immunities granted by the Constitution or laws of the United States, and the Claimant must show that the claimed interest is a property or liberty interest, that the alleged loss amounted to a deprivation, and that the deprivation was without due process of law.

SAME—*constitutional law—creation of protected property interest.* In order for a State to create a constitutionally protected property interest, the language conferring the interest must be of unmistakably mandatory character, requiring that certain procedures shall be employed and that the challenged action will not occur absent specific substantive predicates, and the test for whether a statutory or regulatory procedure creates a protectable due process interest hinges on the actual language used by the legislature.

SAME—*alleged employment termination by third party due to State's conduct—complaint failed to state section 1983 claim—claim dismissed.* Where the Claimant brought a section 1983 claim alleging that she was terminated from her employment by a third party as a result of conduct by Department of Children and Family Services employees, because the State had a duty to, but did not, provide her with due process by giving her notice that she was an indicated perpetrator of child abuse and neglect and by affording her an opportunity to appeal that determination, her claim was dismissed for failure to allege facts showing that she was deprived of a constitutionally or statutorily protected property interest.

ORDER

RAUCCI, J.

This cause coming on to be heard on the Respondent's motion for summary judgment and the Respondent's motion to dismiss, the Court being fully advised in the premises, the Court finds:

1. Because of our disposition of this case upon the allegations of the motion to dismiss, we decline to rule on the motion for summary judgment.

2. Claimant alleges that she was terminated from her employment by a third party as a result of conduct by employees of the Department of Children and Family Services (DCFS). She alleges that Respondent has a duty to provide her with due process by affording notice that she was an indicated perpetrator of child abuse or neglect and to afford her an opportunity to appeal that decision; that Respondent failed to do so and, as a result, she was terminated from her employment. Claimant's amended complaint seeks relief in this Court for deprivation of due process and "privileges and immunities" rights afforded to her under the United States Constitution and pursuant to 42 U.S.C. 1983.

3. Respondent is not a "person" within the meaning of 42 U.S.C. section 1983. *Will v. Michigan Department of State Police* (1989), 491 U.S. 58.

4. A section 1983 claim must 1) have been under color of State law, and 2) have deprived a person of rights, privileges or immunities guaranteed by the Constitution or laws of the United States. (*Bayview-Lofberg's Inc. v. City of Milwaukee* (7th Cir. 1990), 905 F.2d 142, 144.) This claim fails the second test. Claimant must show that 1) the claimed interest is a property or liberty interest and that 2) the alleged loss amounted to a deprivation; and 3) the deprivation was without due process of law. See *Bayview-Lofberg's Inc., supra*.

5. *Scott v. Village of Kewaskum* (7th Cir. 1986), 786 F.2d 338, 339-40, controls this case. To the extent a request appeals to discretion rather than rules, there is no property interest. In order for a State to create a constitutionally

protected property interest, the language conferring the interest must be of “unmistakably mandatory character, requiring that certain procedures ‘shall,’ ‘will,’ or ‘must’ be employed” and that the challenged action will not occur absent specific substantive predicates. (*Colon v. Schneider* (7th Cir. 1990), 899 F.2d 660, 667.) An interest is created only where the law or regulation in question contains specific directives to the decisionmaker that if the regulations’ substantive predicates are present, a particular outcome must follow. The test for whether a statutory or regulatory procedure creates a protectable due process interest hinges on the actual language used by the legislature. (*Colon, supra.*) Claimant has failed to allege any facts tending to show that she is entitled to relief.

It is therefore ordered that the Respondent’s motion to dismiss is granted, and this cause is dismissed and forever barred.

(No. 93-CC-1871—Claimant awarded \$39,555.40.)

GLENSTONE HOMEOWNERS ASSOCIATION, Claimant, *v.*
THE STATE OF ILLINOIS, DEPARTMENT OF TRANSPORTATION,
Respondent.

Opinion filed May 13, 1996.

MARSHALL N. DICKLER, LTD. (JEFFREY A. GOLDBERG
and JAMES A. SLOWIKOWSKI, of counsel), for Claimant.

JIM RYAN, Attorney General (JOEL CABRERA, Assistant
Attorney General, of counsel), for Respondent.

IMMUNITY—*defense of sovereign immunity is waived in Court of Claims.* Once a Claimant is successfully in the Court of Claims, sovereign immunity is statutorily waived and provides no defense against State liability as it does outside the Court of Claims, and therefore, in a homeowner’s association’s claim seeking unpaid assessments on subdivision lots owned by the State, the defense of sovereign immunity was waived by the State.

ATTORNEY FEES—*when attorney's fees are recoverable from State as matter of contract damages.* The Court of Claims will allow recovery of attorney's fees from the State as a matter of contract damages, where the contract expressly provides for them and where the attorney's fees were a result of the State's breach of contract, and hence, are in the nature of an expense incurred as a result of the breach.

REAL PROPERTY—*State's purchase of subdivision lots—covenants to pay assessments were binding on State—award granted.* Where the State purchased four lots within a subdivision for use as a right-of-way for the intended expansion of a highway, the subdivision covenants to pay certain assessments and to be liable for attorney's fees and collection costs were contractual obligations that ran with the land and were binding on the State, and therefore, summary judgment was entered on behalf of the subdivision's homeowner's association in its claim seeking the State's payment of the assessments, and the Court awarded the Claimant the unpaid assessments, attorney's fees and collection costs.

OPINION ON SUMMARY JUDGMENT

EPSTEIN, J.

In this case of first impression, the Claimant, Glenstone Homeowners Association (the "association"), seeks (count I) payment of 1991-93 owner's assessments of \$14,120 on four subdivision lots that were purchased by the Department of Transportation ("IDOT") in 1990, as well as attorney's fees and other collection expenses, and seeks (count II) foreclosure of the association's asserted lien on the four lots for non-payment of \$9,242 of assessments, which was recorded with the Lake County Recorder (document number 3126118). Our jurisdiction is based on section 8(b) (contract clause) of the Court of Claims Act (705 ILCS 505/8(b)).

These claims are before the Court on cross-motions for summary judgment. The association's motion claims \$26,256 in unpaid assessments for the period of July, 1991, through September, 1994, and attorney's fees of \$13,124 and "costs" of \$175.40. The Respondent's motion denies liability altogether. Both parties assert that there are no disputed material fact issues, and that these claims can be adjudicated on the questions of law presented.

The Undisputed Facts

These claims arise from IDOT's 1990 acquisition of four lots of real estate in the Glenstone Subdivision (unit II) on the north side of Cuba Road in Long Grove, Lake County, Illinois. IDOT bought the lots from the subdivision developer for use as right-of-way for the intended expansion of FAP Route 432, i.e., for highway purposes. The \$530,000 price was negotiated under threat of condemnation following IDOT's mandatory purchase offer under the eminent domain statute. (705 ILCS 5/7-102.1.) IDOT took title to the lots and related easements by quitclaim deed dated October 24, 1990, from the developer's land trustee; the deed was recorded with the Lake County Recorder on February 21, 1991 (document number 2991579).

On October 27, 1989, the Glenstone Subdivision, including the purchased lots, had been impressed with a "Declaration of Covenants, Conditions and Restrictions" executed by the developer's land trustee. The declaration, which also created the homeowners association was recorded with the Lake County Recorder on November 1, 1989 (document number 2847044).¹ (See complaint, exhibit C [certified copy of recorded declaration].) The principal covenant in the declaration that is material to the association's claims provides:

"Article 4, Section 1: Creation of Lien and Personal Obligation for Assessments. Each Owner of a Lot * * * by acceptance of a deed therefor or otherwise, whether or not it shall be so expressed in any such deed * * * hereby covenants and agrees and shall be deemed to covenant and agree to pay to the Association or each Lot owned * * * (1) annual assessments or charges to be paid in equal bi-annual installments (* * * "Annual Assessment") * * * and (2) special assessments for purposes including * * * major capital improvements (* * * "Reserve Assessment"). Reserve assessments are to be fixed, established and collected by the Association shall constitute the maintenance fund of the Association. The annual and special assessments, together with such interest thereon and costs of collection thereof, including * * * reasonable

¹ The association is a not-for-profit corporation as the declaration mandates.

attorneys' fees * * * shall be a charge on the land and shall be a continuing lien upon each Lot against which each such assessment is made. Each such assessment, together with such interest thereon and cost of collection thereof, including * * * reasonable attorneys' fees, * * * shall also be the continuing personal obligation of the * * * Owner of such Lot at the time when the * * * assessment fell due."

Other provisions of the declaration also relied upon by the association are article 4, section 3 ("Computation of Assessments" [relating to the 1/24 share to be paid by each lot owner, personal liability of lot owners, and the non-exculpation of lot owners for assessments due to non-use of the association common areas]), section 4 ("Date of Commencement of Annual Assessments" [relating to delinquencies and late fees on assessments]), and article 9, section 3 ("Remedies" [relating, *inter alia*, to lien foreclosure, cumulation of remedies, and entitlement to recovery of attorney's fees and collection costs and expenses]). These covenants, conditions and restrictions ("covenants" or "subdivision covenants") in the declaration, and their enforceability against IDOT as owner of the four lots, are the subject of this dispute.²

IDOT acknowledges that it was aware of the declaration and of the homeowners association before it completed its purchase, and that it requested the developer-owner to provide a "release" of the four lots from the homeowners association (departmental report, August 4, 1995, at page 2.) IDOT was informed that the developer had already "turned the homeowners association over to the unit owners." *Ibid.*³

² The declaration also contains restrictions which, if enforceable against IDOT, would effectively preclude the use of the four lots for the highway purposes for which IDOT acquired them. Insofar as the record on summary judgment reflects, the four parcels have remained vacant and have not been utilized for any purpose by IDOT to date.

³ The declaration was noted as a special exception in the second title commitment obtained by IDOT (see departmental report, exhibit I (Mid America Title Co., commitment, schedule B, number 9)); that commitment also excluded the association assessment against the lots (*id.*, exhibit I, schedule B, number 10). The company apparently removed these exceptions in its final policy (*id.*, exhibit J (Title Policy number 144-022245, schedule B)).

Following an internal discussion among IDOT attorneys, the department elected to close on its purchase of the lots without obtaining a release or conveyance from the association. This was based on the IDOT attorneys' consensus that the subdivision covenants are not enforceable against IDOT, as an agency of the sovereign, for a series of reasons (see, IDOT departmental report, August 4, 1995, at pages 3-4), most of which are advanced in the Respondent's arguments on the pending cross-motions for summary judgment.

Pursuant to IDOT's lawyers' determination, and in the absence of an appropriation specifically for the payment of these association assessments, IDOT has not paid any of the association's assessments since taking title to the four lots. On February 3, 1993, the association filed its collection and foreclosure claims in this Court.

The Parties' Legal Positions

On the primary issues presented—whether the State is liable on the covenants contained in the declaration that run with the land, especially on the affirmative covenant to pay assessments, and whether any such pecuniary liability is unenforceable against the State for some other reason, the parties take fundamentally opposing positions.

The Claimant contends that the subdivision covenants are binding on IDOT, notwithstanding its status as an agency of the State. The association maintains that the State is not exempt from covenants that were lawfully imposed on property that the State later acquired and now owns; that IDOT's purchase of the lots subjects it, by voluntary and express assumption, to the obligations of covenants impressed on the property that run with that land; and that the obligations of those covenants are en-

forceable in contract in this Court.

Respondent IDOT contends (1) that the State, as sovereign, is not bound by covenants running with land that it acquires as a matter of law, based apparently on the doctrine of sovereign immunity; (2) that the declaration and its covenants are not express contracts, but are instead “implied contracts” which are unenforceable against the State as a matter of law; (3) that the declaration conflicts with the Illinois Purchasing Act and is thus unenforceable against the State; (4) that even if the subdivision covenants are theoretically binding on the State, no money judgment may be imposed against the State in the absence of an appropriation for the particular contractual purpose; and (5) that the express language of the declaration exempts or excludes these parcels from the operation of the covenants because the parcels were acquired by a public body for highway purposes; (6) that the State is not obligated to pay association assessments because it does not and will not receive any benefit from such payments; and (7) that the State is not liable for attorney’s fees or interest absent a statute so providing.

In reply to IDOT’s contentions, the Claimant argues (a) that the declaration and its covenants are express, not implied, contracts; (b) that the Illinois Purchasing Act does not apply to those covenants, and specifically not to the covenant to pay assessments; (c) that a specific appropriation is unnecessary for an award to be made; that a lapsed appropriation is adequate; and that the 1990-1995 appropriations for IDOT in fact included appropriations of funds for land acquisition and related expenses, which encompasses the assessment obligations on these lots; (d) that the language of the declaration does not exempt IDOT highway acquisitions of subdivision property; (e) that the state, as a governmental body, is not exempt from

real property covenants that run with the land; and (f) that the State is liable for interest on the overdue assessments and for attorney's fees and collection expenses due to its express contractual obligation under the subdivision covenants.

Analysis

Count I: The Association's Claim for Payment of Assessments

1. *Applicability of the Covenants to the Subject Parcels.*

The Court must first address the interpretative issue raised by IDOT. As Respondent points out, the other issues in this case are moot if the property is not subject to the covenant to pay assessments, which is the sole predicate of liability asserted by the Claimant. However, we do not accept the Respondent's interpretation of the exemption language in the declaration.

Respondent contends that its acquisition of the four parcels brings that land within the language and intent of the following provision of article 4 of the declaration:

"Section 7. The following property subject to this Declaration shall be exempt from the assessments created herein.

(a) All property dedicated to and accepted by a local public authority, and properties granted to or used by a utility company."

Respondent relies on the first clause. Under its language, the terms that define the scope of applicability of this exemption are "dedicated to and accepted" and "local public authority." Neither of these terms are defined in the declaration, and accordingly must be given their ordinary and accepted meanings. Respondent's effort to bring IDOT's acquisition of these parcels under the section 7 language fails both elements.

First, "dedicated to and accepted" is clearly used in

its real estate context. This is a standard real estate term denoting a particular method—or two methods, if both statutory and common law dedication are included—of transferring an interest in real estate to a public body for the purpose of a public way. In contemporary practice, this is ordinarily, but not necessarily, for use as a public street or road.

Respondent has cited no precedent for a usage of “dedication” or “dedicated” meaning a conveyance of land or of interests in land effected by quitclaim deed, as was done here. Indeed, because dedications ordinarily do not convey a fee but instead grant limited rights restricted to the surface of the land, most commonly the right of public passage, there is ample reason to believe that the declaration’s use of the term “dedicated” (with its concomitant requirement of “acceptance”) was an intentional choice of available terms, and was intended to restrict the circumstances in which land in the subdivision would be exempt from assessments.

IDOT would have us read this expression to encompass any subdivision land as to which an interest was granted for road or highway purposes to any public entity. The declaration simply does not say that, although it readily could have if that were the intended purpose of this clause. We find no ambiguity in the language of section 7, nor any indication in the declaration of an intent comporting with Respondent’s broad interpretation.

We find it much more likely that this kind of provision—which is common in developments involving common areas—was intended to accommodate possible dedications of internal streets and sidewalks to the local municipality or township, which would then maintain them. In such event, the section 7 provision would exempt the dedicated *portions* of parcels from assessments

as a way to equalize the assessment burden as between the owners of undedicated and partly-dedicated parcels. This purpose, of course, has nothing to do with major roads adjacent to the subdivision, or with the use of eminent domain powers to acquire subdivision land, or with the removal from the residential subdivision of entire parcels as IDOT's road project would effect as a practical matter. There is no hint in the declaration that section 7 was intended to address these issues, as Respondent itself acknowledges in its brief.

Also supporting this view is the fact that the operative effect of section 7 is not to exclude the "dedicated" land (or the utility property covered by the other section 7 clause) from the declaration or from the subdivision. Thus any land "exempt" under section 7 remains subject to the other terms of the declaration, i.e., other than the assessment provisions. This suggests that section 7 was intended to cover dedicated public streets and perhaps sidewalks inside the subdivision that serve the subdivision, not roads outside the subdivision, which would be the effective result here.

Second, the term "local public authority" is inconsistent with Respondent's argument. Although neither party has cited us to any generally accepted meaning or usage of this term, it is apparent, as the association contends, that "local" does not ordinarily connote a statewide agency or jurisdiction. Respondent's attempt to call IDOT a "local" authority also fails to find support in the voluminous documentation that IDOT produces every year. As nearly as we can tell, IDOT does not refer to itself as a "local public authority" or as "local." It is very difficult to see why a drafter of an Illinois subdivision declaration might do so.

The literal and ordinary, but narrower, meaning of

“dedicated to * * * local public authority” is that this language covers dedications to local governments (usually for road or street purposes). In Illinois, as even a cursory review of our Highway Code shows, the “local” authorities having street and road jurisdiction are cities, villages and incorporated towns (often referred to generically as “municipalities”), and townships and counties. Under the 1970 Illinois Constitution, which was in effect when this declaration was written, local government includes those kinds of public bodies and “special districts.” See, 1970 Ill. Const., Art. VII, “Local Government.” State agencies like IDOT are constitutionally and statutorily referred to by a number of expressions but never by one including the term “local.” We can find no basis for concluding otherwise for the usage intended in this Illinois subdivision declaration.

We therefore hold that the exemption in article 4, section 7 of the declaration does not apply to these lots and does not exclude them or their owner from the covenant to pay assessments.

2. *Sovereign Immunity.*

The principal defense relied on by IDOT appears to be that sovereign immunity bars the enforcement of these covenants. There is an elegantly short answer to this: Sovereign immunity ceases at the door of this Court. Once a Claimant is successfully in this Court, sovereign immunity is statutorily waived and provides no defense against State liability as it does outside of this Court. See, An Act in relation to immunity for the State of Illinois, section 1 (745 ILCS 5/1); see also, Court of Claims Act, section 8 (705 ILCS 505/8). Sovereign immunity is not a defense to claims over which we have jurisdiction under our statute.⁴ It is a bit unsettling that a State agency like

⁴ Respondent does not contend that we lack jurisdiction, although its “implied contract” argument is actually a jurisdictional issue which we take up separately. See Pt. 2, *post*.

IDOT could so fundamentally misunderstand Illinois law of sovereign immunity.

We might therefore consider the possibility that IDOT relies on a different concept than sovereign immunity. Respondent might be arguing that under common law, these kinds of subdivision covenants do not *apply* to the State or to government bodies generally. This kind of argument would not rely on immunity but on substantive real estate law. However, no common law precedent or statutory basis for such a rule of construction of covenants has been cited to us by Respondent, and we are unaware of any such principle.

Accordingly, we must reject both views of IDOT's defense. The covenants apply to IDOT as any other owner; the State is not immune in this Court to liability on these covenants.

3. *The Implied Contract Defense.*

Respondent contends that the declaration, and thus its covenants, are not express contracts, but are instead “implied contracts” which are unenforceable against the State as a matter of law, based on long-settled precedents of this Court, e.g., *Brighton Building Maintenance Co. v. State* (1982), 36 Ill. Ct. Cl. 36. There is no need to review those precedents, which reject implied covenant claims (e.g., quasi-contract, *quantum meruit*) in this Court, because the Claimant does not dispute that point of law.

However, we must point out that the reason for this Court's rejection of implied-contract claims is jurisdictional, based on section 8(b) of our Act—our contract jurisdiction clause—which limits the contract claim jurisdiction of this Court to “claims against the State founded upon any contract entered into with the State of Illinois.” Because implied contracts are *not* “founded upon” express contracts they are not cognizable here.

However, a claim based on a non-express contractual basis may nevertheless be cognizable in this Court. A third-party beneficiary claim—which itself is not an express contract—may be “founded upon” another contract with the State that is an express contract. In that event jurisdiction lies here and the third-party beneficiary claim is cognizable. *Haendel v. State*, No. 90-CC-0234, Slip. Op. April 22, 1996, at 8-9.

Like third-party beneficiary claims founded upon express contracts with the State, this contract claim founded upon a written express covenant is similarly not an “implied contract,” and is therefore not outside our jurisdiction under section 8(b) of our Act, at least not for that reason. This is clearly an express contract claim, not an implied contract claim.

We must only complete the section 8(b) jurisdictional analysis by determining whether or not the underlying express contract—here the subdivision covenants running with the purchased land—are indeed contracts “entered into with the State of Illinois” so as to bring this claim under our jurisdiction. We find, without hesitation, that the State’s acquisition of title to the land subject to the duly recorded covenants and with actual notice of them made the State a party to the declaration and its subdivision covenants. Accordingly, this claim is a claim founded upon a contract with the State, and Respondent’s implied contract objection is rejected.

3. *The Benefits Argument.*

Respondent contends that the State is not, or should not be, obligated to pay association assessments because the State does not, and will not, receive any benefit from such payments. We do not understand the basis, in law or in the Constitution, for this argument, and no supporting basis or precedent has been cited to us.

This argument may have been intended as an adjunct to Respondent's "implied contract" theory, i.e., that if the association's claim were to be adjudicated as an implied contract, then the benefits analysis would be a proper defense to such a theory. However, neither Claimant nor this Court has considered this claim to be based on implied contract doctrines.

In any event, the Respondent's benefit analysis, considered as an independent defense to the Claimant's express contract claim, must be rejected as baseless.

4. *The Illinois Purchasing Act.*

The Respondent contends that the assessment covenant is unenforceable against the State because its acquisition was not in accordance with the Illinois Purchasing Act (30 ILCS 505/9.01 *et seq.*), which generally governs State purchases and contracts for goods and services. Respondent characterizes the contract in this case as a "contract for services" between the association and IDOT, and argues that as such it violates the Purchasing Act's requirements that such contracts be reduced to writing and filed with the State Comptroller.

This clever argument cannot be taken too seriously, for the simple reason that the "services contract" hypothesized after-the-fact by the Respondent is not a separate and independent contract. Simply put, there is no independent "contract for services" in this case that might be bid, or exempted and negotiated, or filed with the Comptroller. The contract in this case is the declaration, which contains as an integral and unseverable part the covenants that Respondent now seeks, erroneously, to treat as an independent contract.

The State's entry into that contract was an implicit part of its purchase of the four subdivision lots. Thus, if

there were to be a violation of the Purchasing Act, the applicability and requirements of the Act as applied to this land acquisition must be analyzed. That is a separate question from the point advanced by Respondent. However, neither party claims that IDOT's purchase of land for highway purposes is governed by the Purchasing Act or that the purchase under threat of condemnation in this case somehow violated that Act. This is understandable. In this light, we need not further examine that issue.

5. *Attorney's Fees and Interest.*

Respondent argues that the State is not liable for attorney's fees or interest absent a statute so providing which is missing here. Claimant urges, on the other hand, that its claims for attorney's fees and interest are not predicated on statute or Court rule or common law, but are instead contractual obligations under the declaration (article 9, section 3), which as a matter of law are as enforceable as the remainder of the declaration against a subdivision lot owner.

Claimant's recovery of these components of its damages claim rests on the enforceability of the covenant providing for payment of attorneys' fees, collection costs and interest. Respondent has cited no precedent holding that contractual obligations to pay fees, interest or similar expenses are unenforceable against the State in this Court, or in the claims forum of any other jurisdiction. However, in *Douglas v. Department of Conservation* (1977), 32 Ill. Ct. Cl. 113, 114-115, this Court allowed recovery of attorney's fees from the State as a matter of contract damages, where the contract expressly provides for them and where the attorney fees were a result of the Respondent's breach of contract, and hence, are in the nature of an expense incurred as a result of the breach. Given the precedent of *Douglas*, and the undisputed fact that this kind of collection expense is directly caused by IDOT's refusal to pay these assessments, we perceive no reason why these

contractual reimbursement obligations should not be treated as any other contract obligation.

6. *Supporting Appropriations.*

The Respondent's final defense against payment to the association is its contention that even if the subdivision covenants are binding on the State, no money judgment may be imposed by this Court against the State in the absence of an appropriation for the particular contractual purpose. On this point, finally, we find principled agreement with the State in this case.

For its part, the Claimant does not dispute this appropriations principle, but instead advances two points that, if accepted, would satisfy the appropriations requirement. First, Claimant argues that the Respondent's view of what is a proper appropriation to fund or to support payment of these association assessments is excessively stringent. Second, Claimant contends that in the annual appropriations to IDOT for fiscal years 1992-1994, covering the periods for which assessment payments are sought in the Claimant's motion, there were in fact adequate appropriations to make these payments and that sufficient funds lapsed from those appropriations in those years to allow an award for the amounts now sought.

We observe that IDOT has not seriously challenged these appropriations contentions of the Claimant. However, the requirement for appropriations to support State contractual obligations is a requirement of constitutional dimensions, and this Court must exercise its own scrutiny on this issue, rather than merely side with the superior argument. Accordingly, we have reviewed the IDOT appropriations act submitted by Claimant for the subject years.

The Court concludes that appropriations for land acquisition, for maintenance of property, and for some con-

tractual service line items are adequate, consistent with the State Finance Act, to support expenditures for these subdivision assessments which, on this record, are for maintenance of property owned by IDOT. We are also persuaded that Claimant is correct that sufficient funds lapsed in these years from suitable line items to support an award in this case.

Count II: Foreclosure of the Association's Lien

In count II, the association seeks to foreclose its lien under the declaration on the four subdivision lots, and thus to foreclose on IDOT's title to those properties, in order to recover the unpaid assessments that are, also, the subject of the count I contract claim. The Respondent has interposed a number of legal and jurisdictional defenses to the count II foreclosure action.

However, in light of our summary judgment on count I and our determination to make an award, the basis of the count II foreclosure action is now moot, at least for the present. We therefore need not take up the technical issues involved in the litigation of count II, and will dismiss count II without prejudice to renew it if for any reason the assessed payments awarded herein are not paid, or for other good cause.

Conclusion and Order

The subdivision covenants are contractual obligations that run with the land, and bind all owners, including the State. As contractual covenants running with and benefiting and burdening these lands, they take on the character of interests in land. IDOT acquired the four lots but did not acquire the association's interest in the lots, as it plainly ought to have done, and thus its quitclaim deed brought less than might have been prudently expected. We have held that IDOT is subject to the covenant rights

against those lots. But that will not end this matter.

Unfortunately, those covenants will continue to impose at least an annual obligation on the State, and possibly more, subject to the availability of appropriated funds. We take the unusual step of pointing this out because of the obvious, but serious, concern that this case will return on an annual basis until either the State conveys away these lots or effects a settlement with the association or acquires the association's interests in the covenants on these lots.

Accordingly, it is ordered:

- A. The Respondent's motion for summary judgment is denied;
 - B. The Court finds that there are no disputed questions of material fact as to count I of the complaint, and that the Claimant is entitled to judgment as a matter of law; Claimant's motion for summary judgment as to count I is granted;
 - C. Summary judgment on count I is entered for Claimant and against Respondent;
 - D. Claimant Glenstone Homeowner's Association is awarded the sum of \$39,555.40 for the following:
 - (1) For assessments for July, 1991 through September, 1994: \$26,256.
 - (2) For attorney's fees for collection: \$13,124.
 - (3) For costs of collection: \$175.40.
 - E. Count II of the complaint is dismissed without prejudice.
-

(No. 93-CC-2602—Claim denied.)

In re APPLICATION OF ROBERTA J. MEDLICOTT

Opinion filed May 17, 1996.

PAUL C. SHEILS, for Claimant.

JIM RYAN, Attorney General (ROBERT J. SKLAMBERG, Assistant Attorney General, of counsel), for Respondent.

LAW ENFORCEMENT OFFICERS AND FIREMEN COMPENSATION—*definition of “killed in the line of duty.”* The Law Enforcement Officers and Firemen Compensation Act defines “killed in the line of duty” as losing one’s life as a result of injury received in the active performance of duties as a fireman if the death occurs within one year from the date the injury was received and if that injury arose from violence or other accidental cause.

SAME—*heart attack—determination of whether decedent was killed in line of duty.* In determining whether the decedent was killed in the line of duty when the cause of death was a heart attack, where the decedent was performing strenuous physical activities at the time the attack was suffered, the Court of Claims has consistently granted awards, but where the decedent was not performing strenuous physical activities at the time of the heart attack, the Court must closely examine whether the circumstances surrounding the decedent’s performance of duties prior to the time of the fatal heart attack may have precipitated the attack.

SAME—*fireman found dead in bed at firehouse was not killed in line of duty—claim denied.* Notwithstanding that the decedent fireman suffered a heart attack and was found dead in a firehouse bunk bed after working two consecutive 24-hour shifts, he was not killed in the line of duty and his widow’s claim for compensation was denied, where, in the year before his death, the fireman was diagnosed with and treated for heart disease, the call to which he responded prior to suffering the heart attack did not involve strenuous activity, and the decedent’s daily job stress and overtime hours worked in the two months before his death were too remote to establish a causal connection between his duties and his death.

OPINION

FREDERICK, J.

This claim is before the Court by reason of the death of Robert G. Medlicott, Sr., a deputy chief with the City of Berwyn Fire Department. The decedent’s widow, Roberta J. Medlicott, seeks compensation pursuant to the Law Enforcement Officers and Firemen Compensation

Act (820 ILCS 315/1-4) (hereinafter referred to as the "Act"). On May 10, 1993, the Court remanded this case to the Commissioner to hold a hearing to determine whether Deputy Chief Medlicott had been "killed in the line of duty" as defined by the Act. The report indicated that Claimant had met the other conditions precedent for an award under the Act.

The facts are as follows: On July 29, 1992, at approximately 6:00 a.m., Deputy Chief Robert Medlicott was discovered dead in his bunk at the Berwyn fire house. The cause of death was determined to be cardiopulmonary arrest secondary to dilated cardiomyopathy.

Former Fire Chief Ron Ballard testified that he was the fire chief at the time of Deputy Chief Medlicott's death. Chief Ballard testified that the normal number of work days per month for a firefighter was seven to eight days or 168 to 192 hours, depending on a number of factors, including the number of days in the month and the days on which the shift falls.

Due to a number of injured officers, Deputy Chief Medlicott was required to work overtime. In June, 1992, the decedent worked 290 hours and in July, 1992, up to the date of his death on the 29th, he had worked 264 hours.

Chief Ballard testified that firemen, while on duty, are subject to the stress of answering an alarm and the stress of being cooped up in the firehouse for extended periods of time. The Claimant, Mrs. Medlicott, testified that Mr. Medlicott had to cancel plans to go to Boy Scout camp with his son the last two weeks of July, 1992, due to the overtime he was required to work.

According to the time records in evidence, Deputy Chief Robert Medlicott started his last shift on the 27th

day of July, on overtime. The next day, July 28th, was his regular shift. Chief Ballard testified a regular shift is 24 hours, so Deputy Chief Robert Medlicott was working back-to-back 24-hour shifts. Mrs. Medlicott said that when he left for work on the 27th, Deputy Chief Robert Medlicott seemed fine.

The incident reports in evidence show that at 6:45 p.m. on July 28, 1995, the second day of his double shift, the decedent answered a fire call. There was nothing particularly dramatic about the call but Chief Ballard testified, when the alarm sounds, the men don't know whether they will be involved in a dramatic fire or not. As an officer, the decedent would not have personally fought the fire but would have directed others.

The detail headed by Deputy Chief Medlicott was back in service by 7:30 that evening and there does not seem to be anyone who could say what time he laid down in his bunk for the night. Chief Ballard did say, however, that Deputy Chief Robert Medlicott was on duty, subject to an alarm at any time, until he was discovered at 6:00 a.m. on July 29, 1995.

The medical records of Robert Medlicott were examined by William Brice Buckingham, M.D. who testified as an expert. The records showed that Robert Medlicott had been treated for about one year prior to his death. In August of 1991, a cardioversion was performed by a Dr. Pacold. At that time, Robert Medlicott had a rapid pulse which had failed to respond to beta blockers or Digoxin. The cardioversion successfully re-regulated his heart rate. The doctor advised Mr. Medlicott to abstain from beer. Mr. Medlicott was an ex-smoker, having given up cigarettes ten years before, and he had been treated for the rapid pulse about ten years prior to his death.

Mrs. Medlicott testified that the decedent was following the doctor's orders with respect to taking his medications and abstaining from alcohol. She further testified that the decedent was not under any work restrictions from the doctor.

Dr. Buckingham's report stated, "The work hours * * * could be an aggravating or precipitating factor causing this patient's death * * * working the number of hours described * * * could interfere sufficiently enough with his cardiac mechanism and add sufficient burden to his cardiac function to precipitate such an event." Dr. Buckingham further testified that Robert Medlicott had a serious disease and was at risk "virtually any time." It is important that Dr. Buckingham did not testify that the overtime work caused the death to a reasonable degree of medical certainty.

The Act provides for compensation to the designated beneficiary where the fireman is "killed in the line of duty." The Act defines "killed in the line of duty" as "losing one's life as a result of injury received in the active performance of duties as a * * * fireman * * * if the death occurs within one year from the date the injury was received and if that injury arose from violence or other accidental cause."

The sole issue before this Court is whether the decedent was killed in the line of duty. In addressing this issue, the Court has previously stated:

"Cases involving heart attacks are among the most difficult presented to this Court. The Court recognizes that police work involves stress and strain which can lead to heart attacks. In deciding whether an award should be granted, an effort is made to determine whether the activities the decedent was performing precipitated the heart attack. In cases where a decedent is performing strenuous physical activities at the time the attack is suffered, the court has consistently granted awards. However, in cases where the decedent was not performing strenuous physical activities when the heart attack was suffered, the Court must closely examine whether the circumstances surrounding the

decedent's performance of duties prior to the time the fatal heart attack was suffered may have precipitated the attack." *In re Application of Smith* (1990), 43 Ill. Ct. Cl. 183.

In this case, Deputy Chief Medlicott had worked a substantial amount of overtime in the two months preceding his death and he did respond to a fire call on July 28, 1992, but the record indicated that it was not a serious incident. Claimant urges this Court to conclude that the cumulative effect of working overtime and the daily stress of waiting for the fire alarm were the cause of the decedent's heart attack.

Claimant strongly relies on the Court's opinion in *In re Application of Feehan* (1980), 34 Ill. Ct. Cl. 293. The facts in *Feehan*, however, are clearly distinguishable. Terry Wayne Feehan was a sheriff's investigator. He was found unconscious on a third floor bathroom of a county courthouse. The circumstances leading to Investigator Feehan's death were that he put in an extraordinary amount of overtime in the active performance of stressful police duties prior to his death. The work he performed consisted of investigating crimes committed and about to be committed, making arrests, performing searches, and conducting surveillance and stakeouts in connection with a burglary and drug dealing. On the date of his death, he traveled to deliver evidence to a crime lab. Upon his return, he was called to testify at a hearing in a burglary case. Investigator Feehan was unaware he would have to testify. He began his testimony at 11:35 a.m. and testified for approximately 30 minutes. He left the courtroom and was found dead in the restroom shortly thereafter. Investigator Feehan was in the active performance of stressful duties just prior to his death.

Clearly, obligation and rigors faced daily by our firefighters result in stress for them. However, the evidence

in the instant case is too remote to establish a causal connection between the employment and the death. At the time of death, Claimant was not involved in any strenuous activity. He was not responding to a call, and in fact he had long returned from the last call. The decedent apparently went to sleep and then died.

The overtime and the daily stress of his duties as a fireman are too remote to establish a causal connection between his duties and his death. There is simply not enough evidence to establish that the circumstances surrounding decedent's performance of duties prior to the time the fatal heart attack was suffered precipitated the heart attack.

The Court must acknowledge the decedent's contributions to the public during his career and the tragedy of his untimely death; however, there is not enough evidence to establish that Deputy Chief Medlicott was "killed in the line of duty."

We are not unsympathetic to the loss of Claimant. However, as a Court, we must follow the law. We have stretched the statutory definition of killed in the line of duty to its extreme in many cases but the facts of this case are well beyond that limit.

Deputy Chief Medlicott was a fine fireman, but he was not killed by violence or other accidental cause. He had a serious disease and died of that disease.

For the foregoing reasons, it is the order of the Court that Claimant's claim be and hereby is denied.

(No. 93-CC-2848—Claim denied.)

DONALD ANDERSON, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed November 1, 1995.

MARK E. WOHLBERG, for Claimant.

JIM RYAN, Attorney General (JOEL CABRERA, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*proving negligence*. An inmate who alleges that his injuries resulted from the State's negligence must prove that contention by a preponderance of the evidence, and must further demonstrate that the State had actual or constructive notice of the dangerous condition which caused the injury.

SAME—*inmate burned when pipe burst—failure to establish negligence*. In a claim by an inmate who worked in a prison ethanol plant and suffered burn injuries when a pipe carrying hot liquid burst, the inmate's allegations that the State negligently failed to provide him with a safe work area, failed to maintain and repair the pipe, and failed to warn of the dangerous condition, were not supported by the evidence and his claim was denied, since the record indicated that the State made routine checks of the area and equipment and took reasonable steps to insure their safety, it had no notice of any defective condition prior to the Claimant's injury, and the Claimant himself failed to exercise reasonable care.

OPINION

JANN, J.

This cause arises from an incident on June 17, 1991, at approximately 8:00 p.m. at the Vienna Correctional Center. Claimant, an inmate at the time, was working in the ethanol plant as a still operator when a pipe burst. Claimant received first and second degree burns on several areas of his head, left eye and left arm. Claimant asserts that Respondent was negligent in the maintenance of the ethanol still, failed to make necessary repairs after notice of a defective or unsafe condition, failed to inspect the work area and failed to warn Claimant of the unsafe condition of the pipe and work area. Claimant seeks \$25,000 in damages for his injuries, lost time, pain and suffering, and permanent disfigurement.

Claimant testified that he had worked in the ethanol plant as a still operator on the 3:00 p.m. to 11:00 p.m. shift for approximately eight months prior to his injury on June 17, 1991. Claimant advised his supervisor that the still was running “kind of hot” approximately one to one and one-half hours before the pipe broke. Claimant was instructed to follow routine procedures involving adjustment of valves to attempt to lower the temperature of the still. Claimant stated a maintenance man was summoned, but he was also unable to rectify the overheating. When the temperature had failed to lessen within an “hour or so,” Claimant was told to shut down the still by his supervisor, Ralph Childers. As Claimant attempted to shut down the still, a pipe carrying hot liquid burst and sprayed the left side of his face, head and left arm. Claimant was taken to the medical unit for treatment.

Claimant testified that no routine maintenance was performed on the still during his tenure at the ethanol plant. He stated that repairs were made on an as-needed basis by inmate repairmen. Claimant further stated that the pipe in question had leaked about two weeks prior to the incident. He stated that leaks were common and repairs made in a “makeshift” manner. However, Claimant admitted that he was not an expert as to plumbing matters.

Claimant stated he was in severe pain from the burns for two to three weeks following his injury. He also suffered constant itching of the affected areas for several months and blurred vision in his left eye. Claimant presently complains of continued itching four to five times per month, a discoloration of the skin on his shoulder and occasional blurred vision in his left eye. Claimant sought no further medical treatment for his injuries after he was allowed to return to work in September, 1991. No medical evidence was introduced as to Claimant’s condition

and prognosis following his release from prison in December, 1991.

Claimant seeks recovery of \$135 as lost time. No evidence was admitted to support the claim as to dates of the lost time and compensation. Medical records indicate Claimant was injured again on September 11, 1991, while lifting a bucket in the ethanol plant. He apparently returned to work on or before September 11, 1991.

Claimant introduced no evidence of proper maintenance standards applicable to an ethanol still operation. No witnesses to the incident testified or submitted statements to corroborate Claimant's assertions of negligence and Respondent's notice thereof. No evidence was presented as to previous incidents of injury from similar circumstances at the ethanol plant.

Randall McClellan, farm supervisor at Vienna for the last ten years, testified on behalf of Respondent. Mr. McClellan was in charge of the supervisors who ran the ethanol plant and major maintenance therein. Mr. McClellan is on premises from 8:00 a.m. to 4:00 p.m. The ethanol plant is a 24-hour, three-shift operation with State employee supervisory staff and inmate employees. Mr. McClellan stated that the Department of Corrections has institutional directives which mandate daily checks of equipment. Maintenance routine cards are kept in a daily log and initialed by a supervisor on duty during the 7:00 a.m. to 3:00 p.m. shift. The maintenance cards for the date in question were produced and indicated inspection had been made. No records of actual repairs were introduced. Mr. McClellan testified that records of routine or minor repairs are not generally kept. Mr. McClellan testified he has knowledge of Claimant's injury and subsequent repair of the pipe in question. Claimant also stated the pipe was repaired after his accident.

Unfortunately, Mr. W. H. Taylor, the supervisor who made the inspection of the equipment on the day of the incident, is deceased. No incident or repair reports from the day in question were presented. Mr. Ralph Childers, the supervisor on duty at the time Claimant was injured did not testify nor were any statements or reports made by Childers presented.

Mr. McClellan described the workings of the ethanol still in some detail. He explained that relatively low pressures of two to three pounds are normal in the distillation procedure and that internal temperature of the liquid mash does not exceed 220°. Although the liquid could certainly cause burns to exposed skin, McClellan explained that Claimant's contentions that the pipe exploded due to excess pressure and temperatures well in excess of 220° were not possible. He further stated that he would have been routinely notified of any obvious defect in the machinery requiring the plant to be shut down. McClellan received no such notice on the day in question.

Claimant contends that his injuries resulted from the negligence of the Respondent. Such contention must be proven by Claimant by a preponderance of the evidence and that Respondent has actual or constructive notice of the dangerous condition which caused the injury. *Secor v. State* (1991), 44 Ill. Ct. Cl. 215.

Claimant argues that the State owes a duty to provide an inmate with safe working conditions and proper safety equipment, citing *Branch v. State* (1994), 45 Ill. Ct. Cl. 102, wherein the Claimant, an inmate of a penal institution, was ordered to clean the ceiling of the kitchen and had requested a ladder to enable him to do so. However, his request for the ladder was refused and he was directed to stand on a chair which was piled with paper.

Whereupon, he stood on the chair, slipped and fell which caused his injury. This Court held that the State breached its duty to provide a safe work area and proper equipment for Claimant. These facts are directly contrary to the case at bar. There was no evidence submitted that the Respondent did not provide Claimant with a safe work area and proper conditions. Claimant's own testimony which was often conflicted, self-serving and uncorroborated, indicated that in his opinion, the procedure for shutting down the still was safe. The evidence indicates that routine procedures were followed to safely lower the temperature of the still. No evidence beyond Claimant's speculation was provided as to the cause of the broken pipe.

The Claimant testified that he believed the still was dangerous, yet he worked on it and exposed himself to danger for eight months. Such action on his part is not an exercise of reasonable care on the part of the Claimant. *Albers v. Continental Co.* (1955), 220 F.2d 847.

Claimant contends that an inmate of a penal institution is not ordinarily free to refuse to perform a task even if he considers his working conditions unsafe, citing *Reddock v. State* (1978), 32 Ill. Ct. Cl. 611, which is inapplicable to the case at bar. Claimant Anderson was regularly employed in the "still" area involved for eight months and there were no accidents that occurred during that period until the accident involved herein. Based on this record, this area could not be classified as a hazardous area. Additionally, Claimant's assertion is defeated by his own testimony wherein he returned to work at the still sometime in September 1991 and complained to the supervisor that it was unsafe. He was reassigned by the supervisor to another area in the ethanol plant.

Further, this Claimant has not shown any evidence that Respondent did not exercise reasonable care in

maintaining the “still” or the pipe that connected the “still” to the electrical pump. To the contrary, evidence submitted by Respondent indicates that routine maintenance checks were being made every day and that such a maintenance check was made on June 17, 1991, just prior to the pipe burst involved in this cause. No obvious defects were found.

In addition to Claimant not meeting his burden of proof as to the negligence of Respondent being the cause of his injury, if such negligence were present and proven, Respondent, to be held liable, must have had notice of the defect. (*Rosario v. State* (1992), 43 Ill. Ct. Cl. 283.) The evidence indicates that steps were taken to lower the temperature of the still in a routine manner upon Claimant’s notice to his supervisor. Claimant did not notice leaks in the burst pipe or other defects in the pipe on the day in question.

We hereby find Claimant has failed to meet his burden of proof and this claim is hereby denied.

(No. 94-CC-0459—Claimant awarded \$5,200.)

J. BRADLEY YOUNG, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Order filed May 7, 1996.

JOSEPH L. RACINE, for Claimant.

JIM RYAN, Attorney General (JON MCPHEE, Assistant
Attorney General, of counsel), for Respondent.

HIGHWAYS—*determination of negligence.* In cases involving negligence in an automobile accident, the trier of fact must determine that it was the duty of the Respondent at the time of the occurrence to use ordinary care for the safety of the Claimant, and that the Respondent’s failure to do so caused the injury or property damage to the Claimant.

SAME—*duty of care owed by operators of State vehicles.* Operators of State vehicles are charged with the same duty of care as other drivers upon the highway, including the duty to see that which the driver clearly should see, and testimony by the driver that he looked but did not see will not absolve him of a charge of negligence, and the State is liable for damages proximately caused by its driver's negligent acts.

SAME—*salt truck operator's negligence caused accident and resulting damage to Claimant's car—damages awarded.* Testimony by the Claimant and a State salt truck driver showed that the truck driver was negligent in failing to see the Claimant's car in the left lane of two northbound lanes of traffic before the truck moved in front of the Claimant's vehicle and into a U-turn lane, thereby causing the Claimant's car to collide with the salt truck, and a property damage award was made to the Claimant for the undisputed value of his vehicle.

ORDER

MITCHELL, J.

The Claimant, J. Bradley Young, filed his complaint with the Court of Claims on September 1, 1993, seeking damages in the amount of \$5,200 from the State of Illinois for property damage as a result of an automobile accident in which Claimant's vehicle collided with a Department of Transportation salt truck. The Claimant contends that the Respondent's employee was negligent in the operation of the salt truck and that negligence was the proximate cause of the collision.

A hearing was held before this Court on September 22, 1994. The evidence consists of testimony by the Claimant and the driver of the salt truck. The filing of briefs was waived by the parties.

FACTS

On January 20, 1993, at approximately 6:15 p.m., the Claimant was operating his 1987 Audi 4000S in the left lane of Interstate 55 near Litchfield when he attempted to pass another vehicle and an IDOT salt truck. Both vehicles were traveling northbound in the right lane. It is uncontroverted that the roadway was icy, and it was sleeting

at the time. The Claimant was traveling at approximately 25 mph while the salt truck, driven by IDOT employee, Steven Voegele, and the other vehicle, a Ford Pinto, driven by an unknown motorist, were traveling between 15 and 20 mph.

The Claimant testified that he was driving in the left lane a car length or two behind the salt truck when the salt truck, without signaling, turned from the right lane, across the left lane and into a U-turn lane on the left that connects the northbound and southbound lanes of Interstate 55. The Claimant testified that he attempted to apply his brakes, but the icy road conditions made it impossible for him to stop. Claimant then attempted to drive onto the U-turn lane. The rear of his vehicle fish-tailed and collided with the left rear side of the salt truck. The Claimant testified that the car was totaled and that 30 days later he purchased a vehicle of identical make, model and year for \$5,200.

Voegele admitted that he was acting in the scope of his employment with the Department of Transportation when the collision occurred. Voegele testified that he signaled his turn between 200 and 300 feet before the U-turn lane, and that he checked his mirror for vehicles traveling in the left lane prior to changing lanes and saw no vehicles. He testified that he had gotten into the left lane 100 feet before the U-turn lane.

LAW

In cases involving negligence in an automobile accident, the trier of fact must determine that it was the duty of the Respondent at the time of the occurrence to use ordinary care for the safety of the Claimant, and that his failure to do so caused the injury or property damage to the Claimant.

Regarding the exercise of reasonable care, operators of State vehicles are charged with the same duty of care as other drivers upon the highway, and the State is liable for damages proximately caused by the operator's negligent acts. *Marquis v. State* (1985), 37 Ill. Ct. Cl. 221, 222.

The duty of care with which the Respondent is charged is to see that which he clearly should see. (*Id.* at 223.) In addition, testimony of a driver that he looked but did not see will not absolve him of a charge of negligence occasioned by failure to look. (*Grass v. Hill* (1981), 94 Ill. App. 3d 715, 418 N.E.2d 1137.) Regardless of whether Voegele executed a lane change before turning into the U-turn lane or whether he signaled his lane change or turn, he had a duty to see a vehicle overtaking him at a relatively slow rate of speed. Voegele should have seen the Claimant's vehicle if he had looked before changing lanes or turning. Therefore, Voegele was guilty of negligence.

Regarding whether Voegele's negligence was the proximate cause of damage to the Claimant's vehicle, it was foreseeable that because of the slick road conditions, a vehicle attempting to pass the salt truck would be unable to stop in time to avoid colliding with the salt truck. Clearly the action of Voegele driving into the lane in which the Claimant was traveling without seeing the Claimant's vehicle caused the Claimant's automobile to collide with the salt truck.

Regarding the amount of damages, it was uncontroverted that the Claimant's vehicle was totaled. Nor did Respondent contest that the value of the vehicle was \$5,200 at the time of the accident, as evidenced by the fact that the Claimant purchased a vehicle of identical make, model and year for \$5,200. Therefore, the Claimant is awarded \$5,200.

(No. 94-CC-1657—Claim denied.)

DAVID LAKE, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed March 8, 1996.

DAVID LAKE, *pro se*, for Claimant.

JIM RYAN, Attorney General (WENDELL HAYES, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*medical malpractice—what Claimant must establish.* Any Claimant who files a claim against the State alleging medical malpractice must establish by a preponderance of the evidence a breach of duty by the Respondent, that the Respondent deviated from the standard of care, and that the deviation was a proximate cause of the Claimant's injury, and both the relevant standard of care and the Respondent's deviation therefrom which proximately caused the Claimant's injury must be established by expert testimony.

SAME—*medical malpractice—standard of care.* The standard of care which must be established by an inmate in a claim for medical malpractice is that care which is provided by a reasonably well-trained medical provider in the same or similar locality, and while a deviation from the standard of care can be found if the inadequate care is obvious, there still must be proof that the deviation was the proximate cause of the alleged injury.

SAME—*inmate's allegations of medical negligence—no expert testimony or proof of causation—claim denied.* Where an inmate sought monetary damages based on allegations that, while incarcerated, he received improper treatment for open sores on his thumb and foot, the claim was denied, because the alleged inadequate care was not obvious, and the inmate failed to present expert testimony establishing the relevant standard of care, the State's deviation therefrom, and that the deviation proximately caused the alleged injury.

OPINION

FREDERICK, J.

Claimant, David Lake, an inmate with the Illinois Department of Corrections, seeks money damages from Respondent, State of Illinois, based on Claimant's allegations that he did not receive proper health care and treatment while incarcerated with the Illinois Department of Corrections at the Menard Correctional Center. In his complaint, Claimant alleges that Claimant was afflicted

with open sores on his right thumb and foot for which he sought treatment. Claimant contends that the treatment afforded by Respondent was unsuccessful, and his condition worsened. He further contends that in spite of his complaints, he did not receive appropriate care between the months of October, 1992, and December, 1992. Claimant contends that in December of 1992, Claimant was afforded different medication which again caused his condition to worsen. Finally, Claimant contends that in January of 1993, he was referred to “doctors from an outside medical facility” who discovered the cause of his problems and apparently relieved Claimant’s symptoms.

The cause was tried before Commissioner Rath. The Claimant proceeded to trial even though the Commissioner indicated Claimant could seek a continuance to obtain witnesses and evidence. At the hearing, Claimant testified that when he arrived at Menard Correctional Center on August 13, 1992, he was examined and found to be physically “stable.” Claimant informed Menard correctional officials that he had a medical history of ulcers and was seen on August 17, 1992, by Dr. Khan. On August 18, 1992, Claimant submitted a request to the healthcare unit at Menard to see a doctor concerning two open sores located on his right toe and right thumb. Claimant contends his request went unanswered until finally, on September 27, 1992, he was seen by Dr. Khan. Claimant informed the doctor that he had submitted a request to the healthcare unit concerning the sores. Dr. Khan looked at the sores and prescribed an anti-fungus cream and zinc ointment. Claimant testified that this medication had an adverse effect and that he made further requests for medical attention. On September 29, 1992, Claimant contends that a medical technician was informed by Claimant of the problems he was having with his right fifth toe and right thumb. Thereafter, Claimant received

additional creams and treatments on October 1, 1992. He was also seen by medical personnel on October 2, 1992. During this period of time, Claimant testified that he was in pain but was given nothing for the pain. On October 7, 1992, Claimant was seen by Dr. Khan who observed his condition and prescribed medicated cream but gave nothing to Claimant for pain. At the trial, Claimant contended that his right thumb was larger than his left thumb as a result of these conditions.

Claimant testified that he believed his medical needs were not being addressed on a professional level and were totally disregarded. He believes the treatment he received caused him physical and psychological pain. Claimant further testified that on November 30, 1992, he received outside help from a Dr. Wallace in Belleville. Dr. Wallace gave him medication that worked and apparently resolved Claimant's medical problems. However, Claimant testified that he still has pain in his hand and he is limited in his writing with his hand.

On cross-examination, Claimant acknowledged that he saw medical technicians and nurses, a doctor, and a specialist during his time at Menard. Claimant admitted that on numerous occasions he had opportunities to have his problems looked at and had received certain prescribed medications. On cross-examination, Claimant produced ten different medication containers and stated that these were the medications he was treated with.

Claimant contends in general that he was not treated properly and did not receive "the right stuff."

Claimant presented no expert medical testimony. The Respondent presented no evidence.

Claimant's claim is a cause of action sounding in medical negligence. Any Claimant who files a claim against the

State alleging medical malpractice must establish by a preponderance of the evidence a breach of duty by Respondent, that the Respondent deviated from the standard of care, and that the deviation was a proximate cause of Claimant's injury. (*Pink v. State* (1991), 44 Ill. Ct. Cl. 295.) Claimant failed to present any expert testimony to establish the standard of care, that Respondent deviated from the standard of care, and that the deviation was a proximate cause of Claimant's injury. Such evidence must be established by expert witnesses. (*O'Donnell v. State* (1980), 34 Ill. Ct. Cl. 12.) An inmate who files a claim for medical malpractice must establish the standard of care by expert testimony. The standard of care which the Claimant must establish is that care which is provided by a reasonably well-trained medical provider in the same or similar circumstances in a similar locality. (*Williams v. State* (1994), 46 Ill. Ct. Cl. 221.) In the present case, Claimant has failed to prove the standard of care and a deviation from that standard of care. (*Ray v. State* (1992), 44 Ill. Ct. Cl. 173.) While the Court has indicated a deviation from the standard of care can be found if the inadequate care is obvious, there still must be proof that the deviation was the proximate cause of the alleged injury. *Purtle v. Hess* (1986), 111 Ill. 2d 229.

The Court finds that the alleged inadequate care contended by Claimant is not obvious in this case. Claimant had the burden of providing expert testimony to establish the standard of care, which he did not do. Claimant has also failed to meet his burden of proof on the issue of proximate cause. *Tops v. Logan* (1990), 197 Ill. App. 3d 284.

In this case, there is no competent evidence that the Respondent deviated from the standard of care or that any actions or inactions by the medical providers proximately

caused any injury to this Claimant. For the foregoing reasons, it is the order of this Court that Claimant's claim be and hereby is denied.

(No. 94-CC-1722—Claim dismissed.)

VILLAGE OF HARRISTOWN, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed January 23, 1996.

HEYL, ROYSTER, VOELKER & ALLEN (ROY GULLY, of
counsel), for Claimant.

JIM RYAN, Attorney General (KAREN MCNAUGHT,
Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*Highway Code—State's immunity for damage to local entities' equipment placed on or under highway.* Pursuant to section 9—113(g) of the Illinois Highway Code, local entities and public utilities have sole responsibility for maintaining and repairing their ditches, drains, tracks, rails, poles, wires, pipelines and other equipment after such equipment is placed upon, under, or along any State highway, and thereafter the State shall in no case be liable to the entity for damages incurred by the entity or to its equipment.

SAME—*village's property damage claim barred by Highway Code—claim dismissed.* A claim by a village seeking compensation for damage to its equipment located on a State highway as a result of State mowing operations was dismissed with prejudice based on the immunity conferred by section 9—113(g) of the Illinois Highway Code, since the State's mowing activities related to and arose out of the operation, maintenance and use of the State's highway right-of-way, and as such, were intended to be immunized against liability.

OPINION

EPSTEIN, J.

This is a negligence claim for damages to the Claimant village's equipment, an electrical box and power pole that were located on Old U.S. Route 66, a State highway, pursuant to permit. The damages were allegedly caused by employees and agents of the Illinois Department of

Transportation (“IDOT”) while performing mowing operations on the State highway.

This claim is before us on the Respondent’s motion to dismiss, which asserts the immunity provision of section 9—113(g) of the Illinois Highway Code. (735 ILCS 5/9—113(g).) The Respondent contends that this statute bars the tort liability asserted in Harristown’s complaint, and relies on our construction of section 9—113(g) in *Village of Lansing v. Illinois Department of Transportation* (1994), 46 Ill. Ct. Cl. 429, which was a third-party contribution claim against IDOT.

Because the Respondent has filed its departmental report, and because the Claimant has not disputed the threshold facts asserted in the report on which the applicability of the statute depends, i.e., that the village’s equipment was located on a State right-of-way and was located there pursuant to an IDOT permit issued to Claimant, we treat the motion to dismiss as a section 2—619 motion based on the bar of section 9—113(g) immunity supported by the departmental report.

The statute, section 9—113(g), reads as follows, with “IDOT” substituted for the statutory phrase “State highway authority” that is employed in the Highway Code:

“(g) It shall be the sole responsibility of the entity, without expense to [IDOT], to maintain and repair its ditches, drains, track, rails, poles, wires, pipe line or other equipment after it is located, placed or constructed upon, under or along any State highway and in no case shall [IDOT] thereafter be liable or responsible to the entity for any damages or liability of any kind whatsoever incurred by the entity or to the entity’s ditches, drains, tracks, rails, poles, wires, pipe line or other equipment.”

The terms of the statute, particularly the immunity granted by it to IDOT vis-a-vis an “entity,” are stated in unqualified, absolute terms that do not admit of exceptions. This unqualified view and application of the statute was our construction in *Village of Lansing*, and we adhere

to that interpretation, wherever and whenever the statute is applicable. But neither the *Village of Lansing* opinion nor any other decision of this or any other Illinois court have addressed the question of the scope of applicability of this statute.

The arguments in this case have not been particularly helpful on this issue, and neither side has cited us to any precedents relating to this statute or any similar immunity or liability-shifting statute that might provide guidance. The Respondent takes the position that the statute is absolute in its effect and unlimited in its applicability: that anything owned by a municipality or public utility (the most common “entities” in the usage of the Highway Code) that is situated in, on, or under a State highway right-of-way pursuant to IDOT permit is simply open game for any IDOT tort, and IDOT is immune. Period. The Claimant, on the other hand, insists that the General Assembly did not intend to grant a blanket, unlimited immunity from any IDOT activities. The Claimant, however, also cannot point us to any instructive precedent, even by analogy. Neither the litigants nor our own research have discovered any legislative history that might inform our analysis, other than the language of the Highway Code itself.

Neither side of this dispute finds any explicit language in section 9—113, in any of its subparagraphs, nor in any other section of the Highway Code, that addresses the question of scope of applicability in any express terms. The language of paragraph (g) does not contain any express limitations on its applicability, other than the qualifying facts of location on State right-of-way and a proper permit for the equipment of the “entity.”

Nevertheless, we agree with the Claimant that the statute was not intended to, and does not, have universal application. Still, we agree with the Respondent and adhere

to our existing construction that where section 9—113(g) applies, it is absolute in the immunity granted to IDOT. (*Village of Lansing, supra.*) Nevertheless, this statute is contrary to the common law of tort liability (sovereign immunity aside), and is thus to be construed narrowly where possible in light of its language. Since the language here does not define the scope of applicability, we look to the statutory context, i.e., the Act and the section containing this paragraph, for an elucidation of the legislative intent of the applicability of this provision.

The Court need not here identify a bright line of applicability for this statutory immunity provision: it suffices for present purposes to observe that its applicability cannot sensibly be broader than the Act of which it is a part, the Highway Code. (Indeed, when this provision was enacted as part of the original Highway Code, the 1870 Constitution contained a restriction in its legislative article limiting the contents of legislation to the “subject” of the enactment. See 1870 Ill. Const., art. IV, section 13 (single subject rule). Thus the impact of this provision could not exceed the “highway” subject of the code.) Similarly, there is no basis for reading this immunity provision any broader than the subject of the section of which it is a part. The draftsmanship of this statute—which placed this immunity clause within a larger section, rather than establishing it as a free-standing provision within the code—suggests that it is but an aspect of the subject addressed in section 9—113, rather than having more general application.

When the scope of section 9—113 is reviewed, it is clear that this section is solely concerned with the sharing of State and township highway right-of-ways with other users under a permit system administered by IDOT. Simply put, section 9—113 creates a regulatory or permit system for the use of State and township real estate by local

governments, public utilities, and purely private parties; it is a land use statute. The immunity and liability-shifting provisions of paragraph (e) are plainly designed to eliminate the State's responsibility for the gratuitous use of its property under this land use statute.

In this context, it follows that section 9—113(g) has no intended application beyond the landuser-landowner liabilities implicated by the statutory land use scheme of section 9—113. This, then, is the consideration that determines the outer limits of the application of section 9—113(g) immunity.

Where the liability asserted against IDOT relates to, or arises out of, the ownership, operation, maintenance or use of the highway or roadway right-of-way, then the section 9—113(g) immunity applies full force and unqualifiedly. Where the asserted liability of IDOT arises independently of, and unrelated to, the ownership, operation, maintenance or use of the right-of-way, then that liability is beyond the reach of section 9—113(g) immunity. The inquiry is necessarily a case-by-case and fact-dependent exercise.

In this case, the liability asserted arises from the allegedly negligent operation of mowing equipment by IDOT personnel on the highway. The IDOT activity involved was the mowing of the highway right-of-way, which is clearly related to—and virtually a part of—IDOT's ownership and maintenance of the highway right-of-way. Indeed, this kind of normal maintenance activity is precisely the kind of activity that was plainly intended to be immunized against liability to those using the property under permit.

Thus we find, as we must, that the village's claim predicated on the allegedly negligent mowing operation

is barred as a matter of law by section 9—113(g). For this reason, the Respondent's motion to dismiss must be granted.

The claim is dismissed with prejudice.

(No. 94-CC-1955—Claim dismissed.)

EDWARD W. ARDT, Claimant, *v.* THE STATE OF ILLINOIS and the
ILLINOIS DEPARTMENT OF PROFESSIONAL REGULATION,
Respondents.

Order filed May 5, 1995.

Opinion filed March 8, 1996.

JAMES D. GOODMAN, for Claimant.

JIM RYAN, Attorney General (IAIN D. JOHNSTON, Assistant Attorney General, of counsel), for Respondents.

ATTORNEY FEES—*claim for litigation expenses under section 10—55(c) of Administrative Procedures Act dismissed for lack of jurisdiction.* In a dentist's claim under section 10—55(c) of the Illinois Administrative Procedures Act seeking to recover his reasonable litigation expenses stemming from an administrative action in which he had partial success and obtained a judicial invalidation of administrative rules, the Court of Claims determined that neither section 8(a) or 8(i) of the Court of Claims Act granted jurisdiction to the Court to adjudicate the dentist's administrative litigation expense claim brought under section 10—55(c), and the claim was therefore dismissed for lack of jurisdiction.

ORDER

EPSTEIN, J.

This claim for recovery of \$53,000 of litigation expenses is brought pursuant to section 10—55(c) of the Illinois Administrative Procedures Act (“APA”) (5 ILCS 100/10—55(c)), on the basis that the Claimant had secured a judicial invalidation of a State administrative rule.

This claim is now before the Court on the Claimant's motion for summary judgment which has been fully briefed.

Claimant apparently brought this claim directly to this Court in January, 1994, after our supreme court's December, 1992, affirmance of the appellate court order that invalidated, on constitutional grounds, an administrative regulation of the Department of Professional Regulation ("Department") that had regulated advertising by dentists. (*Ardt v. Illinois Department of Professional Regulation* (1992), 154 Ill. 2d 138, 607 N.E.2d 1226, affirming 218 Ill. App. 3d 61, 578 N.E.2d 128 (1st Dist. 1991).) The Claimant was significantly but not entirely successful in that litigation. He was also partly victorious in his challenge to various department rules. As the Claimant points out, the appeals in that litigation were lengthy and burdensome: Claimant's initial appeal to the circuit court led to another by him and spawned two appeals by the department which the Claimant was obliged to defend. After the appellate process concluded, the Claimant asserted in this Court, seemingly for the first time, his statutory claim for recovery of his "reasonable expenses of the litigation" to which he claims entitlement under APA section 10—55(c) as a result of his having invalidated administrative rules in that litigation.

Before the Court can take up the merits, a threshold issue must be resolved. The Court is constrained to raise, on its own motion, the issue of its subject matter jurisdiction to adjudicate *ab initio* this fee claim. Although it is settled that this Court has exclusive jurisdiction to adjudicate a claim and to enter a judgment against the State when an Illinois statute permits liability against the State (and waives sovereign immunity), this Court's jurisdiction to adjudicate a claim must be based on a statutory grant. This Court is entirely a creature of statute.

We observe that section 8(i) of the Court of Claims Act contains a specific grant of jurisdiction to this Court to adjudicate certain litigation expense claims under section 10—55(a) of the APA, but section 8(i) on its face appears not to provide jurisdiction over claims brought under APA section 10—55(c). (See 705 ILCS 505/8(i).) Similarly, the language of APA section 10—55 is unclear, especially in light of the different “court” references contained in paragraphs (a) and (c) of that section. Ultimately, it is uncertain whether or not the APA or the Court of Claims Act, both invoked in this case, or any other Illinois statute, singly or collectively, grant subject matter jurisdiction to this Court, either exclusively or concurrently with the circuit and appellate courts, to adjudicate fee awards under APA section 10—55(c) [formerly section 14.1(b)]. Because this Court’s jurisdiction is entirely statutory, an analysis of all of the pertinent statutes and of their interplay and of their legislative histories and legislative intent is required. This is most appropriately done, initially, by the litigants.

We also observe that this case appears to be a procedural case of first impression, i.e., this is apparently the first case in which a litigation expense Claimant under APA section 10—55(c) has come initially to this Court, rather than proceeding first in the circuit or reviewing court for a fee award and then bringing that award here for review and entry of a judgment. See, e.g., *Citizens for a Better Environment v. State* (1987), 39 Ill. Ct. Cl. 205 (appellate court award); *Cooper-Becker v. State*, No. 92-CC-2792 (unpublished order, Montana, C.J., adopting fee award ordered by circuit court); *Kaufman Grain Co. v. State* (1990), 42 Ill. Ct. Cl. 290 (entering award imposed by appellate court in *Kaufman Grain Co. v. Director, Dept. of Agriculture* (4th Dist. 1989), 179 Ill. App. 3d 1040, 534 N.E.2d 1259, 1265.)

We believe it is appropriate and necessary to have full briefing of this issue by the parties before further consideration of this case. It is therefore ordered:

1. Claimant and Respondent are directed to file supplemental briefs or other submissions on, and limited to, the following:
 - (a) Supplementing the record with portions of the record in the circuit, appellate or supreme courts, as either party deems relevant to this Court's consideration of the jurisdictional issue;
 - (b) The issue of the jurisdiction of this Court to adjudicate *ab initio*, and in lieu of the trial or reviewing court, the recovery of litigation expenses under section 10—55(c) of the Administrative Procedures Act; and
 - (c) If a party contends that such jurisdiction is granted by law, whether such jurisdiction of this Court is concurrent or exclusive;
2. Claimant's and Respondent's supplemental briefs shall be filed within 60 days after the entry of this order.
3. Either party may file a supplemental reply within 30 days after the other party's supplemental brief is filed. Requests for oral argument shall be filed by that date.
4. The Claimant's summary judgment motion is taken under advisement.

OPINION

EPSTEIN, J.

This claim for recovery of \$53,000 of administrative litigation expenses was brought pursuant to section 10—55(c) of the Illinois Administrative Procedures Act (the

“APA”) (5 ILCS 100/10—55(c)), on the basis that the Claimant had secured a judicial invalidation of a State administrative rule. This claim is before the Court on the Claimant’s motion for summary judgment, fully briefed, and this Court’s later inquiry as to its jurisdiction (see, order of May 5, 1995), which was supplementarily briefed and orally argued to the full Court.

1. The Facts

Claimant, a dentist, was the subject of an administrative action by the Department of Professional Regulation (the “department”) relating, *inter alia*, to his professional advertising. In that proceeding, the Claimant challenged the validity on constitutional grounds of various rules and regulations of the department that regulated dental advertising and which were the basis, in at least substantial part, of the department’s action against the Claimant. That litigation wound its way from an administrative hearing in the department, to the circuit court, to the appellate court and, finally, to the supreme court, which affirmed the appellate court’s decision that invalidated administrative regulations of the department. *Ardt v. Illinois Department of Professional Regulation* (1992), 154 Ill. 2d 138, 607 N.E.2d 1226, affirming 218 Ill. App. 3d 61, 578 N.E.2d 128 (1st Dist. 1991).

In that exhaustive litigation, the Claimant was partially and significantly but incompletely victorious. He was also substantially but incompletely victorious in his challenge to various department rules. Nevertheless, he was undisputedly successful in invalidating administrative rules. It is also clear that the last two of these lengthy and burdensome appeals resulted from the department’s appeals from orders adverse to it, which the Claimant was obliged to defend and which he defended successfully.

Claimant brought this claim directly to this Court in January, 1994, well after the supreme court's opinion of December, 1992. In this Court, Claimant asserted his statutory claim for recovery of his "reasonable expenses of the litigation" under APA section 10—55(c), to which he claims entitlement as a result of his having invalidated administrative rules of the department in that litigation. His "reasonable expense" claim is for \$53,000.

2. The Jurisdictional Issue

This Court raised the jurisdictional issue, which we characterized as the "subject matter jurisdiction [of the Court of Claims] to adjudicate *ab initio* this fee claim" (order of May 5, 1995). We noted then that our jurisdiction must be based on a statutory grant, as this Court is entirely a creature of statute and its authority devolves solely from statute.

We also observed that the provision of our statute that was invoked to provide jurisdiction, section 8(i) of the Court of Claims Act (705 ILCS 505/8(i)), contains a specific grant of jurisdiction to this Court to adjudicate litigation expense claims brought under section 10—55(a) of the APA, but not over claims brought under APA section 10—55(c). The Court asked the parties to brief this facial jurisdictional distinction between section 10—55(a) and section 10—55(c) claims, and we invited analysis of the question of

"whether or not the APA or the Court of Claims Act * * * or any other Illinois statute, singly or collectively, grant subject matter jurisdiction to this court, either exclusively or concurrently with the circuit and appellate courts, to adjudicate fee awards under APA §10—55(c) [formerly §14.1(b)]."

Finally, in throwing this jurisdictional issue back to the litigants, the Court reviewed, non-exhaustively, the procedural history of these section 10—55(c) fee claims in this Court. We observed that this case appeared to be a

procedural case of first impression, i.e., that this was apparently the first case in which a litigation expense Claimant under APA section 10—55(c) has come initially to this Court, rather than proceeding first in the circuit or reviewing court for a fee award. We pointed out that in those cases, the fee award adjudicated in the courts of general jurisdiction had been brought here for review and entry of a judgment. See, e.g., *Citizens for a Better Environment v. State* (1987), 39 Ill. Ct. Cl. 205 (appellate court award); *Cooper-Becker v. State*, No. 92-CC-2792 (unpublished order, Montana, C.J., adopting fee award ordered by circuit court); *Kaufman Grain Co. v. State* (1990), 42 Ill. Ct. Cl. 290 (entering award imposed by appellate court in *Kaufman Grain Co. v. Director, Dept. of Agriculture* (4th Dist. 1989), 179 Ill. App. 3d 1040, 534 N.E.2d 1259, 1265.)

3. The Positions of the Parties

Claimant contends that this Court has the exclusive jurisdiction to adjudicate section 10—55(c) fee claims under the Court of Claims Act and under general principles of Illinois sovereign immunity law, particularly in the absence of any jurisdictional grant to any other court over section 10—55(c) fee claims on which the legislature has waived sovereign immunity. Claimant relies on section 8(a) of our Act, the general jurisdictional grant to this Court to adjudicate “claims against the state founded upon any law of the State of Illinois * * *” and, to a lesser extent, on section 8(i) of our Act, which he argues was not intended, or cannot sensibly be read to have been intended, to be limited to administrative cases that are not litigated beyond the administrative level. Claimant argues, consistently, that the adjudications of the fee awards in *Citizens for a Better Environment*, *supra*, and *Kaufman Grain Co.*, *supra*, by the appellate court, and in

Cooper-Becker, supra, by the circuit court, were improper and without jurisdiction (but were seemingly salvaged by this Court's adoption of those courts' awards).

The Respondent takes precisely the opposite position. The State takes the unqualified position that this Court lacks any jurisdiction to adjudicate claims brought under section 10—55(c) by virtue of the absence of a specific statutory grant of jurisdiction over section 10—55(c) claims.

Neither the Claimant nor the State advocates, or recognizes any argument that might support, the notion of concurrent jurisdiction of this Court and the Illinois courts of general jurisdiction over APA section 10—55(c) fee and expense claims.

3. The Opinion

Analysis of our jurisdiction traditionally and appropriately starts with our own statute, the Court of Claims Act, and commences particularly with section 8, the jurisdictional section of our Act. This is because the General Assembly has for many years followed a general practice of legislating grants of jurisdiction and other powers to this Court within that Act, usually by amending section 8. That legislative practice, however, is not constitutionally mandated. Accordingly, review of our Act does not necessarily exhaust the potential statutory sources of our jurisdiction.

Initially, then, we have reviewed our Act and the arguments of the parties. Sections 8(a) and 8(i) of the Act, which are invoked here, provide as follows:

“Section 8. Jurisdiction. The court shall have exclusive jurisdiction to hear and determine the following matters:

- (a) All claims against the State founded upon any law of the State of Illinois, or upon any regulation thereunder by an executive or administrative officer or agency, other than claims arising under the Workmen's Compensation Act or the Workmen's Occupational Diseases Act, or claims for expenses in civil litigation.

- (i) All claims authorized by Section 14.1(a) of the Illinois Administrative Procedure Act for the expenses incurred by a party in a contested case on the administrative level.”

For the reasons that follow, we conclude that neither section 8(a) or section 8(i) of the Court of Claims Act grant jurisdiction to this Court over administrative litigation expense claims arising under APA section 10—55(c).

Although a superficial consideration of section 8(a) may suggest that these section 10—55(c) fee claims might be covered by its “founded upon any law” language, as Claimant urges, that does not take account of the statutory exclusion of “claims for expenses in civil litigation” contained in the same provision. And although the civil litigation expense clause of section 8(a) is somewhat ambiguous on its face, it is ultimately an *exclusion* of such expense claims from the section 8(a) grant of jurisdiction as this Court has held. *Taylor v. State* (1995), 48 Ill. Ct. Cl. 369.

As it is clear that the administrative review litigation that is the subject of this claim is civil litigation, it follows that “expenses in civil litigation” under section 8(a) of our Act encompasses the fees and expenses sought in this case, and excludes this claim from our section 8(a) jurisdiction.

The analysis of our section 8(i) jurisdiction is briefer. That provision simply does not include APA section 10—55(c) claims, and Claimant has not persuaded us that there is any basis on which we could, or should, construe the statute other than as it plainly reads—or fails to read.

The Claimant argues, essentially, that the General Assembly made a legislative error in including section 10—55(a) but not section 10—55(c) in this jurisdictional grant, and that a literal application of the omission will leave section 10—55(c) Claimants with a right devoid of a

remedy, which is to be avoided. That is not a senseless argument. But it lacks merit under the full statutory circumstances. (In any event, it would require more than a merely harsh result for this Court to find and “cure” a possible legislative error, and at a minimum there would have to be a strong showing of legislative error contrary to legislative intent, which is utterly missing here.)

There are three answers to Claimant’s arguments on section 8(i). First, the statute itself manifests a plain intent to have a limited reach. The statute includes language that explicitly limits our section 8(i) jurisdiction to “expenses incurred by a party in a contested case *on the administrative level.*” (Emphasis added.) This language eliminates any hint of inadvertence in the drafting of section 8(i), and plainly fails to reach administrative cases that reach judicial review. This is not an instance of a purely numerical cross-reference in a statute that might be misdrafted.

Second, the statutory scheme of the APA section 10—55 manifests a coherent and rational legislative scheme. Under APA section 10—55, there are only two situations in which a Claimant can get reimbursement for his or her litigation fees and expenses: (1) in an agency-initiated case that “*does not proceed to court* for judicial review,” and (2) on an issue on which a “*court does not have jurisdiction * * ** under Section 2—611” [now Supreme Court Rule 137] (Emphasis added.) It is only in these instances where the Claimant can eventually come to this Court under APA section 10—55(b), which is the procedural implementation section for section 10—55(a). On the other hand, section 10—55(c)—which is in issue here—is *not* limited to expenses “at the administrative level” and *only* comes into play where there has been a judicial invalidation of an administrative rule. Thus, section

10—55(c) involves *only* judicial proceedings in the courts of general jurisdiction. The APA's bifurcation of its statutory remedy into non-judicial cases and judicial cases, with a distinct procedure for each, is entirely rational. That the APA allows jurisdiction over section 10—55(a) claims to remain in the circuit court (or the reviewing courts) rather than vesting this Court with jurisdiction over them is a legislative choice that this Court cannot and should not question.

Third, Claimant's contention that this Court's refusal to exercise jurisdiction over his section 10—55(c) fee and expense claim will leave him, and other administrative litigants similarly situated, without a remedy is effectively disposed of by the analysis above. It seems clear that jurisdiction to adjudicate administrative litigation expense claims under APA section 10—55(c) lies in the circuit court or the reviewing courts. Contrary to the Claimant's suggestion, no statutory grant is required to provide such jurisdiction to the circuit, appellate or supreme courts, whose underlying jurisdiction to adjudicate all justiciable controversies flows not from statute but from article VI of the Illinois Constitution of 1970.

Of course, a claim that is barred by sovereign immunity, such as a claim against a State agency for litigation expenses, is non-justiciable for that reason. The legislative waiver of sovereign immunity over claims against the State for litigation expenses in administrative proceedings—which is effected by APA section 10—55—is necessary to *remove* the jurisdictional impediment against adjudicating these claims against the State as a defendant. But once that impediment is removed by statute, as it has been by section 10—55(c), the constitutional jurisdiction of the circuit, appellate and supreme courts applies fully to those administrative expense claims, unless the legislature

prescribes jurisdiction elsewhere, such as this Court, as it traditionally does but as it has not done for these claims.

Claimant misapprehends the law when he contends that *all* claims over which sovereign immunity has been waived must be adjudicated in this Court. That is, of course, the general rule in Illinois. And, for those claims that are governed by the Court of Claims Act, exclusive jurisdiction in this Court is the rule. But jurisdiction here is the general rule because—and only because—the General Assembly has chosen to vest jurisdiction in this Court over most otherwise-immunized claims against the State. But most is not all.

There are a few classes of claims against the State where the General Assembly has opened the door to liability but has left jurisdiction in the circuit and reviewing courts rather than specifying exclusive jurisdiction here. For example, fee award cases for bad faith pleading by the State (under former section 2—611 and now seemingly under Supreme Court Rule 137) are heard in the courts in which the pleading offense occurred, which ordinarily is in the circuit court. (*Taylor v. State* (1995), 48 Ill. Ct. Cl. 369.) We now hold that the same is true of APA section 10—55(c) claims for litigation expenses.

Our review of the remainder of the section 8 provisions and of the other sections of the Court of Claims Act failed to disclose any plausible basis for jurisdiction in this Court over section 10—55(c) expense claims. None of the parties has suggested a jurisdictional predicate in any other statute.

However, before terminating the analysis, and notwithstanding the failure of the Claimant to argue the point, we consider the possibility that the references to “court” in APA section 10—55(b) and (c) itself might itself constitute a grant of jurisdiction, and if so, whether

the statute's use of the generic and uncapitalized term "court" might encompass this Court as well as the state courts of general jurisdiction, even though, as the State emphatically points out, the statute uses the capitalized term "Court of Claims" in section 10—55(b). We agree that this strongly suggests an intended distinction between "court" and "Court of Claims." It is not altogether clear, however, just what distinction was intended.

We have given this much consideration. Although we accept the point that the two terms should be read to have different meanings, we do not agree with the State's argument that "court" necessarily excludes the Court of Claims. We have found nothing in the APA's language or policy or available legislative history that calls for that construction. Thus it is plausible that the APA, or at least the APA amendment enacted in Public Act 82-670, contemplated concurrent jurisdiction over section 10—55(c) claims, by this Court and the court that invalidates or reviews the invalidation of the administrative rule (which triggers the State's liability under section 10—55(c)).

However, we are persuaded otherwise by the legislative history of these provisions. The General Assembly's inclusion of a companion amendment to our Act granting us jurisdiction (over the section 10—55(a) claims) in the same enactment in which it added the administrative expense remedy to the APA demonstrates that the legislature did *not* intend the APA language itself to be a jurisdictional grant. See Public Act 82-670 (adding [currently-numbered] section 10—55 to the APA and adding section 8(i) to the Court of Claims Act). If the APA's language was intended or understood to be a jurisdictional grant, there would be no reason to amend the Court of Claims Act to grant us jurisdiction a second time. The canons of construction mandate us to adopt an interpretation that avoids

redundancy in statutory language where possible, and we do so. Accordingly, we must find that the APA language was not a jurisdictional grant. For this reason, jurisdiction is unavailable to this Court under the provisions of APA section 10—55.

That, finally, exhausts the analysis which leaves this Court without jurisdiction and the Claimant in the position, as he put it, of trying to convince a reluctant court elsewhere in Illinois that it has jurisdiction to hear his administrative expense claim. We intimate no views on Claimant's contention that section 10—55(c) may create an independent action, and we intimate no view on whether the supreme, appellate or circuit courts that heard the original litigation—in which this fee and expense claim clearly could have been adjudicated—still have or could reassert that jurisdiction to entertain Claimant's petition. We do observe in passing that no statute of limitations has been brought to our attention that would bar this claim in this or any other court.

This Court understands, as Claimant has aptly pointed out, that our conclusions as to the jurisdiction of other courts may not be binding or even persuasive, particularly as we hold that we lack jurisdiction to do anything but issue this opinion and dismiss this case in this Court. Nevertheless, that conclusion impacts on our ultimate holding, and is germane to Claimant's argument that this statutory claim must have a remedy in some court. That oft-made argument has particular resonance in this case.

This Court, however, lacks jurisdiction to entertain this administrative litigation expense claim brought under APA section 10—55(c). Accordingly, this claim is dismissed, without prejudice to reassert it in a court of competent jurisdiction.

(No. 94-CC-2390—Claimant awarded \$50,000.)

In re APPLICATION OF NANCY KOLOWSKI

Opinion filed August 23, 1995.

JOHN M. HOSTENY, for Claimant.

JIM RYAN, Attorney General (CHAD FORNOFF, Assistant Attorney General, of counsel), for Respondent.

LAW ENFORCEMENT OFFICERS AND FIREMEN COMPENSATION—*when officer is killed in the line of duty*. A law enforcement officer is killed in the line of duty as contemplated by the Law Enforcement Officers and Firemen Compensation Act when his life is lost as a result of injury received in the active performance of duties as an officer if the injury arose from violence or other accidental cause.

SAME—*heart attack—determination of whether award will be granted*. In deciding whether an award should be granted under the Law Enforcement Officers and Firemen Compensation Act when the cause of death was a heart attack, where the decedent was performing strenuous physical activities at the time the attack was suffered, the Court has consistently granted awards, but where the decedent was not performing strenuous physical activities, the Court must examine whether the circumstances surrounding the decedent's performance of duties prior to the time the fatal heart attack was suffered may have precipitated the attack.

SAME—*fatal heart attack—job stress and performance of strenuous activities during week before death—compensation awarded*. Although the Claimant's deceased husband, a police officer, was not performing strenuous physical activities when he suffered a fatal heart attack while on duty in his squad car, the Claimant was awarded compensation where, in the week prior to his death, the officer worked long hours in extremely cold weather performing physically and mentally exhausting drug surveillance work and during that time he experienced early signs of coronary stress, and earlier in his career the officer had been traumatized by his involvement in a shooting and was subjected to mental abuse by his supervisor.

OPINION

PATCHETT, J.

This cause comes before the Court upon the claim filed herein by the Claimant, Nancy Kolowski, the widow of Robert Kolowski, for benefits under the provisions of the Law Enforcement Officers, Civil Defense Workers, Civil Air Patrol Members, Paramedics, Firemen, and

State Employees' Compensation Act ("the Act"). 820 ILCS 315/1 *et seq.*

The Claimant seeks to recover under the Act for the death of her husband who died of a heart attack while on duty as a special agent with the Illinois State Police—Division of Criminal Investigation.

The Claimant is the designated beneficiary of Robert Kolowski. On February 25, 1993, Robert Kolowski was on duty in his assigned squad car en route to interview local gun dealers pursuant to a firearm owners' identification card violation. He suffered a heart attack in the parking lot of Division 5 headquarters at approximately 3:15 p.m. He was rushed by ambulance to St. Joseph Hospital, where he was pronounced dead at 4:37 p.m.

Although the decedent was not performing strenuous physical activities when he suffered his heart attack, a close examination of the circumstances surrounding his performance of duties prior to the time of the fatal heart attack shows that these circumstances may have precipitated the heart attack. Special Agent Kolowski was involved in a job that is, by nature, very strenuous. Additionally, the decedent was involved in a shooting in 1980, and he suffered nightmares about this incident up to the time of his death. Only days before his heart attack, the decedent worked a 13-hour day and an 18-hour day that culminated in drug arrests in extremely cold temperatures. The decedent was further involved in unloading, loading, and transporting over 300 pounds of cannabis at the end of the 18-hour day in extremely cold temperatures.

Earlier in his career, Robert Kolowski served as a State trooper and field training officer. Until two weeks prior to his death, he was assigned to the Will County Task Force and involved in undercover operations. By all

accounts he was an outstanding officer and had a brilliant career with the State police. Special Agent Kolowski, in addition to his investigative work, was also involved in testing and training new recruits. The department chose him to be a supervisor over cadets at the Illinois State Police Academy in 1988.

In the course of his career, Special Agent Kolowski was exposed to strenuous and arduous activities. In 1980, he was involved in a shoot-out in which he and his partner fired 21 shots at an assailant, striking him 13 times before he fell. Up until his death, Robert Kolowski suffered nightmares related to that incident.

Special Agent Kolowski's physical and emotional stress continued when he was assigned to the Will County Task Force. The Will County Task Force was often involved in undercover operations, including drug surveillance and arrests. This task force had problems with personnel because many officers had taken early retirement. Furthermore, Special Agent Kolowski had a personal conflict with one of his supervisors. In addition to the physically demanding assignments on the task force, Special Agent Kolowski may have been subjected to ethnic slurs and other public humiliation by this supervisor. Special Agent Kolowski filed a formal grievance in late January, 1993. This unit was disbanded on February 11, 1993, only two weeks before Robert Kolowski's death on February 25, 1993.

After the dissolution of the Will County Task Force, Robert Kolowski returned to the Division of Criminal Investigations and continued his undercover work. On February 18, 1993, he worked from 8:26 a.m. to 5:20 p.m. and then was called out again at 11:45 p.m. and worked until 4:00 a.m. the following morning, a 13-hour day. On February 19, he began working at 9:39 a.m. and worked until 3:30 a.m. the next morning, an 18-hour day.

During the last 12 hours of that 18-hour day, he was assigned to a drug surveillance case. Temperatures that day were extremely cold, and one officer had to write out the incident report from inside a vehicle in order to keep his pen from freezing. That drug surveillance ended with arrests and recovery of over 300 pounds of cannabis. Robert Kolowski assisted in transporting the cannabis from the suspect's vehicle to a police vehicle, and again from the police vehicle into evidence storage.

Soon after these arrests, Robert Kolowski complained of a tightness in his chest, congestion, and hot and cold sweats. Thinking it was only a cold or the flu, he did not see a doctor. Robert Kolowski called in sick on February 22 and 23, 1993. Although his symptoms did not improve, he did go to work on February 24 in order to catch up on his paperwork. On February 25, 1993, he went into work, again with what he believed to be symptoms of a cold or influenza. That afternoon he was called out to investigate a firearm owner's identification card violation. As he entered his squad car in the parking lot of Division 5 headquarters, he suffered a heart attack. He was rushed by ambulance to St. Joseph Hospital, where he was pronounced dead at 4:37 p.m.

The issue presented for determination by the Court is whether the decedent was killed in the line of duty as contemplated by the Act. More specifically, the issues are whether his life was lost as a result of injury received in the active performance of duties as a State police officer and whether the injury arose from violence or other accidental causes.

This Court has recognized that cases involving heart attacks are "among the most difficult presented * * *." (*In re Application of Smith* (1990), 43 Ill. Ct. Cl. 183.) The Court continued: "In deciding whether an award should

be granted an effort is made to determine whether the activities the decedent was performing precipitated the heart attack. In cases where a decedent is performing strenuous physical activities at the time the attack is suffered, the Court has consistently granted awards. However, in cases where the decedent was not performing strenuous physical activities when the heart attack was suffered, the Court must closely examine whether the circumstances surrounding the decedent's performance of duties prior to the time the fatal heart attack was suffered may have precipitated the attack." *Smith, supra*.

While the heart attack must have been the result of performance of duties, in some cases it is relevant to examine the "circumstances and events further preceding the death than those occurring solely on the day of the heart attack as far as is practical and not overly remote." (*Smith* at 186-87.) In other cases, the Court has examined the hours the decedent worked just prior to his death in order to show that the heart attack the decedent suffered constituted an injury arising from "other accidental cause." In *In re Application of Feehan* (1980), 34 Ill. Ct. Cl. 293, the Court noted that a police officer who suffered a fatal heart attack after testifying in a burglary case had been working an extraordinary amount of overtime in addition to the stressful nature of drug surveillance and stakeouts. In *Smith, supra*, the Court noted that a jailer who suffered a fatal heart attack worked 14 straight days under stressful conditions. In both cases, the Court granted an award under the Act.

The facts in the case at hand are analogous to those in *Feehan* and *Smith*. Robert Kolowski worked a 13-hour day and a second 18-hour day just prior to his illness. He worked drug surveillance and made arrests in extremely cold conditions. In the end, Robert Kolowski and his team

made several arrests and recovered over 300 pounds of cannabis. Robert Kolowski further unloaded and reloaded the 300 pounds of cannabis in these extremely cold temperatures. Within a day of this mentally and physically exhausting work, he began to notice symptoms of what he thought was a bad chest cold, but may have been early signs of coronary stress. After missing two days of work, he returned to his job while suffering the same symptoms. While on the job, he suffered a fatal heart attack.

Looking beyond the events that occurred just prior to Robert Kolowski's death, we note that he suffered a tremendous amount of job-related stress throughout his career. He was involved in a shooting in 1980 that haunted him the rest of his life. Also, he allegedly suffered mental abuse and humiliation with the Will County Task Force.

This Court has recognized the stressful nature of police duties, especially those involving arrests, searches, and surveillance. (See *Feehan, supra.*) Even an officer who worked as a fingerprint technician and who complained of pressure in his work received an award from this Court. See *In re Application of Nicholson* (1979), 33 Ill. Ct. Cl. 319.

This Court has previously granted an award in the case of a heart attack which occurred while a deputy sheriff was shoveling snow. The deputy sheriff was shoveling snow away from the car which had become stuck while he was en route to serve process on a certain individual. Clearly that activity was part of the performance of his duties as a law enforcement officer. (*In re Application of Parchert* (1980), 33 Ill. Ct. Cl. 312.) In addition, in *In re Application of Ford* (1986), 38 Ill. Ct. Cl. 306, this Court entered an award for an officer who suffered a heart attack while walking a new beat alone in a high crime area. The new beat included an area where gang activities and

shootings had occurred. The stress therefore associated with that risk contributed to his death which was the result of “other accidental cause.” Therefore, the officer was killed in the line of duty, and this Court entered an award.

In the present case, Robert Kolowski, having been exposed to an extremely high stress situation, was called from his office to conduct an investigation. In the course of conducting that investigation, he died of a heart attack.

This Court has also made an award where the heart attack occurred off duty when the evidence established that the decedent had to exert or had encountered strenuous exertion on the job. Subsequent to the extreme physical exertion, the officer died on the next afternoon. This is similar to the case at hand where Kolowski had encountered considerable physical exertion a week prior to the heart attack. He had complained about not feeling well after the exertion, and he ultimately had the heart attack. See *In re Application of Sparling* (1983), 36 Ill. Ct. Cl. 353.

For the reasons stated above, we award the Claimant the sum of fifty thousand dollars (\$50,000).

(No. 95-CC-1206—Claim denied.)

AARON WASHINGTON, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Order filed December 6, 1995.

AARON L. WASHINGTON, *pro se*, for Claimant.

JIM RYAN, Attorney General (NUVIAH SHIRAZI, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*State not insurer of prisoners' safety—negligence.* The State is not an insurer of the safety of persons under its control, and in order to sustain a negligence claim against the State, the Claimant must show that the State had a duty, that the duty was breached, and that the breach was the proximate cause of the injury.

SAME—*inmate struck on head with fire extinguisher by fellow inmate—claim denied.* An inmate who was struck on the head with a fire extinguisher while engaged in a fight with another inmate could not prevail in his negligence claim alleging that the State had a duty to lock the fire extinguishers in the prison, since there was no rule or regulation to that effect, it was a common practice to keep the extinguishers unlocked so that inmates could quickly eliminate small fires, and there had been no similar incidents involving assaults with fire extinguishers in at least 15 years at the prison.

ORDER

MITCHELL, J.

This is a claim for personal injury pursuant to the Illinois Court of Claims Act. (705 ILCS 505/8(c).) Claimant alleges that he was injured as a result of negligence in the maintenance and control of a fire extinguisher used by another inmate to strike Claimant in the head during a fight on September 19, 1994, at the Centralia Correctional Center.

Claimant contends that Respondent negligently failed to lock the fire extinguishers so that they may not be removed by inmates and used as weapons. As a result of that negligence, Claimant states that he was struck in the head with a fire extinguisher by a fellow inmate and suffered a cut to his head. He also suffered headaches for two or three months afterward.

A hearing was held before this Court on May 4, 1995, during which Claimant testified that he was attacked, without provocation, by an inmate wielding a fire extinguisher. He was treated for a laceration to his head. Claimant denies being a gang member or being involved in the fight before he was attacked.

Also at the hearing, Respondent called Lawrence Boshera, fire safety coordinator at the Centralia Correctional Center, to testify. Boshera testified that there are no rules or regulations promulgated by the Illinois Department of Corrections that fire extinguishers must be locked in boxes. He states that it is common practice to keep fire extinguishers unlocked so that inmates can extinguish small fires more quickly than if a corrections officer had to be called to unlock a fire extinguisher. He also stated that in the 15 years that he had been at Centralia Correctional Center, no other inmate has used a fire extinguisher as a weapon.

Respondent also called James Alemond, internal affairs investigator of the Illinois Department of Corrections. Alemond testified that Claimant was a member of the Gangster Disciples gang and was found to have been a participant in the fight and was disciplined.

Claimant contends he is entitled to damages of \$45,000 from Respondent for negligence.

The State is not an insurer of the safety of persons under its control. *Dorsey v. State* (1977), 32 Ill. Ct. Cl. 449.

In order to sustain the negligence claim against Respondent, Claimant must show that Respondent had a duty, that the duty was breached and that the breach was the proximate cause of the injury.

Claimant failed to show that Respondent had a duty to lock the fire extinguishers in its penal institution. There is no rule or regulation to that effect. In addition, Claimant failed to show that Respondent had notice of a dangerous condition. In fact, testimony showed that no one had used a fire extinguisher as a weapon at the Centralia Correctional Center in at least the past 15 years.

Respondent has decided that fire safety warranted keeping fire extinguishers unlocked. It appears that Respondent acted reasonably and in a manner consistent with accepted prison practices.

Therefore, this claim is denied.

(No. 95-CC-1975—Claim denied; petition for rehearing denied.)

EDWARD DYE, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed November 1, 1995.

Order on petition for rehearing filed May 17, 1996.

EDWARD D. DYE, *pro se*, for Claimant.

JIM RYAN, Attorney General (NUVIAH SHIRAZI, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*establishing negligence*. In order to sustain a negligence claim against the State, the Claimant must show by a preponderance of the evidence that the State had a duty, that the duty was breached and that the breach was the proximate cause of the Claimant's injuries, and the Claimant must also prove his damages.

SAME—*duty to provide medical care—proof through expert testimony—damages*. While the State owes a duty to provide inmates with reasonable medical care, claims that the State provided inadequate or improper medical care are allegations of medical malpractice which must be proven by expert testimony, and absent proof of damages no award may be entered by the Court, and an award may not be based on conjecture.

SAME—*negligent failure to provide inmate with diabetic diet during lockdown—no proof of damages—claim denied—petition for rehearing denied*. The State was negligent in failing to provide the Claimant with his diabetic diet during a 10-day prison lockdown, but the inmate's negligence claim and petition for rehearing were denied, because he failed to prove the value of the meals of which he was deprived and did not produce expert testimony to support his claim that, as a result of not receiving his medically prescribed diet, he suffered eye, kidney, liver and cardiovascular damage.

OPINION

FREDERICK, J.

This is a claim for personal injury pursuant to section 8(c) of the Illinois Court of Claims Act. (705 ILCS 505/8(c).) Claimant, Edward Dye, has alleged that he was injured as a result of being deprived of his diabetic diet from September 6 to September 16, 1994, while the Centralia Correctional Center was on lockdown.

Claimant, an inmate with the Illinois Department of Corrections, contends that he was suffering from an abnormally high blood sugar level. He claims that he has suffered irreversible injuries to his eyes, kidneys, liver and cardiovascular system.

At the trial before the Commissioner on May 4, 1995, Claimant testified that he filed a grievance with the Illinois Department of Corrections, which has since promulgated a procedure for supplying inmates with diabetic diets while institutions are on lockdown. In this Court, Claimant seeks monetary compensation for the 30 diabetic meals he alleges he did not receive. The Department of Corrections refused to award Claimant compensation. Claimant also testified that his eyes and kidneys have deteriorated.

On cross-examination, Claimant stated that during the lockdown he ate items he purchased at the commissary, including potato chips. He admitted to purchasing items such as candy bars, cookies, pies and summer sausage, but stated that he purchased those items for someone else.

During the hearing, the Respondent called Harold Cotten, health care unit administrator, who testified that during October, 1994, Claimant failed to pick up many of his diabetic meals and had complained about the diet. Mr. Cotten stated that on November 4, 1994, Claimant was

taken off of the diabetic diet because he failed to comply with the program by refusing to pick up his diabetic meals. Claimant was put back on the diet on December 1, 1994, and has recently been complying with the diet.

Respondent also called Donna Bassett, an accountant with the Illinois Department of Corrections, who testified to the commissary slips denoting food items Claimant purchased as described heretofore.

In addition to his testimony, Claimant submitted a memorandum opinion and order entered by the Honorable George M. Marovich on March 10, 1995, in the United States District Court for the Northern District of Illinois, Eastern Division, in the case of *Edward Dye v. Michael F. Sheahan, J. W. Fairman and Szabo Correctional Services*, cause number 93-C-6645. The opinion notes that taking diabetics off of their medically-prescribed diets, and denying a diabetic prisoner a special diet may have violated the eighth amendment.

Claimant contends that he is entitled to \$30,000 in damages for injuries he suffered to his eyes, kidneys, liver and cardiovascular system as a result of Respondent's gross negligence in failing to provide him with a diabetic diet for ten days in September, 1994.

Claimant testified that on September 6, 1994, to September 16, 1994, the institution was on lockdown. Claimant is diabetic. Claimant has a prescription for a diabetic diet. During the lockdown, diabetic prisoners were not served their diabetic diets. Claimant, in his institutional grievance, sought monetary damages for the 30 diabetic meals he did not receive. Claimant testified he has had to live on commissary items he purchased at the inmate commissary. Claimant testified his diabetes is now completely out of control. Claimant sought payment for

the approximately 30 dietary meals he did not receive. The Institutional Board affirmed the grievance in regard to the failure to provide dietary meals during lockdown but denied the monetary compensation request.

The Claimant testified that as a result of not receiving his diet food, he ended up in the hospital. Only normal meals were served during the lockdown. As a result of Claimant's grievance, a uniform procedure was established to ensure dietary meals to those prisoners requiring such meals. Claimant further testified he was hospitalized on the 16th of September. He was sent back to the unit that day. Three days later a lab test was done which indicated his glucose was running well over 200. Claimant testified he had frequent urination, headaches and nausea. He felt his whole system was out of whack for ten days. Claimant feels he has suffered "all sorts of damage" to his eyes and kidneys.

Claimant did not call any medical expert witnesses to testify concerning his medical condition. The transcript does show that Claimant's medical records indicate that on September 16th he came into the medical unit for a blood sugar test. Claimant apparently denied any complaints at that time. No acute distress was noted.

In order to sustain a negligence claim against Respondent, Claimant must show Respondent had a duty, that the duty was breached, and that the breach was the proximate cause of Claimant's injuries. Claimant must also prove his damages.

This Court has held that the State owes a duty to provide inmates with reasonable medical care. (*Bynum v. State* (1992), 44 Ill. Ct. Cl. 1.) Respondent did breach its duty by failing to provide Claimant with diabetic meals from September 6 through September 16 of 1994. Claimant was to have a diabetic diet. Respondent failed to provide this diabetic with his medically-prescribed diet while

the institution was on lockdown. Respondent has admitted this and has since modified its procedures so that diabetic inmates are provided with proper meals during lockdowns. The State was negligent.

The inquiry does not end here, however. Claimant must prove this breach of Respondent's duty was the proximate cause of his injury and what those damages are by a preponderance of the evidence. (*Harris v. State* (1989), 41 Ill. Ct. Cl. 184.) The Claimant has failed to prove the value of the meals for which he was deprived and presented no evidence in that regard. The Claimant has further failed to produce any evidence to show that there has been any irreversible damage to his eyes, kidneys, liver or cardiovascular system. A mere statement that these injuries occurred is insufficient. Claimant failed to produce expert testimony or even produce medical reports reflecting such injuries. This Court requires expert testimony to prove claims of insufficient medical care. Claims that the State provided inadequate and improper medical attention and care are allegations of medical malpractice and must be proven by expert testimony. (*Woods v. State* (1985), 38 Ill. Ct. Cl. 9; *Arterburn v. State* (1990), 43 Ill. Ct. Cl. 246.) While we find the State failed to provide the ordered diet foods during the lockdown, we cannot find Claimant was damaged without expert testimony which Claimant failed to provide.

For the foregoing reasons, it is the order of this Court that Claimant's claim be and hereby is denied.

ORDER

FREDERICK, J.

This cause comes before the Court on Claimant's petition for rehearing, and the Court having reviewed the

opinion and the pleadings, and the Court being fully advised in the premises, wherefore, the Court finds:

1. That this case was tried before the Commissioner of the Court on May 4, 1995.

2. That Claimant had a fair opportunity to present his case.

3. That Claimant failed to prove damages by a preponderance of the evidence.

4. That Claimant had the burden of proving his damages. *Jackson v. State* (1992), 45 Ill. Ct. Cl. 314.

5. That absent proof of damages, no award may be entered by the Court. *Harris v. State* (1989), 41 Ill. Ct. Cl. 184.

6. That an award may not be based on conjecture. *Walter v. State* (1989), 42 Ill. Ct. Cl. 1.

7. That the Court's November 1, 1995, opinion was the correct resolution of this case as Claimant failed to prove his damages by a preponderance of the evidence.

8. There is no competent evidence before the Court that Claimant suffered injuries to his eyes, kidneys, liver and cardiovascular system.

9. That there is no competent evidence before the Court regarding the value of the meals.

10. Claimant cites the cause of *Bynum v. State* (1992), 44 Ill. Ct. Cl. 1, in support of his petition for rehearing. In *Bynum, supra*, the Claimant presented the expert medical testimony of Dr. Michael Gonzales. Dr. Gonzales testified that the Respondent failed to provide the special care which a paraplegic patient would need in order to prevent pressure sores; that Claimant was given the wrong size colostomy bags, the colostomy did not adhere;

that the medical care Respondent provided Claimant did not meet the standard of care; that Claimant did not receive the physical therapy he required; and *but for the inadequate treatment Respondent provided Claimant “he would be able to walk today.”* (Emphasis added.)

11. That Nathaniel Bynum proved his damages by a preponderance of evidence by competent medical testimony.

12. Claimant herein has failed to prove his damages by a preponderance of the evidence by competent medical evidence. The Court cannot speculate as to whether Claimant has suffered injuries to his eyes, kidneys, liver and cardiovascular system.

13. That Claimant’s request for the Court to accept “known facts” does not satisfy Claimant’s burden of proof.

For the foregoing reasons, it is the order of the Court that Claimant’s petition for rehearing be and hereby is denied.

(No. 95-CC-3426—Claim dismissed.)

THEODORE BUCHANAN, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Order filed April 11, 1996.

THEODORE BUCHANAN, *pro se*, for Claimant.

JIM RYAN, Attorney General (DONALD C. McLAUGHLIN, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*inmate’s unauthorized absence from correctional facility—claim for missing property dismissed.* Where the Claimant’s

work release status was revoked after he violated Department of Corrections rules by failing to return to a correctional facility from work as scheduled, his claim for conversion of his personal property by the State during his subsequent transfer to another institution was dismissed, based upon a department rule which stated that an inmate's personal property was deemed abandoned in the event of his unauthorized absence, or failure to return to the facility.

ORDER

JANN, J.

This cause coming to be heard on Respondent's motion to dismiss, due notice having been given, and the Court being fully advised in the premises, makes the following findings:

According to the complaint, on May 7, 1994, Claimant was an inmate at Crossroads Community Correctional Center ("Crossroads"). At Crossroads, Claimant was in the work release program. On May 7, 1994, Claimant failed to return from work at his regularly scheduled time of 1:00 p.m. At 1:45 p.m., on May 7, 1994, Claimant was written a disciplinary report by Crossroads indicating he was in violation of Department of Corrections Rule 504c item 207.

Department of Corrections Rule 504c item 207 states:

"Unauthorized Movement or Absence.

Definition: Being anywhere without authorization, or being absent from where required to be outside the facility, or returning late or not traveling directly to/from any authorized destination without prior approval."

A warrant was issued for Claimant's arrest. 26 hours later, at 3:00 p.m. on May 8, 1994, the Claimant turned himself in to a police station. Claimant was transferred from the police station to Joliet Reception and Classification Center on May 10, 1994. On May 11, 1994, before the adjustment committee, the Claimant pled guilty to violation of Department Rule 504c item 207—unauthorized movement or absence. As a result, Claimant's work release status was revoked.

On May 27, 1994, the Claimant was transferred to the Hill Correctional Center (“Hill”). On September 22, 1994, the Claimant sought to grieve an issue of missing property to the coordinator of inmate issues. The Claimant grieved that when transferred to Hill, he had not yet received any of his property from his placement at Crossroads.

On October 11, 1994, the office of inmate issues recommended that the matter be remanded to Crossroads for review and for a report to be forwarded to the director’s office within 20 days. On December 12, 1994, the office of the coordinator of inmate issues reviewed the information and recommended that Claimant’s grievance be denied. On February 14, 1995, the office of the coordinator of inmate issues readdressed Claimant’s grievance of missing personal property. Once again, the coordinator of inmate issues noted that Crossroads acted appropriately in denying the grievance, specifically noting that all responsibility to an inmate’s property is forfeited when the inmate is away from the center for a period of time that is unauthorized.

Subsequently, on April 27, 1995, the Claimant filed this suit in the Court of Claims. Claimant now brings this claim for the conversion of his personal property by Department of Corrections officials on May 10, 1994, when he was transferred from Crossroads to Joliet Correctional Center. Claimant alleges he was not permitted to take his property with him. Claimant seeks from the Respondent the sum of \$1,286.

Department of Corrections Rule—part 535, section 535.130(c) states:

“(c) Committed persons’ personal property shall be deemed abandoned in the event of an unauthorized absence such as an escape, runaway, attempted escape or runaway, or failure to return to the facility.”

Department of Corrections Rule—part 535, section 535.130(d) states:

“(d) The Department shall not be responsible for loss of abandoned property or for any items for which the committed person does not have an inventory record, a permit and/or receipt, or which would have been subject to an inventory but does not appear itemized on the inventory.”

As stated above, the Claimant was found guilty of Dept. Rule 504c item 207 by an adjustment committee.

According to Department Rules 535.130(c) and (d), when the Claimant failed to return to Crossroads, his absence was unauthorized, and thus his personal property was deemed abandoned. The department was no longer responsible for any loss of the abandoned property.

It is hereby ordered that Claimant’s action be dismissed with prejudice.

(No. 96-CC-0057—Claim dismissed.)

ROBERT DEVANEY, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed April 11, 1996.

JERRY SERRITELLA, for Claimant.

JIM RYAN, Attorney General (GUY A. STUDACH, Assistant Attorney General, of counsel), for Respondent.

EXHAUSTION OF REMEDIES—*all other remedies must be exhausted before filing claim.* Pursuant to section 25 of the Court of Claims Act, any person who files a claim in the Court of Claims shall, before seeking final determination of his claim, exhaust all other remedies and sources of recovery, and absent such an exhaustion of remedies, the Court does not have jurisdiction to consider a claim.

SAME—*retaliatory discharge—Claimant failed to exhaust remedies—claim dismissed.* The Claimant’s retaliatory discharge claim against the State was dismissed for lack of jurisdiction where the Claimant failed to exhaust his administrative remedies by appealing his employment termination to the Merit Commission of the Secretary of State’s office as provided under the State Merit Employment Code.

OPINION

SOMMER, C.J.

Claimant alleges that he was separated from employment in the office of the Secretary of State in retaliation for having exercised certain unspecified “rights” under the Workers’ Compensation Act. (820 ILCS 305/1 *et seq.*) Respondent has filed a motion to dismiss the claim based in part on Claimant’s failure to exhaust his administrative remedies with the Merit Commission for the Office of the Secretary of State.

Exhaustion of all available remedies is specifically required for all claims pursuant to section 25 of the Court of Claims Act (705 ILCS 505/25):

“Any person who files a claim in the court shall, before seeking final determination of his or her claim[,] exhaust all other remedies and sources of recovery whether administrative or judicial; except that failure to file or pursue actions against State employees, acting within the scope of their employment, shall not be a defense.” See also Rules 6 and 9 of this Court. (74 Ill. Admin. Code 790.60 and 790.90.)

Absent such an exhaustion of remedies, this Court simply does not have jurisdiction to consider a claim. *Watkins v. State* (1992), 45 Ill. Ct. Cl. 203, 205-206.

Here, the precise administrative remedy Claimant failed to exhaust was available to him under section 9a of the Secretary of State Merit Employment Code (15 ILCS 310/9a):

“A certified employee who believes that he or she has been separated from employment in the Office of the Secretary of State by a personnel transaction used as a subterfuge for discharge may, within 15 calendar days after the final decision of the Director of Personnel on the transaction, appeal in writing to the Commission. The appeal must allege specific facts which, if proven, would establish a prima facie case that the employee was in effect discharged contrary to and in violation of the requirements of Section 9 of this Act [15 ILCS 310/9]. Any appeal which fails to allege sufficient and specific facts to support the allegation may be summarily dismissed by the Commission. The Commission in due exercise of its discretion may make its decision on the appeal after an investigation of the allegations or it may order

a hearing held on any disputed issues of fact or law. In any hearing called under the provisions of this section to resolve a dispute of fact, the employee has the burden of establishing by the introduction of competent evidence a prima facie case proving that the employee was pretextually discharged. Nothing in this section shall be construed to preclude employees from timely asserting other rights given to them under this Act.”

Interestingly, Claimant does not dispute his failure to exhaust these administrative remedies. Rather, Claimant’s counsel contends that an exception to the exhaustion requirement should exist in retaliatory discharge claims. As authority for this argument, Claimant’s counsel cites to cases where the judicial courts of this State have allowed union members to file suit for retaliatory discharge without first exhausting contractual remedies contained in the grievance procedures of their collective bargaining agreement. (See, e.g., *Midgett v. Sackett-Chicago, Inc.* (1984), 105 Ill. 2d 143, 473 N.E.2d 1280.) However, those situations are not analogous. Exhaustion of remedies is a fundamental *jurisdictional* requirement which must be satisfied in order for *any* claim to be brought before this Court, and we are not at liberty to disregard it. This Court has a long history of summarily rejecting claims filed by those who have failed to fully pursue their remedies elsewhere, even when employment issues were at stake. See, e.g., *Badal v. State* (1981), 35 Ill. Ct. Cl. 254.

Accordingly, the Court finds that Claimant failed to exhaust his administrative remedies with the Merit Commission of the Office of the Secretary of State and that, pursuant to section 25 of the Court of Claims Act, the Court does not have jurisdiction to consider this claim. It is therefore ordered that Respondent’s motion to dismiss is allowed, and this claim is dismissed with prejudice.

(No. 96-CC-2432—Claim dismissed.)

ANTHONY LONGSTREET, SR., Claimant, *v.*
THE STATE OF ILLINOIS, Respondent.

Order filed May 20, 1996.

ANTHONY O. LONGSTREET, SR., *pro se*, for Claimant.

JIM RYAN, Attorney General (DONALD C. McLAUGHLIN, Assistant Attorney General, of counsel), for Respondent.

IMMUNITY—*when members of judiciary are entitled to immunity.* Members of the judiciary are entitled to absolute immunity for performance of their duties, and such immunity applies to judicial acts or rulings on matters before the bench and within the Court's jurisdiction and it insulates judges from liability in damages for judicial acts.

SAME—*inmate's negligence claim against judge dismissed—absolute immunity.* In an inmate's claim against a judge alleging that, during the course of the inmate's criminal case, the judge negligently deprived him of his constitutional rights, the judge was entitled to absolute immunity from liability in damages to the inmate and the claim was dismissed, since the judge's alleged actions occurred in his judicial capacity while he presided over criminal matters involving the inmate.

ORDER

PATCHETT, J.

This matter coming to be heard on the motion of the State of Illinois to dismiss the claim herein, and it appearing to the Court that Claimant has received due notice, and the Court being fully advised in the premises:

According to the complaint, Claimant, while an inmate at the Pontiac Correctional Center, brought this *pro se* complaint in tort against Randolph County 20th Judicial Circuit Judge Jerry D. Flynn. Claimant was convicted of aggravated battery and given a two-year consecutive sentence.

Claimant seeks damages of \$100,000 for the negligence of Judge Flynn. Claimant alleges the judge breached

his duty to inform the Claimant of his rights to be tried on an indictment and to have a grand jury hear evidence in a criminal case for the purpose of establishing probable cause to prosecute for the offense of aggravated battery. Claimant alleges the judge was required by law to execute a written waiver that the Claimant knowingly waived his right to be tried on an indictment yet failed to do so.

Claimant alleges Judge Flynn refused to issue a writ of *habeas corpus* demanding his release from the Illinois Department of Corrections. Furthermore, based on Judge Flynn's actions, Claimant alleges his constitutional rights were violated, he suffered hardship, as well as the infliction of mental pain and mental anguish. As a result, Claimant alleges he is justly entitled to compensation by the State for the negligence of Judge Flynn in the sum of \$100,000.

Members of the judiciary are entitled to absolute immunity for performance of their judicial duties. (*Forrester v. White* (1988), 108 S. Ct. 538, 543, 544; *Nance v. Lane* (N.D. Ill. 1987), 663 F. Supp. 33, 35; *Scruggs v. Moellering* (7th Cir. 1989), 870 F.2d 376, 377; *Dellenbach v. Letsinger* (7th Cir. 1989), 889 F.2d 755, 761.) Absolute immunity applies to judicial acts or rulings on matters before the bench and within the Court's jurisdiction. (*Ohse v. Hughes* (7th Cir. 1987), 816 F.2d 1144, 1154.) Absolute immunity insulates members of the judiciary from liability in damages for judicial acts. *Anderson v. Roszkowski* (N.D. Ill. 1989), 681 F. Supp. 1284, 1292.

Claimant alleges Flynn was a judge of the Circuit Court of Randolph County who was assigned to hear the matter of *People v. Anthony Longstreet*, 91-CF-41. (See Claimant's complaint). The Claimant was convicted of aggravated battery on December 4, 1991.

The Claimant's complaint indicates Jerry D. Flynn was a judge of the Circuit Court of Randolph County assigned to hear matters where Claimant was a defendant. The Claimant appeared before this member of the judiciary who was performing judicial duties to conduct hearings or trials relating to the criminal matters involving the Claimant. Judge Flynn is entitled to absolute immunity from liability in damages in this present action since his actions clearly occurred in his judicial capacity as a trial judge of the criminal matters in which the Claimant was a party. The mere fact that Claimant appears unhappy with being convicted should be addressed on appeal and not brought as an action against this judge of the Circuit Court of Randolph County in the Illinois Court of Claims.

It is hereby ordered that the motion of the State of Illinois be, and the same is, hereby granted, and the claim herein is dismissed with prejudice.

CRIME VICTIMS COMPENSATION ACT

Where person is victim of violent crime as defined in the Act; has suffered pecuniary loss; notified and cooperated fully with law enforcement officials immediately after the crime; the injury was not substantially attributable to the victim's wrongful act or substantial provocation; and his claim was filed in the Court of Claims within one year of the date of injury, compensation is payable under the Act.

OPINIONS PUBLISHED IN FULL FY 1996

(No. 88-CV-0496—Claimant awarded \$2,040.)

In re APPLICATION OF RALPH J. HOPKINS

Opinion filed December 3, 1993.

Order filed August 22, 1995.

LEGAL ASSISTANCE FOUNDATION (DEVEREUX BOWLY, of counsel), for Claimant.

JIM RYAN, Attorney General (PAUL H. CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*evidence which may be introduced at hearings under Act.* In hearings held under the Crime Victims Compensation Act before Commissioners of the Court of Claims, any statement, document, information or matter may be received in evidence if, in the opinion of the Court or its Commissioner, such evidence would contribute to a determination of the claim, regardless of whether such evidence would be admissible in a court of law.

SAME—*Claimant stabbed in tavern—admissibility of police reports—award entered pursuant to parties' stipulation.* In a claim under the Crime Victims Compensation Act by a man who was stabbed in a tavern, the State sought to introduce a police report over the Claimant's objection to show that the Claimant may have initiated the altercation, thereby precluding his recovery under the Act, but after the Court of Claims remanded the case for a determination by the Commissioner as to whether the police report was

admissible under the Act, the parties entered into a stipulation and the Claimant was awarded \$2,040 for loss of earnings.

OPINION

FREDERICK, J.

This cause comes before the Court on the application of Claimant, Ralph J. Hopkins, for benefits pursuant to the Illinois Crime Victims Compensation Act. The application was filed on January 15, 1988. The history of the case indicates the Attorney General filed his investigatory report on November 1, 1989, and the Court entered an order denying the claim on January 4, 1990. The basis for the denial was a finding by the Court that the Claimant's conduct contributed to his injury to such an extent as to warrant that the Claimant be denied entitlement to compensation.

On January 22, 1990, the Claimant requested a hearing before the Commissioner assigned to the case to contest the initial denial of the claim based on the Respondent's investigatory report. The Commissioner tried the case on December 14, 1990, on the issue of liability only. The Court learned at the oral arguments that there was a tacit agreement between counsel to try the issue of liability bifurcated from the issue of damages. In the event the Claimant prevailed and damages could not be stipulated to, a second trial would be held to determine damages. While this procedure may not be the most economical in time for the parties and the Court, this procedure is not disapproved in crime victims cases. This procedure may be useful in many crime victims cases where damages are easily ascertainable and the Attorney General has the ability and staff to ascertain the statutory damages. However, it would help ensure judicial economy if the parties would advise the Commissioners of disputed damage issues in crime victims cases, where possible, so that all fact issues can be determined in one trial. By allowing this

procedure of bifurcation in crime victims cases, we acknowledge that crime victims cases are different than most other cases and that this bifurcated procedure can be appropriate in crime victims cases.

At the trial on liability before the Commissioner, the Claimant testified that one week prior to March 5, 1987, he gave a ride to an acquaintance named Janice who worked at a tavern located at 511 S. St. Louis. Janice objected to the fact that Claimant was going to stop at a few places before taking her home. Janice decided to get out of Claimant's car and to find another means of getting home. On March 5, 1987, Claimant went to the tavern located at 511 S. St. Louis. Janice was sitting by the door. Janice shoved Claimant in the face and the lights went out in the tavern. After the lights went out, Claimant was stabbed. Claimant denied that he started the fight which led to his injury.

The Respondent called no witnesses. The Respondent sought to introduce the police reports which indicate that Claimant may have started the fight. The Claimant objected to the introduction of the police reports and the Commissioner sustained the objection pursuant to the authority of *Tamm v. State* (1982), 35 Ill. Ct. Cl. 805. Without the police reports, the only evidence before the Court is the Claimant's testimony indicating he did not start the altercation. The Claimant argues that police reports are inadmissible hearsay. The Respondent argues that the Crime Victims Compensation Act allows the Commissioner and the Court to consider all evidence helpful to the determination of the Claimant's right to benefits. (740 ILCS 45/13.1(b).) Section 13.1(b) states that at "hearings held under this Act before Commissioners of the Court of Claims, any statement, document, information or matter may be received in evidence if in the opinion of the Court or its Commissioner such evidence

would contribute to a determination of the claim, *regardless of whether such evidence would be admissible in a court of law.*” (Emphasis added.)

Normally police reports are not admissible in a court of law except for purposes of impeachment of the officer’s testimony. We have held as we did in *Tamm, supra*, that in cases other than crime victims cases police reports are normally inadmissible. However, the statute in crime victims cases specifically allows for the receipt of any document in evidence regardless of its admissibility in a court of law if either the Court or Commissioner is of the opinion that such document would contribute to the resolution of the case.

While in most cases, we would agree that police reports should not be admissible, we do find that there are crime victims cases where police reports may be helpful and should be admitted. Where witnesses are deceased, unavailable or refuse to testify, police reports may help the Court in resolving the issues. In such cases, the Court must consider the weight to be given to such reports in the face of testimony at the trial which is the subject of cross-examination. Generally more weight will be given to live witnesses who are subject to cross-examination or where the police reports are inconsistent. *In re Application of Cage* (1990), 43 Ill. Ct. Cl. 443.

The trial transcript indicates that the Commissioner believed police reports were inadmissible under any circumstances. Because of this belief and because the trial only considered liability and not damages, we remand this case to the Commissioner assigned to the case for a new trial. In the event the Respondent is unable to present witnesses and attempts to admit police reports, the Commissioner should make a finding based on section 13.1(b) (740 ILCS 45/13.1(b)), as to admissibility.

Based on the foregoing, the case is remanded to the Commissioner assigned to the case with directions to set a retrial of the case in accordance with the findings of this opinion.

ORDER

FREDERICK, J.

The parties have entered into a stipulation whereby the Attorney General's Office recommends that a payment in the amount of \$2,040 be made to the Claimant, Ralph Jerome Hopkins, for loss of earnings.

Wherefore, it is hereby ordered that a payment in the amount of \$2,040 be made to the Claimant, Ralph Jerome Hopkins, for loss of earnings.

It is further ordered that this case be closed.

(No. 89-CV-0322—Claimant awarded \$560.75; request for additional compensation denied.)

In re APPLICATION OF RONALD D. MANCINI

Opinion filed November 19, 1993.

Opinion on petition for rehearing filed March 11, 1996.

STEVENS & MCGUIRE (K. THOMAS STEVENS, of counsel), for Claimant.

JIM RYAN, Attorney General (PAUL H. CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*compensable pecuniary loss defined*. Section 2(h) of the Crime Victims Compensation Act includes in its definition of compensable pecuniary loss, loss of earnings and future earnings because of disability resulting from injury, and an award for loss of earnings or future earnings is to be determined based on the victim's average net monthly earnings for the six months immediately preceding the date of injury or \$1000 per month, whichever is less.

SAME—*reduction in loss of future earnings—unreasonable failure to secure substitute employment.* A crime victim's loss of future earnings shall be reduced by any income from substitute work performed by the victim or by income he would have earned in available appropriate substitute work he was capable of performing but unreasonably failed to undertake.

SAME—*victim of violent crime—award for medical expenses—request for additional compensation denied.* Based upon the testimony of the Claimant and his companion at the time of an altercation with two men, as well as evidence showing that the other men were convicted of battery as a result of the incident, the Claimant was found to be a victim of violent crime entitled to compensation, but his award was limited to medical expenses supported by the record, his request for loss of earnings was denied because there was insufficient documentation of Claimant's work as a stagehand from which to calculate an award, and the Claimant could not recover lost future earnings because he unreasonably failed to undertake substitute work or show that he was incapable of performing any work.

OPINION

JANN, J.

This claim arises out of an incident that occurred on September 29, 1987. Claimant, Ronald Mancini, seeks compensation pursuant to the Crime Victims Compensation Act (hereinafter referred to as the "Act"). 740 ILCS 45/1 *et seq.* (1992).

The Court, after review of the claim and the investigatory report issued by the Attorney General, issued an opinion on July 22, 1989, denying the claim. The Court found that the Claimant and a companion initiated a series of fights with third persons that led to Claimant's injuries. The Court also found that Claimant notified law enforcement officials 11 days after the perpetration of the incident and failed to establish that such notification was timely under the circumstances.

Claimant seeks reimbursement for out-of-pocket medical expenses and loss of earnings. The sum sought is in excess of the maximum award allowed by the Act. Claimant was employed full time by the fire department of the City of Chicago prior to his injury and worked occasionally as a stagehand.

On August 17, 1989, Claimant filed a petition for hearing. A hearing was conducted at which Claimant and a witness on behalf of Claimant, David Sears, testified. Claimant was represented by counsel. Ten exhibits were offered into evidence by the Claimant. All ten were admitted without objection.

Claimant testified, under oath, that on the day in question he and David Sears stopped at a bar to wait for a ride from Claimant's girlfriend. On that day he and Sears had been working as stagehands and he had his tool bag with him. All of the tools possessed by the two were in the tool bags at all times.

The two were at the bar for approximately 30 to 35 minutes and were drinking their second beer when Claimant heard several individuals at the end of the bar making racial slurs. As the Claimant and Sears started to leave the bar, one of the individuals blocked their path. Claimant told the individuals that he and Sears did not want any trouble and only wanted to leave. The individual, whom Claimant later learned was Lavelle Cross, said to "hang around for awhile" or "you ain't going nowhere." Claimant stated that he did not respond to Cross but asked the bartender to call the police and she refused. Another individual, Joseph Pinney, was next to Cross. Neither Claimant or Sears made any aggressive moves towards Cross or Pinney.

Claimant and Sears left the bar several minutes after the verbal exchange. As the two entered the street, Cross and Pinney and a third individual followed them out of the bar. Sears started running and Claimant ran across the street to the Medinah Building to seek some protection. He dropped his tool bag approximately 50 feet from the door to the building and found the doors locked. Cross and Pinney grabbed Claimant by both arms and threw him into and through a plate glass door.

Claimant stated that neither he or Sears held a hammer or any other tool that could be considered a weapon. He did not have a chance to turn around and defend himself or to fight off his attackers. He was knocked unconscious in the attack.

Claimant suffered extremely severe injuries to his left upper extremity which nearly resulted in the loss of the upper extremity and his life. The injury included multiple tendon, artery, nerve and muscle injuries as indicated by Claimant's exhibits.

After the incident Claimant was taken by ambulance to the hospital and received emergency surgery. The day Claimant came out of intensive care, 11 days after the incident, he reported the crime to the police. He was in the hospital three to four weeks. There is evidence that he was receiving vast amounts of pain-killing drugs, i.e., morphine and darvon. Claimant's exhibit number 1 is a letter from Daniel J. Nogles, M.D., in which it is stated that Claimant nearly lost his life and was in no condition to communicate with anyone during the majority of his hospitalization. Based upon the evidence relating to Claimant's physical and mental inability to report the crime because of his injuries, the Court finds that Claimant has established that notification to police was reasonable under the circumstances.

David Sears' testimony corroborated Claimant's version of the incident, and confirmed that he and Claimant were attacked without having provoked the incident.

The Respondent did not produce any witnesses but did tender a 12-page group exhibit purporting to be the October 10, 1987, police report which was admitted into the record without objection.

The Attorney General's investigatory report filed with the Court prior to its July 22, 1989 opinion, included a conclusion that Claimant and a companion verbally harassed one of the offenders, struck the offender with a hammer and initiated another fight. The Court apparently relied upon this factual conclusion, along with the statement in the investigatory report that the conduct of Claimant directly contributed to his injury, in issuing its opinion denying the claim.

During the hearing, the Assistant Attorney General indicated that the Respondent, in preparing and filing the investigatory report, only reviewed the police report arising out of the incident. A review of the police report indicates that approximately seven witnesses were interviewed and the three most relevant are Claimant, Sears and Robert Harris, the night watchman at the Medinah Building. The interview with Harris indicates that Claimant voluntarily left the Medinah Building with a hammer in his hand to face Cross and Pinney. The Harris interview does not directly dispute any other portion of Claimant's testimony.

The police report, except for the interviews with Cross and Pinney, does not tend to prove that Claimant initiated or provoked the altercation. Claimant's exhibit numbers 4 and 5 are certified statements of convictions of Cross and Pinney, respectively, for the offense of battery arising out of the incident.

Based upon the testimony of Claimant and his companion, and the proof of convictions of Cross and Pinney, this Court finds that Claimant did not initiate the altercation and therefore did not directly contribute to his injury.

The issue of reimbursement for certain expenses must now be considered. Claimant's exhibit number 11, purporting to be Claimant's complete financial account from Northwestern Memorial Hospital, was presented. A

review of the exhibit shows that Claimant's hospital bill for the period of September 30 through October 16, 1987, totaled \$37,161.40, of which \$91.40 was indicated as the sum due from Claimant, the balance being indicated as due from insurance benefits.

Claimant's group exhibit number 7 relates to the medical expenses incurred by Claimant. The first page is a summary of medical expenses totaling \$2,557.88. Claimant contends that these expenses were paid out-of-pocket by him and he received no reimbursement. Photocopies of certain checks from Claimant, allegedly indicating the payments, are included in the exhibit.

In reference to the copies of checks the following is noted: (a) the sum of the copied checks is only \$1,404.25; (b) a check in the sum of \$50 is made payable to CADCO, which is not listed in the summary of medical expenses (pg. 1 of exhibit number 9); (c) there are no copies of checks to Drs. Bell and Stromberg, and to Dr. Maier, although the doctors are listed on the summary; and (d) checks totaling \$962.50 include the name "Sonnenberg" in the memo portion of the check. The name "Sonnenberg" also appears on Claimant's 1987 and 1988 individual income tax returns, whereby Claimant declares Donald Sonnenberg and Julene Sonnenberg, no relationship to Claimant, to be his dependents. All checks with the Sonnenberg notation in the memo portion were dated in 1988.

The balance of the documents in Claimant's exhibit number 7, are statements for services including: (a) a Northwestern Medical Faculty Foundation, Inc., statement indicating that on April 26, 1988, a \$10 payment was received from Claimant, on July 5, 1988, another \$10 payment was received, and on June 6, 1989, a \$109 payment was made by Claimant; (b) a June 7, 1990, statement from Drs. Bell and Stromberg indicating \$92 was due without

any indication of sums paid by Claimant; (c) an illegible statement; (d) the following statements, all of which are not included in the \$2,557.88 sum in Claimant's summary of medical expenses—(i) Consultants in Neurology, Ltd., (ii) an April 24, 1990, statement from Northwestern Memorial Hospital, (iii) a June 9, 1990, statement from Addison Radiology ASSC, SC, and (iv) statements from Our Lady of the Resurrection medical facility, and (e) a statement from DeSilva Center.

The inconsistencies between the summary of medical expenses and supporting documents is tremendous and troubling. It is not logical or reasonable that Claimant would pay a bill attributable to him by placing another person's name in the memo area of the check. Based upon inconsistencies and absence of documentation, and potentially misleading information, the Court could deny Claimant's entire claim for reimbursement of \$2,557.88 in medical bills.

In the interest of fairness, and due to the fact that the Attorney General has not filed any objections to the information, Claimant shall be reimbursed \$560.75 for the following payments for medical services which are claimed on the summary and are supported by the documents in Claimant's exhibit number 7:

Northwestern Medical Faculty	
Foundation, Inc.	\$179.00
Dr. DeBacher	100.00
Dr. Brandstatter	125.00
Dr. Bartruck	55.00
Damon Clinical Labs	48.75
Diagnostic Radiology Associates	33.00
Nuclear Medical Associates	10.00
Evanston North Shore	
Home Health	<u>10.00</u>
Total Substantiated	\$560.75

Claimant seeks an award in excess of the maximum sum permitted by the Act for lost earnings. In support of his claim, he offered exhibit numbers 8 through 11. Claimant presents a theory of “differential” loss. Claimant maintains that his differential in income between his previous full-time salary and the gross benefits he now receives is approximately \$20,624.88 less per year. The total loss of wages claimed from the date of the injury to the hearing date is \$46,411.23.

Immediately prior to the injury on September 29, 1987, Claimant’s gross pay was \$2,730 per month and his net pay was \$1,860.04 per month as verified by his exhibits.

Exhibit number 8 indicates that Claimant would receive his ordinary disability benefit of \$1,009.51 per month from September 29, 1988, to January 17, 1993. Accordingly, Claimant would receive approximately \$39,976.60 for that 39.6-month time period. Claimant’s gross salary, based upon his pay of \$2,730 per month for the same 39.6-month time period would have been \$108,381. Pursuant to Claimant’s differential loss theory, there is a difference of \$68,404.41, between the salary he would have earned as a fireman and the disability benefits he received. This is in excess of the maximum that can be awarded pursuant to the Act. If the differential in earnings were all that would be required to demonstrate a loss of earnings claim under the Act, Claimant would be entitled to the maximum award of \$25,000.

Section 2(h) of the Act defines compensable “[P]ecuniary loss” as, *inter alia*, loss of earnings and loss of future earnings because of disability resulting from injury. The same section specifies that an award for loss of earnings or future earnings is to be determined on the basis of the victim’s average net monthly earnings for the six months

immediately preceding the date of injury or on \$1,000 per month, whichever is less. In this instance, Claimant demonstrated six months of earnings from his primary job as a fireman prior to the date of injury. The sum of \$1,000 per month is the lesser amount to be used to calculate earnings loss for Claimant.

Claimant was injured on September 29, 1987, and was earning \$2,703.50 per month as an employee of the Chicago Fire Department. He was on personal disability leave from his job for a period of 12 months following the incident and received his earnings in full from the fire department. Therefore, Claimant did not lose any earnings in the 12 months following the injury, except for what he might have earned in his second job as a stagehand. His Federal tax returns indicate that he earned \$787 in 1987 and \$2,369 in 1988 from his stagehand work. The only conclusion which can be drawn is that he had more earnings from his stagehand job in the calendar year after the incident. No tax return for 1989 was provided. There is insufficient documentation of his earnings from his stagehand work to warrant an award of loss of earnings.

Additionally, it is noted that the 1988 Federal tax return shows he received a \$15,000 sum from a Nationwide Life Insurance policy.

On November 30, 1988, 14 months after the incident, the retirement board of Firemen's Annuity and Benefit Fund of Chicago notified Claimant that he was granted ordinary disability benefits in the amount of \$1,119.51 a month beginning September 28, 1988, and that he was removed from the Chicago Fire Department payroll effective September 29. The sum of \$110 was to be deducted from his benefits for his health insurance premium.

On November 17, 1989, Claimant was notified by the board that he was found unfit for duty and his benefits

would be continued for another year. A July 17, 1990, letter from the board indicates that Claimant would receive a monthly grant of \$1,009.51 until January 17, 1993.

Section 2(h) of the Act specifies that the loss of future earnings shall be reduced by any income from substitute work actually performed by the victim or by income he would have earned in available appropriate substitute work he was capable of performing but unreasonably failed to undertake.

Claimant testified that he has had some employment as a stagehand since the date of his injury. His grasp and strength of his left arm do not permit him to work as a stagehand like he did prior to the accident. There is no evidence of other efforts by Claimant in attempting to secure appropriate substitute work.

Claimant's disability benefit does give him less income than his pay from the fire department. But, the claimed loss of future earnings because of his disability needs to be reduced by income earned in available appropriate substitute work he was capable of performing but unreasonably failed to undertake. See section 2(h) of the Act.

Claimant testified that he did some stagehand work after his injury; therefore, it was demonstrated that he was capable of performing some substitute work. He did not demonstrate that he was unable to perform additional substitute work. The finding of disability by the retirement board was that he was unfit for duty as a fireman. There were no findings or proof offered that Claimant is completely and permanently disabled and incapable of performing any work. Claimant has failed to establish that he experienced a loss of earnings making him eligible for an award, after the board granted him ordinary disability benefits effective September 29, 1988.

We find that Claimant's petition for loss of earnings and future earnings is hereby denied. Claimant unreasonably failed to undertake substitute work he was capable of performing, or to demonstrate that he was incapable of performing any work. Claimant did not provide evidence relating to his income in 1989; therefore, he has failed to demonstrate that any sum would be due him for 1989.

It is hereby ordered that Claimant be awarded the sum of \$560.75 for medical expenses supported by the evidence. Should Claimant be able to verify additional medical expenses alleged, he may petition the Court for further consideration.

OPINION

JANN, J.

This cause comes before the Court on a rehearing of Claimant Ronald Mancini's application for compensation pursuant to the Crime Victim's Compensation Act (hereinafter the "Act"). (740 ILCS 45/1 *et seq.* (1992).) Claimant's application sought compensation in the amount of the statutory maximum of \$25,000 for injuries occurring as a result of a September 29, 1987, incident. The Court issued an opinion on November 19, 1993, finding that Claimant was a victim pursuant to the Act and ordering that Claimant be awarded the sum of \$560.75 for certain medical expenses.

On December 14, 1993, Claimant filed a petition for rehearing. On March 30, 1994, the Court entered an order granting a rehearing to allow Claimant to supplement the record and give evidence regarding his continuing disability and inability to obtain substitute employment.

At the rehearing, Claimant appeared and testified. Claimant identified and verified that his income for 1989

was \$3,023. He described the six stagehand job assignments he had in 1989. He performed more of a supervisory or management position than actual physical labor. He identified his 1991 Federal tax return. He verified five stagehand job assignments and that his income was \$3,938. He identified his 1992 Federal tax return. He identified his 1993 Federal tax return, and verified his income as \$10,326.

Claimant stated that after his injuries he was unable to perform the requirements of his job as a fireman for the City of Chicago. He returned to the Chicago Fire Department and attempted to regain his position, but was unable to, based upon his physical evaluation. He received extensive physical therapy from Baxter Clinical Health Rehabilitation Center. He estimates that his strength is 45 to 50 percent of what it was before the incident.

Claimant testified the injury has affected his ability to work as a stagehand because it requires a lot of strenuous work, including unloading and loading semis. His condition allows him to function as a manager for stagehand activities.

Claimant explained that he earned more as a stagehand in 1988 (\$2,400-\$2,500) than in 1987 (\$800) because he was working as a fireman in 1987, and was not working as a fireman in 1988. In 1990 he did not have a job. He applied for many different positions with maintenance and lawn care but was unable to get a job. He constantly has pain associated with his injuries in his left elbow to his forefingers and in his three right fingers. His previous employment had been in physically demanding jobs. He had not received any specialized training in any types of occupations, other than to be a fireman or stagehand.

Claimant has applied at delivery services with cars, driving for trucking firms and delivery for maintenance

and janitorial services. He has applied at restaurants for busboy positions, but it is difficult with only one functioning arm.

Claimant identified 12 additional exhibits offered into evidence at rehearing. On the exhibits, which relate to services performed on account of his injuries, Claimant stated:

- a. S-5 is a \$494 bill that he personally owes to Illinois Masonic Medical Center;
- b. S-6 is a \$39.51 bill he personally owes to Consultants in Neurology;
- c. S-7 is a \$109 bill he personally owes to Northwestern Medical Faculty Foundation;
- d. S-8 is a \$26 bill he personally owes to Drs. Branch, Statger, Forenz and Thornhill (although he testified he owed them \$290);
- e. S-9 is a \$15.82 bill he personally owes to OLR Cardiology Services Limited;
- f. S-10 is an \$80 bill he personally owes to DeSilva Center;
- g. S-1 is an \$899 bill he personally owes to Dr. DeBacher;
- h. S-12 is a \$108 bill he personally owes to Nuclear Medical Associates Limited;
- i. S-13 is a \$370.35 bill he personally owes to Northwestern Hospital Radiology Group;
- j. S-14 is an \$84.70 bill he personally owes to Northwestern Hospital;
- k. S-15 is a \$326.65 bill he personally owes to Northwestern Hospital;
- l. S-16 is an \$8.25 bill he personally owes to Resurrection Hospital; and
- m. S-17 is a \$2,448.90 bill he owes to Drs. Bell, Stromberg, Hanis, Nagel and Widery.

Exhibit numbers S-15 through S-17 were admitted into the record. Claimant identified exhibit number S-18 as copies of bills for cash expenditures made for medication which were admitted into the record.

Claimant testified in relation to Claimant's group exhibit number 7 (admitted in the initial hearing), that Sharon Zoden was the signer of certain checks. She is his "ex." At the time the checks were written he was living with her. Sonenberg was her married name, and Zoden was her maiden name. In relation to the checks with "Sonnenberg" in the memo portion, he stated that Ms. Sonnenberg did not receive any medical care from Surgical Associates in General Surgery (a check in the 300 series) and that the check was in regard to his bill. His testimony in relation to check number 194, check number 152, and check number 180 was consistent with his explanation of the one in the 300 series.

On cross-examination, Claimant acknowledged that 1993 was the only year his adjusted gross income was under \$12,000. He is not currently working but is trying to get a landscaping job. He is still under the care of doctors. He did not file a civil suit as a result of the incident.

Claimant was receiving annuity benefits from the fireman's fund until 1993. He has not received those benefits since 1993. On line 17-B of his 1989 tax return, \$13,433 was reported from the fireman's annuity. This is his pension. The approximate sums also appear on line 17-B of his 1991 and 1992 Federal tax returns. He received nearly \$40,000 in pension payments. In the 1993 Federal tax return the sum of \$578 appears because he exhausted the benefits available to him under his pension. He will not receive any retirement payments. He had not filed a 1994 Federal tax return at the time of rehearing.

The first year after the incident, Claimant received full pay from the fire department. Then the retirement board met and determined he was disabled. He began receiving \$1,009.58 per month. The retirement board determined each year, through 1992, that Claimant was still unfit to perform the duties of a fireman.

Claimant received \$5,000 of unemployment benefits in 1989. None of his medical or hospital creditors represented by exhibit numbers S-5 through S-17 have filed a lawsuit to collect the sums owed.

In relation to the payments made with checks wherein the word "Sonnenberg" was on the memo portion of the check, no bills were provided which would show that services were provided to Claimant. Claimant was instructed that the record would remain open for 30 days after the rehearing and he could file any documents he desired.

Claimant believed that he would have received continuing disability payments and a pension if he had ten years on the fire department. Instead, he only had eight years and the retirement board refunded his pension contributions over three and one-half years. Claimant was granted leave to supplement the record with information from the Fireman's Annuity and Benefit Fund. The Commissioner inquired whether there was any type of work that Claimant could do, *i.e.*, working at a convenience store. It was also suggested that Claimant provide specific information on his efforts at finding a job, *i.e.*, dates and names of companies.

Claimant applied for disability with the Social Security Administration and for supplemental social security but was denied.

On April 12, 1995, Claimant's counsel provided a March 27, 1995 letter from the Retirement Board of the

Fireman's Annuity and Benefit Fund of Chicago, and an affidavit of Claimant, dated April 24, 1995, which stated his efforts to secure employment. The two documents were marked as exhibits and became part of the record. Claimant has not filed a brief.

The March 27, 1995 letter indicates that Claimant was employed by the Chicago Fire Department on February 18, 1980, and was so employed until September 29, 1988, at which time he went on ordinary disability in the amount of \$1,199.51 per month through January 16, 1993, when his benefit expired. It states further that this benefit was not a deduction from future benefits nor was it deferred compensation. He was reinstated to the Chicago Fire Department on April 16, 1993, through June 1, 1993, which was his date of discharge. For pension purposes, accumulated service credits amount to 13 years and nine days. As of the date of the letter, Claimant had two options: collect a pension at age 50 in the monthly amount of \$475 or take a refund of his contributions in the amount of \$39,584.21.

The affidavit provided by Claimant listed 23 different companies where he made efforts toward seeking employment. No dates of when the efforts were made are stated in the affidavit.

FINDINGS

The record is inconsistent in relation to whether Claimant received disability payments or a return of his pension funds from 1989 through 1993. He testified that it was the return of his pension. However, the documents provided indicate that Claimant was receiving disability payments. In addition, he apparently received unemployment compensation in the sum of \$5,000 in 1989, which was at the same time he was receiving disability payments. The State of Illinois may have a claim against him

for a set-off in the amount of unemployment compensation received.

The purpose of the rehearing was to allow the Claimant to supplement the record on his continuing disability and inability to obtain substitute employment. Claimant has supplemented the record, however, we find that Claimant is not entitled to an award for loss of earnings or loss of future earnings. Claimant received his salary or disability payments from the Fireman's Fund in excess of the \$1,000 monthly maximum specified in the Act. Claimant applied for disability with the Social Security Administration and for supplemental social security but was denied benefits. More importantly, no expert evidence has ever been provided to indicate that Claimant is now physically unable to work. The purpose of the Act is not to provide relief for persons who are unable to *find* employment after suffering injuries, but is to compensate those persons who are unable to work because of injuries suffered from a violent crime. In this instance, Claimant has not demonstrated that he is unable to find work because of his injuries.

In relation to compensation for medical and hospital expenses, the Court's prior award of \$560.75 shall stand. Although the purpose of the rehearing was for consideration of continuing disability and inability to find work, Claimant supplemented the record with 13 different bills/statements from medical and health providers indicating that he still personally owes money. This evidence was not provided in the initial hearing. Exhibit number S-17 indicates that the provider wrote off the amounts owed as a bad debt. All of the other bills/statements are dated six or seven years prior to the hearing date. Although Claimant testified that he still owes those sums, he did not provide any independent evidence that the providers are still seeking payment.

Based upon the evidence provided at the rehearing and documents supplementing the record, the Court's award of \$560.75 shall stand and Claimant's requests for additional compensation are hereby denied.

(No. 90-CV-0329—Claim denied; petition for rehearing denied.)

RHONDA LEE a/k/a RHONDA COLINA, as Guardian of the Persons and Estates of AMANDA COLINA, ANGEL COLINA, and VICENTA COLINA, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed May 5, 1995.

Order filed August 31, 1995.

NORTHWESTERN UNIV. LEGAL CLINIC (THOMAS F. GERAGHTY, of counsel), for Claimant.

JIM RYAN, Attorney General (PAUL H. CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*burden of proof not met where Claimant fails to substantiate decedent's earnings.* The failure to substantiate a crime victim's earnings through applicable tax returns results in a finding that the Claimant has not met the burden of proof in a claim for loss of support.

SAME—*failure to prove decedent provided support to children during six months before his death—claim denied—petition for rehearing denied.* Since the Claimant's hearsay testimony regarding the decedent's alleged employment income and financial support provided to his children before he was murdered was insufficient to sustain a finding of lawful income for the six months preceding his death, the Claimants failed to meet their burden of proving that the decedent provided support to his children during the six months prior to his death, and therefore the Claimants' request for compensation and petition for rehearing were denied.

OPINION

JANN, J.

This action is the second hearing of a consolidated claim encompassing three separate claims originally identified by 91-CV-0028, 91-CV-0130 and the above number.

All relate to claims for compensation under the Illinois Crime Victims Compensation Act (740 ILCS 45/1 *et seq.*), and arise from the murder of Armando M. Colina (“Armando”) on August 14, 1989. The original claim brought on her own behalf by Rhonda Lee (“Rhonda”), the live-in companion of the victim and the mother of his three children, was denied because the parties were never married.

This second claim is brought on behalf of the minor children fathered by the victim and currently under the care of their mother, Rhonda Lee, and asks for compensation based upon the loss of the three children’s father’s financial support.

The key question is whether, as required by the statute, the victim, Armando Colina, supported his children in the six months prior to his death.

At hearing, testimony was given by Glenn Reitsma (“Reitsma”), stepfather of Rhonda Lee and stepgrandfather to the Claimant children. Reitsma and Rhonda’s mother shared an apartment with Rhonda and Armando for a time in 1988 and Reitsma testified that Armando paid him in cash for their share of the rent. Reitsma also got a job for Armando at his place of employment. The work was apparently sporadic, as Armando’s total earnings for 1988 were less than \$4,800. There is no direct evidence of any earnings in 1989, the subject period.

Irene Anthony (“Irene”), who worked as a babysitter for Armando and Rhonda between 1988 and 1989, testified concerning the fact that Armando always paid her in cash, usually on a daily basis, in an amount between \$70 and \$80 per day, four or five days per week. Irene worked on an as-needed basis and made approximately \$600 to \$700 per month.

The final witness was Rhonda Lee who testified that Armando earned about \$1,200 per month after taxes and that he gave her \$250 every two weeks to run the house. Rhonda claimed that after the work at her stepfather's company ran out, Armando worked for a now-defunct company that rehabbed old refrigerators, "Gonzalo Used Refrigeration," which brought in a net take-home of \$300 per week. Claimant's brief maintains that wage and tax statements for 1989 are not available but does not state whether "Gonzalo Used Refrigeration" filed any wage or tax statements with the Federal government or State of Illinois. Claimant wrongfully asserts that Armando worked for Data East Pinball during the six months prior to his murder and wrongfully ascribes to him both full-time work and the title of project manager. Mr. Reitsma was a project engineer at Data East; Armando's work at Data East does not add up to 12 weeks work during the whole of 1988. There is no evidence that Armando performed any work at Data East during the statutory period. Further, the argument over the W-4 is disingenuous: Armando claimed multiple dependents on his W-4 to avoid having any taxes taken out; at the time of filing his return, he could regain all taxes withheld without claiming any deductions, as his personal exemption was greater than the minimal amount he had earned during 1988.

What appears from the record is that Armando Colina apparently had some sources of money which were not a part of anyone's formal records. Claimants will argue that the source of the funds which Armando used to support his family is irrelevant, and that the only relevant issue is how his children will get along without such financial contribution.

Nevertheless, the record presented before us is a murky one. According to this record, Rhonda and Armando

met in 1984. Rhonda had a baby in 1985, Robert Vasquez, whose father is not Armando. Armando and Rhonda continued to keep company and Amanda was born to them in 1987. In 1988, Armando and Rhonda signed a lease with Rhonda's parents for the apartment on Howard Street. Reitsma got Armando a job at his company but Armando didn't earn \$4,800 there during the year. This is the year *before* Rhonda claimed that work got slow and that Armando was laid-off. Six months after moving in, the arrangement ended (Irene refers to Reitsma as "the man that left.") Rhonda testified that the "family" then moved to an apartment on Argyle Avenue. In fact, the birth certificate of Angel Colina, born 12/28/88 shows an address of 839 West Sheridan Road. Later in her testimony, Rhonda stated that they moved into the Argyle address in late February or early March of 1989. No explanation for the termination of the Howard lease, nor the subsequent move from Sheridan after a few months is detailed in the record. However, Reitsma testified, "I believe [Armando] tried to [support his children] but I don't really know how well he succeeded." Reitsma further testified that he was "concerned about [the grandchildren's] welfare."

Throughout this time, Armando, with 1988 gross income on the record of about \$400 per month, was paying \$500 to his wife for incidentals; \$300 to his in-laws for rent (later \$425 for rent at the Argyle address); \$700 to \$800 to Irene Reynolds for baby-sitting because Armando "might be" out working for eight to ten hours. (Irene stated "he must be working because he paid me"); buying groceries, snacks, toys, and junk food for the children; taking days off whenever he felt like it, also according to the testimony of Irene Reynolds; "he used to buy new furniture like snapping the fingers" (testimony of Irene Reynolds); in the two weeks prior to his death, Armando, with no known source of income, paid over \$3,000 cash to

Allied Furniture, Central Furniture, Nelson Brothers and Highland Superstore for furniture and stereo equipment. Shirlee Garcia of Traveler's Aid states by affidavit that she saw Armando almost every day during the last four months of his life, although he was supposedly at work.

Looking at all the evidence, there is nothing on the record which indicates that the victim engaged in any type of lawful employment during the period for which financial responsibility had to be proven, outside of the nebulous assertions that some type of refrigerator repair business no longer extant was paying him and apparently not reporting such wages. Claimant Rhonda Lee testified that she had contacted the owner, Gonzalo, of Gonzalo Used Refrigeration in conjunction with filing this cause of action. Ms. Lee stated she was unable to adequately explain the proceedings to Mr. Gonzalo as he spoke Spanish and she was unable to make herself understood. No further attempt to verify the victim's wages and his exact period of employment at Gonzalo is set forth in the record.

Claimant's brief relies upon *In re Application of Michael DeBartolo* (1984), 36 Ill. Ct. Cl. 442, for the proposition that in a compensation case for loss of support, "dependency must be proved by a preponderance of the evidence," which is one that "is more probably true than not." However in *DeBartolo*, the decedent's employer/partner and work release records provided some evidence to support a finding of employment. We have also found that failure to substantiate earnings through applicable tax returns results in a finding that Claimant has failed to meet the burden of proof. (*In re Application of Jeanette M. Crissie* (1992), 44 Ill. Ct. Cl. 443.) In *Crissie* we further held that "copies of paid utility bills prove only that they were paid, but do not prove income or earnings of the victim." See *Crissie*, at 448.

The record before us is most analogous to *Crissie, supra*. The numerous offerings of hearsay evidence as to decedent's income do not support a finding of lawful income for the six months preceding his death.

We hereby find Claimants have failed to sustain their burden of proof that decedent provided support to his children during the six months prior to his death. This claim is hereby denied.

ORDER

JANN, J.

This cause comes on to be heard on Claimants' petition for rehearing. The Court has carefully considered the record in this cause and finds Claimants' petition for rehearing is hereby denied. Claimants have failed to meet their burden of proof as to decedent's employment in the six months prior to his death.

(No. 90-CV-0953—Claim denied.)

In re APPLICATION OF BERNESTINE RICHARDSON

Order filed May 8, 1990.

Opinion filed April 15, 1996.

BERNESTINE RICHARDSON, *pro se*, for Claimant.

JIM RYAN, Attorney General (JAMES MAHER, III and CHARLES DAVIS, Assistant Attorneys General, of counsel),
for Respondent.

CRIME VICTIMS COMPENSATION ACT—*limitations—filing of notice of intent and application*. Pursuant to section 6.1 of the Crime Victims Compensation Act, a person is entitled to compensation if, within six months of the occurrence of the crime, he files a notice of intent to file a claim, and within one year of the occurrence of the crime upon which the claim is based he files an application with the Court of Claims, and upon good cause shown

the Court may extend the time for filing the notice of intent and application for a period not exceeding one year.

SAME—*limitations provisions strictly construed*. The Crime Victims Compensation Act is a secondary source of recovery, and the Court has construed the statute's limitations provisions strictly.

SAME—*untimely claim—reliance on funeral director's assurances—petition for extension of time to file claim denied*. Despite the Claimant's belief based upon the assurances of the funeral director who handled her deceased husband's funeral arrangements, that the necessary forms for crime victims compensation had been filed, where 27 months elapsed between the commission of the crime and the filing of the notice of intent and application for benefits, the claim was time-barred and the Court of Claims was constrained to deny the Claimant's petition for an extension of time to file her claim.

ORDER

MONTANA, C.J.

This cause coming on to be heard on the petition of B. Richardson for an extension of time to file documents to claim benefits under the Crime Victims Compensation Act, 740 ILCS 45/1 *et seq.* (hereinafter referred to as the Act); the Court hereby finds:

1. Section 6.1 of the Act provides in pertinent part that a person is entitled to compensation under the Act if:

“(a) within 6 months of the occurrence of the crime he files a notice of intent to file a claim with the Attorney General and within one year of the occurrence of the crime upon which the claim is based, he files an application, under oath with the Court of Claims * * *. Upon good cause shown, the Court of Claims may extend the time for filing the notice of intent to file a claim and application for a period not exceeding one year * * *.”

2. The crime was alleged to have occurred on October 12, 1987;

3. The notice of intent was filed January 16, 1990;

4. The application was tendered on January 16, 1990;

5. The petition at bar was filed on January 16, 1990;

6. Pursuant to the section of the Act quoted above we have authority only to extend the filing time for a period not to exceed one year;

7. We are therefore unfortunately constrained by operation of law to deny this petition.

Wherefore, it is hereby ordered that this petition be, and hereby is, unfortunately denied.

OPINION

FREDERICK, J.

This cause comes before the Court on the petition of Bernestine Richardson for an extension of time to file her claim for benefits under the Crime Victims Compensation Act. On May 8, 1990, the Court entered an order denying the Claimant's petition finding that Petitioner was time-barred by the statute of limitations. The time period for extensions of time for filing the claim had passed the extension period of one year allowed by section 6.1 of the Crime Victims Compensation Act as it appeared on the date of the crime.

The Act stated: A person is entitled to compensation under the Act if:

"(a) within 6 months of the occurrence of the crime he files a notice of intent to file a claim with the Attorney General and within one year of the occurrence of the crime upon which the claim is based, he files an application, under oath with the Court of Claims * * *. Upon good cause shown, the Court of Claims may extend the time for filing the notice of intent to file a claim and application for a period not exceeding one year." Ill. Rev. Stat. 1987, ch. 70, par. 76.1.

The Court based its denial on the facts that the crime was alleged to have occurred on October 12, 1987; the notice of intent was filed on January 16, 1990; the application was tendered on January 16, 1990; and the petition at bar was filed on January 16, 1990. On May 17, 1990, the Claimant requested a hearing to review the Court's decision.

On November 7, 1991, a hearing was held before Commissioner Michael E. Fryzel. The Claimant appeared

and testified at the hearing, as did her aunt, Martha Yaney. The Claimant and her aunt were both credible witnesses and indicated they relied on a funeral director who handled the funeral of the alleged victim, the Claimant's husband. The Claimant claims that she was repeatedly told by the funeral director that he filed the appropriate form for her to receive compensation under the Act. A letter from the funeral director, admitted into evidence, stated that "every form that was sent to (the) funeral home * * * was sent back re: Carl Richardson."

There does exist some confusion as to what type of forms the funeral director said he would file, what type of forms he was sent, and what the Claimant believed was being done on her behalf. Certainly the occurrence of a crime in which your spouse is killed could lead to confusion and trauma for the surviving spouse.

It appears in this case that the Claimant believed the appropriate forms for compensation under the Act had been filed for her. She testified, and her aunt corroborated the testimony, that efforts to follow up with the funeral director on the status of any filing always led to assurances that everything necessary had been done. Only when the Claimant began to make further calls to follow up with someone other than the funeral director, did she realize that something was wrong.

At the time of the crime in this case, the maximum period allowed to file, with an extension, was 18 months. Under the amended Act in effect presently, that time period has been extended to 24 months. The time elapsed in the case at bar between the commission of the crime and the filing of the application was 27 months.

The Crime Victims Compensation Act is a secondary source of recovery. (*In re Application of George* (1993),

45 Ill. Ct. Cl. 483.) The Act is statutory and the Court has construed the limitation provisions strictly. (*In re Application of Hutcherson* (1985), 37 Ill. Ct. Cl. 491.) Claimant's reliance on the funeral director's assertions is not a recognizable exception to the filing time limitations.

The Court has denied petitions to extend time where the Claimant alleged an Assistant Attorney General told Claimant not to file the application until a workman's compensation claim was completed and where the Claimant argued the police and hospitals did not give the Claimant information about the Act as required. (*In re Application of Geraghty* (1989), 42 Ill. Ct. Cl. 388; *In re Application of Schenk* (1991), 43 Ill. Ct. Cl. 437.) While we are sympathetic to the Claimant herein, we have no lawful authority to expand the statute of limitations for the filing of the application.

For the foregoing reasons, it is therefore the order of this Court that Claimant's petition for an extension of time to file her claim for benefits under the Crime Victims Compensation Act is denied.

(No. 92-CV-1015—Refund to State ordered.)

In re APPLICATION OF GREGORIO LOPEZ, JR.

Opinion filed May 17, 1996.

JOHN B. MIX, for Claimant.

JIM RYAN, Attorney General (PAUL H. CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*exhaustion of remedies requirement—State's lien.* Crime victims compensation is a secondary source of compensation available only after the applicant has exhausted all other sources of payment, such as insurance, and where compensation is awarded

and the person receiving it also receives any sum required to be, but which has not been, deducted under the Act, he shall refund to the State the amount of the compensation paid to him which would have been deducted at the time the award was made, but expenses, including attorney's fees, may be deducted from the amount returnable to the State under the lien.

SAME—dram shop settlement—motion to waive State's lien—Claimant ordered to return net amount of award to State. On Claimant's motion to waive the State's lien created as a result of his crime victims compensation award, where the Claimant's net award from a dram shop settlement after deducting attorney's fees and costs was less than the amount he had previously received under the Crime Victims Compensation Act, the Court directed that the Claimant return the net amount of his dram shop settlement to the State pursuant to the State's lien on the Claimant's other sources of recovery.

OPINION

JANN, J.

This cause comes on to be heard on Petitioner's motion to waive lien, due notice having been given and the Court being fully advised in the premises finds:

1. Petitioner was awarded the sum of \$4,903.12 for medical expenses and lost earnings by order of the Court on July 7, 1993.

2. Petitioner filed suit in the Circuit Court of Cook County styled Gregorio Lopez, Jr. v. Michael A. Salem, et al., cause no. 91 L 11031 under the Dram Shop Act seeking damages arising from the same incident underlying his petition in the Court of Claims.

3. Petitioner's cause in circuit court was set for mandatory arbitration. The panel of arbitrators found against Petitioner.

4. Petitioner instructed his attorney to file a renunciation of the arbitrator's findings and paid \$200 to have the cause reinstated for a jury trial.

5. Prior to trial, Petitioner accepted a settlement in the sum of \$7,500.

6. Petitioner agreed to a contingent fee agreement with his attorney in the amount of one-third of the proceeds from any settlement or judgment. Additional costs in the amount of \$822.50 were incurred in pursuance of the lawsuit in circuit court.

7. Petitioner's net recovery from the lawsuit is \$4,177.50. As his net proceeds from the settlement were less than the award herein (\$4,903.12), Petitioner seeks waiver of the statutory lien of the State of Illinois created by section 17(c) of the Act. (740 ILCS 45/17(c).) Section 10.1(g) of the Act states that "compensation under this Act is a secondary source of compensation and the applicant must show that he has exhausted the benefits reasonably available under the Criminal Victim's Escrow Account Act or any governmental or medical or health insurance programs, including * * * life, health, accident, or liability insurance." 740 ILCS 45/10.1(g).

The Act further states "where compensation is awarded under this Act and the person receiving same also receives any sum required to be, and that has not been deducted under Section 10.1, he shall refund to the State the amount of the compensation paid to him which would have been deducted at the time the award was made." 740 ILCS 45/17(d).

As recently held in *In re Application of Cherrington* (1994), 46 Ill. Ct. Cl. 615 (also a dram shop case), "Under the law * * * crime victim's compensation is a secondary source of compensation available only after having exhausted all other sources of payment, such as insurance, and the repayment of crime victim's compensation is *mandatory* if amounts which have been recently recovered would have been deducted when computing the original award, had these amounts then been available." (Emphasis added.) The dram shop award herein would

have been deducted from Petitioner's award had it been received prior to the award under the Act.

As previously stated, Petitioner's net award from the circuit court case was less than the award granted under the Act. A similar situation was recently addressed by the Court in *In re Application of Shook* (1994), 46 Ill. Ct. Cl. 619 which held:

"The Act speaks of monies received by the Claimant. (740 ILCS 45/17d.) We find that expenses, including attorney's fees, may be deducted from the amount returnable to the State under the lien, as the Claimant receives only the net amount. The reasoning is that without such expenses, no recovery would be made."

We hereby order that the net amount of the dram shop award in the amount of \$4,177.50 be returned to the State as per section 17 of the Act.

(No. 92-CV-1105—Claim denied.)

In re APPLICATION OF ELITHA BUTLER

Opinion filed November 1, 1995.

ELITHA BUTLER, *pro se*, for Claimant.

JIM RYAN, Attorney General (PAUL H. CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*Act is secondary source of compensation.* Compensation under the Crime Victims Compensation Act is a secondary source of compensation and the burden is on the Claimant to prove by a preponderance of the evidence that the Claimant meets all requirements for eligibility.

SAME—*hit-and-run accident not statutorily covered offense—claim denied.* Where a pedestrian was killed by a hit-and-run driver who was later issued tickets for failure to exercise due care and operation of an uninsured vehicle, the decedent's mother was denied crime victims compensation, since a hit-and-run accident not involving reckless homicide or DUI is not a statutorily covered offense, there was insufficient evidence that the decedent was a victim of reckless homicide or DUI, and the Claimant therefore failed to prove that her son was a victim of a crime of violence as defined under the Crime Victims Compensation Act.

OPINION

FREDERICK, J.

The Claimant, Elitha Butler, was the mother of Michael Butler who was struck by an auto driven by John Daniel on September 13, 1990, near 13346 South Indiana, Chicago, Illinois. Police investigation showed that the victim was hit as he was walking along the street. The victim died on September 15, 1990. The driver fled the scene but was later issued tickets for failure to exercise due care on the roadway and operation of an uninsured vehicle. Police found no evidence of alcohol or illegal drug use by the driver. After being granted an extension of time to file a claim, on December 2, 1991, Elitha Butler filed a claim for reimbursement of funeral expenses totaling \$2,855.52. On September 18, 1992, the Court denied the claim holding that the investigation showed the driver was not under the influence of intoxicating liquor or narcotic drugs. Thus the accident was an unintentional motor vehicle offense and not covered as a “crime of violence” under the Crime Victims Compensation Act. The Claimant asked for a review of the decision. A hearing was held before Commissioner Michael E. Fryzel on April 8, 1994.

At the trial, Claimant testified a bus driver who saw the accident said “something wrong with him,” referring to the driver of the vehicle. She further testified, “He look like he been drinking or something else. I don’t know. Drugs or what, but I know the man—he was walking all over the street.” Joseph Cole, who witnessed the accident, testified he saw the driver get out of the car and walk up to the victim. Mr. Cole was sitting back drinking beer when he saw the accident. He got up and started running towards the street because he knew the victim. He didn’t know if the driver was scared of them but he

started walking toward the car. The man got in the car and locked the door. They tried to open the car door. The driver then made a u-turn and took off. A couple of people with Mr. Cole starting throwing their beer cans at him and he pulled off. Mr. Cole did not talk to the police when they arrived. Mr. Cole testified in regard to the driver, “Well, looking at his face expression, he was under the influence of drinking. He had been drinking.”

There is no question that the death of Michael Butler is a tragedy. We are very sympathetic toward the Claimant and understand her grief. However, this is a claim pursuant to the Crime Victims Compensation Act. This is not a criminal prosecution and/or a State civil claim against the driver and the Court’s decision in this claim has nothing to do with whether the victim died in vain or not. Compensation under the Crime Victims Compensation Act is a secondary source of compensation. (*In re Application of Bavidio* (1992), 44 Ill. Ct. Cl. 449.) The burden of proof in a crime victims compensation case is on the Claimant to prove by a preponderance of the evidence that the Claimant meets all requirements for eligibility. *In re Application of DeBartolo* (1984), 36 Ill. Ct. Cl. 442.

In the present case, the Court has scrupulously examined the investigatory report and the transcript of the trial. We find that Claimant has failed to prove by a preponderance of the evidence that Claimant’s decedent was the victim of a crime of violence as defined in section 72(c) of the Act. The only covered offenses involving motor vehicles are reckless homicide and DUI. A hit-and-run accident not involving reckless homicide or DUI is not covered by the Act. (*In re Application of Wilcox* (1988), 41 Ill. Ct. Cl. 339; *In re Application of Cenicerros* (1995), 48 Ill. Ct. Cl. 653.) The evidence presented at trial, which is the only evidence the Court is considering,

falls far short of a preponderance of the evidence that the decedent was a victim of a reckless homicide or DUI. The testimony which we have quoted is conclusory and without proper foundation. These findings in no way impugn the victim or the Claimant. We would like nothing more than to make an award. However, based on the evidence before us, we cannot do so. For the foregoing reasons, this claim is denied.

(No. 92-CV-2094—Claim denied.)

In re APPLICATION OF JANE DOE

Opinion filed May 15, 1996.

JANE DOE, *pro se*, for Claimant.

JIM RYAN, Attorney General (CHARLES A. DAVIS, JR., Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*alleged sexual abuse of minor—insufficient proof—claim denied.* In a claim brought by a mother on behalf of her minor daughter seeking reimbursement for medical and counseling bills as a result of alleged sexual assaults on the child by her father, although there was some evidence to support the allegations, the claim was denied because the child refused to admit that her father committed the alleged acts, and there was no direct evidence of physical sexual abuse which would constitute a violent crime under the Crime Victims Compensation Act.

OPINION

JANN, J.

This cause is brought before the Court by Jane Doe on behalf of her minor daughter, Joan. Jane seeks reimbursement of medical and counseling bills incurred on behalf of her minor daughter as a result of alleged sexual assaults by the child's father. In an order dated March 26, 1993, the Court denied Claimant's application based

upon a lack of evidence that a violent crime as defined by the Crime Victims Compensation Act (740 ILCS 45/1 *et seq.*), was committed against the victim.

Claimant requested rehearing in a timely manner and hearing was held before Commissioner Turner on October 1, 1993.

Claimant appeared *pro se* and presented evidence to the Court. The facts as presented in the hearing transcript are as follows:

Claimant and her husband, John Doe, were divorced on April 19, 1989. Mrs. Doe was given custody of Joan and her two minor brothers. The children are triplets born on September 23, 1984. The divorce settlement provided that Mr. Doe was to have visitation with the children so long as visitation was supervised by Mrs. Doe or another adult approved by Mrs. Doe.

In the early months of 1992, Joan and her brothers were enrolled in the Life Span Program. Life Span is a domestic violence agency which provides counseling for young children. The children were enrolled in the program by their mother to help them deal with their father's alcoholism and erratic behavior. Lynn James, a children's counselor with Life Span testified as to the events she observed at Life Span. At the beginning of every Life Span meeting the participants were required to sign their names on an attendance sheet. Ms. James and the other counselors notice that, although there was no child named Susan registered for the program, the name Susan continued to appear on the sign-in sheet over a period of several weeks. On February 4, 1992, the counselors figured out that "Susan" was Joan Doe. Ms. James asked Joan who Susan was. Joan told Ms. James that Susan was her friend. Joan was asked if Susan had family problems.

Joan told Ms. James that “her father does things to her that scare her.” Ms. James advised Mrs. Doe of this conversation. Mrs. Doe assured Ms. James that Joan had no friends or neighbors named Susan.

Two days later, Ms. James again spoke to Joan about “Susan.” Joan said Susan was very scared because Susan’s father touched her. Joan proceeded to relate incidents of Susan’s father touching her “private parts” when she was in the shower and in her father’s bedroom. The child reverted to present tense in describing several of these incidents. Joan drew a picture of Susan for Ms. James which physically matched Joan’s appearance. Joan asked her mother to call Ms. James after her next visitation with her father. She told Ms. James “I saw Susan today and Susan’s father hurt her today.” Ms. James believed that Susan was really Joan and that the seven-year-old had been molested by her father. Susan/Joan had also shown where she had been touched via drawings.

Ms. James contacted DCFS which sent a caseworker to Mrs. Doe’s home on February 9, 1992. Joan refused to acknowledge that she had been molested by her father during this interview. A medical exam later that evening proved inconclusive as to signs of penetration. Ms. James stated that Joan had never discussed an incident of full penetration which would be consistent with the physical examination findings. Additionally, Joan told Ms. James she thought going to the hospital was a good idea as she might be “contagious.” Joan subsequently told Ms. James that she had told her father about her conversation with Ms. James and that he had stopped hurting her and she (Joan) didn’t want to talk about it anymore.

Joan was given another physical examination on February 27, 1992, and another interview at Columbus Hospital. Again, the results were inconclusive and Claimant

was advised that her former husband could not be prosecuted if Joan refused to specifically admit that her father had molested her. It is the opinion of Ms. James that Joan was molested.

Ms. James suggested that Joan would benefit from additional therapy. Mrs. Doe engaged Dr. Susan Babb, a licensed clinical psychologist. Dr. Babb specializes in working with early childhood disorders and adolescents. Although she does not specialize in child sexual abuse, she testified that she has had extensive experience in that area of practice.

Joan began seeing Dr. Babb on March 9, 1992, and was continuing to see her as of the date of hearing. Dr. Babb testified that Joan continued to deny that she was molested when asked directly. However, Joan has also been consistent in providing indirect evidence which Dr. Babb found "compelling" that she was molested by her father, beginning at approximately age three. Joan was also consistent in her therapy with Dr. Babb in lapsing into the first person when relating "Susan's" history of molestation. However, she was fiercely protective of her family as a cohesive unit and unable to directly accuse her father of molestation. Dr. Babb also felt that Joan was seeking approval from her father and felt she had failed him in some way due to his lack of attentiveness. Joan had continued to be an excellent student but had what Dr. Babb described as anxiety-related problems at home. Joan also made drawings which identified the areas which were touched by "Susan's" father. These drawings were consistent with those Joan made for Ms. James and indicated the child had been touched in a sexually explicit manner with her father's penis on her mouth, anus and vagina.

On cross-examination, Dr. Babb stated that in her professional opinion, Joan had been molested but was unable

to verbalize the incidents directly due to her age and the trauma these events had wrought.

Dr. Babb also reviewed a psychological evaluation by Dr. Lynne H. Shebon, Ph.D. Dr. Shebon tested Joan on Dr. Babb's recommendation. Dr. Shebon's report was made part of the record. Dr. Shebon's report did not indicate a finding of sexual abuse. However, she made findings similar to those of Dr. Babb with regard to Joan's anxiety over the divorce and her father's unavailability. It was also noted that Joan felt she was in some way to blame for the break-up of her family. Dr. Shebon recommends that "continued inquiry into the nature of possible threats to Joan's sense of safety is urged."

The State presented no testimony at hearing.

Claimant has provided no direct evidence of physical sexual abuse which would constitute a crime under the Act. The young victim has never directly accused her father of the alleged acts. We cannot assume the alleged crime occurred based upon the evidence available herein.

We note that the allegations herein are of a most serious and heinous nature. If the young victim is able to provide more information as to the alleged assaults resulting in charges against the perpetrator at some later date, she may refile this action any time before she reaches the age of majority.

Claimant has failed to prove that a violent crime as defined by the Act has occurred. This claim does not meet a required condition precedent under the Act.

It is hereby ordered that this claim be, and hereby is denied.

(No. 93-CV-1133—Claim denied.)

In re APPLICATION OF JAMES PATTERSON and
WILLIE J. PATTERSON

Opinion filed December 27, 1995.

JAMES PATTERSON and WILLIE J. PATTERSON, *pro se*,
for Claimants.

JIM RYAN, Attorney General (PAUL H. CHO, Assistant
Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*reimbursement for funeral expenses—reduction requirement.* Section 10.1(c) of the Crime Victims Compensation Act allows a relative of a deceased crime victim to seek compensation for funeral expenses which he has paid or is obligated to pay, and the Act further provides that an award shall be reduced by the amount of benefits, payments or awards from other sources, except the reduction requirement does not apply to annuities, pension plans and Federal social security payments payable to the dependents of the victim, or the net proceeds of the first \$25,000 of life insurance benefits that would inure to the benefit of the applicant.

SAME—*funeral expenses—claims by brother and son of crime victim denied.* In a case involving claims by the brother and son of a deceased crime victim seeking reimbursement for the decedent's funeral expenses, the son's claim was denied because the decedent's retirement fund paid all of the funeral expenses as requested by the son thereby requiring an award reduction for amounts received from other sources, and with regard to the brother's claim, an investigation by the Attorney General was recommended because the record indicated that either the brother or the funeral home had knowingly received and converted compensation from the State which should have been returned in light of the full funeral expense payment made by the decedent's retirement fund.

OPINION

FREDERICK, J.

These claims are before the Court on two different crime victims compensation applications seeking compensation pursuant to the Crime Victims Compensation Act (hereinafter the "Act"). (740 ILCS 45/1, *et seq.* (1992).) Claimant, James Patterson, brother of the deceased victim, sought funeral and burial expenses arising out of the death of the victim on August 17, 1992. Claimant, Willie J.

Patterson, son of the deceased victim, is also seeking funeral and burial expenses.

On May 13, 1994, the Court, in reliance upon the investigatory report by the Attorney General's office, issued an opinion awarding the sum of \$500 to James Patterson and the sum of \$2,500 to James Patterson and Wallace Broadview Funeral Home. The opinion included findings that James Patterson had paid the sum of \$500 of the funeral and burial expenses and still owed the sum of \$3,339 to Wallace Broadview Funeral Home. The Court denied an award to Willie J. Patterson, finding that he did not incur a compensable loss under the Act.

On June 13, 1994, Willie J. Patterson filed a request to review the opinion. His written request indicated that he had proof of payment to Wallace Westend Funeral Home by the Laborers' Retirement Board Employees' Annuity and Benefit Fund of Chicago. A hearing was scheduled for October 14, 1994, before the Commissioner at which time James Patterson appeared. James Patterson was not seeking a review of the opinion. Claimant, Willie J. Patterson, did not appear and therefore, the hearing was continued.

The continued hearing was conducted on April 27, 1995, at which time Willie J. Patterson appeared and testified. Willie J. Patterson presented a photocopy of the front and back of a check dated December 23, 1992, to Wallace Westend Funeral Home as Claimant's exhibit 1. The check was drawn on an account in the name of the Laborers' Annuity and Benefit Fund. The copy of the reverse of the check indicated that it was endorsed by the funeral home and deposited in its own account. The second page of Claimant's exhibit 1 was a copy of the form entitled, "Refund to Heirs," which was signed by Willie J. Patterson on November 13, 1992. The form specified that

the Laborers' and Retirement Board Employees' Annuity and Benefit Fund of Chicago (hereinafter the "Fund") was requested and authorized to make payment to Wallace Westend Funeral Home and the balance of any sums remaining were to be paid to Willie J. Patterson.

At the April hearing, Willie J. Patterson was not sure whether the funds were death benefits, retirement benefits or deferred compensation. He presented a letter addressed to him from the Fund indicating that the Fund granted a refund to the account of the deceased victim in the amount of \$40,224.22. The letter also indicated that the sum of \$3,839 was going to be deducted and paid to the funeral home. It appears that this payment is not a death benefit but part of the retirement refund.

The Respondent indicated that the funeral home may have been paid twice, once by the Fund and also by the State. The funeral home signed an affidavit indicating payment from James Patterson. According to Willie J. Patterson, James Patterson was with him on November 13, 1992, when he signed the "Refund to Heirs" form and was aware that the sum stated would be paid to the funeral home.

A second continued hearing was held on July 30, 1995. The order setting the hearing was mailed to both Claimants. At the July hearing, Willie J. Patterson appeared. James Patterson did not appear. Mr. Vernon Wallace, the owner of Wallace Westend Funeral Home, appeared pursuant to subpoena by the Attorney General's office. Willie J. Patterson testified that James Patterson was not a beneficiary of the Fund. James Patterson filed the crime victims compensation application before he knew anything about it. He received a bill from Wallace Funeral Home for \$3,839.

Mr. Wallace testified that he received the \$3,839 from the Fund and received the \$2,500 from the State.

He agreed that the funeral home was paid twice. He stated that his records indicated that he refunded the \$2,500 paid by the State to James Patterson. He also believes he saw Willie J. Patterson in his office. He believes James Patterson indicated that the money should be reimbursed to him because he, James Patterson, forwarded the Fund's payment to the funeral home. Mr. Wallace did not recall whether the \$2,500 check from the State was co-payable to James Patterson and the funeral home. He did not recall whether James Patterson specifically requested a refund. It is his normal procedure to refund automatically when he receives an overpayment. Mr. Wallace indicated that he would provide copies of his records within one day of the hearing. However, no records have been received from Mr. Wallace.

On July 20, 1995, Respondent sent a letter to James Patterson asking him to contact the Attorney General's office. On August 24, 1995, the Respondent sent a letter to the Commissioner which indicated that Todd Magee, nephew of James Patterson, requested, via a telephone conversation, another date so that testimony could be presented that Willie J. Patterson was not telling the truth. On August 29, 1995, the Commissioner had a telephone conference with the Respondent and confirmed that the Attorney General's office had not received documents from Mr. Wallace.

Subsequent to the July hearing, the Court received copies of the two State warrants, together with copies of the reverse sides showing the endorsements. Exhibit number 2 is a copy of warrant number 9614231, dated May 26, 1994, payable in the sum of \$2,500 made co-payable to Patterson, James & Wallace Broadview Funeral Home. The reverse side indicates that both James Patterson and Vernon Wallace endorsed the check and it was

apparently deposited in the funeral home's account on approximately June 14, 1994. The endorsements and deposit took place approximately 18 months *after* Wallace Westend Funeral Home received payment from the Fund. (Emphasis added.) Exhibit number 3 is a \$500 warrant, dated May 26, 1994, and is payable to James Patterson. It was apparently endorsed and cashed by James Patterson on June 1, 1994.

Based on the evidence, the Court finds that Willie J. Patterson directed the Laborers' Annuity and Benefit Fund to pay \$3,839 to Wallace Westend Funeral Home for the funeral and burial of the deceased victim. The Fund paid the sum requested to the funeral home. Section 10.1(c) of the Act allows a relative of the deceased victim to seek compensation for funeral expenses which he has paid or is obligated to pay. Section 10.1(e) provides that an award shall be reduced by the amount of benefits, payments or awards listed in section 7.1(a)(7) of the Act. Clause (j) of subsection (a)(7) requires the listing of "any other source." The payment from the Fund falls into the "other source" category.

Section 10.1(e) expressly excepts from the reduction requirement:

"* * * annuities, pension plans, Federal Social Security payments payable to dependents of the victim and the net proceeds of the first \$25,000 of life insurance that would inure to the benefit of the applicant * * *."

The Court further finds that the \$40,224.22, and particularly the portion thereof used for funeral expenses, was a benefit, award or payment from "other sources" and reduced the funeral expenses paid by Willie J. Patterson, and therefore, Claimant, Willie J. Patterson, is not entitled to any compensation under the Act.

The Act specifically provides that benefits, payments or awards payable from pension plans do not reduce an

award pursuant to the Act *except* when such payments are payable to “dependents” of the victim. Willie J. Patterson has not shown that he was dependent on the deceased victim. The use of the words “pension plans” in the reduction exception indicates that the General Assembly intended to exempt payments from pension plans only when received by dependents. It is reasonable to conclude that the General Assembly, therefore, intended for payments from pension plans to be included as “other sources” and reduce awards when received by non-dependents. Therefore, the exception cannot apply to the receipt of funds by Willie J. Patterson and any award should be reduced by the full amount paid by the Fund.

In relation to James Patterson, there is nothing in the record to indicate that he did not advance \$500 for the funeral expenses. The \$500 payment was made prior to the \$3,839 payment by the Fund. There is nothing in the record that indicates James Patterson was obligated to pay the additional \$3,339 in funeral expenses. The issue becomes more complex by virtue of the awards made and warrants delivered to James Patterson and the funeral home in May of 1994, some 18 months after the date of the Fund’s payment of *all* funeral expenses. Additionally, James Patterson and Mr. Wallace endorsed and cashed their warrants. It appears that either Mr. Wallace, or James Patterson, knowingly received \$2,500 from the State that should have been returned to the State.

The Court strongly recommends that the Attorney General investigate and prosecute the individuals responsible for the knowing receipt or conversion of State warrant number 9614231 in the sum of \$2,500.

The Crime Victims Compensation Act is a secondary source of compensation. In this case, the entire funeral bill was paid by another source. Claimant, Willie J. Patterson,

has failed to prove by a preponderance of the evidence that he is entitled to compensation.

For the foregoing reasons, it is hereby ordered:

A. That the claim of Claimant, Willie J. Patterson, is denied.

B. That the Attorney General shall be notified of this opinion.

C. That the Court strongly recommends that the Attorney General investigate and prosecute the individual or individuals responsible for the knowing receipt or conversion of State warrant number 9614231 in the sum of \$2,500.

(No. 93-CV-1167—Claim denied.)

In re APPLICATION OF GERALD L. SIVELS, MARJORIE SIVELS
BARNES, and CINDIE HUDGENS

Order filed December 8, 1995.

GERALD L. SIVELS, MARJORIE SIVELS BARNES, and
CINDIE HUDGENS, *pro se*, for Claimants.

JIM RYAN, Attorney General (PAUL H. CHO, Assistant
Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*award for loss of support—what Claimant must show.* Pursuant to section 72(f) of the Crime Victims Compensation Act, where a Claimant seeks loss of support for the decedent's minor child, the amount shall be based on the amount of support the child received for the six months prior to the victim's death, but mere entitlement to support is not dependency under the Act, and dependency cannot be found where the Claimant fails to produce evidence that the deceased victim was actually contributing to a person's support since the legislature intended to compensate persons who experienced out-of-pocket loss.

SAME—*claim for loss of support for decedent's minor child denied.* The Court of Claims denied a request by the mother of a deceased crime victim's

minor child seeking compensation for loss of support since, although the Claimant established that there was a court order directing the decedent to pay support for the benefit of the child, and that the decedent was working in the six months prior to his death, the Claimant failed to prove that the decedent was actually contributing to the child's support during the six-month period before he died.

ORDER

MITCHELL, J.

On September 19, 1992, Maurice Sivels was a victim of first degree murder. Gerald L. Sivels, brother of the deceased victim, Cindie Hudgens, mother of Alexis Laurice Hudgens, minor child of the victim, and Marjorie Sivels Barnes, wife of the deceased victim, brought this action seeking compensation pursuant to the Crime Victims Compensation Act, hereinafter referred to as the Act. 740 ILCS 45/1 *et seq.*

On November 16, 1993, following a review of the investigatory report, this Court found that Claimant, Gerald Sivels, had paid funeral expenses in the amount of \$2,767.31.

The Court found that Claimant, Cindie Hudgens, had failed to substantiate that the deceased victim was making child support payments in the six months prior to the incident. The Court held that her application for compensation was denied.

The Court further held that Claimant, Marjorie Sivels Barnes, was entitled to loss of support. The Court determined that the victim's average net monthly earnings were \$779.90 and his projected life expectancy was 74.2 years. The victim was 39 years old at the time of his death; therefore, the projected loss of support for 35.2 years was calculated at \$329,429.76.

Since the pecuniary loss of Claimants Gerald Sivels and Marjorie Sivels Barnes exceeded the \$25,000 maximum

allowed by statute, the Claimants' awards were prorated in accordance with the percentage of net loss.

A total award was made to Gerald Sivels in the amount of \$200 and to Marjorie Sivels Barnes in the amount of \$24,800.

On December 3, 1993, Claimant, Cindie Hudgens, filed a request for the Court's consideration of her claim.

Claimant, Cindie Hudgens, appeared at a hearing on February 16, 1995, and produced a State of Illinois birth certificate for the minor child, Alexis Hudgens, which did not name the child's father.

Illinois Department of Public Aid records indicate that the deceased victim, Maurice Sivels, was required by court order to pay support in the amount of \$54 bi-weekly for the benefit of Alexis Hudgens. The effective date of the order was October 8, 1991.

Claimant established that the deceased victim was employed at Julian Electric, Inc. in the six months prior to the incident. However, in a letter dated November 16, 1994, the employer denied having made any child support deductions from the victim's paycheck.

Claimant did not offer any other evidence to support her position that the deceased victim was contributing to the minor child's support.

Section 72(f) of the Act provides that where Claimant is seeking loss of support for the deceased's minor child, the amount shall be based on the amount of support the child received pursuant to the judgment for the six months prior to the victim's death.

The Court has consistently held "that mere entitlement to support is not dependency under the act." *Reynolds v. State* (1992), 45 Ill. Ct. Cl. 525, 535; *In re Application of Smith* (1976), 31 Ill. Ct. Cl. 675, 679.

Dependency cannot be found in a case where Claimant fails to produce evidence that the deceased victim was actually contributing to a person's support. The legislature intended to compensate persons who experienced out-of-pocket loss. *Reynolds, supra*, at 536; *Smith, supra*, at 679.

In this case, Claimant has established that there was an order for the deceased victim to pay support for the benefit of his daughter. Claimant further produced evidence that the victim was working in the six months prior to the date of the incident. However, there is no evidence that the deceased was contributing to the support of the minor child during the six months prior to his death.

For the purposes of the Act, the Claimant's minor child was not a dependent of the deceased victim and, therefore, her request for compensation for loss of support must be denied.

(No. 93-CV-1727—Claim denied.)

In re APPLICATION OF MARIA BUENO and EMELY DELGADO

Opinion filed December 27, 1995.

MARIA BUENO, *pro se*, and Legal Assistance Foundation of Chicago (DEVEREUX BOWLY, of counsel), for Claimants.

JIM RYAN, Attorney General (PAUL H. CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*claims for funeral expenses and loss of support denied*. Where the deceased crime victim's mother sought compensation for funeral expenses, and the mother of the decedent's minor son requested an award for loss of support, both claims were denied, since the decedent's mother admittedly presented false and conflicting information

regarding the source of the funds used to pay the funeral and burial expenses, and the mother of the decedent's child failed to show that the decedent was actually providing support for his son in the six months prior to his death.

OPINION

SOMMER, C.J.

This claim comes before the Court on two different crime victims compensation applications. The Claimant, Maria Bueno, the mother of the deceased victim, and the Claimant, Emely Delgado, mother of the deceased victim's son, Rafael Padilla, Jr., seek compensation pursuant to the Crime Victims Compensation Act (hereinafter referred to as the "Act") 740 ILCS 45/1, *et seq.* (1992).

On November 16, 1993, this Court issued an opinion finding that Claimant Bueno incurred funeral and burial expenses in the amount of \$3,369. This Court ordered that the sum of \$3,000 be awarded as compensation for funeral expenses. An award to Claimant Delgado was denied. The opinion included a finding that Claimant Delgado had not substantiated her claim that the victim's minor son, Rafael Padilla, Jr., was dependent on the victim for support.

On December 17, 1993, Claimant Delgado, by and through her attorney, appealed the decision. She asserted that evidence would show that the victim's son was dependent upon the victim for support. She also disputes the portion of the opinion that awards \$3,000 in funeral expenses to Claimant Bueno, contending that the funeral was paid for by her, Claimant Delgado, and that Claimant Bueno provided incorrect or fraudulent documents.

A hearing was scheduled for October 14, 1994, at which time, Claimant Delgado appeared with her attorney. Her attorney acknowledged that she was not eligible

for reimbursement of funeral and burial expenses because she was not a relative. The following documents were offered by the Claimant and made a part of the record:

1. A copy of the 1989 U.S. Individual Income Tax Return Form 1040A signed by Rafael Padilla showing income of \$3,459 and declaring Giovanni Padilla to be a dependent.

2. A copy of a Certificate of Live Birth indicating that Rafael Padilla was the father of Rafael Giovanni Padilla, Jr., born on December 19, 1983.

The Assistant Attorney General indicated that his office would review the employment records in relation to the loss of support claim and would investigate the funeral and burial expenses.

A continued hearing was held on March 15, 1995, at which both Claimants appeared and testified. On the issue of funeral and burial expenses, the Attorney General's office confirmed that Caribe Funeral Home provided two contradictory affidavits. One indicates that Maria Bueno paid the funeral and burial expenses and the other indicates Emely Delgado paid the expenses. Claimant Delgado is not related to the victim; therefore, she would not be eligible for reimbursement. (740 ILCS 45/10.1(c) (1992).) The Assistant Attorney General ("AAG") indicated that Ms. Bishop from Caribe told him that she did not know why there were two different affidavits. The AAG subpoenaed her for the hearing; however, she did not appear. She did not send documents to the AAG.

Claimant Bueno testified that she was the mother of the deceased victim and he lived with her. She presented four receipts, numbers 2415, 2418, 2419 and 2707, from Caribe Funeral Home, indicating that money was received

from Maria E. *Perez*. Claimant Bueno stated that Perez was her maiden name. The receipts are dated July 14, 1992, through August 18, 1992, and total \$3,180. She presented a receipt, dated June 15, 1994, from Cast Monuments, Inc., showing that \$1,649.50 was paid by Maria *Padilla*, whom she said was her. She had a copy of a cashier's check made payable to Cast Monuments, Inc. in the amount stated on the receipt. The remitter on the check was Maria Bueno.

The AAG presented a copy of the funeral director's report, signed by Julius (or Julia) Bishop, and a statement of services indicating that \$3,369 was received from Maria *Padilla*, mother of Rafael Padilla. The document appeared to have been altered; i.e., certain items scratched out, with additions, and signatures. "Padilla" was crossed out and "Bueno" was printed in. A copy of a receipt was attached, number 2867, dated August 30, 1993, showing receipt of \$3,369 from Maria Padilla, with "Padilla" crossed out and "Bueno" printed in. This receipt is different than the receipts presented by Ms. Bueno at the hearing.

Claimant Delgado testified that the deceased victim was the father of her son. She stated that neither she nor Claimant Bueno paid for the funeral. A collection was gathered from the victim's friends, grandmother, and other family from his father's side. She presented a receipt from Caribe of \$3,369 from Emely Delgado. She stated that the victim's stepmother, Natalia Molina, was involved in collecting the money. Claimant Bueno argued with Natalia in relation to the collection of the money; and Natalia gave some of the collection to Claimant Bueno and some to Caribe. She stated that Claimant Bueno did not pay the funeral expense out of her own pocket but from a collection taken from the victim's friends and family.

Claimant Delgado testified her name was put on the receipt because she and Claimant Bueno entered into an oral agreement. She presented a signed funeral director's report, dated September 11, 1992, showing that Emely Delgado paid \$3,369 for funeral and burial expenses. Claimant Delgado believes that the victim's grandmother paid \$1,000, his aunt's husband paid \$580, his aunt bought the suit, and the rest was contributed by his friends.

In relation to the oral agreement between the Claimants, Claimant Delgado stated that the receipt would be put in her name and the \$3,000 reimbursement would be split three ways: \$1,000 for the victim's son, \$1,000 for the monument, and \$1,000 for Claimant Bueno. Claimant Bueno "went behind my back, went to the funeral director, and asked her for a receipt." When she learned that Claimant Bueno was going to receive \$3,000 for funeral and burial expenses, she asked Claimant Bueno whether she was still going to give her \$1,000 for her son, and was told "No." That is why she got a lawyer and appealed the order.

Claimant Bueno said that Claimant Delgado was lying. She stated that she used money from social security to pay for the monument. She receives disability payments from the Social Security Administration. She said that the money paid to Caribe came from her. She said her friend gave her \$600. His name was "Sammy" but she did not know his last name. She said "Natie," her son's stepmother, collected \$1,500. She also collected approximately \$500 from friends but forgets how much she collected. She claims to have paid \$600.

Claimant Delgado's counsel indicated she would stipulate that Ms. Bueno paid \$600 of the burial and funeral expenses. Claimant Bueno then claimed she paid more than \$600. She asked for a continuance to "bring all the papers."

On the issue of loss of support, Claimant Delgado testified that her son, Rafael Giovanni Padilla, Jr., born on December 19, 1983, was the son of the victim. She was unsuccessful in obtaining later tax returns, beyond the 1989 return, of the victim. In 1990 and 1991 he was working at a temporary place, but was still supporting the boy. He gave her cash for the support every week, usually between \$50 to \$125 per week. One time it was \$485. He spent a lot of time with his son.

The employer report indicates that at the time of his death the victim was employed by Cole's Appliance and Furniture Company from March, 1992, to the date of his death. The victim received his first check on March 21, 1992.

At the conclusion of the hearing, the record was left open for either Claimant to present any further documents. Claimant Bueno wanted to present a list of persons who gave her money but had left it at home. She was instructed to mail it together with a letter if she desired. Subsequent to the hearing, Claimant Bueno mailed a letter together with a letter from Jorge L. Crespo and a garbled listing of contributions. (English translations were provided by the Commissioner's secretary).

This is a troublesome case. Claimant Delgado admits that she filed false information in relation to the funeral and burial expenses. She contends that it was done in furtherance of an agreement with Claimant Bueno. Claimant Bueno denies that this agreement took place. Claimant Bueno's testimony is expressly inconsistent. At times she states that she paid all of the funeral and burial expenses, and at other times she states that she paid \$600 of the funeral and burial expenses. The funeral home's records are also inconsistent. The funeral home either negligently reported receipt of the same funds, or has

participated in the presentation of false information as alleged by Claimant Delgado.

This Court finds that Claimant Bueno's presentation of false information, i.e., she paid all of the expenses, in light of her testimony that the bulk of the money came from a collection, is sufficiently inconsistent to bar her from any recovery. (740 ILCS 45/20.) Public policy is best served by discouraging the presentation of false information.

On the loss of support claim, the same public policy concerns expressed above apply to Claimant Delgado's provision of false information on the funeral expenses. However, the support that would be provided would be for the benefit of the victim's minor child, aged eight years and 205 days as of the date of the victim's death. The record does establish that the victim was employed for some time during the six-month period prior to his death. The total net earnings for the six-month period was \$2,379.86, or an average monthly net income of \$396.64. There is no documentation to show that he was actually providing support for his son. Claimant Delgado stated that neither she nor the victim maintained a checking account and the victim would give her cash ranging from \$50 to \$125 per week. No witnesses were presented to corroborate these payments. Her counsel indicated that the victim was providing an average of \$250 per month. This amount is 64 percent of his average monthly net income. Claimant Bueno did not dispute that the victim was making cash payments to support his son. She did state that the victim was living with her at the time of his death; therefore, it may be reasonable to conclude that his own living expenses might not be as high if he were living on his own.

This Court finds that Claimant Delgado has not established that support was being provided. It is therefore

ordered that this Court's order of November 16, 1993, is amended and compensation is hereby denied to both of the Claimants.

(No. 93-CV-2399—Claim denied.)

In re APPLICATION OF KERRY JONES and ROSE MARIE JONES

Opinion filed May 17, 1996.

KERRY JONES and ROSE MARIE JONES, *pro se*, for Claimants.

JIM RYAN, Attorney General (PAUL H. CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*basis for reduction or denial of award—victim's conduct contributed to his death.* Section 80.1(d) of the Crime Victims Compensation Act states that an award shall be reduced or denied according to the extent to which the victim's acts or conduct provoked or contributed to his injury or death, or to the extent to which any prior criminal conviction or conduct of the victim may have directly or indirectly contributed to the injury or death of the victim.

SAME—*murder victim's drug involvement contributed to his death—claim denied.* Based on evidence indicating that the decedent, a murder victim, was involved in the sale and distribution of illegal narcotics and was shot during a drug transaction, the Court of Claims found that the victim's conduct contributed to his death to such an extent as to warrant the denial of a crime victim's compensation claim by the victim's mother on behalf of her three minor children.

OPINION

FREDERICK, J.

This claim arises out of an incident that occurred on May 7, 1991. Kerry Jones, the mother of Brian K. Jones, Brandon D. Jones and Dominique S. Jones, the minor children of the deceased victim, Brian Keith Jones, and Rose Marie Jones, mother of the deceased victim, seek

compensation pursuant to the provisions of the Crime Victims Compensation Act, hereinafter referred to as the "Act." 740 ILCS 45/1 *et seq.*

On August 16, 1995, the Court entered an order denying the claim. Based on the investigatory report, the Court found that the deceased victim was involved in the illegal sale and distribution of narcotics and that the offenders shot the decedent during an illegal narcotics transaction. In light of that finding, the Court denied the claim as the victim's conduct provoked or contributed to his death to such an extent that Claimant did not meet the required conditions precedent for an award of compensation. On August 24, 1995, Claimant requested a hearing. The cause was tried before Commissioner Fryzel.

Claimant, Kerry Jones, was the mother of the victim's children and Claimant, Rose Marie Jones, was the mother of the victim, Brian Jones. The victim was fatally shot in the head on March 24, 1991, by George Brown and Christopher Stokes who then left the deceased victim in an abandoned building at 716 E. Marquette Road in Chicago, Illinois, where he was found on May 7, 1991, by two men searching for tin cans. The offenders were later apprehended and found guilty of murder. Stokes was given 35 years and Brown 15 years in prison. On November 30, 1992, Kerry Jones filed a petition for extension of time to file a claim under the Crime Victims Compensation Act. The Court of Claims granted the petition on March 3, 1993, giving her 60 days to file a claim, which she did on March 15, 1993, and August 19, 1993. The claim is for compensation for the mother of the victim and Brandon D. Jones, Brian K. Jones, Dominique S. Jones, minor children of the deceased victim. The Court of Claims denied the claim on September 20, 1993, stating that section 6.1(a) of the Act required that an application

be filed within one year of the date of the crime upon which the claim is based. The Court can extend that period up to another year. This petition was filed more than two years after the crime, constraining the Court by operation of law to deny the petition. The Claimant asked for a review of the decision based on the incapacity of the Claimant, Rose Marie Jones, because she is being treated for schizophrenia, paranoid type (per a May 19, 1994, letter from Community Counseling Centers of Chicago). The Court ordered, on June 29, 1994, that a Commissioner be assigned to hold a hearing to hear evidence on whether Claimant was incapacitated as defined by law so as to extend the statute. A hearing was held before Commissioner Michael E. Fryzel on December 7, 1994. The Attorney General was ordered to file an investigatory report. The Court of Claims denied the claim on August 16, 1995, stating that police investigation revealed that the victim was involved in the sale and distribution of illegal narcotics and that the offenders shot him during an illegal narcotics transaction. Section 80.1(d) of the Act states that an award shall be reduced or denied according to the extent to which the victim's acts or conduct provoked or contributed to his injury or death. Since the victim was shot during an illegal drug transaction, his conduct contributed to his death to such an extent as to warrant that the Claimants be denied entitlement to compensation.

Claimant, Kerry Jones, testified that Brian Jones did not deal drugs at all and that the men who murdered him mistook him for his brother, Shawn Jones, who is a drug dealer. This testimony directly contradicts what she told the police when they were investigating the murder. The police report indicates she told officers that on March 23 and 24, 1991, the victim had approximately \$3,000 worth of drugs on his person. She related that he did not store

drugs in their residence but had a key to another location unknown to her where he kept narcotics and valuables. She additionally related that Wayne Henley would often accompany the deceased on “drops of narcotics.”

Officers also interviewed many other people, including Shawn Jones, who all stated that Brian Jones dealt drugs (cocaine). Wayne Henley told the police that he was called by Brian to go on a run with him for a drug deal on the day Jones was shot, but when Henley arrived at Jones’ house, Jones was already gone. While there is some evidence in the police reports that Shawn Jones owed Stokes \$30,000 for drugs and that there may have been mistaken identity of Brian for Shawn, there is also reason to believe that everyone knew each other and that the shooting was due to Brian’s own drug deals. Section 80.1(d) of the Act states that an award shall be reduced or denied according to the extent to which the victim’s acts or conduct provoked or contributed to his injury or death, or to the extent to which any prior criminal conviction or conduct of the victim may have directly or indirectly contributed to the injury or death of the victim. *In re Application of Cross* (1980), 34 Ill. Ct. Cl. 411; *In re Application of Casey* (1993), 46 Ill. Ct. Cl. 610.

We find that, based on the evidence before the Court, Brian Keith Jones contributed to his death to such an extent that this claim should be denied. The evidence points to his involvement in narcotics and indicates that his death was drug-related. Claimants have failed to present sufficient evidence to contradict that conclusion. (*In re Application of Fort* (1990), 42 Ill. Ct. Cl. 392.) While the decedent’s death is a tragedy and we sympathize with Claimants in their loss, we are constrained to find that Claimants have failed to meet their burden of proof that they have met all conditions precedent for an award under

the Act. For the foregoing reasons, it is the order of the Court that the claim be and hereby is denied.

(No. 94-CV-1064—Claim denied.)

DARTALLION ALLEN, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed September 15, 1995.

DARTALLION ALLEN, *pro se*, for Claimant.

JIM RYAN, Attorney General (WENDELL DEREK HAYES, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*prerequisite to recovery—cooperation with law enforcement officials.* Under section 6.1(c) of the Crime Victims Compensation Act, in order to receive compensation, a Claimant must cooperate fully with law enforcement officials in the apprehension and prosecution of the assailant, and Claimants who give law enforcement officials different versions of the incidents giving rise to their injuries have failed to cooperate fully with law enforcement officials and are ineligible for compensation.

SAME—*gunshot victim gave police different versions of events leading to injuries—claim denied.* In a crime victim's claim seeking compensation as a result of a gunshot wound to his leg, where the Claimant gave police different versions of the events leading to his injuries, serious doubts were raised regarding his credibility, the investigation into the shooting was hampered, and the Claimant's failure to fully cooperate with law enforcement officials resulted in the denial of his claim.

OPINION

FREDERICK, J.

This claim is before the Court on an application for compensation filed by Dartallion Allen under the provisions of the Crime Victims Compensation Act, hereafter referred to as the "Act." (740 ILCS 45/1 *et seq.*) The Claimant filed an application alleging he was entitled to compensation because he had been shot in the right leg on August 19, 1993.

An order was entered by this Court on May 11, 1994, denying the claim based on the investigatory report of the Attorney General's office. The reason for denial was that the report indicated the Claimant refused to cooperate with law enforcement officials in the apprehension and prosecution of the assailant as required by section 45/6.1(c) of the Act. The Claimant made a timely request for a hearing pursuant to section 45/13.1 of the Act. A hearing was held before Commissioner Clark on December 8, 1994. The evidence consists of the Claimant's testimony, bills submitted by the Claimant documenting expenses incurred for medical treatment, and employers' reports for calculating lost wages.

The Claimant testified that he was walking near the home of his girlfriend at 6706 Forest Boulevard, Washington Park, Illinois, when he felt something hit his leg. Moments later he noticed blood dripping down his leg and summoned help at his girlfriend's home. His girlfriend's daughter took him to his mother's home. His family took him to St. Mary's Hospital in East St. Louis, Illinois, where he was treated for a gunshot wound. The Claimant initially told officers with the St. Clair County Sheriff's Department that he did not see his assailant. The Claimant stated that the officers searched his home looking for the pistol with which he was shot.

The Claimant's condition worsened and he went to Touchette Regional Hospital in Centreville, Illinois, where the bullet was removed. While at the hospital, an officer with the sheriff's department questioned Claimant again. Claimant alleges that the officer harassed him and would not accept his answer that he did not see his assailant. To appease the officer, Claimant then told the officer that while he was standing at a bus stop, two white men jumped out of some bushes, robbed him and shot him.

Claimant submitted bills from St. Mary's Hospital totaling \$1,598.64; from Dugan and Carls, Radiologists, Ltd., totaling \$72; and from Touchette Regional Hospital totaling \$987. The Claimant also submitted employee reports prepared from three employers. Only one report showed earnings prior to the date of the shooting and this was only for the two months prior to the date of the shooting. The other two reports recorded earnings following the date of the shooting. Based on the report that most accurately complies with the instructions on the form, the Claimant's net average monthly income would have been \$404.03. The Claimant's physician allowed him to return to work on September 27, 1993. Thus, he was unable to work for about one month.

Section 6.1(c) of the Act states that in order to receive compensation, a Claimant must cooperate fully with law enforcement officials in the apprehension and prosecution of the assailant. This Court has previously held that Claimants who give law enforcement officials different versions of the incidents giving rise to their injuries have failed to cooperate fully with law enforcement and are ineligible for compensation. (*In re Application of Vaughn* (1981), 35 Ill. Ct. Cl. 517; *In re Application of Ford* (1984), 37 Ill. Ct. Cl. 443.) The differing versions proclaimed by Claimant raise serious doubts about his credibility.

No matter what the Claimant's reasons, he failed to fully cooperate with law enforcement officials by telling a different version of his story, thus hampering any investigation into the shooting.

Because the Claimant failed to fully cooperate with law enforcement officials, he has failed to meet all required conditions for an award under the Act. For the foregoing reasons, the Claimant's claim is denied.

(No. 94-CV-2294—Claim denied.)

In re APPLICATION OF CARMEN I. MERCADO

Opinion filed March 11, 1996.

CARMEN I. MERCADO, *pro se*, for Claimant.

JIM RYAN, Attorney General (PAUL H. CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*Claimant has burden of proving compliance with conditions precedent to award.* The Crime Victims Compensation Act is a secondary source of recovery and is strictly a statutory remedy, and the Claimant has the burden of proving that she has complied with all conditions precedent to an award.

SAME—*claim must be denied where Claimant's conduct contributes to his death or injury.* The Crime Victims Compensation Act requires that the Court of Claims deny compensation where the victim contributes sufficiently to his own death or injury.

SAME—*decendent in possession of gun and drugs at time of death—claim denied.* In light of a police investigation finding that the Claimant's son was in possession of illegal drugs and a loaded handgun at the time he was shot to death, the Court of Claims determined that the decedent's illegal conduct contributed to his death to such an extent as to warrant denial of the Claimant's request for crime victim's compensation.

OPINION

FREDERICK, J.

Claimant, Carmen I. Mercado, filed her application for benefits under the Crime Victims Compensation Act (740 ILCS 45/1 *et seq.*), hereinafter referred to as the “Act,” on February 16, 1994. On March 1, 1995, the Court, relying upon the investigatory report of the Attorney General, denied compensation to the Claimant. The investigation found that Claimant's decedent had a quantity of illegal drugs and a fully-loaded handgun in his possession at the time of his death. Based on those facts, the Court found that the Claimant's decedent contributed to his own death to such an extent as to warrant that the Claimant be denied compensation.

Claimant, Carmen Mercado, is the mother of the deceased victim, Alfredo Mercado. Her application indicates that she claims medical and hospital expenses and funeral and burial expenses. The Claimant made a timely request for a hearing. The case was tried before Commissioner Blakemore.

The issue before the Court is whether the Claimant's decedent's acts or conduct provoked or contributed to his injury or death to the extent that the claim should be reduced or denied. At the hearing Claimant testified that she did not believe her son provoked his own death. There was no proof he used the gun that was found in his possession. Mrs. Mercado was not present at the time her son was shot to death. She was taken to the scene later. She talked to the police a day later. The police told her that someone claiming to be Alfredo Mercado's aunt tried to grab the bag in the car. The offender was a David Ruiz and he was going to trial. She was not aware that her son was a member of the Insane Camel Boy street gang. She believed her son had friends who were Camel Boys but that Alfredo was not a member of the gang. She never had any problems with Alfredo. She was not aware that Alfredo carried a 25-caliber automatic handgun and had a bag of marijuana with him when he was killed. Claimant does not know if her medical insurance covered Alfredo's medical bills. At the time of trial, she was not receiving bills from the Cook County Hospital. Claimant believed her son did not need to be selling drugs.

Before the Court rules on this matter, the Court expresses its condolences to Mrs. Mercado. She has lost her son and there is nothing that can bring him back. Her loss is the greatest a mother can have and there is no doubt that Claimant loved her son very much.

The Crime Victims Compensation Act is a secondary source of recovery. It is strictly a statutory remedy. The

Claimant has the burden of proof that she has complied with all conditions precedent to an award. (*In re Application of Bavidio* (1992), 44 Ill. Ct. Cl. 449.) The Act requires the Court to deny compensation where the victim contributes sufficiently to his own injury or death. In the present case, it is undisputed that Claimant's decedent was in possession of illegal drugs and a loaded handgun at the time of his death. Both of these actions are crimes and Claimant's evidence does not credibly dispute this evidence. The Court has denied numerous claims where a Claimant has been involved in a crime at the time of his death where the Court found the illegal conduct contributed either directly or indirectly to the death or injury. (*In re Application of Hum* (1992), 44 Ill. Ct. Cl. 486; *In re Application of Wintrol* (1985), 38 Ill. Ct. Cl. 409; *In re Application of Casey* (1993), 46 Ill. Ct. Cl. 610.) The cited cases are a small sampling of cases where the factor of guns and/or drugs was found by the Court to be a contributing factor to a death or injury to such an extent as to lead to the denial of the claim. Guns and drugs are truly a deadly combination.

In the instant case, Alfredo Mercado had a gun and drugs in his possession and was killed. We find that those factors contributed to the decedent's death to such an extent that the claim should be denied pursuant to section 10.1(d) of the Act.

For the foregoing reasons, it is the order of the Court that this claim be and hereby is denied.

(No. 94-CV-2822—Claim denied.)

In re APPLICATION OF MARGARITO CENICEROS

Opinion filed August 18, 1995.

LEGAL ASSISTANCE FOUNDATION (DEVEREUX BOWLY, of counsel), for Claimant.

JIM RYAN, Attorney General (PAUL H. CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*crime victim—crime of violence—motor vehicles*. A crime victim as defined in the Crime Victims Compensation Act is a person killed or injured as a result of a crime of violence perpetrated or attempted against him, and the term “crime of violence” does not include any other offense or accident involving a motor vehicle except reckless homicide and DUI.

SAME—*hit-and-run accident—failure to stop and report and reckless conduct in use of vehicle not covered offenses—claim denied*. The Claimant, a victim of a hit-and-run accident, could not recover in a crime victims compensation claim, since neither failure to stop and report, commonly known as “hit-and-run,” or reckless conduct in the use of a motor vehicle, are statutorily compensable violent crimes and the only vehicle-related crimes of violence included under the Crime Victims Compensation Act are reckless homicide and DUI.

OPINION

SOMMER, C.J.

This claim for compensation under the Crime Victims Compensation Act (740 ILCS 45/1, *et seq.*), hereinafter referred to as the “Act,” comes before the Court on a timely petition for a hearing and review of an order of this Court dated June 22, 1994, denying this claim. Oral argument before the entire Court was held on March 29, 1995.

In the crime victim compensation application, the Claimant states that he was “struck by auto which didn’t stop.” The conduct described is often referred to as a “hit-and-run” or “leaving the scene of an accident,” but in reality is a violation of the Illinois Vehicle Code, which requires a driver of a vehicle to stop or report when involved in an accident result in death or injury. 625 ILCS 5/11—401.

The failure to stop or report (“hit-and-run”) is not listed as one of the crimes for which compensation may be awarded to the victim under the Crime Victims Compensation Act. 740 ILCS 45/2(c).

Presently, a crime victim is defined in the Act as “a person killed or injured * * * as a *result* of a crime of violence perpetrated or attempted against him * * *.” 740 ILCS 45/2(d). Emphasis added.

Thus, to award compensation to a victim on the basis that the perpetrator failed to stop or report would violate the present definition of a crime victim, as the victim was not injured as a *result* of the failure to stop or report; and would create an irrational scheme of compensation where the injuries were purely accidental.

The Claimant argues that a driver who does not stop or report may have committed the crime of reckless conduct. This crime is listed as one of the crimes for which compensation may be awarded to the victim under the Crime Victims Compensation Act. 740 ILCS 45/2(c).

The argument of the Claimant has been rejected previously. In *In re Application of Stevens* (1976), 31 Ill. Ct. Cl. 710, the Court stated:

“The language of Chapter 38, Section 12—5 (Reckless Conduct) of the Illinois Revised Statutes does not specifically mention motor vehicle accidents. If the General Assembly had intended to include motor vehicle accidents it could have done so easily by including under its definition of crime of violence those sections of the statutes which specifically mentioned motor vehicle offenses.

* * *

It is the Court’s opinion that the inclusion of Section 12—5 of Chapter 38 in the definition of crimes of violence in the Act was for the purpose of including all Acts of reckless conduct other than motor vehicle accidents.” *Stevens* at 711, 712.

The Claimant argues that since the decision in *Stevens*, the General Assembly has added to the Act the

crimes of reckless homicide and driving under the influence of alcohol or drugs—crimes involving motor vehicles. 740 ILCS 45/2(c).

The Claimant urges us to adopt the reasoning in the claim of *In re Application of Smith* (1992), 45 Ill. Ct. Cl. 520. In *Smith*, the Court found reckless conduct in the discharge of a firearm to be a lesser included offense in the offense of involuntary manslaughter. (A crime which was not included under the Act at the time.) The Claimant urges that the finding in the *Smith* claim of reckless conduct on the part of the offender should apply to situations where victims are injured by motorists who then flee. The Claimant's argument is that, even if failure to stop or report after an accident is not a crime compensable under the Act, reckless conduct might be found. Additionally, using the reasoning in *Smith*, the Claimant argues that reckless conduct is a lesser included offense in reckless homicide; and, therefore, with the addition of reckless homicide as a "crime of violence" under the Act, reckless conduct is necessarily included as a "crime of violence" applicable to motor vehicle mishaps.

The Claimant's analogy to *Smith* fails partially as reckless conduct is not necessarily a lesser included offense in failure to stop or report. A hearing would be required in most claims, as failure to stop or report is not proof standing alone of reckless conduct.

The Crime Victims Compensation Act provides that "'crime of violence' does not include any other offense or accident involving a motor vehicle except those vehicle offenses specially provided for in this paragraph." 740 ILCS 45/2(c).

This Court has previously found that the term "crime of violence" as specified in the Act does not include any

other offense or accident involving a motor vehicle except reckless homicide and driving under the influence of intoxicating liquor or narcotic drugs. *In re Application of Catron* (1992), 45 Ill. Ct. Cl. 558, 561, citing *In re Application of Wilcox* (1988), 41 Ill. Ct. Cl. 339, 340.

Given the General Assembly's specific language excluding "any other offense or accident involving a motor vehicle," and the fact that this Court has excluded reckless conduct as a "crime of violence" since 1976 in motor vehicle claims, and in the absence of specific legislative disapproval of our interpretation, we are constrained to continue to adhere to it. *Henderson v. State* (1991), 44 Ill. Ct. Cl. 180, 181.

It is true that reckless conduct can be committed by the driver of a motor vehicle. See 1961 Committee Comments in Smith-Hurd Illinois Compiled Statutes Annotated under 720 ILCS 5/12—5.

However, we find that there is a "vehicle offense" equivalent to reckless conduct, namely reckless driving. (625 ILCS 5/11—503.) Thus, reckless conduct is a generic offense, while reckless driving is a motor vehicle offense. Therefore, we find for the reasons previously given that reckless conduct is not to be included as a "vehicle offense" under the Act, as a specific "vehicle offense" is available to be placed in the Act if the General Assembly were to choose to do so.

The *Smith* claim involved a shooting—conduct not subject to the limiting terms of the Act as "vehicle offenses" are. Thus, our ruling in the *Smith* claim is consistent with this opinion.

In addition to causing many more hearings, the inclusion of reckless conduct or reckless driving (both misdemeanors) as crimes compensable under the Act in motor

vehicle accidents would extend the possibility of benefits under the Act to a new, large group of Claimants—those injured in unintentional automobile accidents, whose remedy has been traditionally found in the tort law. As we have shown, we believe that such a dramatic widening of the Act must be done specifically by the General Assembly if it so desires.

Therefore, we find that failure to stop or report (“hit-and-run”) and reckless conduct in the use of a motor vehicle are not crimes for which compensation may be awarded to the victim under the Crime Victims Compensation Act.

It is therefore ordered that this claim is denied after hearing and this Court’s order of June 22, 1994 is affirmed.

(No. 94-CV-3047—Claim denied.)

DELORIS ARMSTRONG, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Order filed June 7, 1996.

DELORIS ARMSTRONG, *pro se*, for Claimant.

JIM RYAN, Attorney General (PAUL H. CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*victim’s conduct and gang membership contributed to his death—claim denied.* An application for benefits under the Crime Victims Compensation Act by the aunt of a deceased crime victim was denied, because the evidence showed that the victim and his alleged assailant were members of opposing street gangs, the shooting in which the decedent was killed was precipitated by gang rivalry and prior gang incidents, and therefore the victim’s conduct provoked and contributed to his own death.

ORDER

SOMMER, C.J.

On September 29, 1993, James Earl Thomas was shot to death on West Jackson in the City of Chicago.

Pursuant to the Crime Victims Compensation Act, a claim was made by Deloris Armstrong, the decedent's aunt, for funeral expenses she had paid. On December 6, 1994, this Court originally denied the application for benefits submitted by the Claimant due to the fact that the Claimant's decedent was participating in gang activity which contributed to his death.

A hearing on the matter was held on August 14, 1995. Submitted during the course of the hearing was the report of the pathologist who conducted an autopsy on Mr. Thomas. In his opinion, the decedent died as a result of multiple gunshot wounds to the body. According to the reports submitted by the Chicago Police Department, the decedent was found at the scene of the shooting in clothes which exhibited gang graffiti and symbolism. A friend of the victim informed the police that Mr. Thomas was a member of the Black Gangster Disciples. That person also indicated that the victim was in that location to talk with another gang about a prior fight. The investigating officers checked the Chicago Police Department records and determined that the victim was a Black Gangster Disciple, with a criminal record. Further investigation by the police confirmed that the victim was at the scene of the shooting because of a prior incident. The man eventually arrested for shooting Mr. Thomas admitted that the motive for the shooting was a previous gang altercation.

It is clear that the victim and the alleged offender in this case were from opposing street gangs. This incident occurred because of their gang affiliation, gang rivalry and previous gang incidents. The victim's conduct and his membership in a gang provoked and contributed to his own death and, therefore, the claim will be denied under 740 ILCS 45/10.1(d), which states that an award may be denied where the decedent provoked and contributed to his own death.

It is therefore ordered that this Court's order of December 6, 1994, is affirmed and the present appeal is denied.

(No. 94-CV-3414—Claimant awarded \$2,594.)

In re APPLICATION OF DELIA LEYVA

Opinion filed January 23, 1996.

JEFFREY URDANGEN, LTD. (ERIKA B. CUNLIFFE, of counsel), for Claimant.

JIM RYAN, Attorney General (PAUL H. CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*former gang member was innocent victim of violent crime—funeral expenses awarded—claim for loss of support denied.* Although the decedent had been a member of a street gang while in high school, at the time he was fatally shot he was no longer affiliated with any gang and had a job parking cars and, because the decedent was an innocent victim of violent crime, his grandmother was entitled to compensation for his funeral expenses, but she failed to prove her claim for loss of support, and that claim was denied.

OPINION

FREDERICK, J.

This claim arises out of an incident that occurred on September 18, 1993. Delia Leyva, grandmother of the deceased victim, Victor E. Ramirez, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the "Act." 740 ILCS 45/1 *et seq.*

The Court previously denied the claim in its order of December 16, 1994. The Court found, based on the investigatory report, that the victim's conduct contributed to

his death to such an extent as to warrant that the Claimant be denied entitlement to compensation. The Court found that the incident occurred due to the fact that the victim and the offender were members of opposing street gangs and the death occurred as a result of their gang affiliation, gang rivalry, and face-to-face provocation.

The Claimant filed a timely request for hearing and the cause was tried before Commissioner Michael Kane. The evidence presented shows that while the investigation completed by the Attorney General suggests that street gang affiliation had some connection to this shooting, a more thorough examination of the facts reveals that the decedent had not been involved in any street gang activity for some years prior to the shooting. The Claimant, the grandmother of Victor E. Ramirez, applied for compensation, specifically, funeral expenses and loss of support as a result of the shooting death of Mr. Ramirez on September 18, 1993. Evidence was elicited at the hearing which established the following facts: the victim, Victor Ramirez, in his high school days, was in fact a member of a street gang; on the date of the shooting, he was not involved in any gang activity, but simply was in the wrong place at the wrong time. The individual who shot Mr. Ramirez, Darvin Williams, did not know the victim. However, in a confession to police he did admit shooting victim Ramirez simply because Mr. Ramirez was with an individual who Williams thought to be a member of a gang. The victim had not been involved in any gang activity since his high school days and was working. Furthermore, he had been through the TASC program and a counselor had found him a job parking cars.

Because the evidence presented indicated that the decedent had previously left the Latin Kings street gang, we find our previous findings to be in error. A close examination of the evidence shows that the decedent did

nothing to provoke his own injury. Prior to the shooting, the Claimant's decedent was merely seated on a step. He did not show any gang signs, gang clothing or shout gang slogans. The decedent was not a gang member on the date of his death.

This Court has taken a strong stance against street gangs and has found that such gang membership and its concurrent terrorism can be provocation for injuries and death suffered by gang members in gang wars. Such is not the case here.

For the foregoing reasons, it is the order of this Court that Victor E. Ramirez was the innocent victim of a violent crime and Claimant, Delia Leyva, is entitled to compensation under the Act. We find that Claimant has substantiated her claim for \$2,594 for funeral expenses but has failed to prove by a preponderance of the evidence a loss of support. Claimant's loss of support claim must be denied.

It is therefore ordered that Claimant, Delia Leyva, is awarded \$2,594 in full and final satisfaction of her claim and the remainder of her claim for loss of support is denied.

(No. 95-CV-1779—Claim denied.)

In re APPLICATION OF GLORIA BARNETT

Opinion filed May 15, 1996.

GLORIA BARNETT, *pro se*, for Claimant.

JIM RYAN, Attorney General (PAUL H. CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*Claimant has burden of proving conditions precedent to award.* The Claimant has the burden of proving by a preponderance of the evidence that all conditions precedent for an award under the Crime Victims Compensation Act have been met.

SAME—*shooting victim contributed substantially to his own death—claim denied.* A crime victim who was shot and killed after an altercation with another man, contributed substantially to his own death and his mother was denied crime victims compensation, where the evidence indicated that the shooting arose out of the altercation with the other man, the person charged with the victim's murder was acquitted, and the victim was in possession of illegal narcotics and may have had a gun at the time of the incident leading to his death.

OPINION

FREDERICK, J.

This claim arises out of an incident that occurred on September 13, 1994. Gloria Barnett, the mother of the deceased victim, Charles Roy Barnett, Jr., seeks compensation for medical expenses and funeral expenses pursuant to the provisions of the Crime Victims Compensation Act, hereinafter referred to as the "Act." 740 ILCS 45/1 *et seq.*

On August 15, 1995, the Court entered an order denying the claim. The police investigation revealed that the victim was arguing with a person on a street, the victim obtained a handgun and pointed it at the person with whom he was arguing, and the alleged offender obtained a handgun and shot the victim. The victim was also found to be in possession of illegal narcotics at the time of the incident. Based on the investigatory report, the Court determined that the victim's conduct contributed to his death to such an extent as to warrant that Claimant be denied entitlement to compensation pursuant to section 10.1 of the Act.

On August 31, 1995, Claimant requested a hearing. A hearing was held on December 15, 1995, at which Claimant appeared and testified. Two daughters of

Claimant, Barbara Walker and Iesha Mason, also attended the hearing. Although mostly hearsay, Ms. Barnett testified that on September 13, 1994, her son left South Suburban College with a girlfriend. He went to get a haircut and the barber told him to return in 30 minutes. Her son and his friend were riding around and they went down Loomis Street in Harvey. They saw somebody they knew and stopped to talk to the guy. A guy got out of another car and began arguing with her son. Her son and the person began fighting. Her son was trying to get back to the car. He was shot in the back while running down the street. Angie, the victim's friend, told Claimant that she heard somebody say "pop that fool." Claimant was not present at the incident.

An individual was arrested, charged and tried. He was found not guilty. According to Claimant, the judge stated that there was insufficient evidence to find him guilty. Angie was in the car during the incident and testified at the criminal trial. Claimant testified that Angie said the victim did not possess a handgun and Claimant was told that the police did not find a gun. Angie did not possess a handgun. In response to questions regarding the police finding narcotics on her son, Claimant indicated that it was odd that the police did not find his apartment keys or his wallet. Angie did not testify before the Commissioner nor was a transcript of her criminal trial testimony presented to the Court.

Claimant's daughter, Barbara Walker, stated that her brother was attending school and was not mixed up in drugs. The victim had worked with his mother at Little Company of Mary Hospital, however he had re-enrolled in college.

Neither Claimant nor her daughters were at the scene of the incident. Claimant did not know why the

fight took place. Angie told her that the other boy got out of the car and he and the victim “started tussling on the ground.” Her son tried to run away after the physical altercation. Angie allegedly testified at the criminal trial that the victim did not have a gun. The alleged offender said the victim had a gun.

Claimant stated that she borrowed the money from her credit union for the funeral expenses. She produced a document indicating that she borrowed \$2,810 to use for funeral and burial expenses and it has been paid back in full. The assistant Attorney General acknowledged that he was in possession of a funeral director’s report indicating that \$7,863 was paid by Ms. Barnett.

The police report contains a handwritten notation that “medical technicians released to R/O victim’s clothing, a clear plastic bag containing a leafy plant-like material believed to be cannabis, a folded piece of paper containing a white powdery substance believed to be cocaine.” Another handwritten notation indicates that the victim’s sister, Sulena Barnett, said that Lisa Carter “stated ‘Ron’ shot victim over a past argument.” The report also states “that ‘Ron’ is a local drug dealer.” The fifth page of the report appears to be a summary of the case prepared by the State’s Attorney’s Office of Cook County against the person charged with the murder of the deceased victim. The summary includes a statement that after the victim and Conwell began fighting “victim Barnett went to his girlfriend’s car and retrieved a handgun and pointed it at witness #5 Conwell.” The aforementioned statement is attributed only to the person charged with murder. There are no other references to anyone else saying that the victim had a gun.

Neither Claimant nor her two daughters were present at the incident. No occurrence witnesses testified at

this hearing. The victim possessed illegal narcotics at the time of the incident and such possession has not been substantially contradicted. The references to the victim pointing a handgun at an individual with whom he was having a fight are apparently made by the person charged with the murder of the victim. The person was acquitted of the murder of the victim. Angie was not called as a witness in this proceeding to dispute the allegation.

It is undisputed that a physical altercation took place between the victim and an individual. Although the victim was killed by someone other than the person he was fighting, it appears that the shooting arose out of, or was a continuation of, the altercation. No one was convicted of a violent crime against Claimant's son. It is unfortunate that the circumstances associated with the death of the victim have never been finally determined. However, this Court cannot arrive at a different conclusion than the criminal court based upon the evidence presented that the Claimant's decedent contributed substantially to his own death. The decedent may have had a gun, he did have drugs in his possession, and he was involved in an altercation. This Court has consistently denied or reduced awards in cases with facts similar to the facts adduced in this case involving drugs and guns. *In re Application of Hun* (1992), 44 Ill. Ct. Cl. 486; *In re Application of Casey* (1993), 46 Ill. Ct. Cl. 610; *In re Application of Cross* (1980), 34 Ill. Ct. Cl. 411.

The Claimant has the burden of proving that she has met all conditions precedent for an award pursuant to the Act by a preponderance of the evidence. (*In re Application of Bavidio* (1992), 44 Ill. Ct. Cl. 449.) While we understand and sympathize with Claimant's loss of her son, we must find that Claimant has not met all conditions precedent for an award under the Act. For the foregoing

reasons, it is the order of this Court that this claim be and hereby is denied.

(No. 95-CV-2522—Claim denied.)

In re APPLICATION OF EUGENE MINES, III

Opinion filed May 17, 1996.

EUGENE MINES, III, *pro se*, for Claimant.

JIM RYAN, Attorney General (PAUL H. CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*notification requirement*. Section 6.1(b) of the Crime Victims Compensation Act requires that a person requesting compensation under the Act notify law enforcement officials within 72 hours of the perpetration of the crime allegedly causing death or injury to the victim, but if the notification is made more than 72 hours after the crime is perpetrated, the applicant must establish that such notice was timely under the circumstances.

SAME—*limitations—failure of police to advise Claimant of Act*. The failure of police to advise the Claimant of the Crime Victims Compensation Act is not an exception to the limitations period under the Act.

SAME—*injuries sustained in breaking up fight—notification to law enforcement officials was not timely—claim denied*. Where the Claimant did not notify law enforcement officials of injuries he sustained in breaking up a fight until 23 days after the incident occurred, he was precluded from recovering under the Crime Victims Compensation Act, since the Claimant did not prove that such notice was timely under the circumstances, and neither his lack of knowledge of the Act or the failure of police to advise him of its existence were exceptions to the statutory limitations period.

OPINION

FREDERICK, J.

The Claimant, Eugene Mines, III, was kicked in the face by unknown offenders when he tried to break up a fight between two men on December 30, 1994, at the American Legion Hall, 705 South Larkin, in Joliet, Illinois.

Claimant suffered a ruptured orbit of the left eye, retinal detachment, and lost a lens and iris. On March 9, 1995, Mines filed a claim pursuant to the Crime Victims Compensation Act for doctor and hospital expenses totaling \$30,656.62, plus lost wages. Claimant had no insurance available to pay the medical bills. The Court denied the claim on July 3, 1995. The Court found that section 6.1(b) of the Act (740 ILCS 45/6.1(b)) requires that a person requesting compensation under the Act notify law enforcement officials within 72 hours of the perpetration of the crime allegedly causing the death or injury to the victim. If the notification is made more than 72 hours after the perpetration of the crime, the applicant must establish that such notice was timely under the circumstances. The Claimant notified law enforcement officials 23 days after the perpetration of the crime and had not established that such notification was timely under the circumstances. The Claimant requested a review of the decision. A hearing was held before Commissioner Michael E. Fryzel on February 16, 1996.

The Claimant testified that he did not report the crime to law enforcement officials for two reasons. The first reason is that he was not informed about the Crime Victims Compensation Act until his aunt, a police officer, told him ten days after the crime. The second reason is that the offenders were unknown to him and he thought the police wouldn't do anything because of this. The Claimant's mother testified that when he went into the hospital, someone told her to file a police report but they didn't know which police department would handle the case. The Joliet police said it was a county police problem. After talking to Officer Williams ten days later, Mrs. Mines called the county police and asked if they could send an officer to Claimant's house since her son was not able to go into the police station as he had a high fever.

They replied that there was a snowstorm and told her to wait until the victim felt better and then have him come in. When she called again on January 23, 1995, 23 days after the incident, Officer Stott of the Will County Sheriff's Police Department, who came out, said the police should have sent somebody out the night she first called.

Claimant and his mother were not aware of the Act until they talked to Officer Williams, ten days after the crime, at which time they contacted the county police. Even if the police had sent someone out that night, the report would have been made a substantial time after the 72-hour deadline required by the Act. This Court has held that failure of the police to advise a Claimant of the Act is not an exception to the limitations periods under the Act. (*Schenk v. State* (1991), 43 Ill. Ct. Cl. 437.) Claimant has failed to show that the notification he made 23 days after the occurrence was timely under the circumstances of this case. (*In re Application of Seber* (1987), 40 Ill. Ct. Cl. 387.) Claimant has failed to meet all conditions precedent for compensation under the Act. Based on the foregoing reasons, it is the order of the Court that this claim be and hereby is denied.
