REPORTS

OF

Cases Argued and Determined

IN THE

COURT of CLAIMS

OF THE

STATE OF ILLINOIS

VOLUME 46

Containing cases in which opinions were filed and
orders of dismissal entered, without opinion
for: Fiscal Year 1994—July 1, 1993-June 30, 1994

SPRINGFIELD, ILLINOIS
1995

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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.

OFFICERS OF THE COURT

ROGER A. SOMMER
Morton, Illinois
Chief Justice - January 15, 1993—
Judge - February 26, 1987—January 15, 1993

LEO F. POCH, Judge
Chicago, Illinois
June 22, 1977—June 30, 1994

RANDY PATCHETT, Judge
Marion, Illinois
March 26, 1985—

ANNE M. BURKE, Judge
Chicago, Illinois
March 6, 1987—May 15, 1994

NORMA F. JANN, Judge
Chicago, Illinois
May 1, 1991—

ROBERT FREDERICK, Judge
Urbana, Illinois
June 1, 1992—

DAVID A. EPSTEIN, Judge
Chicago, Illinois
June 20, 1994—

GEORGE H. RYAN
Secretary of State and *Ex Officio* Clerk of the Court
January 14, 1991—

CHLOANNE GREATHOUSE
Deputy Clerk and Director
Springfield, Illinois
January 1, 1984—

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

REPORTED OPINIONS

FISCAL YEAR 1994

(July 1, 1993 through June 30, 1994)

(No. 80-CC-0260—Claim denied; motion for rehearing denied.)

CHARLES S. LAWRENCE and MINNIE JOHNSON LAWRENCE, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed October 16, 1992.

Order on petition for rehearing filed August 4, 1993.

DAVID S. POCHIS and ALAN D. KATZ, LTD. (MILES M. DORE, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (GREGORY ABBOTT, Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*State not insurer of persons traveling upon its highways—elements of negligence claim.* The State is not the insurer of persons traveling upon its highways, but it does owe ordinary care in the maintenance of its highways, and in order to recover on a claim of negligence, a Claimant must establish that there was negligence on the part of the State, that the negligence was the proximate cause of the injury, and that the Claimant was not contributorily negligent.

SAME—*Claimants thrown from motorcycle—no showing of roadway defect—negligence claim denied.* In a negligence action filed by the driver of

a motorcycle and his passenger alleging that the two suffered injuries when their vehicle struck a groove in the highway and came to a sudden stop, the claim was denied, since the only evidence indicating that the motorcycle actually encountered a roadway defect was the driver's testimony that, as he was flying through the air after being thrown from the motorcycle, he observed that the vehicle was stuck in a highway crevice or separation.

OPINION

BURKE, J.

On September 10, 1978, Claimants, Charles Lawrence and Minnie Johnson Lawrence were riding eastbound on the Eisenhower Expressway en route to a family gathering in Gary, Indiana. They entered the Eisenhower Expressway at the Austin Avenue entrance. Mr. Lawrence was operating the motorcycle and Minnie Johnson Lawrence was on the back of the motorcycle. It is the Claimants' contention that their vehicle became stuck in a longitudinal joint causing the motorcycle, which was travelling 50 to 55 miles per hour, to immediately stop, flinging them over the handlebars some 100 feet.

Mr. Lawrence admitted that he was driving a 1020 CC Kawasaki motorcycle on the date in question. He further admitted that he was not licensed to drive a motorcycle and that it was the largest motorcycle he ever owned. Mr. Lawrence stated that he was changing lanes and the next thing he knew he was flying through the air. As he flew through the air, he looked back for Minnie and noticed that the motorcycle was wiggling back and forth, stuck in some type of crevice or separation in the highway. He claims he landed approximately 100 feet away from the location of the bike. Mrs. Lawrence indicates that she was on the bike and the first sign to her that something unusual was occurring was that the bike just completely stopped and she tumbled forward. She

received injuries sufficient to keep her hospitalized, but did not suffer head injuries or broken bones.

This Court has repeatedly held that the State is not the insurer of persons traveling upon its highways, but that it does owe ordinary care in the maintenance of its highways. In order to recover on a claim of negligence, the Claimants must establish that there was negligence on the part of the State, that the negligence was the proximate cause of the injury and that the Claimant was not contributorily negligent. The evidence presented by the Claimants, while it is not contradicted, is simply not sufficient. The only evidence that the motorcycle upon which the Claimants were riding was actually stuck in a "groove" while traveling 55 miles per hour is the testimony of Mr. Lawrence that he observed the motorcycle as he was hurling through the air.

Claimants failed to sustain their burden of proof that it was the State's negligence which caused their injuries.

It is hereby ordered that the claim of Charles Lawrence and Minnie Johnson Lawrence is denied.

ORDER

BURKE, J.

This cause coming to be heard upon Claimants' motion for rehearing and the Court being fully advised in the premises,

It is hereby ordered that Claimants' petition is hereby denied.

(No. 81-CC-1479—Claim denied; motion for rehearing denied.)

DR. ULRICH G. KLOPFER, Claimant, *v.* ILLINOIS DEPARTMENT OF PUBLIC AID, Respondent.

Opinion filed August 1, 1990.

Opinion filed September 29, 1993.

COOKE, LEWIS & LAPAT (MICHAEL LAPAT, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (ERIN O'CONNELL, Assistant Attorney General, of counsel), for Respondent.

LIMITATIONS—*vendor-payment claims—when claim seeking payment for medical services rendered under public aid program must be filed*. A claim seeking payment for medical services rendered under the State public aid program must be filed within one year of the denial of the claim by the Illinois Department of Public Aid.

PRACTICE AND PROCEDURE—*permanent injunction stays actions of defendant*. A permanent injunction operates as a continuing adjudication which stays the actions of the defendant, and as such, it must be obeyed until modified or vacated, even if erroneously entered.

PUBLIC AID CODE—*claim for abortion-related services denied*. A claim by a physician seeking payment for 931 abortions performed for public aid recipients was denied as untimely, since it was not brought within one year of the Department of Public Aid's denial of the claim and because, by the time the claim was presented to the Court of Claims, an injunction which had prevented the Department from denying payment to providers for the services in question was no longer in effect, and the constitutionality of Federal and State laws prohibiting payment for such services had been clearly established.

PRACTICE AND PROCEDURE—*Court of Claims may on its own motion dismiss claim based on statute of limitations—motion for rehearing in physician's abortion services claim denied*. Since the statute of limitations is jurisdictional and need not be specifically pleaded, and the court may on its own motion dismiss a claim based on the statute of limitations, a physician's argument that the State waived the limitations issue in his abortion services claim was without merit, and his motion for rehearing was denied.

OPINION

PATCHETT, J.

This is a claim brought by Dr. Ulrich G. Klopfer, a licensed physician in the State of Illinois. Dr. Klopfer

seeks the sum of $165,333.20 for 931 abortions performed by him for Public Aid recipients from June 1978 to February 1979.

This case has raised a myriad of interesting, complex, and difficult issues. The basic facts are these:

In September 1976, the United States Congress enacted legislation known as the "Hyde Amendment." The Hyde Amendment was a provision which was enacted in varying forms into appropriation bills funding the Department of Health, Education and Welfare and the Labor department commencing with fiscal year 1977. The fiscal 1978 and 1979 versions of the Hyde Amendment provided as follows:

"None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians." Section 210 of Public Act 95—480; 92 Stat. 1586, October 18, 1978.

Because of Illinois' participation in the Medicaid program, the Illinois legislature, by Public Act 80—1091, effective November 17, 1977, amended the Illinois Public Aid Code, sections 5—5, 6—1, and 7—1 as follows:

"ARTICLE V—MEDICAL ASSISTANCE

5—5 Medical Services

5—5 The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following: * * * (16) any other medical care, and any other types of remedial care recognized under the laws of the State, *but not including abortions, or induced miscarriages or premature births, unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.*" Chapter 23, Charities and Public Welfare, Section 5—5. (Amendatory language italicized.)

"ARTICLE VI—MEDICAL ASSISTANCE

6—1 Eligibility Requirements

6—1 Eligibility Requirements. Financial Aid in meeting basic maintenance requirements for a livelihood compatible with health and well-being, plus any necessary treatment, care and supplies required because of illness or disability, shall be given under this Article to or in behalf of persons who meet the eligibility conditions of Sections 6—1.1 through 6—1.6. *Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage, or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.*" Chapter 23, Charities and Public Welfare, Section 6—1. (Amendatory language italicized.)

"ARTICLE VII—
LOCAL AID TO THE MEDICALLY INDIGENT

7—1 Eligibility Requirements

7—1 Eligibility Requirements. Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, or burial shall be given under this Article to or in behalf of any person who meets the eligibility conditions of Sections 7—1.1 through 7—1.3, *except where such aid is for the purpose of obtaining an abortion, induced miscarriage, or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.*" Chapter 23, Charities and Public Welfare, Section 7—1. (Amendatory language italicized.)

Following the passage of the aforesaid act, certain individuals brought a class action in the United States District Court for the northern district of Illinois, eastern division, seeking to enjoin enforcement of the aforesaid Illinois statute. A quote from that case follows:

"Plaintiffs brought this class action under 42 U.S.C. Section 1983 to enjoin enforcement of a 1977 Illinois statute withdrawing medical assistance funding in Illinois for all abortions except those "necessary for the preservation of the life of the (pregnant) woman." P.A. 80—1091, Ill. Rev. Stat. Supp. 1978, Ch. 23, Sections 5—5, 6—1, 7—1. Plaintiffs are two doctors who perform medically necessary, but not necessarily life-preserving, abortions for indigent women; the Chicago Welfare Rights Organization, whose members include women dependent on Illinois medical assistance benefits; and Jane Doe, an indigent woman for whom an abortion is medically necessary, but not necessary for the preservation of her life. Defendant Arthur Quern is the Director of the Illinois Department of Public Aid, the State agency responsible for

administering Illinois medical assistance programs. Intervenor-defendants include two doctors and the United States.

1. The classes certified by the District Court consist of (1) all pregnant women eligible for the Illinois medical assistance programs for whom an abortion is medically necessary, but not necessary for the preservation of their lives and who wish such abortion performed, and (2) all Illinois physicians who are certified to obtain reimbursement for necessary medical services rendered to, and who perform medically necessary abortions for, persons eligible for the Illinois medical assistance programs." *Zbaraz v. Quern*, 469 F. Supp. 1212, 1213-14 (1980).

On December 21, 1977, Judge Kirkland, of the aforesaid United States District Court, ordered the proceedings stayed, pending an interpretation of Public Act 80—1091 by an Illinois State court. The plaintiffs then appealed that order to the United States Court of Appeals, Seventh Circuit. That court overruled Judge Kirkland and remanded the case to the United States District Court. In its opinion, the United States Court of Appeals, Seventh Circuit, stated:

"In December 1977, the District Court issued an order abstaining from consideration of the case. Plaintiffs appealed, and this Court granted them an injunction pending appeal against enforcement of the Illinois statute insofar as it prohibits state funding for therapeutic abortions.

* * *

3. Our injunction order defined 'therapeutic' as 'medically necessary or medically indicated according to the professional medical judgment of a licensed physician in Illinois, exercised in light of all factors affecting a woman's health.' The District Court employed this definition in its final judgment now here on appeal." *Zbaraz v. Quern*, 596 F.2d 196, 197-198.

Judge Kirkland, in considering the case after remand, held that by failing to cover "medically necessary" abortions, Public Act 80—1091 violated the Social Security Act and its underlying regulations. Judge Kirkland then issued a permanent injunction restraining the Illinois Department of Public Aid from enforcing Public Act 80—1091 in such a manner as to deny payments under the Illinois Medical Assistance programs for therapeutic abortions. *Zbaraz v. Quern*, 469 F. Supp. 1212.

The plaintiffs once again appealed to the United States Court of Appeals, Seventh Circuit. In an opinion of

February 13, 1979, the appellate court again remanded the case to the district court. Grounds for the remand this time were that Judge Kirkland had resolved the case on statutory grounds and did not resolve any potential constitutional challenges.

> "As noted, the District Court did not reach the Constitutional arguments raised by the parties because it had statutory grounds for its decision. Because the Constitutional issues were not considered below, and in light of the fact that our interpretation of the Hyde Amendment to modify the requirements of Title XIX may alter the Constitutional considerations, it would be inappropriate for us to pass on them now. The parties should have a full opportunity to develop their positions and the District Court to rule on them. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 2826. Therefore, we remand the case for expedited consideration of the Constitutional questions that remain open." *Zbaraz v. Quern*, 596 F.2d 196, 202.

After the second remand, Judge Kirkland recused himself from the case for medical reasons. It was then assigned to Judge Grady who wrote the district court's next opinion, dated April 29, 1979. Judge Grady held both the Hyde Amendment and Public Act 80—1091 as unconstitutional, as applied to medically necessary abortions prior to the point of fetal viability. *Zbaraz v. Quern*, 469 F. Supp. 1212, 1221.

The defendants then sought a direct appeal before the United States Supreme Court. That Court, in *Williams v. Zbaraz* (1980), 100 S. Ct. 2694, held that Public Act 80—1091, and the Hyde Amendment, were not unconstitutional. In addition, that Court held that the district court lacked jurisdiction to consider the constitutionality of the Hyde Amendment.

The Respondent has explicitly acknowledged that from June 1978 to February 1979, the period in which the 931 abortions at issue here were performed, a binding permanent injunction issued by the United States District Court for the northern district of Illinois, eastern division, was in force.

As a result of the first injunction, which was issued by the United States Court of Appeals, Seventh Circuit, in its opinion of January 18, 1978, the Illinois Department of Public Aid sent a notice to medical providers notifying them of the recent court order. The Illinois Department of Public Aid also furnished them with a copy of a new abortion certification. The Department also sent out a "Medicaid Message" furnishing basically the same information. Those documents defined therapeutic. Those documents further provided:

> "The Department will comply with the terms of this injunction and will, so long as the injunction remains in force, render the appropriate payment for 'therapeutic' abortions performed on or after January 11, 1978, upon receipt of the appropriate DPA Form 132 or DPA Form 117 submitted stapled to the newly revised 'Abortion Certification,' a copy of which is printed on the reverse side of this sheet."

Following the first remand, and the subsequent issuance of Judge Kirkland's injunction dated June 13, 1978, the Illinois Department of Public Aid once again sent out a notice to medical providers providing information and definitions essentially equivalent to those quoted above. Copies of these notifications are attached to this opinion and made a part hereof by reference.

The trial of this case began before a Commissioner of this Court on August 1, 1983. The Claimant made a long and explicit *prima facie* case with respect to each billing his office had submitted to the Department of Public Aid. It appears that each billing was submitted on the prescribed billing forms, correctly filled out, and accompanied by a required abortion certificate, which was correctly filled out and signed by the Claimant. That is, with respect to each abortion for which the Claimant seeks funds, he, as a licensed physician, had certified that on a given date, for a given patient, he had performed an abortion which was medically necessary or medically indicated

according to his medical judgment exercised in light of all the facts affecting the patient's health.

Initially, all of the claims in question were accepted by the Illinois Department of Public Aid, processed through that department's vouchering unit, and forwarded to the comptroller's office for payment. It appears from the record that the comptroller's office rejected the claims, and it returned them to the Illinois Department of Public Aid Bureau of Program Integrity.

Unfortunately, the record is not particularly clear regarding the reasons for the comptroller's rejection of these claims. It certainly appears from the record that the comptroller questioned the repeated and numerous diagnoses by the Claimant. Many of these diagnoses and certifications were identical in the terms of their wording. In any event, after the claims were returned to the Bureau of Program Integrity, they were ultimately rejected by the Illinois Department of Public Aid and returned to the Claimant with an explanation as to the reason for their rejection. This transmittal basically began on March 6, 1979.

As indicated by the United States Supreme Court in its opinion, after the permanent injunction was entered by the district court, an application for stay of its order was refused by the district court. The director of the Illinois Department of Public Aid and certain intervening defendant physicians moved in the United States Supreme Court for a stay pending appeal. That was also denied. A reapplication was further denied. The United States Supreme Court issued its opinion on June 30, 1980, in which it held that the Hyde Amendment and the Illinois statute in question, Public Act 80—1091, were not unconstitutional. Initial payment for these abortions was denied in March 1979. A complaint was originally filed on January 16, 1981.

It also appears that during the time in question, 31 other claims submitted by this Claimant were ultimately paid, after having been rejected. Although difficult to understand in the context of the issues before us, we do not find that this is relevant to resolving the issue at hand.

At the trial before the Commissioner, a great deal of time was consumed upon whether or not these abortions in question were medically necessary. Experts were called, and a lot of testimony produced on that issue. We do not feel, however, that we have to resolve that issue in order to resolve this claim. The Commissioner in his recommendation correctly pointed out, as above indicated, that at no time during the two years and six months from the time of the filing of this claim until the beginning of the trial did the Respondent see fit to file any pleadings, whether by way of motions, answers, or the raising of affirmative defenses. In addition, it does not appear there were any discovery procedures initiated prior to the trial beginning on August 1, 1981.

However, at the opening of the first hearing on August 1, 1981, the assistant Attorney General representing the Respondent made an oral motion for summary judgment on the grounds of the statute of limitations. The Attorney General indicated that a departmental report would be attached to such a motion for summary judgment but that it was not in their possession yet. In any event, the hearing was postponed and did not resume again until October 27, 1983.

Unfortunately, during this time the Respondent did not file a motion for summary judgment. In addition, the Attorney General did not raise the issue in its brief. However, it is clear that Public Aid claims must be filed within one year of the denial of the claim. Recently this Court decided the case of *Memorial Medical Center v. State*

(1988), 40 Ill. Ct. Cl. 73, filed February 4, 1988. In that case, Judge Poch dismissed a claim for abortion-related services because under the medical assistance program, one of the three programs involved in the Federal court litigation previously referred to, the claim was untimely in that it was filed more than one year after the date of the department's written notification that the vendor's claims were being disallowed.

While the procedure utilized by the Attorney General has been dismal in its attention to detail, it appears that they raised an extremely valid defense.

However, in addition to the statute of limitations argument, we must look at the effect of the permanent injunction on the State of Illinois and the ultimate resolution of the issues by the United States Supreme Court. There is no doubt that an injunction, while in force, should be obeyed. We believe that the State of Illinois took every effort to do exactly that, as evidenced by the documents which are attached to this opinion. As previously indicated, the various Federal courts denied motions for stay pending the final resolution of these issues by the United States Supreme Court. Therefore, it is clear that the injunction was binding and in effect for the entire time that these abortions were being performed. Illinois courts consistently held that injunction orders will be fully effective even though a notice of appeal is filed unless a stay order is issued. *Bowman Dairy Company v. Lyons* (1954), 2 Ill. 2d 625, 120 N.E.2d 1; *East Side Health District v. Village of Caseyville* (1963), 30 Ill. App. 2d 438, 187 N.E.2d 534.

In addition, the Illinois Supreme Court has held that permanent injunction, until modified or vacated, operates as a continuing adjudication which stays the actions of the defendant, and as such, that it must be obeyed until modified

or vacated, even if erroneously entered. *Bowman Dairy Company v. Lyons, supra.*

The documents attached to this opinion indicate that the Illinois Department of Public Aid intended to comply with the terms of the injunction and render appropriate payment, so long as the injunction remained in force. By the time this claim was originally presented to this Court, the injunction was no longer in force, and the constitutionality of both the Hyde Amendment and the Illinois act had been clearly established by the United States Supreme Court. It is unclear from the record before this Court whether or not the injunction was still in force at the time of the initial rejection of the claims in March 1979. But we feel that basically is irrelevant to the resolution of the issue before us. There are other means of enforcing the violation of an injunction. Evidently, the Claimant took no steps to enforce the purported violation of this injunction by appropriate remedy in the appropriate Federal court. Almost two years elapsed from the time of the initial letter of denial from the Illinois Department of Public Aid until this claim was filed before this tribunal. By the time the claim was filed, and for a considerable period of time prior to the filing of the claim, the injunction was no longer in force, and the constitutionality and validity of the applicable statutes were clearly established.

If payment had been made during the time the injunction was in force, it clearly could not have been challenged. But if payment had not been made at the time the injunction stopped being in force, and if payment had not been made at the time the constitutionality of the applicable statutes was clearly established, then we would be asking the Illinois Department of Public Aid to violate those same statutes by paying for abortions which

had violated the clear meaning of those very statutes. The Claimant is, in fact, asking us to require the State, at this late date, to violate its own law and the law of the United States of America. We do not see before us in the record of this case any theory which would justify such action. Once the injunction stopped being in force, the State was simply not required to make any further payments for abortion procedures which violated the aforesaid acts, regardless of when those abortions were performed.

We make this ruling with clear acknowledgement of the fact that stays of the injunction pending appeal were applied for and denied by both the Department and other parties. However, the Claimant did not attempt any appropriate relief to enforce the injunction in the Federal Courts before bringing this claim. The power of Federal Courts would have been more than sufficient to enforce compliance by the Illinois Department of Public Aid with the injunction while it was in effect.

As we previously indicated, we have recently dismissed a somewhat similar claim for the reason it was not brought in a timely manner. The State of Illinois has sovereign immunity, and the legislature has seen fit to establish this tribunal as a method of allowing citizens to make claims against the sovereign despite the concept of immunity. However, we are obligated by statute to follow the laws of the State of Illinois in ruling on such claims. If we were to grant a claim such as this, which violated a statute passed by the Illinois legislature, and which was ultimately upheld by the United States Supreme Court, we would be doing a great disservice to the concept of sovereign immunity. In addition, the legislature clearly established a statute of limitations for making claims by Public Aid providers. If this Court is made aware of the existence of a valid statute of limitations defense, no matter by how poor

the procedure used by the Respondent in doing so, this Court is bound to recognize the existence of such a defense and to deny the claim accordingly.

For the reasons above stated, we hereby deny this claim.

ORDER

PATCHETT, J.

This cause comes on for hearing on Claimant's petition for rehearing and other relief filed August 13, 1990.

On August 1, 1990, the Court entered an opinion denying Claimant's claim. The opinion rendered clearly goes into all of the complex and difficult issues involved in this case. The evidence is also clear that once Claimant's claim was denied and he was informed by the Illinois Department of Public Aid of the denial, Claimant had one year from that date to file a claim with the Court of Claims. It took Claimant more than one year to file his claim in the Court of Claims.

The record indicates that the same issues advanced by Claimant in his petition for rehearing filed August 13, 1990, were raised by Claimant at the trial proceedings on August 1, 1983. At that hearing, Respondent made a belated oral motion for summary judgment raising the one-year statute of limitations on this claim. However inartfully done, the issue was brought to the Court's attention.

On August 1, 1983, counsel for Claimant made the same arguments to the commissioner that he makes in his petition for rehearing. He argued the oral motion was not timely made, that the motion for summary judgment was not made in accordance with the Civil Practice Act, that there was no notice of the motion, and no actual motion before the Court. He further argued that the oral motion

did not comply with any procedural requirements of the Court. Counsel for Claimant also argued, "If you decide to accept this affidavit, for whatever limited value it has, is really the whole crux of this case." The Claimant obviously realized that the statute of limitations was a significant issue before the Court. Claimant argued that "the whole issue is whether or not claims were submitted in a timely manner, whether they were sent back for resubmission to the DPA and whether or not these claims were properly rejected or whether they were ineligible."

Counsel for Claimant requested the commissioner not to rule on the motion for summary judgment as the motion went "to an ultimate issue of fact for the Court to determine, and there are factual issues which witnesses will testify to."

It is clear that although Respondent never filed a motion for summary judgment, that Claimant was aware of the issue on the period of limitations and that it was an issue of importance and had to be addressed with testimony. Claimant's counsel even raised the issue of rejection and recertification on August 1, 1983. Claimant's counsel argued to the Commissioner:

"So, it's not really when the claim is first denied. It's when they finally say, 'By the way, we are not paying this and that's final.'

I think this is an issue for you to determine when, at what point in time did they stop the investigation as to whether or not the claim was eligible or not and in fact deny it or at what point in time it was shown to DPA that the claim was in fact eligible and then it was subsequently paid.

I think that you'll find that all of the certificates and all of the paper was submitted in a timely manner, and I think that the evidence will show that there was correspondence—as their records show here—between DPA and my client in an attempt to straighten out this matter, and it was only at such a time that it became totally impossible to deal with the Department of Public Aid that this case in fact became possible.

So it's not that simple question of the claim was denied with this letter and then all of a sudden the statute runs. It's a more complex * * *."

The Commissioner stated to Claimant's counsel on August 1, 1983:

"Now, just a minute, Mr. Lapat. If the statute of limitations is in fact an issue, the fact that the Attorney General's Office perhaps sloppily has let two or so many years go by without raising it would not bar the three judges from considering that issue because the Court is an advisory committee to the legislature, and before the Court recommends to the legislature that a given amount of money be appropriated for any given claim, the Court, on its own, will consider all possible defenses, no matter how untimely raised and even if the Court has to raise the defense itself."

The Commissioner then asked for the positions of both counsel on the issue of the statute of limitations. The State took the position that the Claimant's claim was rejected on July 30, 1979. This cause was filed in the Court of Claims on January 16, 1981. The State argued that the statute of limitations was one year pursuant to Ill. Rev. Stat. (1979), ch. 23, par. 11—13. The Commissioner read the statute to Claimant's counsel and indicated to Claimant's counsel that the July 30, 1979, letter of Public Aid stated "Resubmittal of these claims will not result in payment."

Claimant argued that there were attachments to the letter of July 30, 1979, rejecting the claims and an issue of fact exists as to which claims were rejected. He also indicated that it was an issue as to whether Claimant received the rejection notice. Claimant was given the opportunity to wait for the motion for summary judgment to be filed and heard or proceed to trial. Based on the foregoing, it is not credible for Claimant to argue that the statute of limitations was an important issue in this case and that the Claimant did not have an opportunity to respond.

The trial in this case began on August 1, 1983, and extended through eight volumes of testimony. Testimony was taken for several days and into January 5, 1984, when the proofs were closed.

At the trial on January 4, 1984, Kenneth Pitman of the Illinois Department of Public Aid testified. The witness testified to certain letters of March 6, 1979, April 24, 1979, June 19, 1979, July 12, 1979, and a final letter of July 30, 1979, from the department to Dr. Klopfer. These letters, taken together with the testimony of Kenneth Pitman and Beverly Lange, were sufficient circumstantial evidence to show that the 931 claims of Dr. Klopfer were rejected no later than July 30, 1979. This case was filed in the Court of Claims on January 16, 1981.

The issue of the statute of limitations was raised and the Court believed it was raised sufficiently to deny the claim of Claimant on this jurisdictional basis. The decision of the Court had nothing to do with assuming an adversarial role or rewriting rules. The Court did not decide an unfiled summary judgment motion and did not rewrite the rules of civil procedure. The Court made a ruling on the complaint based on the issues and all of the evidence before the Court.

In reading the entire transcript and reviewing all the exhibits, it is clear that the rejection letters refer to the claims at issue in this case. While it is apparent that Claimant and his counsel abhor the Court's decision, it is a decision based on the law and evidence. The Claimant is just plain wrong when he says the statute of limitations issue was waived and that "the actions of the Court of Claims in rendering of this opinion constitute an abuse of discretion making a mockery out of judicial procedure through the Court's assumption of an adversarial position as opposed to its function as an impartial judge."

As early as 1918, this Court has consistently ruled that a State officer is without power to waive or arrest the running of the statute of limitations on a claim against the State. (*McChesney v. State* (1918), 4 Ill. Ct. Cl. 5.) This

Court has a duty to examine each case to determine that we are acting only within our jurisdiction. This is our duty and we take it seriously. It is not taking an adversarial role. The Attorney General is subject to our rules and substantive rights of the State cannot be waived by the Attorney General. *Korneder v. State* (1983), 35 Ill. Ct. Cl. 1001; *Isko Co. v. State* (1918), 4 Ill. Ct. Cl. 171.

Even though the State Attorney General has been willing to stipulate to a claim, this Court has refused to follow the stipulation and denied that part of the claim outside the statute of limitations. (*Goodwill Industries of Chicago & Cook County v. State* (1982), 35 Ill. Ct. Cl. 303.) The Court of Claims was created to adjudicate the claims against the State of Illinois on the basis of the Court's determination of the law and facts. Stipulations of the parties are not binding on the Court of Claims as agreements reached between the parties will be reviewed by the Court to determine their propriety. *Midwest Pediatric Associates v. State* (1983), 35 Ill. Ct. Cl. 765.

The statute of limitations is jurisdictional and need not be specifically pleaded. The Court may, on its own motion, dismiss a claim based on the statute of limitations. (*Illinois Bell v. State* (1981), 35 Ill. Ct. Cl. 345.) The failure to comply with the statute of limitations leaves this Court powerless to enter any award. Lack of jurisdiction can be raised at any time by direct attack or collateral attack. Since the issue was brought to the Court's attention, the Court should consider the issue. *Conley v. State* (1982), 35 Ill. Ct. Cl. 275.

Claims for vendor payments under the IDPA Medical Assistance Program have a one-year statute of limitations. (*Krakora v. State* (1987), 40 Ill. Ct. Cl. 234; *Simon v. State* (1987), 40 Ill. Ct. Cl. 247.) The Court of Claims lacks jurisdiction to consider the merits of those vendor-

payment claims which were not commenced within the time periods provided by the Public Aid Code. *Kim v. State* (1991), 43 Ill. Ct. Cl. 286; *Simon v. State* (1987), 40 Ill. Ct. Cl. 246.

This Court, in ruling on Claimant's claim, has followed its duty. Claimant had a fair trial and has been afforded due process. He just does not receive the ruling which he sought. The Court found the claim to be time-barred as an evidentiary finding. This Court has followed its precedents and found it had no jurisdiction to enter an award because of the statute of limitations time-barring the claim. The motion for rehearing and other relief is denied.

(No. 82-CC-0356—Claimant awarded $75,000.)

JOYCE A. WILSON, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed June 24, 1994.

COPPING AND CARTER, for Claimant.

ROLAND W. BURRIS, Attorney General (JIM MAJORS, Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*duty of care owed by State*. The State has a duty of reasonable care, which extends to maintenance of the shoulder of roadways for the uses for which they are reasonably intended, and a governmental unit which controls a roadway has a duty to warn motorists of hazards adjacent to the roadway even if the hazard itself is not within the control of the governmental unit.

EXHAUSTION OF REMEDIES—*State waived Claimant's failure to exhaust remedies.* Although the Claimant in a negligence action arising out of an automobile accident failed to exhaust her other remedies pursuant to section 25 of the Court of Claims Act, the failure was nonjurisdictional, and the State waived the error by not raising it prior to trial.

HIGHWAYS—*negligence—motorist injured when car struck pothole on shoulder of road—award granted*. Where a large pothole on the shoulder of

a highway at an intersection with a municipal roadway had been in existence for over one year, the State was liable for injuries sustained by a motorist whose vehicle struck the pothole when she pulled off of the highway to avoid an accident, since, although the municipality allegedly had responsibility for maintaining the intersection, the pothole was within the turning radius of both roadways, the State had constructive notice of the hazard, and both the State and the municipality had a duty to repair the pothole or warn of its existence.

OPINION

PATCHETT, J.

This claim arises out of an accident which occurred on a State highway, Route 100 at Otter Creek Bridge. On December 28, 1980, at approximately 7:00 p.m., Mrs. Wilson was traveling northbound on Route 100 after leaving her place of business. She had consumed two alcoholic drinks before leaving work. At the time of the accident, Mrs. Wilson was familiar with the route, having traveled it for a period of five years. Route 100 was a two-lane highway with a 55 mile per hour speed limit.

Otter Creek Bridge lies immediately north of the intersection of Rosedale Township Road and State Route 100. Upon approaching this intersection, Mrs. Wilson noticed two cars passing one another. They occupied both lanes of Route 100. Mrs. Wilson pulled off onto the shoulder at the intersection with Rosedale Township Road to avoid a possible collision. Her car went over a deep pothole. She lost control of her vehicle, entered onto Route 100, and struck the bridge abutment. Neither of the approaching cars stopped.

The pothole in question was 64 feet from the south end of Otter Creek Bridge and three feet from the edge of Route 100. It was in the right turning radius of the intersection for Rosedale Township Road. The pothole was five feet wide and approximately ten inches deep.

The pothole was in an area which was clearly on the shoulder of State Route 100, and part of the State right-of-way. It was also clearly in the turning radius of Rosedale Township Road.

The Illinois Department of Transportation has an administrative memorandum No. 17 which would tend to establish that they did not have maintenance responsibility over the area in question. They argue that the maintenance of the intersection was the responsibility of Rosedale Township and not them.

In order for Mrs. Wilson to prevail on her claim, she must prove, by a preponderance of the evidence, that the State breached its duty to use reasonable care in maintaining the shoulder of Route 100, that the negligence was the proximate cause of her injuries, and that the State had actual and constructive notice of the pothole in question.

At the trial of this case, Douglas Miller testified that he had used the area involving the intersection frequently. His father lived in Rosedale. He indicated that the pothole in question was ten inches deep, five feet wide, and had been in existence for more than one year. That evidence was uncontradicted and is sufficient to establish constructive notice.

The Respondent argued that the State had no duty to maintain the road in question. This Court has held in *Welch v. State* (1966), 25 Ill. Ct. Cl. 270, that the State has a duty of reasonable care, which extends to maintenance of the shoulders of roadways, for the uses for which they are reasonably intended. In this case, the area in question would clearly be an area where both Rosedale Township and the State of Illinois would have some duty to maintain the area and fix the pothole. In *Janssen v. City of Springfield* (1980), 79 Ill. 2d 435, 404 N.E.2d 213,

the supreme court of Illinois stated that the governmental unit which controls the roadway has a duty to warn motorists of hazards adjacent to the roadway, even if the hazard itself is not within control of the governmental unit. The State clearly had constructive notice of this hazard and did not warn motorists of the hazard. In addition, they did not repair it.

Clearly Mrs. Wilson used the shoulder for its intended purposes. She pulled off the highway in order to avoid a collision and hit the pothole. In addition, Joseph Ponce, a maintenance field engineer for the Illinois Department of Transportation, testified that "* * * if the road crew is there, they have instructions to make any repairs to the immediate edge of the highway even if it's in the intersection itself." Of course, this would not establish a duty to repair the pothole, even if the maintenance crew had instructions to repair it if seen. We, however, hold that the existence of a pothole of this magnitude, within three feet of a paved highway and in existence for over one year, clearly creates a duty of the State to either repair it, or to arrange with the other jurisdiction for its repair. It was also clearly established in this case that the State did not have any formal or informal agreement with Rosedale Township as to the maintenance of the intersection area. The State's administrative memorandum stating that it did not have responsibility is simply insufficient to clearly establish that they do not have responsibility.

Clearly the pothole in question was a proximate cause of the injuries. It may not have been the sole proximate cause, but it is sufficient that it was a proximate cause of her injuries. Had there been no cars, there would have been no reason for her to leave the road. However, had there been no pothole, she would have been able to leave the road safely.

The Respondent never raised any issue of contributory or comparative fault. It is true that Mrs. Wilson had two alcoholic drinks before proceeding on the highway. However, there was no evidence that she was intoxicated or that the alcohol contributed to the accident in any way. Therefore, we find that the Claimant was not guilty of any contributory or comparative fault.

The most interesting theory of the State is that the Claimant failed to exhaust all other remedies and sources of recovery pursuant to section 25 of the Court of Claims Act (705 ILCS 505/25). We find that the Claimant did, in fact, fail to exhaust her other remedies. However, the Respondent did not plead the failure to exhaust remedies as a defense. Indeed, the Respondent did not even bring the matter before the Court until the brief filed after the trial. Although the Respondent asked some questions of the Claimant and other witnesses at the trial which would tend to establish this defense, they never attempted to raise it formally until the brief. We hold that the failure to raise the defense of the Claimant's failure to exhaust other remedies is non-jurisdictional. If it is not raised prior to trial, it is waived. This makes it specifically different than the failure to raise the defense of the statute of limitations or the defense that the Claimant failed to file a timely or adequate notice of intent to sue. These are clearly jurisdictional. The failure to exhaust remedies is not jurisdictional.

In recent years, this Court has decided two similar cases. In *Siefert v. State* (1989), 42 Ill. Ct. Cl. 8, the Court held that the State had a duty to maintain the shoulders of its highways in a reasonably safe manner. The Court reached a similar result in *Sallee v. State* (1990), 42 Ill. Ct. Cl. 41, in which we made an award because the State failed to warn of water on the highway even though it had notice of the defect in question.

The most difficult issue regarding liability is the fact that the pothole in question falls in the turning radius of a road intersection. Rosedale Township has responsibility for its road, and the State of Illinois has responsibility for the highway. If the pothole in question had been directly in the Rosedale Township Road, we might have reached a different result. However, since the pothole is in the turning radius, we find it to be an area where both the State and Rosedale Township had responsibilities. Therefore, for the reasons stated above, we find liability and now turn to the question of damages.

Testimony in this case established that as a result of the accident, Mrs. Wilson had a broken left wrist, facial lacerations, facial damage, a fracture of the bone of the right cheek, permanent loss of sight in her right eye, a dislocated hip, torn ligaments in her right knee, a broken rib, and shattered nose. She was hospitalized for seven weeks following the accident, and she underwent therapy for six weeks after her release from the hospital. She has a permanent three-inch scar underneath her right eye. There are also visible scars on the bridge of her nose next to the inside portion of her eyes. There is also a scar on the bridge of her nose that is a quarter circle about two inches long. The blindness in her right eye is permanent. Obviously, she had considerable pain and discomfort.

Although the Claimant had medical insurance to pay most of her bills, we have previously held, in the *Sallee* case cited above, that the collateral source rule is not abrogated by section 26 of the Court of Claims Act. We also ruled that this holding would be applied prospectively to all claims pending at the time of this decision. It appears that medical bills at the time of the trial in this case were approximately $25,170.87. In addition, there were travel and meal expenses of $672.63. The property

loss was proved at $3,240. There were consequential services rendered by Mrs. Wilson's mother-in-law to help after she was injured in the amount of $2,167.60. In addition, there was lost time and wages from work totaling $2,673. These total $33,924.10. After factoring in the disability and the pain and suffering, we are going to award the Claimant the sum of seventy-five thousand dollars ($75,000).

(Nos. 82-CC-0716, 82-CC-0717 cons.—Claimant Norman Brothers, Inc. awarded $52,999.12; Claimant Continental Insurance awarded $47,000.88.)

CONTINENTAL INSURANCE CO. and NORMAN BROTHERS, INC., Claimants, *v.* THE STATE OF ILLINOIS and THE DEPARTMENT OF TRANSPORTATION, Respondents.

Opinion filed October 23, 1992.

Opinion filed August 31, 1993.

THOMPSON & MITCHELL (MICHAEL D. O'KEEFE, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (PHILLIP MCQUILLAN, Assistant Attorney General, of counsel), for Respondents.

NEGLIGENCE—*torts—application of collateral source rule*. The Court of Claims applies the collateral source rule which holds that monies received from a source independent of the tortfeasor may not be deducted from damages, and accordingly, it is the policy of the Court to allow a set-off in a tort claim only when the monies received are from the State or another tortfeasor.

SAME—*payment to Claimant tugboat owner by Claimant insurance company did not entitle State to set-off—awards granted*. In a claim involving damage to a tugboat as a result of the State's negligent operation and maintenance of a drawbridge, although the Claimant insurance company had paid $258,793.96 to the Claimant tugboat owner pursuant to the insurer's obligations under its insurance contract, the Court applied the collateral source rule and determined that the State was not entitled to a set-off against

the tugboat owners claim in an amount equal to that received by the insurer, and awards were granted to the tugboat owner for $52,990.12 for unrecovered damages and to the insurer in the amount of $100,000.

SAME—*damages—awards to tugboat owner and insurer modified on rehearing—jurisdictional limit applied*. On the State's motion for rehearing in a claim arising out of a tugboat's collision with a drawbridge due to the State's negligence, the Court of Claims found that, while the subrogation action brought against the State by the insurer was a separate claim from that of the tugboat owner, it was for the benefit of the tugboat owner and, as such, the Court's aggregate award in the two claims of more than $152,000 violated the statutory jurisdictional limit of $100,000 in damages to or for the benefit of any tort claimant, and the total combined award to the Claimants was reduced to $100,000.

OPINION

PATCHETT, J.

This is a consolidation of two claims arising out of the same set of facts, that being a collision between a tugboat and a drawbridge on the Illinois River. The first party/Claimant is Norman Brothers, Inc., owner and operator of a tugboat named M/V Marvin E. Norman. The second party/Claimant is Continental Insurance Co., which makes its claim as subrogated insurer to the first party. By stipulation of all parties, hearing in this case has been waived in lieu of briefs submitted by parties. All evidence offered is in the form of witness depositions and the parties' exhibits.

The Respondent, State of Illinois, Department of Transportation, by and through the Attorney General's office, is the owner and operator of the instant bridge, and admits the substantial facts as described in Claimants' brief. Consequently, the Court finds the following to be the material facts of the case:

On May 16, 1980, Claimant, Norman Brothers, Inc., was operating the M/V Marvin E. Norman on the Illinois River near Peoria, with George William Norman acting as captain. At the same time, the Franklin Street drawbridge

was operated by Clarence Johnson under the employment of the State of Illinois, Department of Transportation. Said boat is an all-steel tugboat, consisting of four decks, and is unable to pass under the said bridge while lowered. The bridge was a two-lane bridge with automobile traffic in both directions, as well as pedestrian sidewalks on each side.

Said bridge was a drawbridge which was equipped to raise both halves from the center. Said bridge was controlled by a bridge tender from the bridge house, and was equipped with flashing traffic lights, traffic gates and a traffic siren to warn oncoming cars when the bridge was to be raised. The raising of the said bridge was generally accomplished through the use of switches and levers; however, evidence also showed that the bridge was equipped with override switches which could have been used to raise the bridge if the primary operating system was inoperative. Furthermore, had either method been used, the bridge could have been completely raised within 60 seconds and raised sufficiently to allow the boat to pass under within 20 seconds. The bridge tender, however, had little experience at operating such bridges, no knowledge of the override mechanism, and no supervision.

At the time in question, said tugboat was traveling downstream towards said bridge, pushing eight barges arranged in two rows of four each. As the boat came within one-half mile of said bridge, the boat's pilot, George William Norman, properly notified the bridge tender, Clarence Johnson, that he would need the drawbridge raised.

As the bridge came within sight, it was not raised. It raised as the first two of the boat's eight barges passed under the bridge. Despite the fact that the traffic gates had been lowered, traffic lights were flashing and the

traffic siren had been blown, the bridge still was not raised as the second set of two barges began to pass under. The bridge tender made no effort to contact the boat captain by radio to inform him that the bridge could not be raised. Believing that the main operating system was malfunctioning and would not raise the bridge, the bridge tender attempted instead to warn the captain at this point by waving his hands.

As the second set of two barges began to pass under the bridge, the captain put the boat into full throttle reverse. Despite this response, the strong current and heavy weight of the boat and barges pulled the boat into the bridge.

As a result of this collision, the M/V Marvin E. Norman was laid up for repairs for 76 days, preventing Norman Brothers, Inc. from operating under a prior contract with American Rivers Transportation Company, and resulting in loss of profits. The fair and reasonable cost to effect the required repairs to Marvin Norman was $258,793.96. Claimant, Continental Insurance Co., as Norman Brothers, Inc.'s insurer, was obligated to pay out this amount for such repairs. Claimant, Norman Brothers, Inc., seeks recovery for lost profits, as well as losses unrecoverable under the insurance contract with Continental. Claimant, Continental Insurance Co., seeks the maximum recovery allowable in this Court, $100,000. Based on these facts, the Respondent does not refute that the State of Illinois, Department of Transportation was clearly negligent in allowing Clarence Johnson to operate the Franklin Street bridge untrained and with no supervision. Furthermore, the State of Illinois, Department of Transportation was also negligent in not maintaining said bridge in a properly working manner.

While Respondent admits liability, Respondent raises two issues which may affect judgment in this case.

The first of these is Respondent's claim that the State is entitled to a set-off against the Claimant, Norman Brothers, Inc.'s claim in an amount equal to that received by Claimant from Co-Claimant, Continental Insurance Co. This claim is raised pursuant to Ill. Rev. Stat., ch. 37, par. 439.26 which states:

"The granting of an award under this Act shall constitute full accord and satisfaction. There shall be but one satisfaction of any claim or cause of action and any recovery awarded by the Court shall be subject to the right of set-off."

Since Continental has already paid out a sum of $258,793.96 to Claimant, Norman Brothers, Inc., pursuant to its obligations under its insurance contract, such a set-off from the maximum award possible in this Court of $100,000 would completely bar Norman Brothers, Inc. from recovery on its claim for $75,050.64.

In support of this contention, Respondent cites several prior decisions of this Court. The Claimant also cites several prior cases to support its contention that said payment should not entitle the State to a set-off. In fact, this Court has taken conflicting positions on this issue in the past, at times allowing a set-off for any monies received from any source whatever, and at other times only allowing a set-off in instances where monies have been received from a tortfeasor.

These conflicting precedents, however, were put to rest by this Court in the recent case of *Sallee v. State* (1990), 42 Ill. Ct. Cl. 41. The Court noted that, while not explicitly bound to do so by its enabling act, this Court has applied traditional Illinois common law where it does not conflict with the act itself. Such common law includes a "collateral source rule * * * [which] holds that monies received from a source independent of the tortfeasor may not be deducted from damages." (*Peterson v. Bachrodt*

Chev. Co. (1978), 61 Ill. App. 3d 898, 378 N.E.2d 618; *Sallee* at 15.) This Court further explained that the logic of such a rule is that "an injured party has prudently entered into an insurance contract and should be allowed to benefit from it * * *. Failure to apply the collateral source rule allows the wrongdoing, throws the burden on the insured, and rewards those without insurance." *Sallee* at 16.

As a result, it is now the policy of this Court to allow set-offs pursuant to section 26 of the Court of Claims Act (705 ILCS 505/26), only when monies received are from the State or another tortfeasor. Since this decision was intended to be "applied prospectively to all claims pending at the time of this decision," (*Sallee* at 16), and since the instant case was filed in 1981 and was pending in 1990 when *Sallee* was decided, the collateral source rule will be applied in the instant case. No set-off shall be allowed to the State.

The second issue raised by the Respondent is in regards to the amount of damages. Claimant, Norman Brothers, Inc., claims a total of $75,050 in unrecovered damages. This sum includes a $5,000 deductible not paid by Continental Insurance, which is clearly recoverable by this Court's precedent as enunciated in *J. E. Vickers v. State* (1958), 22 Ill. Ct. Cl. 659. They also claim the sum of $9,990.12, paid to maintain an engineer on board the M/V Marvin E. Norman. As this claim represents a necessary expenditure incurred in the process of repairing damage to said vessel, this too is properly recoverable from the State. Respondent does not contest this claim.

Respondent does, however, contest Claimant, Norman Brothers, Inc., claim of $60,060.52 in lost profits. Claimant calculated this claim by multiplying the number of days the Marvin Norman was laid up in repairs (76) by

the amount Claimant estimates his profit per day would have been had the Marvin Norman been operational ($790.27 per day).

Claimant supports his claim of $790.27 per day loss with evidence of a contract entered into between the Claimant and American River Transportation Company. The contract provided for $1,850 to be paid to Claimant each day that the Marvin Norman was engaged in work for American Rivers. Claimant estimates, as he may reasonably do with certainty, that the daily costs incurred by him in operating the Marvin Norman would be $939.73 for labor, $90 for food, and $30 for oil. With these expenses subtracted from $1,850, Claimant estimates that he has suffered a net loss of $790 per day for 76 days.

Such calculations are certainly sufficient to meet the requirements of traditional Illinois common law as enunciated in *Klucznik v. Nikitopoulos* (1987), 503 N.E.2d 1147, which stated, "* * * the law does not require a plaintiff to establish lost profits with mathematical accuracy." However, as observed in *Drs. Sellke v. Twin Oaks* (1986), 491 N.E.2d 912, 917, "* * * it is well established that lost profits are not a proper element of damages where proof of these profits is based on speculation or conjecture." Furthermore, "* * * the long-standing rule in Illinois is that lost profits may be a measure of damages where a business is interrupted, but the business must have been established prior to the interruption so that evidence of lost profits is not speculative. [Citations omitted]."

Claimant's contract with American Rivers, which was in effect prior to the collision complained of herein, provided for two levels of payment. As supported by the evidence on record, the instant contract provided that Claimant be paid $1,850 each day that the Marvin Norman was

in operation, resulting in a profit of $790.27 per day. However, the contract also provided, under paragraphs six and seven, for a lower payment of only $500 per day that the Marvin Norman "is laid up for lack of work." Respondent is correct when it points out that this provision demonstrates that the parties contemplated the possibility of a lay-up wherein Claimant would not be receiving $1,850 per day, but instead, only $500 per day.

The Claimant replies by asserting that the Marvin Norman would be actively operating under contract every single one of these 76 days, had the collision not occurred. The Claimant believes this assertion requires no evidence to support it. Instead, Claimant merely asserts that American Rivers would not obligate itself to pay $500 per day for a vessel it did not need unless it was almost absolutely certain the vessel would be used every day, that the Marvin Norman was a big vessel, and that correspondence between American Rivers and Claimant showed that it was unlikely that the vessel would be laid up. Unfortunately, Claimant's assertions miss the boat.

The only evidence on record in this case is an undisputed contract to pay at least $500 per day, and possibly $1,850 should the services of the Marvin Norman be utilized by American Rivers. It is this contractual relationship only which can trace its establishment to a point in time prior to the instant collision as required per *Drs. Sellke et al*. This contract alone, according to Claimant's own assertions, only entitles Claimant to $500 per day. In order for Claimant to be entitled to $790.21 in profit per day, Claimant must be engaged in active duty on behalf of American Rivers. Presumably, this would have been reflected in some form of work order, or similar request for performance, by American Rivers. No such request has been introduced as evidence into the record. At best, Claimant

might argue that he was in the middle of one such task when the collision occurred. However, no evidence has been offered to establish how long this job would have taken.

As a matter of fact, one can only speculate what American Rivers would obligate itself to do. At best, therefore, Claimant can speculate that American Rivers would have actually requested 76 days of continuous service, and that the Marvin Norman would have been able to provide 76 days of continuous service. To base an award upon such speculation would be pure conjecture. It would violate both the traditional common law and precedent in *Sioux City et al. v. State* (1978), 32 Ill. Ct. Cl. 603. In *Sioux City*, the Court received evidence that Claimant's "losses resulting from the deprivation of the use of the Waverly amounted to $800 per day." The Court found, however, that this figure was "somewhat uncertain," and thus refused the claim of $800 per day, instead awarding $500 per day.

Given that the Claimant in the instant case had made an even less than "somewhat uncertain" showing of evidence regarding lost profits than the claimant in *Sioux City*, this Court will refuse a $790.27 per day award. Instead, we award the amount which is derived from the only relationship clearly established in the record, $500 per day.

As for the claim of the Claimant, Continental Insurance, this Court has repeatedly recognized the claims of subrogated insurers such as in *Lester R. Borum & Emmco Insurance Co. v. State* (1969), 26 Ill. Ct. Cl. 328, 332 and *Vickers* (1958), 22 Ill. Ct. Cl. 671.

Therefore, we award the Claimant, Norman Brothers, Inc.:

Insurance Deductible	$ 5,000.00
Engineer on Board/Repair	9,990.12
Lost Profits: 76 days @ $500.00 per day	38,000.00
Total	$52,990.12

and Claimant, Continental Insurance, $100,000.

OPINION

PATCHETT, J.

This claim arises out of a tugboat accident which occurred March 16, 1980, on the Illinois River. A tugboat, named M/V Marvin E. Norman, collided with a drawbridge. Norman Brothers, Inc., was the owner and operator of the tugboat. Continental Insurance Co. makes a claim as subrogated insurer to Norman Brothers, Inc. The hearing was held April 6, 1987, and in September 1987, a brief was filed by the Claimant. The Respondent filed a brief in November 1987. The case was transferred to a new commissioner in September 1989. A recommendation by that commissioner was filed July 12, 1992. Oral argument was held January 29, 1992. An opinion was filed October 23, 1992.

In that opinion, this Court granted Claimant, Norman Brothers, Inc., $52,990.12, and Claimant, Continental Insurance Co., the sum of $100,000. The Respondent filed a motion for a new hearing on the issue of whether or not the subrogation claim was a separate claim from that of the owner of the tugboat, and on a closely-related issue as to whether the jurisdictional limit of $100,000 in tort actions would apply to this case.

The first issue that the Court must consider on the motion for rehearing is whether the two causes of action in this case are actually one claim, because Continental

Insurance Company comes before this Court as a subrogee. If these actions are one claim, or if they constitute a recovery to or for the benefit of Norman Brothers, Inc., in excess of $100,000, then the award should be modified to apply the jurisdictional limit. If, regardless of how they are labeled, how the claims are brought, or in whose name, they are separate claims, or they are not to, or for the benefit of Norman Brothers, Inc., then, the jurisdictional limit will not be applied.

It is clear that in prior cases before this Court, we have consistently allowed recovery by both a claimant and the claimant's insurance company as a subrogee. In *Borum & Emmco Insurance Co. v. State* (1969), 26 Ill. Ct. Cl. 328, we allowed a truck owner and his insurance company to both recover from the State because of the negligence of the State. In *J. E. Vicker & F. N. Byrn, Copartners, d/b/a Delta Towing Company & Westchester Fire Insurance Company v. State* (1958), 22 Ill. Ct. Cl. 659, a case with strikingly similar facts, we allowed the towboat owner, and the owner's insurance company to both recover their respective losses as the result of the damages. However, the jurisdictional limit set forth by statute was not an issue in those cases.

The jurisdiction of the Illinois Court of Claims is provided in part by section 8 of the Court of Claims Act. (705 ILCS 505/8.) Norman Brothers, Inc.'s claim clearly sounds in tort. The jurisdictional limit on such actions is clearly set at $100,000. The precise wording of that section of the statute is clearly controlling in the present case. It states "that an award for damages in the case sounding in tort, * * * shall not exceed the sum of $100,000 to or for the benefit of any claimant."

This Court refused to exceed a single $100,000 payment when we granted $100,000 to the administrator of

an estate in a wrongful death action, but refused to pay the additional funeral bill of $2,409.50 because the total would have exceeded the jurisdictional limit previously alluded to. (*Peterson v. State* (1984), 37 Ill. Ct. Cl. 104.) It is worthwhile to note that in the *Peterson* claim, despite the fact that the decedent left a widow and two children, the administrator filed a claim for wrongful death and claim for funeral expenses. In a case decided in 1989, *Copland v. State* (1989), 41 Ill. Ct. Cl. 125, this Court awarded the full $100,000 maximum award to the estate of the decedent, and additional $100,000 maximum awards to the father, mother, and sister of the deceased. Each of the family members brought individual claims in that action as well as the action of the special administrator of the estate. Clearly applying the *Copland* rationale to the *Peterson* case, this Court could at the present time award a maximum award to the administrator of an estate, as well as additional awards to family members making a claim under the wrongful death action. This Court has never before reached the issue of whether each claim must be brought in a separate name in order to be able to reach this result. A requirement such as that would seemingly place form over substance. So long as the maximum jurisdictional amount of $100,000 is not exceeded to, or for, the benefit of a single claimant, the statute is complied with. This Court has clearly ruled that in wrongful death situations, the claim of the estate and the claim of surviving family members are not to be considered to or for the benefit of the same claimant, even though surviving family members are almost certainly the beneficiaries of the estate's recovery. The award to the surviving family members for loss of society is clearly separate from the award made to the estate for pre-death pain and suffering, hospital, and funeral expenses. The claims of the family members are not derivative of the

estate, nor is the claim of the estate derivative of that of the family members.

The Claimant pointed out in his reply to the motion for rehearing that the statute governing the Court of Claims allows the Court of Claims to establish rules. The Court of Claims has pursuant to that statutory authority adopted rules; however, none of those rules directly apply to the present situation. In addition, the Civil Practice Act shall apply to the proceedings before the Court of Claims except where that act would be in conflict with specific rules already adopted by the Court of Claims. The Claimant has pointed out that section 2—403(c) of the Code of Civil Procedure (735 ILCS 5/2—403(c)), states that any action brought by virtue of the subrogation provisions of any contact, or by virtue of subrogation by operational law shall be brought either in the name or for the use of the subrogee. We feel that this provision clearly applies to the Court of Claims, but only governs the manner or name in which the claim may be brought, and does not govern whether or not the claim of the insurance company is a separate claim from that of the tugboat owner for purposes applying the $100,000 jurisdictional limit.

After this Court granted the motion for rehearing and heard oral argument on the issues addressed in this opinion, the Court allowed the Claimant and Respondent to file for such additional authorities or memorandum of law as they desired. Claimants filed a supplemental memorandum of law which argued in part that by the very language of the statute setting forth the jurisdictional limit, specifically that part which refers to "* * * if a like cause of action would lie against a private person or corporation in a civil suit" would qualify the insurance company in this case as a claimant. We think, based on prior cases of this Court

which have considered the question of whether or not an insurance company bringing a subrogation action is a claimant, the language of the jurisdictional limit statutes set forth above, and the argument of the Claimant, that in fact the subrogation action brought by Continental Insurance Company is a separate claim.

The question remains, however, whether or not money paid to Continental Insurance Company as a subrogee violates that portion of the jurisdictional limit statute which says that this Court cannot pay more than $100,000 to or for the benefit of a single claimant. Since the subrogation claim is derivative of the claim by Norman Brothers, Inc., can we exceed a single $100,000 payment, regardless of whether it involves one claim or two, or one claimant or two claimants? Any payment made to Continental Insurance Co. would arguably be for the benefit of Norman Brothers, Inc., even if it was a separate claim made payable to a separate claimant.

Black's Law Dictionary defines behalf as benefit, support, defense, or advantage. Since paying Continental Insurance Co. might not create a present advantage or benefit to Norman Brothers, Inc., we must further examine the basis of subrogation. As cited by the Respondent in his brief, the case of *Aupperle v. American Demnity Co.* (1979), 75 Ill. App. 3d 722, 31 Ill. 3d 523 holds that the subrogee can have no greater right than a subrogor, and can enforce only such rights as a subrogor could enforce. That court held when a subrogor waived his right to mechanics' lien, the subrogee's rights in that regard were likewise waived. The supreme court of Illinois in *McCormick v. Zander Reum Co.* (1962), 25 Ill. 2d 241, 184 N.E.2d 882, established the rule cited above. In so doing, they held that a non-negligent employer could not seek reimbursement from a third party because the

employee himself at that point could not assert the claim. Similarly speaking, if Norman Brothers, Inc., would have a right under the Court of Claims statute to only $100,000, how could Continental Insurance Co. enforce rights in excess of that?

Finally, the appellate court of Illinois in the case of *Reich v. Tharp* (1988), 167 Ill. App. 3d 496, 118 Ill. Dec. 248, in a well-reasoned opinion regarding many issues involving subrogation, held that a subrogee can have no greater rights than the subrogor, and the subrogee must step into the shoes or be substituted for the subrogor. In addition, that court held that a subrogor must possess a right that he can enforce against the third party, and the subrogee must seek to enforce the subrogor's right. There is absolutely no doubt that if there was not a jurisdictional limit in the Court of Claims, Continental Insurance Co. would be able to pursue recovery against the State of Illinois because in good conscience, the State of Illinois is responsible for the damage in question. But if Continental Insurance Co. must stand in the shoes of Norman Brothers, Inc., it would appear to be clear that the $100,000 jurisdictional limit would prohibit a recovery in excess of that sum.

In summary, ultimately then the controlling issue in this claim is not whether or not there are multiple claims, or separate claims, or separate claimants, but whether or not a subrogation action, which will result in an aggregation of the awards of more than $100,000 violates that part of the jurisdictional statute cited above which prohibits awards and tort cases in excess of $100,000 to or for the benefit of any claimant. It is clear from reviewing the applicable law that subrogation actions are by their very definition to or for the benefit of the subrogor. Therefore, we hold that the position taken by the Respondent in the

motion for rehearing should be upheld, and the total award in this claim will be reduced to $100,000.

It then remains for this Court to decide what each of the Claimants should receive. The subrogation action is derivative, therefore, the underlying claim of Norman Brothers, Inc., should be given preference. Therefore, we award Norman Brothers, Inc., the sum of $52,999.12, and we award Continental Insurance Company the sum of $47,000.88.

(No. 82-CC-2295—Claimant awarded $20,096.04.)

SPIVEY MARINE & HARBOR SERVICE CO., and CONTINENTAL INSURANCE CO., Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed June 23, 1994.

GOLDSTEIN & PRICE (SIMON TONKIN, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General, for Respondent.

NEGLIGENCE—*collision between towboat and drawbridge—maritime law governed claim.* In a towboat owner's claim against the State for property damage sustained when the towboat hit a drawbridge due to the bridge tender's negligence and then struck a yacht, the Court of Claims determined that maritime law, rather than State tort law, governed such cases where a wrong occurs on or over navigable waters and bears a significant relationship to traditional maritime activity.

SAME—*admiralty claim—equal-division rule inapplicable to facts of case.* The equal-division rule, which applies in admiralty cases, provides that where there is fault on the part of both parties, the damages are divided equally irrespective of the degree of fault attributable to each party, but in a towboat owner's claim against the State arising out of a collision with a drawbridge, the rule was not applied because there was no evidence of fault on the part of the towboat operator.

DAMAGES—*maritime claim—Claimant awarded damages as assignee of yacht owner less set-off—prejudgment interest allowed.* Where the Claimant

towboat owner received an assignment of rights after settling a lawsuit with the owner of a yacht which was struck by the towboat after it collided with a drawbridge due to the State's negligence, the Claimant, in its suit against the State, was entitled, as assignee of the yacht owner's rights, to recover the yacht owner's damages less a set-off in the amount of the settlement received by the yacht owner, and the Claimant was also awarded prejudgment interest pursuant to admiralty law.

SAME—*rule of indemnity under maritime law.* Under maritime law, a non-negligent or secondarily negligent party who makes a payment to a tort victim is entitled to indemnification, including attorney fees and costs, from the party whose primary negligence caused the injury.

SAME—*maritime action—towboat owner could not recover attorney fees and costs under theory of indemnity.* In a towboat owner's claim stemming from the towboat's collision with a yacht after it struck a drawbridge because of the State's negligence, the towboat owner's settlement of the yacht owner's lawsuit constituted an admission of partial liability and, since the towboat owner failed to prove that it was non-negligent or secondarily negligent, it could not recover attorney fees and costs from the State under a theory of indemnity.

OPINION

PATCHETT, J.

This is a tort claim which arises as a result of a towboat-drawbridge collision on the Des Plaines River in the vicinity of Joliet Harbor. This occurred on June 5, 1981, between 9:00 p.m. and 9:30 p.m. As the towboat, the Randy Spivey, approached the Jefferson Street drawbridge, the pilot signalled for the drawbridge to open. The evidence was contradictory as to whether the bridge had begun opening. The pilot of the Randy Spivey, Mr. Bolte, testified that he properly signalled for the bridge to open. He testified that after he saw no response to the first whistle, he blew another whistle and placed his spotlight on the bridge tender's station house. After the drawbridge still failed to respond, Mr. Bolte began to attempt to stop the tow. Mr. Bolte further testified that at no time did the drawbridge tender give the proper signal indicating that the bridge could not be raised.

The Randy Spivey was pushing two loaded coal barges and an empty petro-chemical barge. After it be-

came apparent that the bridge was not going to open in time, Mr. Bolte maneuvered the boat and tow so that the right front cover of the tow (the coal barges, which set lower in the water than the empty petroleum barge) would slip under the bridge. Mr. Bolte cited a concern as to the results of the gasoline barge striking the bridge. He feared fire or an explosion. In order to attempt to accomplish the maneuver described above, Mr. Bolte was forced to swing the rear of his boat toward the left descending seawall and the front of the tow towards the right descending seawall. In other words, the boat and tow moved in a counter-clockwise motion.

The plan did not quite work. The front starboard corner of the lead coal barge made contact with one of the bridge piers. This contact caused the cable securing the gasoline barge to break, setting the barge adrift.

The real damage with which we are concerned, however, occurred when the towboat continued toward the left descending seawall. Mr. Bolte found his boat fast approaching a private yacht, the Seaghost, which was moored approximately 400 to 450 feet below the Jefferson Street Bridge near the left descending seawall. Mr. Bolte testified that he tried several different maneuvers to avoid hitting the yacht, but they all failed. The towboat struck the yacht, causing it to sink.

At the trial of this cause before a commissioner of this Court, the Respondent was precluded by the commissioner from presenting evidence as to the yacht owner's negligence in the mooring of his yacht. The commissioner's reasoning for this was that the Respondent did not raise the issue as an affirmative defense as required by section 2—613(d) of the Illinois Code of Civil Procedure. 735 ILCS 5/2—613(d).

There was evidence, however, as to the possible negligence of Mr. Bolte, the pilot of the Randy Spivey. Mr. Bolte shined his spotlight on the bridge tender's house, possibly causing at least some of the delay in opening the bridge. It appears likely that the bridge was approximately 30 degrees open when the barge struck it.

In addition, Mr. Bolte's own testimony was that upon realizing that the bridge was not opening quickly enough, he traveled an additional 200 to 400 feet before "backing hard" on his engine. If he had not delayed so long, it is possible that there would have been no accident at all. In addition, there was some evidence that the Randy Spivey hit the Seaghost twice. The second hit occurred as the Randy Spivey attempted to maneuver away from the bridge.

This claim presents a varied and interesting set of legal issues. The first and overriding issue is whether maritime law applies to this claim. The Court of Claims has decided a series of bridge/tugboat collision cases. In *Fabick Tugboat Rental Company v. State* (1952), 21 Ill. Ct. Cl. 360, this Court awarded damages in favor of the tugboat company as a result of a collision with the drawbridge. That case cited with approval the case of *Clement v. Metropolitan West Side Elevated Railway Co.* (7th Cir. 1903), 123 F. 271. There the seventh circuit stated:

"A bridge spanning a navigable river is an obstruction to navigation tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary, the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may be readily opened to admit the passage of craft, and maintained in suitable condition thereto. It is also his duty to place in charge those who are competent to operate the bridge, to watch for signals, and to open the bridge for the passage of vessels, and for the performance of such delegated duty he is responsible. It is also his duty to equip the bridge with proper lights giving warning of the position of the bridge and of its opening and closing. If for any reason the bridge cannot be opened, proper signals should be given to that effect, such as will warn the approaching vessel in

time to heave to. A vessel, having given proper signal to open the bridge and prudently proceeding under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage. She is not bound to heave to until the bridge has been swung or raised and locked, and to critically examine the situation before proceeding (*City of Chicago v. Mullen*, 54 C.C.A. 94, 116 Fed. 292), but may carefully proceed at slow speed upon the assumption that the bridge will open in response to the signal, and may so proceed until such time as it appears by proper warning, or in reasonable view of the situation, that the bridge will not be opened (*Manistee Lumber Company v. City of Chicago* [D.C.] 44 Fed. 87; *Central Railroad Company of New Jersey v. Pennsylvania Railroad Company*, 8 C.C.A. 86, 59 Fed. 192), when it becomes the duty of the vessel, if possible, to stop, and, if necessary, to go astern." *Clement*, 123 F. 271 and 273.

In 1958, in *Vickers v. State* (1958), 22 Ill. Ct. Cl. 659, this Court again awarded damages for a similar collision. The Court there held that the State was negligent for not raising the bridge, and also for failure to warn that the bridge would not open. There again the Court cited with approval the case of *Clement v. Metropolitan West Side Elevated Railway Co*., as well as the quote cited above. There the Court found the State liable for a failure to raise the bridge in time and the failure to give the required warnings that the bridge was not going to be raised. The Court cited certain regulations and directives issued by the U.S. Corps of Engineers regarding signals to be given by bridge tenders. Those same signals, in somewhat amended form, were still valid at the time of the accident in question. In 1973, this court also awarded damages for the failure to raise a bridge in *Federal Barge Lines, Inc. v. State* (1973), 29 Ill. Ct. Cl. 25. Once again, the court cited with approval *Clement v. Metropolitan West Side Elevated Railway Co*., cited above.

While this court has traditionally found liability on the part of the Respondent for failure to raise the bridge in time, it has never addressed the issue of whether these cases fell specifically under maritime law or under State law. Either the issue was not raised, or it was not necessary to reach a decision in the prior cases.

It is clear that certain Federal statutes govern the operation of drawbridges. Title 33 U.S.C. §499 provides that:

> "The owner of or the agency controlling a drawbridge crossing navigable waters of the United States shall provide the appliances and the personnel necessary for the safe, prompt, and efficient operation of the draw." 33 C.F.R. §117.555(a).

In addition, Title 33 U.S.C. §494 provides that:

> "The draw shall be opened *promptly* when the signal prescribed in Paragraph (d) of this section for the opening of the draw is received from an approaching vessel * * *." (33 C.F.R. §117.555(d).) (Emphasis added.)

Obviously these statutes directly control the facts of the situation we are faced with. The statutes by themselves, and the associated rules promulgated for their implementation do not, however, automatically control the issue of whether admiralty law applies in this case.

The law regarding admiralty jurisdiction was dramatically altered by the United States Supreme Court in *Executive Jet Aviation, Inc. v. City of Cleveland* (1972), 409 U.S. 249, 44 L. Ed. 2d 454, 93 S. Ct. 493. Prior to this case, admiralty law jurisdiction was based on a fairly strict locality test. The district court set forth the test, primarily relying on *Chapman v. City of Grosse Pointe Farms* (6th Cir. 1967), 385 F.2d 962. The district court set forth the test as: (1) the locality where the alleged tortious wrong occurred must have been on navigable waters, and (2) there must have been a relationship between the wrong and some maritime service, navigation, or commerce on navigable waters.

Based on that test, the circuit court of the sixth circuit affirmed a district court decision denying admiralty jurisdiction of a case which arose because of an aircraft crash into Lake Erie. It was appealed to the U.S. Supreme Court, which affirmed the decision. In doing so, the

Supreme Court set forth a new test for admiralty jurisdiction. They said that serious difficulties often occur with the locality test, which were illustrated by cases where the maritime locality of the tort was clear, but the invocation of admiralty jurisdiction was almost absurd. There the court gave examples such as a swimmer at a public beach injured by another swimmer or a submerged object on the bottom. Some courts have held admiralty jurisdiction in such cases, while other circuits declined to find admiralty jurisdiction. The courts stated that despite the broad language of cases like *The Plymouth* (1866), 70 U.S. (3 Wall), 20, 18 L. Ed. 125, the Supreme Court had never explicitly held that a maritime locality was the sole test of admiralty court jurisdiction. Indeed the Court pointed out that Congress had extended admiralty jurisdiction predicated on the relation of the wrong to maritime activities, regardless of the locality of the tort via the *Extension of Admiralty Jurisdiction Act*, 62 Stat. 496, 46 U.S.C.§740, enacted in 1948. That act was passed specifically to overrule cases such as *The Plymouth, supra*, which had held that admiralty does not provide a remedy for damage done to land structures by ships on navigable waters.

Although the specific holding of *Executive Jet Aviation, Inc.*, applied only to aviation, the Court clearly held that they would no longer invoke admiralty jurisdiction because of the mere fact that the alleged wrong occurred, or is located on or over, navigable waters. The Court did signal that they would require the wrong to bear a significant relationship to traditional maritime activity.

Subsequent to the Supreme Court's decision, several circuit courts had occasion to rule on or consider admiralty jurisdiction in somewhat less than normal circumstances. In *Kelly v. Smith* (5th Cir. 1973), 485 F.2d 520,

the court held that maritime jurisdiction would be invoked where a river pilot was injured by rifle fire directed at his vessel from an island in the Mississippi River which was being used for deer hunting. There the court said that circumstances to be considered are functions and roles of parties, types of vehicles and instrumentalities involved, causation and type of injury, and traditional concepts of the role of admiralty law. In *Gypsum Carrier, Inc., v. Union Camp Corp.* (5th Cir. 1974), 489 F.2d 152, the Fifth Circuit invoked admiralty jurisdiction when a vessel collided with a railroad bridge because smoke emitted from a paper mill nearby obstructed vision.

These and similar cases clearly establish that admiralty law should apply to this claim. We so hold. See also *The Pennsylvania Railroad Company v. SS Marie Leonhardt* (E.D. Pa. 1962), 202 F. Supp. 368; *N.M. Paterson & Sons, Limited v. City of Chicago* (7th Cir. 1963), 324 F.2d 254; *Chicago & Western Indiana Railroad Co. v. Motorship Buko Maru* (7th Cir. 1974), 505 F.2d 579; *St. Louis-San Francisco Railway Co. v. Motor Vessel D. Mark* (S.D. Ala. 1965), 243 F. Supp. 689.

Deciding that admiralty law applies to this claim does not complete the analysis of all the pending issues, however. Even if maritime law applies to cases involving vessel drawbridge collisions, it does not automatically apply in a court such as the Court of Claims. Obviously the Claimants in this case could have sued anybody but the State in Federal or State court on a maritime claim. Because the State has immunity, abrogated only by the Court of Claims system, they must bring their claim in this forum. Federal courts have held in *Continental Casualty Co. v. Canadian Universal Insurance Co*. (5th Cir. 1979), 605 F.2d 1340, that a maritime issue could be raised in a diversity suit, or brought in State court. The

court, however, held that while jurisdiction to decide litigation may be concurrent with State courts, or could be used to invoke Federal court jurisdiction on some independent basis, maritime law determines the rights of the parties involved.

In *Austin v. Unarco Industries, Inc.* (1st Cir. 1983), 705 F.2d 1), the court held that once admiralty jurisdiction is established, all of the substantive rules and precepts peculiar to the law of the sea become applicable. This is true even when the plaintiff decides to pursue his claim in the civil side of Federal or State court. The court went on to hold that while State law may supplement admiralty law, it may not flatly contradict it. State laws are generally referred to only when it affords greater protection to maritime employees than provided by admiralty law. The court reached a similar conclusion in *Taylor v. Lloyds Underwriters of London* (5th Cir. 1992), 972 F.2d 666 in which they held that the interpretation of a contract of marine insurance, in the absence of specific and controlling Federal rule, can be determined by reference to appropriate State law. Here the court cited with approval *Wilburn Boat Co. v. Fireman's Fund Ins. Co.* (1955), 348 U.S. 310, 99 L. Ed. 337, 75 S. Ct. 368.

For the reasons cited in these cases, we believe that if we are going to have a claim system abrogating State immunity, and if we are going to decide tort cases involving admiralty law, that this court must be guided by traditional concepts and rules of maritime law.

In applying these rulings to the facts of the present case, we first come to the issue of comparative negligence. The commissioner of this Court refused to allow the Respondent to present evidence of the possible negligence of the yacht owner because they had not pled it as an affirmative defense. Since we have previously ruled

that maritime law applies to this case, and not State tort laws, the specifics of the Code of Civil Procedure, sec. 2—613(d), would not apply. In *N.M. Paterson & Sons, Limited v. City of Chicago* (7th Cir. 1963), 354 F.2d 254, the seventh circuit court of appeals held that the district court erred in invoking the doctrine of comparative negligence in an admiralty action involving a collision between a steamer and a bridge. The court held that the equal-division rule should have been applied. That rule provides that even if the ship contributed two-thirds of the total fault, as opposed to one-third on the part of the City, the co-defendants would have to divide the damages. This was not brought before this Court at any time during the trial or briefing of this case. The equal-division rule basically provides that the parties divide the damages equally even though one is more at fault than the other. If this rule had been invoked in the present claim, it would have meant that the State of Illinois, and the barge operator, would have to divide the damages to the owner of the yacht, regardless of their respective degrees of fault. This rule, however, would have come into direct conflict with the rule of the Court of Claims which requires that a claimant exhaust all his remedies prior to coming to the Court of Claims.

In this case, the owner of the yacht, Joseph Jura, in fact sued the barge company in Federal court, and he filed a claim in the Court of Claims. After reaching a settlement with the barge company in Federal court, he assigned his claim against the State to the barge company. His claim against the State had been placed on general continuance in conformity with the Illinois Court of Claims Rules while he pursued his Federal lawsuit. Therefore, the issue is whether we should apply the equal-division rule to this claim, thereby splitting the damages of the yacht owner between the barge operator and the State of Illinois, or

whether we should decline to apply that rule because the Claimant was required to exhaust his remedies.

Before we decide that issue, let us again address the facts of this case. In *The Pennsylvania Railroad Co. v. SS Marie Leonhardt* (E.D. Pa. 1962), 202 F. Supp. 368, the United States District Court for the eastern division of Pennsylvania found that a ship having sounded the proper signal may proceed on approaching a drawbridge on the assumption that the bridge will be timely opened. The ship is under no duty to heave to and critically examine the situation to satisfy itself that the drawbridge is operating properly. While the master of a ship may not heedlessly steer the ship into a closed drawbridge, he may approach carefully on the assumption that duties imposed upon bridge personnel will be performed in a timely fashion, in the absence of a signal from the bridge to the contrary. The right of a ship to attempt passage of a drawbridge becomes well-nigh absolute when the bridge personnel, by means of affirmative conduct, extend invitation to proceed in response to the vessel's signal. It should be noted that this Court also cited with approval the case of *Clement v. Metropolitan West Side Elevated Railway Co.*, *supra*. The court also stated that a closed drawbridge without more, or the display of a visual signal indicating that the draw is closed, does not suffice to serve notice upon the pilot or master of an approaching vessel that it will not be timely opened. Viable standards and reasonable prudence, applied to the totality of the circumstances, determine the allocation of fault in each instance. The court cited with approval the case of *The Majestic* (4th Cir. 1936), 80 F.2d 879, and *Munroe v. City of Chicago* (7th Cir. 1912), 194 F. 936.

Based on the facts presented to this court at the trial, there is no evidence that the vessel itself violated any

standard, law, or regulation. While the conduct of shining the light upon the bridge tender's station may have contributed in some manner to the accident, it has not been shown that the shining of the light was in any way a violation of procedure or standard law regulation. In addition, although the pilot did not immediately begin maximum efforts to slow down when he first became concerned about the bridge not opening, it has not been proven that this violated any applicable law or standard. In fact, the standard evidently allows the ship to approach within 300 feet of the bridge before giving the signal to open it. There was little, if any, evidence that the barge was moving at too great a speed. Therefore, we find no liability on behalf of the pilot or barge operator as a result of evidence produced before this Court. We therefore do not apply the equal-division rule.

As we previously stated, the ruling of the commissioner of this Court prohibited the Respondent from producing evidence as to the alleged or possible negligence of the yacht owner in mooring his boat. However, we do not feel that this evidence is necessary in order to have a complete resolution of the issues before this court. We do find negligence on the part of the bridge tender, and therefore on the Respondent, the State of Illinois.

We now must consider the specifics of the Claimants' request for relief. In count I, the Claimants sought recovery for an amount of money as the assignee of the Seaghost owner's claim against the Respondent. The Claimants received said assignment by paying the owner of the yacht and his insurer the amount of $10,750. In return, the owner signed a covenant not to sue and assignment for the Claimants' benefit.

In count II, the Claimants asked the court to award them $12,196 for court costs and attorney fees which

were spent in defending the lawsuit filed against them by the owner of the yacht. In addition, the Claimant wants prejudgment interest on both of the above amounts. The Claimant cited the case of *Lake Front Realty Corp. v. Lorenz* (1960), 19 Ill. 2d 415, 421-23, an Illinois Supreme Court case which analyzed the issue of prejudgment interest against governmental entities. That case was cited with approval by the Court of Claims in *Toombs v. State* (1977), 33 Ill. Ct. Cl. 205. Illinois has long taken the view that interest cannot be allowed unless a statute expressly provides for such interest. Accordingly, in *Toombs* this Court denied prejudgment interest on the grounds that it was recoverable only if authorized by statute. We, however, have already held that admiralty law governs this claim. As such, we must use admiralty law with all its traditional rules and procedures. Admiralty law provides for prejudgment interest. Therefore, we will allow prejudgment interest in this claim. Prejudgment interest is granted under the general law in admiralty cases that "prejudgment interest is permitted in the discretion of the trial court and should be granted unless there are exceptional or peculiar circumstances." *Federal Barge Lines, Inc. v. Republic Marine, Inc.* (8th Cir. 1980), 616 F.2d 372.

There is no doubt that the Claimants, in settling the lawsuit with the owner of the yacht, received an assignment of their rights. The owner of the yacht received $10,750 from the Claimant as payment for their damages. Claimants argue that they are now entitled as the assignee of the yacht owner to the entire amount of damages, not just the $10,750, or a portion thereof, they paid to the owner of the yacht. They cite as authority a case reported in American maritime cases, *Consolidated Grain & Barge Co. v. Chicago & Northwestern Transportation Co.* (S.D.

Ill. 1981), 1983 A.M.C. 90. Assignments of causes of action are permitted under maritime law. (*American Commercial Lines Co. v. Valley Line Co*. (8th Cir. 1976), 529 F.2d 921.) It is generally recognized that an assignee stands in the shoes of his assignor and can recover what the assignor could have recovered. However, must we apply those rules in connection with the Court of Claims rules which require exhaustion of remedies and the set-off. Since the yacht owner has already received $10,750, that figure must be set off against the total amount of damages. The Claimant sought recovery of $18,876 in their complaint, and $22,888 in their brief. We will use the latter figure as a more appropriate figure for damages. Subtracting $10,750 from $22,888, we come up with a figure of $12,138 as possible remaining damages available to the Claimant as assignee of the yacht owner. We award that to the Claimant, along with prejudgment interest at the rate of 5% from the date of the accident. Your award under count I is $12,138, plus prejudgment interest of $7,958.04, for a total award of $20,096.04.

The remaining issue before this Court is count II, which requests attorney fees and court costs based on a theory of indemnity under admiralty law. This court has held in one case that attorney fees are recoverable against the State of Illinois. That case, as cited by the Claimant, is *Douglas v. State* (1977), 31 Ill. Ct. Cl. 499. There this Court allowed attorney fees incurred by the claimant in defending a contract action which was brought because of the conduct of the State of Illinois. The Court can see little distinction between the rationale used by this court in *Douglas* and the factual situation in the present case. If we apply maritime law, clearly attorney fees would be allowable under indemnity theory. However, we do not feel that this is a case of indemnity. As we understand the

rule of indemnity under maritime law, a non-negligent or secondarily negligent party who makes a payment to a tort victim is entitled to indemnification from the party whose active or primary negligence caused the injury. (*Tri-State Oil Tool Industries, Inc., v. Delta Marine Drilling Company* (5th Cir. 1969), 410 F.2d 178; *United States v. GTS Adm. Wm. Callaghan* (S.D. N.Y. 1986), 643 F. Supp. 1483.) Also under admiralty law, a party who pays more than its proportionate share of liability to the victims is entitled to contribution from other tortfeasors. (*Griffith v. Wheeling-Pittsburgh Steel Corp.* (3d Cir. 1979), 610 F.2d 116, 129-130.) There is no doubt that recoverable damages in an indemnity action include costs and attorney fees reasonably incurred by the indemnifiee in defending claims for which the indemnifier is determined to be responsible. *United States v. GTS Adm. Wm. Callaghan*, 1484-1485.

The problem in this case, however, is that we cannot hold as a matter of law that the barge operator is non-negligent, or secondarily negligent. Although as we have previously stated, there was insufficient evidence of negligence on the part of the barge operator produced at the trial before this court, they settled their case with the owner of the yacht company thereby admitting culpability. They settled for $10,750, which is roughly 50% of the damages. If we average the amount sought in the Claimant's original complaint, and the amount of the brief, we come up with $20,882. $10,750 is in fact in excess of half of that figure. We take the settlement, and the money paid, as admission of partial liability on behalf of the towboat operator. In addition, if the barge operator is going to recover on a theory of indemnity, the burden of proof as to whether they were non-negligent, or secondarily negligent, was on them.

In addition, the Claimant asked for in excess of $12,000 for attorney fees and court costs in defending the case in which they settled for $10,750. Attorney fees and court costs must be *reasonably* incurred. Therefore, while we find that attorney fees and court costs would be available to a claimant before the Court of Claims under maritime or admiralty law, we find there is insufficient evidence before this Court to make an award on the basis of indemnity.

For the reasons above stated, we award the Claimant the amount of $12,138, plus $7,958.04 for prejudgment interest at the rate of 5% from the date of the accident through June 20, 1994. The total award is $20,096.04.

(No. 83-CC-0662—Claimant awarded $8,525.65.)

J. J. ALTMAN & COMPANY, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 27, 1994.

MARVIN W. GOLDENHERSH, for Claimant.

ROLAND W. BURRIS, Attorney General (SUZANNE SCHMITZ, Assistant Attorney General, of counsel), for Respondent.

CONTRACTS—*damages—recoverability of attorney fees*. The general rule is that absent a statute or case law to the contrary, each party bears the cost of their own attorney fees, but attorney fees are a proper element of damages recoverable in the Court of Claims where they were incurred in separate litigation with a third party as a result of Respondent's breach of contract.

SAME—*contractor awarded amount of judgment incurred in third party lawsuit by subcontractor—claim against State for attorney fees denied*. Where a subcontractor performed work on a State construction project, for which the Claimant contractor was the construction manager, then sued the contractor in a third party action for the amount due when the State refused to authorize payment for the subcontractor, the State stipulated that it was liable to the con-

tractor for the amount of the judgment in the third party action, but the contractor could not recover attorney fees incurred in that litigation, since it failed to prove a breach of contract by the State which led to the damages claimed.

OPINION

FREDERICK, J.

This Claimant, J. J. Altman & Company, a corporation, filed its complaint with the Court of Claims on November 4, 1982, seeking $22,448.10 in damages from the State of Illinois for litigation costs it incurred as a result of a lawsuit for fees which the Capital Development Board (hereinafter referred to as C.D.B.), did not pay a subcontractor, American Drilling Company, for work it authorized American Drilling Company to perform.

A trial was held before the Commissioner assigned to the case.

In 1973, the Claimant entered into a contract with the State of Illinois through the C.D.B. for the construction of a regional office building in East St. Louis, Illinois. Claimant by contract was the construction manager. During the course of construction, emergency work was authorized by the Respondent to allow American Drilling Company to perform work on the elevator shafts. The additional services amounted to $8,525.65. These matters were agreed to and stipulated to by the State before the Court, however, the C.D.B. had refused to authorize payment for American Drilling Company. American Drilling Company brought suit against Claimant and received a judgment of $8,525.65 plus court costs of $49.20. During the course of the litigation, Claimant incurred $8,531.25 in legal fees. Claimant proceeded through the administrative procedures of the C.D.B. to recoup the amount owed to American Drilling Company, but the claim was repeatedly refused. After paying the judgment, Claimant initiated this

action to recover the amount of the judgment and expenditures made in defending the claim of American Drilling Company in circuit court.

At the hearing of this matter before the Court of Claims Commissioner, the State stipulated that the State was in fact liable for the amount owed American Drilling Company, $8,525.65. The sole matter before the Court was the liability of the State for attorney's fees incurred by the Claimant in the defense of the suit by American Drilling Company in the amount of $8,531.25 and the court costs of $49.20.

The general rule is that absent a statute to the contrary or case law, each party bears the cost of their own attorney's fees. (*Meade v. State* (1979), 33 Ill. Ct. Cl. 113.) The Claimant has not cited nor can we find a statute authorizing the payment of attorney's fees and court costs under the facts of this case. The Claimant, however, is requesting fees incurred in litigation with a third party, not for fees incurred in the present case. The Claimant contends that the litigation between American Drilling Company is a result of Respondent's conduct. This Court has held that attorney's fees are a proper element of damages recoverable in the Court of Claims where they were incurred in separate litigation with a third party as a result of Respondent's breach of contract and therefore are in the nature of an expense incurred as a result of the breach. (*Douglas v. State* (1977), 32 Ill. Ct. Cl. 113.) The Claimant has relied on *Nalivaika v. Murphy*, 458 N.E.2d 995. *Nalivaika* can be distinguished as it was a case brought in tort, not contract. The matter before the Court is a matter of the parties' contract. If a breach of the underlying contract by Respondent were proven, the Claimant would be entitled to attorney's fees incurred in the third-party litigation. However, the Claimant has not

alleged any facts or presented any evidence to prove a breach of contract by Respondent, nor has the Claimant cited the Court to any section within said contract for support for its argument. The Claimant has the burden of proving its damages. (*Harris v. State* (1989), 41 Ill. Ct. Cl. 184.) Claimant has not met its burden of proof in alleging and proving a breach of contract on the part of Respondent which led to the damages claimed, namely the attorney's fees. The Claimant should recover the amount of the judgment of $8,525.65 incurred in the third-party suit, per the State's stipulation to liability, but cannot recover the attorney's fees or court costs from the third-party litigation.

Based on the foregoing, Claimant, J. J. Altman & Company, a corporation, is awarded $8,525.65 in full satisfaction of its claim.

(No. 83-CC-2749—Claim denied.)

ROBERT EARLY and DIANE M. EARLY, Claimants, *v.*
THE STATE OF ILLINOIS, Respondent.

Opinion filed May 20, 1994.

JOHN H. HENELY, LTD. (JOHN H. HENELY and JAMES A. SANTUCCI, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (JOHN A. SIMON, Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*standing water on roadway—warning signs were adequate—motorists' claim denied.* A claim by a motorist and his wife for personal injuries sustained by them when their automobile went out of control and hit a telephone pole after entering an area of standing water on the highway was denied, where the evidence indicated that the State posted warning signs at the area in question prior to the accident, and that the size, placement, condition and number of signs were reasonable, adequate, and in compliance with the relevant rules.

OPINION

MITCHELL, J.

On Saturday, June 13, 1981, heavy rains hit the southwest suburban Chicago area, including northeastern Will County, causing flooding in areas of Joliet and the surrounding area. That afternoon, Claimants, Robert Early and Diane M. Early, husband and wife, traveled from their home in Minooka along Interstate 80 west to Morris, Illinois where a wedding and reception took place. Claimants admit that they did consume some alcohol at the reception, then joined a group at a lounge about 9 p.m. and did consume "a few drinks." At about midnight, they left to go home, a drive of approximately 20 to 25 minutes, and decided to use Illinois Route 6, which runs roughly parallel to Interstate 80, but is an older two-lane road and not a freeway.

On approaching the intersection of Route 6 and Sand Ridge Road, Claimants saw that the road ahead was covered with water from side to side for approximately 100 to 150 feet. Driver, Robert Early, applied the brakes to his car but was unable to stop before entering the water, which caused him to lose control of the vehicle. The vehicle skidded sideways along the right-hand shoulder until it struck a telephone pole. Robert Early suffered injuries, including broken ribs; Diane Early sustained multiple serious injuries which incapacitated her for six months and limited her activities for two years. Claimants seek restitution for their injuries from the State of Illinois, alleging that the signs placed upon the roadway to warn of the hazard were inadequate and failed to alert drivers of the danger from the standing water on the road.

The State testified, largely uncontradicted, that, upon notice from the sheriff's department at approxi-

mately 8:30 p.m. that evening, there was a problem with standing water on Route 6 near Sand Ridge Road, a trained highway maintenance operator, William Weaver, was dispatched to the scene where he removed two signs from an area of the same road which had had a similar problem from standing water earlier in the day, and moved those signs to the area under consideration here. Weaver, in accordance with procedures he had been taught, placed each sign 3/10ths of a mile (approximately 1,584 feet) from the edges of the water in each direction. The signs themselves bore the inscription "WATER ON PAVEMENT" in five-inch high black letters on a reflective yellow sign of 36-inch by 36-inch size. Those signs were attached to tripod-type folding stands which have spiked feet to allow the stand to be sunk into the ground to anchor it. Claimants contend that they saw no warning sign and that quite possibly the sign had been blown over by a stiff wind. Claimants' expert witness further testified that the sign should have been larger, 48 inches by 48 inches, and that only one sign per direction was inadequate—that two would have been better.

A. Whether sign was present. Sheriff's Deputy Dan Carey testified that, in investigating the accident scene, he had occasion to check to see if the warning signs were posted as had been ordered. He found that they were in place. There was no direct contradictory evidence. There was some indication in the testimony of Jeanette Erickson, a local resident who reported the accident to police, that she did not see any warning signs, but no directly contradictory testimony. It is the finding of the Court that the signs had been posted as per the instructions given by George Poppleton to William Weaver.

B. Size of the sign. Claimants' expert testified that he believed a 48-inch by 48-inch sign was called for under

the circumstances, the State's expert, who had a hand in the compilation of the relevant rules, stated that the then-current rules required only a 36-inch by 36-inch sign. A larger sign would have been visible at a greater distance, allowing a longer stopping time. Inasmuch as the Claimants argue that the distance from the sign to the hazard was excessive (see below), this argument does not carry much weight. Clearly it is more difficult to overlook a four-foot square sign than a three-foot square sign, but either size is adequate once the driver is within 200 feet of the sign, and, as stated above, the State did comply with the current rules.

C. Placement of the sign. Claimants further argue that the placement of the warning sign at a distance of 1,500 feet was too far from the hazard and likely to cause confusion since the driver might be looking for the hazard at a distance considerably closer to the warning sign. This argument appears to defy logic. If the driver sees a warning sign, "Water on pavement," the standard reaction ought to be to slow down, at least by removing the foot from the accelerator, if not immediately beginning the braking process. Fifteen hundred feet is designed to allow the vehicle to come to a reasonable deceleration from the posted speed limit, especially on wet pavement, without placing the vehicle's occupants in jeopardy. At the very least, the vehicle's speed approaching the hazard will be less for the driver having braked and been put on alert. We find no fault in the placement of the warning signs.

D. Number of signs. Claimants' expert, Robert Lippmann, made a very good argument for the use of two signs to warn of a hazard, borrowing from the construction industry's practice; further, he felt it would be better if the distance to the hazard were noted on each sign. These ideas obviously have merit. However, the construction in-

dustry can set up signs on a prolonged basis: a construction job can take months. A sign that warns of "construction ahead—400 feet," can be used on every job since it is nearly always possible to measure 400 feet from the point of activity. Here, the Respondent stated that use of these signs was rare and the distance placement was based on the type of road and the speed limit. Thus, the highway department would need detachable distance markers and extra equipment. As to the effect of a second warning device for those who missed the first ones, while that may be desirable, such a change of law or rule must come from the State legislature or appropriate State agency, not from the courts.

E. Condition of the sign. There was some testimony as to whether the actual sign used that night was in proper condition: whether it had ever had a reflective coating or whether that coating might have deteriorated from age and rough use. State's expert testified that all signs of that type are reflective and no evidence was presented which showed that the actual sign in use had lost its reflective coating.

Route 6 is the second most heavily traveled road in Grundy County and the road had water on it for some time prior to the placement of the signs at approximately 8:30 p.m. However, for at least three hours (9 p.m. to midnight), after-dark traffic traversing this busy road with a posted speed limit of 55 mph was able to see the warning signs, act accordingly by reducing speed, and navigate the water without incident. If only one car came through in either direction every two minutes, that would mean that close to 100 cars saw the warning sign and reacted safely to the situation. While there may have been further steps that the State of Illinois could have taken to reduce the chance of such an accident happening, we find that they acted responsibly under the circumstances.

We can sympathize with the pain and suffering that especially Diane Early has endured because of this accident. However, the State of Illinois did not create unreasonably dangerous conditions; it reacted in a reasonable manner and in accordance with departmental guidelines which were adequate for the multitude of vehicles which preceded Claimants down Route 6 that night. The claim is denied.

(No. 84-CC-0595—Claimant awarded $11,472.01.)

CARLSON ROOFING CO., Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed April 17, 1987.

Opinion filed April 7, 1994.

CARLSON ROOFING CO., *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (KATHLEEN O'BRIEN, Assistant Attorney General, of counsel), for Respondent.

LAPSED APPROPRIATIONS—*roofing contract—award granted—university entitled to credit for less expensive substituted materials*. Pursuant to the parties' stipulation and request for partial payment, the Claimant roofing company was awarded $11,472.01 in its lapsed appropriation claim arising out of the installation of a replacement roof on a State university building, but the university was entitled to a $2,801.58 credit against the total contract price of over $14,000, since less expensive materials were necessary to meet project guidelines and were substituted by agreement of the parties for materials originally called for in the contract.

ORDER

JANN, J.

This cause comes on to be heard on the Claimant's request for partial payment and the parties' joint stipula-

tion, due notice having been given, and the Court being advised;

Claimant brought this claim seeking compensation in the amount of $14,439.59 as the balance due on a contract to replace roofing on Cole Hall at Northern Illinois University. The record indicates that a portion of this amount was not paid solely because the funds appropriated for the payment had lapsed. It was stipulated that said portion is $11,472.01, and Claimant has requested payment of this undisputed portion of the claim. Sufficient funds lapsed in appropriation line item number 029-644-01-6-600-0000, FY82, to cover this amount.

We will make an interim award as requested, but because the Court has no appropriation of 029 funds, the payment will have to be made via the Court's special awards bill.

Accordingly, it is hereby ordered that Claimant be, and hereby is, awarded the sum of $11,472.01, which shall be paid when it becomes available. The balance of the claim remains under litigation.

OPINION

JANN, J.

On June 17, 1982, Claimant, Carlson Roofing Co. (hereinafter referred to as Carlson), entered into a contract with Respondent Northern Illinois University (hereinafter referred to as NIU) for the installation of a replacement roof of a university building. The contract specifically provided in part that Carlson use only materials manufactured by TREMCO Roofing Company and that the project meet Underwriter's Laboratory (U.L.) class A rating and that TREMCO issue their ten-year guarantee at the project completion.

After the work on the roof had begun, it was discovered that several amendments to the contract were necessary. The contract price was increased to reflect the additional work and materials required.

It was also discovered that specifications as written could not achieve the U.L. standard required to obtain the TREMCO ten-year guarantee. In order to obtain the U.L. rating, it was necessary to substitute a base sheet material which was $814.98 less expensive than the material originally required, and an insulation which was $1,986.60 less expensive. It must be noted that all undisputed amounts due on the contract have been paid.

The sole issue before this Court is whether or not the State is entitled to a credit of $2,801.58 for the less expensive materials substituted.

It is clear that the purpose of the project specifications as proposed were to offer the bidding contractors a standard on which they could reasonably base their bids. It is reasonable to expect that after a major construction project such as this one has begun, it becomes necessary to make amendments to the original contract agreement.

The evidence indicates Carlson and NIU were agreeable to contract modifications. In fact, the contract price was increased on two separate occasions in the amounts of $2,632.50 and $1,286.39 respectively as additional material and labor became necessary. Carlson was also willing to substitute other less expensive materials when it was determined that the originally specified materials were unsuitable to achieve the ultimate project goals. However, Carlson was not willing to decrease the contract price or credit NIU for the less expensive materials.

Carlson contends that the type of insulation and base sheet were prescribed in the original project specifications

and, therefore, the fact that subsequent changes were required was irrelevant. The fact that two substantially less expensive materials were ultimately required is relevant and NIU is entitled to a credit respectively. In the event that NIU had required a substantially more expensive material, NIU would have been responsible to adjust the contract price to reflect the required change. Clearly, the same standard must apply where a substantially less expensive material is ultimately used.

In absence of any evidence disputing the reduced cost of the substituted materials or any evidence demonstrating that the substitution increased labor or any other costs of construction, we hereby find that NIU is granted a credit to the contract in the amount of $2,801.58 and Carlson's claim is denied.

(No. 84-CC-2466—Claimant William Henderson awarded $20,000; Claimant Judy Henderson awarded $100,000; Claimant William Henderson, Jr. awarded $65,000; Claimant Melanie Henderson awarded $65,000.)

JUDY HENDERSON, Individually, and as Mother and next friend to MELANIE HENDERSON and WILLIAM HENDERSON, JR., and WILLIAM HENDERSON, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed May 17, 1993.

Order filed October 19, 1993.

Supplemental Opinion filed January 25, 1994.

KRALOVEC, JAMDOIS & SCHWARTZ, for Claimant.

ROLAND W. BURRIS, Attorney General (ROBERT J. SKLAMBERG, Assistant Attorney General, of counsel), for Respondents.

PRISONERS AND INMATES—*State is not strictly liable in cases involving*

prison escapees. The State is not strictly liable in cases involving prison escapees nor is it an insurer of actions involving escaped inmates, and in order for a Claimant to recover, it must be shown that the State was negligent.

SAME—*assault and rape committed by escaped inmate—State was negligent in failing to follow established procedures.* In a claim involving an escaped prison inmate who kidnapped a woman and her two children, forced them to drive to Chicago, then forcibly assaulted and raped the woman, the State was negligent in allowing the inmate's escape, where prison employees failed to follow established procedures in performing headcounts of the inmates and in guarding the outer walls of the institution.

SAME—*damages awarded in negligence claim involving escaped inmate—awards modified on rehearing.* While a woman, her husband, and her two children were initially awarded compensatory damages in their claim resulting from an escaped inmate's kidnapping of the woman and children and subsequent rape and assault of the woman, on a petition for rehearing requested by the woman and children, their awards were increased to reflect significant amounts for future pain and suffering and future psychological expenses which were not granted in the original proceeding.

OPINION

JANN, J.

I. Procedural History

This case arose out of a complaint filed in the Court of Claims that asserted that on March 15 and 16, 1983, the Respondents, State of Illinois and Department of Corrections, through its agents and employees at Pontiac Prison, were negligent in allowing inmate Anthony Davis to escape. The complaint further alleged that as a direct and proximate result of the escape, the Claimants were injured when inmate Anthony Davis kidnapped three of them, forced them to drive him to Chicago and forcibly assaulted and raped Claimant, Judy Henderson, in the presence of her children. Additionally, Claimants have asserted loss of consortium on behalf of William Henderson, the husband of Judy Henderson.

The claim was brought pursuant to section 1 of the Escaped Inmate Damages Act (740 ILCS 60/1) and, prior

to the hearing on this matter, the Claimants exhausted all other remedies by the filing of a complaint in the Circuit Court of Cook County, which was subsequently dismissed. On January 6, 7, and 16, 1992, evidence was heard in the Court of Claims. Additionally, an evidence deposition was taken of Dr. Paul Taylor, a psychologist, which is of record.

II. Facts

In December of 1981, Anthony Davis (hereinafter Davis) was sentenced to 25 years at Pontiac Correctional Center for five counts of armed robbery and one count of burglary. Pontiac Correctional Center is a maximum security prison which houses approximately 1,500 inmates in the maximum security portion of the facility.

On March 15, 1983, inmates Davis and Rodney Bradley were able to leave the "chow" line and hide themselves within the prison for approximately nine hours. During the time that Davis and Bradley were hiding, at least three head counts of their gallery were performed by correctional officers Gerald Bolen and Edward Schulthes. Exhibits introduced by Claimants show that on all of these occasions the employee performing the count noted that all inmates were present when, in fact, inmates Davis and Bradley had manipulated their beds to make it appear that they were present while they were actually concealed elsewhere in the prison.

Counts performed by employees Allen Forst and Melvin Franks failed to note that the number of inmates returning from dinner matched the number who had gone to dinner. Respondent's employee Emil Wooldridge was stationed in tower 18 during the early morning hours of March 16, 1983. He failed to observe inmates Davis and Bradley during their escape. Inmate Davis climbed

over the prison walls at approximately 4 a.m. on March 16, 1983, and effectuated his escape. As a result of the incident, numerous prison employees were disciplined.

In March of 1983, the Claimants' family included William D. Henderson, Jr., Judith K. Henderson, Melanie Henderson, age 10, and William D. Henderson III, age 7. The Hendersons had resided at 1005 South Oak Street in Pontiac for about six weeks and the house was located approximately one block from Pontiac Prison.

On March 18, 1983, Judy and the two children entered the family van for the purpose of going to school. Upon entering the van, they noticed that a black male was lying in the back with a gun pointed at them. The man was wearing a prison outfit and the gun was a rifle. The man told Judy that he had someone else with him in the van and that he wanted to be driven to Chicago. While in Pontiac, Judy requested that the children be released but the kidnapper refused. The record is clear that the man with the gun was in fact Anthony Davis, the escapee from Pontiac.

Davis forced Mrs. Henderson and the children to drive to Chicago where Davis attempted to cash one of Mrs. Henderson's checks at a drive-through bank. Davis subsequently choked and raped Mrs. Henderson in front of her young children. Davis then forced Mrs. Henderson into a grocery store in another attempt to cash a check. Mrs. Henderson was able to escape with the aid of a store security guard and Davis was apprehended. He was convicted of rape, kidnapping and assault for which he received a sentence of natural life.

Mrs. Henderson and her children were treated at Michael Reese Hospital. Dr. Paul Taylor, a clinical psychologist, provided services to Mr. & Mrs. Henderson

and the children in 1983 and in 1991. Medical bills submitted total $2,389.75. Property damage for repairs to the van were $166.20.

III. Negligence

The facts summaried above are not disputed. Our primary task is to determine whether Respondent was negligent by acts of commission or omission in allowing Davis to escape and thereby becomes liable for damages to Claimants.

We have consistently held that the State is not strictly liable in cases involving escapees. (*American States, Inc. v. State*, 23 Ill. Ct. Cl. 47.) Similarly, the State is not an insurer of actions involving escaped inmates. (*Voll v. State* (1979), 33 Ill. Ct. Cl. 201.) In order for Claimants to recover, it must be shown that the State was negligent. *Johnson v. State* (1981), 34 Ill. Ct. Cl. 234.

The record in this case is extensive and includes numerous documents prepared by the Department of Corrections as a result of their investigation of Davis' and Bradley's escapes. Ten employees were disciplined. Of the 10, several were terminated (some were eventually reinstated with suspensions).

The current warden of Pontiac, Richard Gramley, testified that he had carefully reviewed the records of the incident which occurred prior to his becoming warden at Pontiac. The following exchange was part of Claimant's cross-examination of Gramley:

"Q. (By Mr. Schwartz) Do you have any opinions as to how it was that Anthony Davis was able to escape?

A. It appears as though a number of individuals deviated from established procedures policy, did not properly do what they were supposed to do, failed to do what they were supposed to do, and as a result of this the inmate was able to create a breach in security and was able to escape and there were a number of individuals and a variety of different actions."

In response to a question by the attorney general, the Warden testified as follows:

"Q. (By Mr. Sklamberg) Do you feel that Anthony Davis' escape in 1983 could have been prevented?

A. Based on what I have read if certain staff had done their job, had followed their procedures as they had been trained to do and as they were supposed to do, yes, sir, it could have been prevented."

The record shows that numerous head counts dictated by prison procedures and policies in effect at the time were performed incorrectly. Additionally, the two employees stationed in the towers nearest the wall where the prisoners escaped were either asleep or inattentive.

Respondent argues that the State cannot be held liable as Davis' record while incarcerated gave no indication that he was an escape risk and his actions were not foreseeable.

We find this argument without merit as applied to the facts at hand. The testimony and evidence adduced at hearing clearly illustrated that numerous testing and review procedures were enacted by the Department of Corrections to identify persons who might be deemed serious escape risks. Although Davis had not exhibited behavior which would have identified him as an escape risk, we find no fault with the failure of the system to so identify him. By the very nature of the institution, it must be assumed that a person incarcerated may try to escape if given opportunity. Respondent introduced proof of Pontiac's extremely low escape record to bolster its argument that the escape was not foreseeable. While we agree Pontiac's record is excellent, we are not persuaded of the unforeseeability of this escape. Davis' escape was made possible by the failure of security personnel to properly perform their duties. When procedures established to prevent escape are not followed and security is breached

it follows that escape is foreseeable. We find Respondent negligent in allowing Davis' escape.

IV. Damages

There is clear evidence that Davis' escape was the direct and proximate cause of Claimant's injuries. The Respondent argues that because Claimants resided about one block from the prison there was an assumption of risk and contributory negligence as regards the possibility of an escape. We disagree. To adopt such a theory would make the siting of prisons in any but the most remote, unpopulated regions impossible. The State owes its citizens a duty to run its prisons in a reasonable manner and act with due care to prevent escape of prisoners in their care.

There was no dispute as to medical and property damage bills introduced into the record. Medical bills totalled $2,389.75 and property damage to the van was $166.20. We hereby award $2,389.75 to Judy Henderson for medical expenses and $166.20 for property damage.

Mrs. Henderson, Mr. Henderson, Will Henderson and Melanie Henderson testified to the physical and emotional damages they have endured as a result of this escape, kidnapping and assault. All four family members were evaluated by Dr. Paul Taylor in 1983 and again in 1991. Dr. Taylor's evidence deposition was taken in December of 1991. Although certain objections to various elements of the deposition were made by both parties during the deposition, the deposition was made part of the record at hearing.

Dr. Taylor's deposition discloses that he saw the family members individually in 1983 within approximately six months of the incident. He did not keep notes of these initial meetings apparently because the family's attorney had asked him to make an analysis based upon a relatively

brief examination process which Dr. Taylor felt was not possible at that time.

Dr. Taylor began seeing the Hendersons again in 1991. Most were seen five or six times over a few months. Each family member was given a battery of tests used in evaluating persons embarking on a course of therapy. Although Dr. Taylor opined that additional sessions with each of the Hendersons would have been helpful in making more precise diagnoses, he felt each of the Hendersons had suffered distress in varying degrees from the trauma of the 1983 incident. Dr. Taylor recommended a two-year course of weekly therapy for each of the Claimants and the prescription of anti-depressant drugs. Dr. Taylor estimated the cost of therapy at $3,000 to $4,000 per year, per patient and the cost of anti-depressants at from $45 to $120 monthly.

Respondent asserts that Claimants had a duty to mitigate damages and failed to do so by seeking counseling services only for purposes of litigation. Claimant Bill Henderson admitted he had no interest in pursuing therapy. Dr. Taylor's statements regarding Melanie and Will also indicate no desire for therapy independent of this case. Mrs. Henderson testified that therapy was beyond the family's means in the years after the incident but expressed no desire for help now. While we do not agree that Claimants must seek therapy to mitigate damages, we feel Claimants have failed to sustain their burden of proof as regards an award of damages for future therapy. There is no evidence that Claimants desire additional therapy at this time.

Claimants Judy, Melanie and Will Henderson have made claims for pain and suffering. We feel awards are appropriate based upon the horrifying nature of this case and the testimony herein.

We hereby award Judy Henderson $50,000 compensatory damages for pain and suffering and $20,000 compensatory damages as mother and next friend of William Henderson III. We award $20,000 compensatory damages to Melanie Henderson, who has now reached majority.

William Henderson, Jr. seeks compensation for loss of consortium. Mr. and Mrs. Henderson's testimony clearly demonstrated that the kidnapping and assault have affected their marriage negatively and have made normal relations virtually impossible. We hereby award William Henderson, Jr. $20,000 compensatory damages.

ORDER

JANN, J.

This cause coming on to be heard on the motion of Claimants for rehearing, it is hereby ordered that: the clerk is directed to set this cause for oral argument on the next available date.

It is further ordered that a voucher be processed in the amount of $20,000 to William Henderson, Jr. consistent with the court's order of May 17, 1993, there being no issues in dispute regarding said Claimant.

SUPPLEMENTAL OPINION

FREDERICK, J.

On May 17, 1993, the Court rendered its opinion in this cause. The Court found in favor of all Claimants as to liability and awarded Judy Henderson $50,000; William Henderson, Jr., $20,000; Melanie Henderson, $20,000; and William Henderson III, $20,000. Judy Henderson, Melanie Henderson, and William Henderson III petitioned for rehearing. William Henderson, Jr. accepted his award and did not request a rehearing. The Court heard oral argument on the petition for rehearing.

The Court has seriously considered the parties' arguments as to the issues of future pain and suffering and future psychological treatment. Based on our review of the transcripts, the pleadings, the Court's prior opinion, and the oral arguments, we are constrained to find that the petition for rehearing should be allowed. The Claimants should be awarded significant amounts for future pain and suffering and future psychological expenses based on the evidence in this case.

Based on the foregoing and based upon our review of the entire proceeding, we modify our prior award in the Court's opinion of May 17, 1993. We hereby award Judy Henderson the sum of $100,000 to compensate her for compensatory damages, future pain and suffering, and future psychological expenses. We hereby award William Henderson III the sum of $65,000 to compensate him for compensatory damages and future damages. We hereby award Melanie Henderson the sum of $65,000 to compensate her for compensatory damages and future damages.

(No. 84-CC-3313—Claim dismissed.)

JOYCE KISH MCALLISTER, Special Administrator of the Estate of JOHN W. TELLONE, Deceased, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed April 11, 1994.

SANDMAN & LEVY (ROBERT P. DLUGAJCZYK, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (RICHARD J. KRAKOWSKI, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*automobile accident—claim alleging defective design and construction of bridge was time-barred.* Pursuant to section 13—214 of the Code of Civil Procedure, a negligence action alleging that the State's defective design and construction of a bridge caused an automobile accident involving Claimant's decedent was dismissed as time-barred, since the claim was filed more than ten years after the State's reconstruction of the bridge, and with respect to allegations of negligent maintenance and failure to warn of potential hazards, those duties had been contractually delegated to the municipality in which the bridge was located.

ORDER

JANN, J.

This cause coming on to be heard on the motion of Respondent to dismiss the claim herein, due notice having been given the parties hereto, and the Court being fully advised in the premises, the Court finds that the instant claim for negligence was filed on May 29, 1984. The complaint involves a two-automobile accident that allegedly occurred on May 30, 1983, on the Central Avenue Bridge where it crosses Grand Avenue, in Chicago.

The Complaint alleges the following acts of negligence on the part of Respondent:

(a) Carelessly and negligently failed to provide safe and suitable lane dividers;

(b) Carelessly and negligently designed the lane dividers between the northbound lanes of the Central Avenue Bridge and the southbound lanes of the Central Avenue Bridge at the location aforesaid;

(c) Carelessly and negligently failed to warn motorists that the northbound lanes and the southbound lanes of the Central Avenue Bridge at the location aforesaid were not divided in a suitable manner.

We see that the subject bridge, including the median, was constructed by Cook County in 1938, and reconstruction was completed by the State in 1969.

Section 13—214 of the Illinois Code of Civil Procedure (735 ILCS 5/13—214) provides:

"§13—214. Construction—Design management and supervision. As used in this Section "person" means any individual, any business or legal entity, or any body politic.

(a) Actions based upon tort, contract or otherwise against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property shall be commenced within 4 years from the time the person bringing an action, or his or her privity, knew or should reasonably have known of such act or omission. * * *.

(b) No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission. However, any person who discovers such act or omission prior to expiration of 10 years from the time of such act or omission shall in no event have less than 4 years to bring an action as provided in subsection (a) of this Section. * * *."

Since the instant claim was filed more than 10 years after the Illinois Department of Transportation's reconstruction of the subject bridge in 1969, we hold that Claimant's allegations concerning Respondent's design and construction thereof are barred by the above statute.

We also hold that as to any other of Claimant's allegations, including maintenance and warning signage with respect to the subject bridge on the date of the incident herein, any such duties were delegated to the City of Chicago pursuant to agreement with Respondent. (The Court has reviewed copies of the maintenance agreement and supporting documentation, submitted pursuant to Court of Claims Regulation 790.140.)

For the foregoing reasons, the claim herein should be dismissed.

It is therefore ordered that Respondent's motion be, and the same is, hereby granted, and the claim herein is dismissed, with prejudice.

(No. 88-CC-0315—Claim denied.)

WILEY A. GLASS, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed April 12, 1994.

DESSEN & MOSES (MARY LEE BERRESHEIN, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (ERIN O'CONNELL, Assistant Attorney General, of counsel), for Respondent.

CONTRACTS—*janitorial services contract—Claimant voluntarily terminated performance with Department of Public Aid.* A claim for breach of a maintenance contract, brought against the Department of Public Aid pursuant to section 8(b) of the Court of Claims Act, was denied where Claimant had entered into a 12-month contract with the Department to provide janitorial and maintenance services, later received a termination notice premised upon inadequate performance and negotiated a "second chance" agreement with the Department, but failed to return to the cleaning site pursuant to the terms of the negotiated agreement.

OPINION

JANN, J.

This action was brought by Claimant pursuant to Section 8(b) of the Court of Claims Act. (705 ILCS 505/8(b).) Claimant alleges breach of a maintenance contract by the Illinois Department of Public Aid.

Claimant entered into a written contract with the Illinois Department of Public Aid on June 18, 1984. Mr. Glass was to perform janitorial and maintenance services

at 2036 South Michigan Avenue, Chicago, Illinois. The term of the contract was twelve (12) months beginning July 1, 1984, and ending June 30, 1985. There was an option to renew for an additional twelve-month period beginning July 1, 1985, through June 30, 1986.

The contract termination clause provided that the State could terminate the contract by providing 30-days written notice to the contractor. Any and all provisions of the contract were terminable by the State with 30-days written notice if performance by the contractor was found inadequate. The issue before us is whether the State gave adequate notice for termination of the contract due to inadequate performance by Claimant's company.

Claimant, Wiley Glass, d/b/a Service Rite Cleaners entered into a contract on June 18, 1984, to provide janitorial services to the Illinois Department of Public Aid at 2036 South Michigan Avenue. Claimant testified that he began service on July 2, 1984, and continued to perform until July 17, 1984. Claimant testified, and was not rebutted by the State, that he received notification on July 17, 1984 that in accordance with paragraph 6 of the contract, the State gave written notice that the contract would be terminated as of July 22, 1984. The termination notice was given by Ronald L. Parrish, chief, Bureau of Administrative Services. Claimant testified that he then engaged an attorney who negotiated with the Department of Public Aid (the Department) on his behalf and worked out an arrangement for him to return to the premises and continue janitorial services. The record reflects Claimant's acknowledgment of receipt of the termination notice and the arrangement for Claimant to be given a second chance to perform in a letter dated July 25, 1984, from Claimant's attorney. An August 1, 1984, letter from Ronald Parrish to Mr. Glass was entered into

evidence. In the letter, Mr. Parrish advised Claimant that the Department had agreed to provide Claimant's company a second chance to demonstrate its ability to perform janitorial services at 2036 South Michigan. The letter of August 1, 1984, further stated that service was to resume on August 6, 1984.

Mr. Glass further testified that his wife called the Department and stated that they would not return to the cleaning site. When further questioned under oath, Mr. Glass testified that he had made a decision not to return to the cleaning site despite the preceding agreement acknowledged in correspondence, to return to work on August 6, 1984.

The testimony clearly demonstrated that Claimant, after initial notification of termination for inability to adequately perform, agreed to a reformation of the contract and subsequently chose to voluntarily terminate performance thereunder. We hereby find Respondent did not breach its contract with Claimant. This claim is hereby denied.

(No. 85-CC-1082—Claim denied.)

JAMES BOLDIAN, a minor, by his Mother & Next Friend SHELIA BOLDIAN, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1994.

HARVEY L. WALNER & ASSOC. (JONATHAN WALNER, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (JAN SCHAFFRICH, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*collision between auto and minor child does not automatically impute liability to driver*. While persons driving vehicles within the State of Illinois have an obligation to maintain a lookout for minor children and other pedestrians, especially in areas where children are known to frequent, not every collision between the auto and a minor child should automatically impute liability to the driver.

SAME—*State not liable for injuries to minor child struck by police car*. Although the nine-year-old Claimant was struck by a University of Illinois police car while crossing the street in early evening hours, his claim for compensation from the State was denied where testimony established that Claimant had crossed the street between two parked cars in the middle of the block in contravention of traffic laws while running an errand for his mother, and evidence established that the police car was traveling at a very low rate of speed and that the driver began braking the vehicle upon seeing the Claimant exit a store and disappear between two parked cars.

OPINION

JANN, J.

Claimant James Boldian, a minor born January 24, 1973, was injured when he ran into the street and was struck by a University of Illinois police car on November 26, 1982. A hearing on the matter was conducted by the Commissioner on March 2, 5, and 6, 1990. Respondents filed a brief June 23, 1993. Claimant did not file a brief. Preparation and delivery of transcripts caused a considerable delay in submission of the brief and resulting Commissioner's report.

Facts

The incident occurred between 5 and 6 p.m. on November 26, 1982 in the 1300 block of Taylor Street between Ada and Throop Streets in Chicago, Illinois. Taylor Street runs east and west with one lane of traffic in each direction and parking on both sides of the street. There were sidewalks on both sides of Taylor Street. There was low-rise public housing on the north side of Taylor and vacant lots and the L & M Liquor store on the south side of the street.

On the date of the accident, Claimant was nine years and two months old. His mother sent him to the L & M Liquor store to purchase a loaf of bread for dinner. Claimant was wearing a navy blue snowsuit with a large fur-trimmed hood. Claimant had been sent to the store on other occasions. His mother had warned him to watch for cars before crossing the street. Claimant did not use the crosswalk to cross the street.

Bobby Smith, a nine-year veteran of the University of Illinois police force, was proceeding eastbound on Taylor Street as Claimant exited the L & M Liquor store to cross Taylor Street. Smith had his headlights on as it was dark and was traveling at 15-25 miles per hour. The posted speed limit is 20 miles per hour.

Smith saw Claimant exit the store. At that time, Claimant was 15 to 20 feet from the front of the vehicle. Smith applied his brakes to slow the vehicle. Smith testified he lost sight of Claimant when he ran between two parked cars but reapplied his brakes to avoid the child as he darted into the street. Smith's vehicle was nearly stopped when it struck Claimant in the lower right leg.

Claimant was taken to the University of Illinois Hospital where he was held for observation until November 29, 1982. The discharge summary indicates there were no bruises, abrasions, hematomas or other signs of trauma. He had complained of pain in his right leg and left side. A hospital bill in the amount of $1,943.25 was introduced into evidence. The bill was paid by the Illinois Department of Public Aid. Claimant received no permanent injuries resulting from the incident.

Claimant's witness Earl Jones gave testimony in a deposition and at the hearing. Mr. Jones witnessed the accident from directly across the street where Claimant

walked into traffic. Mr. Jones stated the Respondent's auto skidded and left skid marks. Mr. Jones' testimony was rebutted by both of Respondent's employees. He also estimated Smith's speed at 30-40 miles per hour. However, Mr. Jones' memory was much less clear regarding his own actions just prior to the accident.

Claimant testified he did not have a clear view of the street as he could not see over/around the parked cars before he stepped into the street. Claimant heard the Respondent's brakes before he felt impact.

Smith and his partner, Raymond Barrera, testified at hearing. Smith testified that he was on patrol duty at the time of the accident. He was aware that the area had a public housing development and a liquor store on either side of Taylor Street. He stated he saw Claimant exiting the liquor store with a bag in his hand. Smith began braking his vehicle. Claimant was running and disappeared from Smith's view when he ran between two parked cars. Smith did not see Claimant look both ways before entering traffic and only caught sight of him again when he exited from between the cars. Smith braked hard but was unable to avoid hitting Claimant with his right front bumper. Claimant flew over the hood and got up running. Smith pursued Claimant, laid him down and put a blanket under his head while his partner called paramedics. Chicago police were also called and responded.

Mr. Barrera also testified that Claimant ran out of the store and momentarily disappeared between parked cars. Barrera warned Smith to "look out" for Claimant resulting in braking the patrol car. Mr. Barrera's testimony was primarily evoked through refreshing his recollection of a deposition given shortly after the incident.

Law

Claimants must prove by a preponderance of the evidence that Respondents' negligent acts proximately caused Claimant's injuries. While it is true that persons driving vehicles within the State of Illinois have an obligation to maintain a lookout for minor children and other pedestrians, especially in areas where children are known to frequent, not every collision between an auto and a minor child should automatically impute liability to the driver. It is clear from the minor injuries sustained by Claimant that the Respondents' vehicle was traveling at a very slow rate of speed. Claimant's testimony indicates he did not look to ascertain whether cars were approaching or disregarded the approach of Respondents' vehicle before proceeding into the street. Claimant chose to cross the street in contravention of traffic laws at mid-block. He had been warned by his mother to watch for cars and had made this trip repeatedly in the past. At nine years of age, his mother felt he was able to handle this task and understand the risks involved.

We hereby find Claimant's acts were the direct and proximate cause of his injuries. Claimant has failed to prove that Respondents have breached a duty resulting in Claimant's injury. Claimant ran from between parked cars into traffic and made an accident unavoidable.

This claim is hereby denied.

(No. 85-CC-2367—Claimant awarded $100,000.)

PROTECTIVE INSURANCE CO., Subrogee of Richard Fusselman d/b/a Gene Fusselman, Denver L. Echternkamp & William M. Gully, Subrogors, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed May 16, 1994.

STEPHEN M. PASSEN, LTD. (DAVID G. SUSLER, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (DAVID RODRIGUEZ, Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*State's failure to maintain shoulder of highway—proximate cause of accident.* Where the State had permitted a one-mile stretch of highway to have a six-inch drop-off from the pavement to the shoulder to exist for at least three years, the State's failure to maintain the shoulder amounted to negligence and could be a proximate cause of a vehicle accident caused at least in part from a vehicle encountering the drop-off after leaving the pavement.

NEGLIGENCE—*State's negligent maintenance of highway shoulder subjected it to liability for fatal accident.* Where an employee of Claimant's insured was driving a semi-trailer truck on a U.S. highway in a snowstorm when he temporarily drove the right side of the truck onto the shoulder to avoid an oncoming vehicle and, upon re-entering the pavement, encountered a six-inch drop-off from the pavement to the shoulder and jackknifed the truck across the highway to collide with the decedent's oncoming car, the State's negligent maintenance of the highway shoulder subjected it to liability for the fatal accident.

DAMAGES—*State was one-third at fault for fatal accident—comparative negligence.* Although the State's negligence in failing to repair a six-inch drop-off from the highway pavement to the shoulder was a proximate cause of a fatal accident between a jackknifed semi-trailer truck and an oncoming car, the doctrine of comparative negligence applied to the case and, since the truck driver was negligent in the operation of the truck, the State's liability was limited to one-third of the amount for which the case was settled.

OPINION

MITCHELL, J.

A final hearing on the above entitled claim was held on March 29, 1993 at the James Thompson Center,

Chicago, Illinois. Stephen M. Passen and David G. Susler appeared on behalf of the Claimant, Protective Insurance Co. and Roland Burris, Attorney General, State of Illinois, by David Rodriguez, Assistant Attorney General, appeared on behalf of the Respondent, State of Illinois.

From the testimony introduced at the hearing, it appears that the Claimant, Protective Insurance Co., was the insurer of a certain trucking company that employed as a driver Denver L. Echternkamp. On January 23, 1984, Echternkamp testified that at about 5:30 a.m. he was driving a tractor-trailer westbound on U.S. 24 at or near mile post 4 in Brown County, Illinois. He had driven a load of dairy products from Quincy to Springfield, Illinois, delivered the load and was returning to Quincy. He left Springfield at about 1 or 2 a.m. When he reached mile post 4, he was involved in an accident which resulted in the death of Stanley Max Hulme.

He testified that it was snowing heavily and visibility was limited at the time of this accident. As Mr. Echternkamp was driving westbound on U.S. 24 in the Mount Sterling area, he testified that out of nowhere came a pair of headlights that appeared to be in Mr. Echternkamp's lane of traffic. To avoid hitting the approaching vehicle, a small General Motors station wagon, Mr. Echternkamp stated that he eased his truck to the right. As he did so, his truck dropped off on to the shoulder, down to what turned out to be a six-inch drop-off. After the car passed, he tried to ease back onto the highway. He stated that he could feel the truck lurch against the edge of the six-inch drop-off.

He stated that when the truck went off the shoulder, he was driving about 35 or 40 miles per hour. He felt that this was a safe and reasonable speed under the weather conditions. He stated that the left side of the tractor-trailer remained on the pavement while the full right side

dropped off onto the shoulder. In order to bring his vehicle safely back on to the roadway, he stated that he decelerated and applied light pressure to the brakes. He stated the right front wheels finally regained the pavement but the rear dual axle kept sliding against the ledge. When the front wheels jumped up, he stated he felt the truck start to jackknife, so he released the foot brake and pulled the hand valve down to apply brakes to the trailer hoping it would straighten it out. However, he stated that the truck jackknifed, spinning in a counter-clockwise direction. It came to rest with the trailer blocking both the east and westbound lanes. At this time Stanley Max Hulme was driving eastbound on U.S. 24, was unable to stop and ran into the passenger side of the trailer. As a result of the impact, the truck slid around and came to rest on the south shoulder facing south. Mr. Hulme died as a result of the injuries he received in the collision.

After the accident, Mr. Echternkamp stated he got out of his truck and observed a large, lengthy drop-off along the northern shoulder where his truck had dropped off. He stated there were no warning signs of any kind along the northern shoulder that would indicate to Mr. Echternkamp, or to any driver on the roadway, that there was a drop-off in that area. Mr. Echternkamp stated he was not aware of any drop-off in that area before this accident. He also stated there is no overhead lighting on that stretch of highway.

The Illinois State Police investigated the accident. Trooper Meyer and trooper Groesch, an accident reconstruction specialist certified by the State of Illinois, measured the drop-off from the highway pavement down to the shoulder to be six inches deep. This six-inch drop-off stretched for approximately one mile both east and west of the accident site. According to witnesses, the drop-off

had existed for at least three years and probably as long as ten years.

The experts for both the Claimant and the Respondent believe that the six-inch drop-off resulted in an unsafe condition. Furthermore, Claimant's expert along with that of the Illinois State Police reconstruction expert believe that the drop-off was a contributing factor in the accident.

The first issue the Court must deal with is whether the State's failure to maintain the shoulder allowing a six-inch drop-off was a proximate cause of the accident which resulted in Stanley Max Hulme's death. We believe the cases of *Peterson v. State* (1984), 37 Ill. Ct. Cl. 104, and *Seifert v. State* (1989), 42 Ill. Ct. Cl. 8, as cited by the Claimant are applicable. The Court believes here as in *Seifert v. State*, *supra* that the State caused a dangerous condition to exist by neglecting to maintain the shoulders after having had actual or constructive notice of the defects.

Therefore, it is the Court's ruling that the State was negligent in this case and contributed to the accident.

The second issue for the Court to deal with is the amount of damages to be awarded. The Claimant on behalf of Mr. Echternkamp paid the decedent's estate $300,000 in full settlement of their claim. The doctrine of comparative negligence applies in this case and the Court must now determine the percentage of the $300,000 which should be attributed to the State. Having reviewed all of the transcript and exhibits placed in evidence, it is the Court's belief that Mr. Echternkamp was negligent in the operation of the truck; however, the Court believes the State to be 33⅓% negligent in this case.

Therefore, the Court awards $100,000 to the Claimant, Protective Insurance Company, Subrogee of Richard

Fusselman, d/b/a Gene Fusselman, Denver L. Echternkamp and William M. Gully, Subrogors.

(No. 86-CC-0821—Estate of Jose Luiz Olivo, Claimant Carmen J. Olivo awarded $50,000; Claimant Miguel Olivo awarded $30,000; Claimant Edwin Olivo awarded $20,000; Claimant Luz Olivo awarded $20,000.)

CARMEN J. OLIVO, Administrator of the Estate of Jose Luiz Olivo, Claimant, *v.* THE STATE OF ILLINOIS and/or its Department of Mental Health and Developmental Disabilities, Respondents.

Opinion filed October 19, 1993.

REED, SCOBY, & TRAINOR, LTD. (RICHARD TRAINOR, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (JOHN R. BUCKLEY, Assistant Attorney General, of counsel), for Respondent.

HOSPITALS AND INSTITUTIONS—*dosage of drugs exceeding manufacturer's guidelines created prima facie evidence of negligence—patient's death due to asphyxia*. Where Claimant sought compensation for the death of her son, who died from asphyxia due to aspiration of vomit, while being restrained by employees of a State mental hospital, evidence that physicians had administered dosages of Thorazine daily for 2½ years at a level that exceeded the manufacturer's guidelines created a *prima facie* case of negligence.

NEGLIGENCE—*State liable for death of mental health hospital patient —excessive medication.* Where a retarded patient at a State mental hospital died from asphyxia due to aspiration of vomit while being restrained during a psychotic episode, evidence that doses of Thorazine administered over a long time to control the patient's aggressive behavior had exceeded the manufacturer's guidelines, as well as evidence that suppression of the gag reflex is a side effect of being over-medicated with Thorazine, established liability on the part of the State for the negligence of the hospital doctors.

DAMAGES—*decedent's family entitled to damages for pecuniary losses and loss of society.* The parents and siblings of a retarded patient at a State mental hospital, who died as the result of the negligence of the doctors in administering excessive medication, were entitled to damages from the State for pecuniary losses and loss of society, where the family had retained a relationship with the deceased, despite his confinement in the hospital.

OPINION

MITCHELL, J.

The Claimant, Carmen J. Olivo, seeks compensation for the death of her son, Jose Luiz Olivo, on November 1, 1983, at the Shapiro Developmental Center located in Kankakee, Illinois. Shapiro Developmental Center is operated by the Illinois Department of Mental Health and Developmental Disabilities. There are two issues to be addressed in this matter. First, whether the State, through its agents, over-medicated the decedent and therefore deviated from the standard of care. Secondly, whether the actions of the Shapiro staff personnel in restraining the decedent violated the standard of care.

Jose Luiz Olivo was 33 years old at the time of his death. He had been at the Shapiro Developmental Center since September 11, 1973. Jose was diagnosed as moderately mentally retarded with an I.Q. of 40. He also had a history of psychotic episodes which included aggressive behavior. While at Shapiro, Jose received the drug Thorazine. Thorazine is used to treat people who have psychosis. Psychosis is a psychiatric condition in which a person's ability to perceive reality has become defective. Other symptoms include agitation and anxiety.

According to the Physician's Desk Reference (PDR), which lists the manufacturer's recommendations, 500 mg. of Thorazine is generally a sufficient daily dose to control acutely agitated or disturbed patients. While gradual increases to 2,000 mg. a day or more may be necessary, there is little therapeutic gain to be achieved by exceeding 1,000 mg. a day for an extended period. Thorazine is known to have side effects on the central nervous system. These side effects include neuromuscular or extra-pyramidal reactions. These extra-pyramidal reactions include

agitation or motor restlessness; dystonia, which is a muscle spasm, involving the neck muscles and swallowing mechanism; as well as Parkinson-like symptoms.

At the time of his death, Jose was receiving approximately 1,000 milligrams of Thorazine daily. He also was receiving a drug called Artane. Artane is prescribed to counter Parkinson-like symptoms and other reactions to the Thorazine.

On November 1, 1983, Jose Olivo was observed by Robert Dean, his group leader, as being agitated and upset. Mr. Dean also noticed that Jose was more hyper than usual both before and during breakfast. After breakfast, Mr. Dean instructed Jose to clean his room. Jose became upset with this and began slamming doors and ran into another group's area. Mr. Dean, along with another technician, followed Jose into the other area. The two men took Jose by the arms and tried to get him to sit down. When this was not successful, it was necessary to put Jose on the ground.

Jose was being physically restrained on the ground by technicians Robert Dean, Mark Larimer and Doug Jones. Jose was on his back at first and then it became necessary to put him on his stomach. At some point during the struggle, there were four technicians present, one holding each of Jose's arms and legs. This struggle went on for 10 to 20 minutes and according to Novella Morris, another technician, Jose was stating that he wanted to be held still.

After approximately 20 minutes, Jose stopped struggling. He was not moving at all. William DeBlouwe, another technician, tried to tickle Jose to get a response. There was testimony to the effect that on previous occasions Jose would evidently close his eyes and pretend he was sleeping. The staff would then tickle him in order to

arouse him. Apparently, when the tickling "didn't work," Mr. DeBlouwe then performed the Heimlich maneuver on Jose, causing him to vomit. Novella Morris then tried to perform CPR on Jose, without success.

Paramedics from the Kankakee Fire Department arrived on the scene at about 8:30 a.m. The paramedics were not successful in reviving Jose and he was removed to the hospital. The coroner found the immediate cause of death to be asphyxia due to aspiration of vomit.

At the hearing before this Court, both sides brought in medical experts. The Claimant brought in Dr. Nelson Borelli, a board certified psychiatrist, to testify on her behalf.

Dr. Borelli testified that he felt Jose Olivo was overmedicated while he was a resident of Shapiro Developmental Center. At the time of his death, Jose was receiving 1,000 mg. of Thorazine along with a dose of Artane. According to Dr. Borelli, Jose was exhibiting the symptoms of overdosage of Thorazine and that is why he was given the drug Artane. Artane is used to control some of the adverse reactions to the Thorazine.

Jose Olivo died from asphyxia due to aspiration. Dr. Borelli is of the opinion that Jose Olivo's death was caused by the reactions to Thorazine and the way he was restrained by Shapiro personnel. Jose was very agitated that morning and it became necessary for the employees to physically restrain him. During the struggle to restrain Jose, he vomited and subsequently choked on that vomit.

Based on his medical opinion, Dr. Borelli felt that Jose's agitation, as well as his impaired gag reflex, was due to being given excessive doses of Thorazine over a prolonged period of time. The doctor also believed that if the Shapiro staff would have been trained in the proper way to restrain a patient, Jose's death may have been avoided.

The staff, by having Jose's arms crossed against his chest while laying on his stomach, caused Jose to vomit. There also was a staff member on Jose's back as they attempted to hold Jose down. Dr. Borelli felt the staff members should have checked Jose more closely during the struggle for possible signs of distress. This was not done and in Dr. Borelli's opinion, this negligence by the Shapiro staff also contributed to the death of Jose Olivo.

The State relied on Dr. Daniel Luchins, also a board certified psychiatrist, as their expert. Dr. Luchins felt that, in his opinion, the dosage of Thorazine given to Jose Olivo was not excessive and would not have significantly suppressed his gag reflex. Based on the medical records reviewed by Dr. Luchins, he is of the opinion that Jose was not suffering any serious side effects of the medication given to him while at Shapiro Developmental Center. The doctor also testified that in his experience, he has never seen a patient that had a suppression of the gag reflex due to Thorazine. Dr. Luchins also testified that according to the latest scientific literature there is no scientific evidence that Thorazine, in its standard clinical doses, interferes with the gag reflex.

Dr. Luchins stated that in his opinion the best way to determine the effective dosage of the drug would be to test the blood level. According to the medical records, Jose's blood level of Thorazine was 49. The therapeutic range given is between 30 and 300. Dr. Luchins testified that Jose's therapeutic range was low with low potential for side effects.

Dr. Luchins also testified that he did not feel the low white blood count (4500) for Jose was of major concern. He stated that a normal range was 6,000 to 10,000 white blood cells and it was not until the count dropped below 4,000 that the medication should be stopped. Dr. Luchins

was of the opinion that a standard side effect of antipsychotic drugs is a lower white blood cell count. Dr. Luchins stated that since Jose's white blood cell counts remained constant over a couple of years, it was not necessary to test Jose's blood more extensively.

Dr. Luchins testified he did not feel the Shapiro staff was negligent in the way they restrained Jose. In his opinion, there is no perfect way to restrain someone when they are attacking other people. When a person is struggling, it is hard to put them in restraints. When it is necessary to restrain someone, the staff is trained in certain ways to control the arms and legs. It is Dr. Luchins' opinion that something happened while Jose was being restrained which led to his death, but it was not the negligent actions of the employees that caused Jose's demise.

In order for a claimant to prevail, she must show by a preponderance of the evidence that the State owed the claimant a duty, this duty was breached, that the claimant was free of contributory negligence and that the State's breach was the proximate cause of death. *Mazurek v. State* (1975), 30 Ill. Ct. Cl. 247, 249.

In this case before us, the decedent, Jose Olivo, was receiving approximately 1,000 mg. of Thorazine on a daily basis for 2½ years prior to his death. Both Dr. Borelli and Dr. Luchins testified that the level of medication exceeded the manufacturer's recommendation as listed in the Physician's Desk Reference. Jose was also receiving a drug called Artane. Artane is prescribed to counter Parkinson-like symptoms which are side effects of Thorazine.

Jose Olivo was administered doses of drugs which exceeded the manufacturer's guidelines. The coroner found the immediate cause of death to be asphyxia due to aspiration of vomit. Suppression of the gag reflex is a side

effect of being over-medicated with Thorazine. A dosage of drugs which exceeds the manufacturer's guidelines creates *prima facie* evidence of negligence. The State is responsible for the negligent actions of its doctors who treated the decedent. *Cyperstein v. State* (1981), 35 Ill. Ct. Cl. 22, 25.

The Claimant argues that the Shapiro staff was negligent in their attempt to restrain Jose and this also contributed to his death. The staff at Shapiro or at any other center has a responsibility to maintain order and protect all of the patients. When someone is in an uncontrollable state as Jose was, the staff members must do what they can to maintain order. Although the staff received some training on how to restrain a patient, it is not always possible to use the proper textbook techniques. It is not clear by the preponderance of the evidence that the actions of the Shapiro staff constituted negligence in their attempt to restrain Jose and maintain order at the center.

The decedent's family has also made a claim for pecuniary losses and loss of society sustained by reason of the death of Jose Olivo. The testimony of Carmen Olivo and the rest of her family show the family did maintain a relationship with Jose despite the fact he was hospitalized. Where there are parents surviving a deceased child, there is a presumption of substantial loss even when the decedent and the lineal kinsmen are adults.

Although perhaps not crystal clear, the preponderance of the evidence presented suggests that the State did indeed breach its duty in the care of Jose Olivo by exceeding the recommended dosages of his medication and by having done so for a lengthy period of time. Jose Olivo was free from contributory negligence in the fact he only took the medication he was told to take. Therefore, based on the evidence, the Claimant, Carmen J. Olivo, Administrator of the

Estate of Jose Luiz Olivo, is awarded the sum of $50,000 for the estate. Further, the Claimant, Carmen J. Olivo, is awarded the sum of $50,000, Miguel Olivo is awarded the sum of $30,000, Edwin Olivo is awarded the sum of $20,000 and Luz Olivo is awarded the sum of $20,000.

(No. 86-CC-1055—Claim denied.)

KENNETH VAN HORN, Claimant, *v.* THE STATE OF ILLINOIS, DEPARTMENT OF TRANSPORTATION, Respondent.

Opinion filed August 10, 1993.

JACK R. DAVIS (DAVID CORBETT, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (JOHN R. BUCKLEY, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*what necessary to establish State's liability for highway accident.* The Claimant must prove by a preponderance of the evidence that the State was negligent, that the State's negligence was the proximate cause of Claimant's injuries, and that the Claimant exercised due care for his or her own safety.

HIGHWAYS—*lack of factual link between alleged negligent highway design and accident—proximate cause.* Although evidence was presented that may have established that a stretch of State highway failed to meet current design standards regarding limited passing area and shoulder design, the Claimant failed to establish liability of the State for injuries incurred when an oncoming car entered his lane and collided with the motorcycle he was riding, where the evidence failed to provide a factual link between the highway design and the presence of the oncoming car in Claimant's lane of traffic.

OPINION

MITCHELL, J.

This matter came on to be heard for trial on or about March, 1991. After hearing, both parties were afforded

an opportunity to submit briefs. However, only the Claimant submitted a brief.

At trial, the evidence was the following:

On June 23, 1984, at 8 p.m., Claimant was going West on Route 62 between Palatine Road and Route 59. Claimant was driving a motorcycle. The road was wet and visibility was poor. At this time, Claimant was traveling at 30 miles per hour. At this point, Claimant saw a car come into his lane traveling in the opposite direction, i.e., heading directly towards him. Claimant attempted to swerve to the right, but still collided with the car. Claimant lost consciousness and when he regained his consciousness, he was experiencing severe pain in his legs. It was subsequently determined that he suffered multiple fractures of both legs which caused one of his legs to eventually be shorter than the other; pain in his legs for the rest of his life along with stiffness. Claimant was out of work for approximately 28 months, causing him to lose $50,000 in wages. The State and Claimant stipulated that the medical bills from the accident of June 23, 1984, totalled $92,593.32. Claimant's other witness was Matthew Sielski. He testified as an expert witness for Claimant. Mr. Sielski is a professional traffic engineer. After qualifying Mr. Sielski as an expert, Claimant asked Mr. Sielski if he was familiar with Illinois State Route 62 between Palatine Road and State Route 59. Mr. Sielski stated that he was. Mr. Sielski stated that based upon a reasonable degree of scientific certainty, Illinois State Route 62 between State Route 59 and Palatine Road did not meet the standards in the profession of traffic engineers in the following ways: first, the shoulder width should be at least eight feet and the slope of the shoulder should be a one-foot drop every four feet, and second, the passing area at that point of the road is only 700 feet, which is too short to

allow safe passing. The current configuration of the road is that the shoulder is five to five and one-half feet wide with a drop-off of one foot for every two feet. In terms of the passing lane, it is currently 700 feet, but anything less than 850 to 900 feet is unsafe.

After the testimony of his expert witness, Claimant called no other witnesses. The Claimant never produced any evidence which indicated that the motorist with whom Claimant collided was attempting to pass and that as a result of the defective passing distance, the motorist collided with Claimant. Further, Claimant never produced any evidence that the alleged defective shoulder had anything to do with the accident.

The Respondent, State of Illinois, produced evidence from Larry Sorenson, an employee of the Illinois Department of Transportation for 30 years. Claimant stipulated that Mr. Sorenson was an expert and in particular in the area of road design engineering. Mr. Sorenson currently is a plan preparation engineer. His duties include supervising 20 to 30 other engineers and technicians designing various highways in the State of Illinois. Mr. Sorenson stated that Route 62 between Palatine Road and Route 59 is safe. His rationale for that statement was that the highway is generally straight with no horizontal or vertical curves. The shoulder is adequate for a vehicle to pull off with only shallow ditches. Finally, the pavement width meets the current criteria for pavement width. Mr. Sorenson stated that any deviation between the subject stretch of highway and current standards is explained by the fact that the highway, when it was built, was built to the then-prevailing standards. Unless an accident occurred at the location which indicated that it was unsafe, the road would not be reconstructed. The accident information regarding this stretch of highway indicated that in

a three-year period there were two accidents. The two accidents being the accident which is the subject of this lawsuit and a subsequent accident. Finally, Mr. Sorenson stated that there is no requirement to correct a highway shoulder which may be substandard by current standards.

The State's next witness was James Evers, who has worked for the Illinois Department of Transportation for approximately 37 years. Claimant stipulated that Mr. Evers is an expert. Mr. Evers is currently the operations traffic engineer for the arterial section. In his area, they devise the signs and markings for the highways and place the signs and markings on the highway. He stated that Route 62 between Palatine Road and Illinois Route 59 is properly marked according to the standards mandated by the law in Illinois. Finally, Mr. Evers testified that passing safely is the responsibility of the driver who is conducting the passing maneuver.

Claimant submitted a brief in support of his position. The State, in spite of the fact that it indicated on several occasions that it would submit a brief, has not done so. The State indicated that because Assistant Attorney General Buckley, who tried this case, left the office, someone else would submit a brief. However, no brief was ever submitted.

Claimant must prove by a preponderance of the evidence that the State was negligent, that the State's negligence was the proximate cause of the injuries and that the Claimant exercised due care for his or her own safety. *Hoekstra v. State* (1985), 38 Ill. Ct. Cl. 156, 159-160; *Hupka v. State* (1982), 35 Ill. Ct. Cl. 581. Claimant has not met his burden in this case.

The fundamental problem with Claimant's proof is that he has failed to demonstrate, even assuming there

was negligence by the State in the construction or marking of the highway, that negligence was the proximate cause of his injuries. Claimant *never* produced any evidence that the car with which he collided was in his lane because it was passing other vehicles. This was a necessary factual link to establish that the passing zone had anything to do with this accident. In the absence of the evidence of the other driver's actions, it is equally likely that the other driver was asleep at the wheel or was driving recklessly as it is that the driver was passing. The State in its opening statement put Claimant on notice that it was the State's position that the proximate cause of the injury was the unsafe operation of the other vehicle which struck Claimant and not any negligence by the State.

Claimant argues in his brief that the State failed to exercise reasonable care in the design, construction and maintenance of State Route 62 in that the passing area was too short and the shoulder was substandard. The evidence demonstrated no reasonable connection between the alleged negligent condition and the accident.[1] There was no evidence that the alleged substandard shoulder had anything to do with the accident. The sole cause of the accident, based upon the evidence adduced at the trial, is the action of the car which collided with Claimant.

It is hereby ordered that the Claimant has failed to demonstrate any connection between any alleged negligent action by the State and the accident, and the claim is hereby denied.

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[1] As indicated in the statement of facts, the State submitted evidence which indicated that the condition of the road was not unsafe.

(No. 86-CC-1455—Claimant awarded $17,500.)

DAVID SUHRBIER, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed June 27, 1994.

ISADORE M. BERNSTEIN, LTD., for Claimant.

ROLAND W. BURRIS, Attorney General (COLLEEN MCCLOSKEY, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*proximate cause defined.* Proximate cause has been defined as any cause which, in a natural or probable sequence, produced the injury complained of; and it need not be the only cause, it is sufficient if it occurs with some other cause acting at the same time which, in combination with it, causes the injury.

SAME—*bicycle accident—double parking of State-owned van was proximate cause.* Where the Claimant suffered injuries after colliding with an oncoming car while bicycling on a public street within a designated bicycle path that diagonally crossed the street, and the evidence established that Claimant's vision was obscured by a State-owned van being double-parked in a no-parking zone, the State was liable for Claimant's injuries.

DAMAGES—*State entitled to setoff of amount recovered by Claimant in common law action.* Upon finding that the State was liable to the Claimant for injuries received in a collision between the bicycle he was riding and an oncoming car because Claimant's vision was obscured by an illegally parked van owned by the State, the Court of Claims, pursuant to section 790.60 of the Court of Claims Regulations, deducted $7,500 from an award of $25,000 the Claimant previously obtained in circuit court from the driver of the oncoming car.

OPINION

SOMMER, C.J.

The Claimant seeks $75,000 in damages from the State for injuries he sustained when he was struck by a motor vehicle.

On September 3, 1985, Claimant alleges that Respondent was the owner of a food service truck and was negligent in double-parking its van in a no-parking zone, thus causing Claimant's view to be obstructed, which resulted in his inability to see an approaching vehicle

which struck him while on his bicycle. Claimant further alleges that the aforesaid negligent act of the Respondent was the direct and proximate cause of his personal injuries and pecuniary damage.

Claimant filed a lawsuit in the circuit court of Cook County against the driver of the car that struck him and it is entitled: *David Suhrbier v. Mathew Zell*, No. 85 L 25030. Claimant was awarded a judgment in his favor for $7,500. Claimant did not appear at the trial of this claim because he was serving in the Army. At his evidence deposition of June 11, 1991, Claimant stated that he had received active duty orders for an army internal residency program at Brook Army Medical Center in Fort San Antonio, Texas. Claimant's counsel stated that Claimant was in the Army, somewhere in the East. In pursuance to Illinois Supreme Court Rule 212(b)(2), due to his said absence from the county, the transcript of Claimant's evidence deposition, together with the exhibits therein attached, was introduced and admitted into evidence.

The evidence presented consists of the report of the proceedings, filed May 15, 1993. The evidence deposition transcript of Claimant held on June 11, 1991, department report, deposition exhibits 1, 2, 3, 4, being medical records and briefs of both parties.

In his evidence deposition, Claimant stated that he was riding a bicycle to class at the University of Illinois Medical School when he was struck by an automobile, causing him to suffer multiple injuries. He was taken by ambulance to the Carle Foundation Hospital in Urbana, Illinois. There he received medical treatment including x-rays of the knee, arm, shoulder, head and neck. A shoulder harness was placed on his upper right arm, a cast was placed on his forearm and his upper right arm, and a sling placed on his right arm, and he was hospitalized for two days.

Claimant testified that he was physically unable to maintain a full curriculum as prior to his accident and that it took him two years to complete his studies for his masters degree instead of one. He also stated that he was off work at the Ground Round Restaurant where he was employed at the time of the accident for about one year, and that his medical bills were approximately $2,300.

Claimant's testimony disclosed that the accident occurred on Mathews Street, a one-way northbound street in Urbana. There are bicycle paths on both sides; the west side path only runs south. At approximately halfway down Mathews Street, this bicycle path ends. At this point, a diagonal bicycle path marked on the pavement connects the bicycle paths from the west side to the east side of Mathews Street, and when it reaches the east side of the street it resumes its northbound direction. The entire length of the crossing is marked with painted lines and at no time was he outside those lines before being hit by the vehicle travelling on Mathews Street. Upon reaching this crossing path and before entering on to same, he saw a white van of the State double-parked on the west side of Mathews Street in the lane of ongoing northbound traffic, which obscured his vision. Claimant got off his bicycle to look around the parked van, to observe any traffic that may have been approaching the bicycle path. Seeing none, he mounted his bicycle and entered the bicycle path to cross Mathews Street. Halfway through the crossing path, he was hit by a vehicle.

The Claimant must prove by a preponderance of the evidence that the State was negligent in the double-parking of its van and that such negligence was the proximate cause of the accident in order to prevail on his claim. The obstruction of Claimant's vision to observe traffic before attempting to cross Mathews Street was the cause of the

resulting accident. Certainly, unimpeded vision of oncoming traffic would have permitted Claimant to determine if it would be safe to cross the busy thoroughfare on a bicycle without endangering his personal safety. Further, it must be concluded that double-parking of the State's van is *prima facie* negligence in Illinois. *French v. City* (1976), 65 Ill. 2d 74; *Dini v. Naiditch* (1960), 20 Ill. 2d 406.

Proximate cause has been defined as any cause which, in a natural or probable sequence, produced the injury complained of. It need not be the only cause; it is sufficient if it concurs with some other cause acting at the same time which, in combination with it, causes the injury. The position of the Respondent that the independent act of a third person, namely the driver of the car that hit the Claimant, inflicted the injury, is not persuasive. Authorities cited by the Respondent are not on point. The case of *Sheehan v. Janesville*, cited by Respondent, involved the plaintiff sustaining injuries when he swerved his car to avoid a collision and crashed into a truck parked in a no-parking zone. The Court therein held that such parking in a no-parking zone would not have been reasonably foreseeable. In the case at bar, the State's double parking in the path of moving traffic, obscuring the vision of persons wishing to cross is foreseeable.

Claimant, a physician, described the accident in his evidence deposition, and he gave a detailed description of his multiple injuries. The negligent act of the Respondent was the proximate cause of the accident. Invoices submitted as exhibits indicate the injuries and the treatment of same support the nature and extent of the same.

Claimant suffered injuries, pain and suffering, his medical expenses, loss of time, additional cost of college attendance and loss of wages, totalling $25,000. However, pursuant to section 790.60 of the Illinois Court of Claims

Regulations (74 Ill. Adm. Code 790.60), pertaining to "Exhaustion of Remedies," the amount of $7,500, being the amount of the judgment awarded to Claimant in the circuit court case against the driver of the vehicle that struck him, is herewith deducted, for a net award of the claim herein, to $17,500.

Wherefore, it is hereby ordered that the Claimant be awarded $17,500 in complete and full satisfaction of the instant claim.

(No. 86-CC-2302—Claimant awarded $2,500.)

WALTER STEWART, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed June 23, 1994.

HARRIS & BERLIN, for Claimant.

ROLAND W. BURRIS, Attorney General (SANDRA CASTILLO, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*default judgment entered as sanction against State—failure to comply with discovery orders*. Although the State is not normally held liable for intentional torts committed by its inmates, where a death-row inmate received a neck wound in an attack by another inmate in 1984, a claim for compensation was filed in 1986, and the State consistently refused to answer discovery in the case, the Court of Claims entered a default judgment against the State in 1990 as a sanction for failure to comply with the court's discovery orders.

SAME—*prisoner awarded $2,500 damages—attack by another inmate.* Following entry of a default judgment against the State on a death-row inmate's claim arising out of neck injuries received when intentionally attacked by another inmate, the inmate was awarded $2,500 where the injury required two hours in the emergency room and resulted in a superficial scar on his neck, without any major muscle or nerve damage.

OPINION

PATCHETT, J.

Claimant, Walter Stewart, is an inmate in custody of the Illinois Department of Corrections. Mr. Stewart has pled guilty to a charge of murder and had been sentenced to death.

On March 2, 1984, Mr. Stewart was incarcerated at Menard Correctional Center. At about 1:30 p.m., he was in the recreation yard with two other death-row inmates. Mr. Stewart was attacked. During the attack, he blacked out. When he regained consciousness, he was inside a building, lying on the floor with correctional staff and medical staff around him. He does not remember being stabbed.

He was transported to the Chester Memorial emergency room with a neck wound to suture. He was returned to Menard within two hours. Mr. Stewart was in the prison hospital from March 2, 1984, to March 6, 1984. He was then returned to death row. He was provided with bandages and gauze to change the dressing. After three weeks, his stitches were removed.

The evidence showed that the Claimant sustained a superficial wound that went through the skin. The wound healed well. It did not involve any major muscle structure, and the only physical deficit remaining from the injury is a scar.

Mr. Stewart has a well-healed scar on the left side of his neck. The scar is V-shaped with the apices of the V projecting anteriorly. The upper limb measures approximately 2½ inches, while the lower limb measures approximately 2 inches. The scar involves the skin and subcutaneous tissue. The scar is supple; it can slide over the deeper structures of the neck, *i.e.*, it is not attached to the

deep structures. There is no evidence of keloid formation.

This Claimant was attacked by a fellow inmate. The State is not normally held liable for intentional torts committed by its inmates. (*Long v. State* (1986), 40 Ill. Ct. Cl. 39.) However, the State consistently refused to answer discovery in this case. This case was originally filed in 1986. On April 20, 1990, this court entered an order which stated, in relevant part, as follows:

"[w]ith respect to claimant's renewed motion to require compliance with discovery requests and orders and for sanctions, respondent is ordered to comply with or object to all outstanding discovery requests within forty-five (45) days of the date of this order. This is the third such order this Court has entered on this subject. If respondent does not comply with this order, the Court will consider claimant's request for a default judgment."

Despite the fact that this Court entered such an order, the State did not respond. Therefore, on December 7, 1990, this Court entered an order granting judgment on the issue of liability to the Claimant as a sanction for consistent failure to respond to the discovery requests.

Because of the order of December 7, 1990, the trial held before a commissioner of this Court was only on the issue of damages. Although Mr. Stewart claimed substantial physical and emotional damages as a result of the attack, he has failed to prove it. There was no major muscle or nerve damage. There is nothing in the record to support Mr. Stewart's claim for substantial damages. As this court stated in *In re Application of Lopez* (1987), 39 Ill. Ct. Cl. 315: "[D]amages may not be awarded on the basis of conjecture or speculation."

However, Mr. Stewart's testimony clearly showed that he did have pain and suffering and permanent scarring. However, since Mr. Stewart spent only two hours at the emergency room and his sutures were removed in

three weeks, we can conclude that the pain and suffering was not extreme.

For the reasons stated above, we award the Claimant two thousand five hundred dollars ($2,500).

(No. 86-CC-3287—Claim denied.)

ANN FEJES, Executrix of the Estate of Joseph M. Fejes, Deceased, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed February 2, 1990.

Opinion filed May 13, 1994.

ZIMMERLY, GADAU, SELIN & OTTO (JOHN OTTO, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (KAREN MCNAUGHT, Assistant Attorney General, of counsel), for Respondent.

DAMAGES—*widow's life insurance proceeds should not be set off against potential wrongful death recovery.* In an action where the decedent's widow filed a claim, in her capacity as executrix, against the State for her husband's death after hitting a bridge abutment that was unprotected by a guardrail, the court denied the State's motion to dismiss which was premised upon the State's allegation that the $128,000 of life insurance proceeds received by the widow should be set off against the $100,000 maximum recovery allowed by the State, since the Court of Claims has adopted the "collateral source" rule and will not offset the life insurance recovery.

NEGLIGENCE—*bridge abutment unprotected by guardrail—State not liable for fatal accident.* Although the State had a duty to maintain the section of U.S. Route 45 where Claimant's husband was fatally injured when his car hit a concrete bridge abutment unprotected by a guardrail, and even though the bridge abutment was only one foot, ten inches off the roadway, the State was not liable where an entryway into a farm field preceded the bridge by such a short distance to prevent construction of a guardrail, and the design of the bridge did not violate established safety standards at the time the bridge was constructed or at the time of the accident.

ORDER

MITCHELL, J.

This cause coming to be heard on the Respondent's motion to dismiss, and this Court being fully advised in the premises, finds that on June 27, 1984, an automobile driven by the decedent, Joseph M. Fejes, struck a bridge on State Route 45 in Champaign County, Illinois. The decedent's widow, Ann Fejes, is claiming, in her capacity as executrix, $100,000 from the State. The Respondent has made its motion to dismiss on the basis that the widow, Ann Fejes, has received $128,000 in insurance payments because of her husband's death, and that the amount of these payments should be set-off against the $100,000 recovery limit in this Court. The Claimant counters that the widow, Ann Fejes, received the insurance benefits in her individual capacity and not as executrix.

In wrongful death claims this Court has held that the claims are those of the survivors, not the personal representative who acts for the survivors for convenience and to avoid duplication. (It is possible for the personal representative to represent the estate in a wrongful death claim, *i.e.*, pain and suffering of the decedent, however, such is not before us to any substantial degree.) *Pigott v. State,* unpublished order filed February 11, 1986, 41 Ill. Ct. Cl. 216; *Copeland v. State* (1989), 41 Ill. Ct. Cl. 125; *Wilborn v. B. F. Bast, Inc.* (1978), 381 N.E.2d 787, 788.

Apparently, the only survivor who could benefit is Ann Fejes. Therefore, this Court rules that the $128,000 received from insurance may potentially be set-off.

On May 22, 1987, this Court ordered the parties to provide the terms of the insurance contracts under which Ann Fejes recovered. No answer was forthcoming, and the claim was sent to the Commissioner for a determination of

the terms of the contracts. The Commissioner held a pretrial hearing and ordered the filing of the insurance contracts on February 22, 1988. The response contained only the contract for the CUDIS policy in the amount of $80,000. This policy was an accident policy purchased by the decedent. On June 20, 1988, the Claimant was granted 60 days to supply the contracts on the remaining $48,000 worth of insurance recoveries. Though on October 27, 1988, the Claimant advised that all the policies had been filed, the Commissioner states that upon review of the Commissioner's file and the Court file, the contracts for $48,000 were not present.

In the circuit courts, the recovery under the CUDIS policy would be a collateral source recovery, and as this Court has adopted the collateral source rule *Sallee v. State* (1990), 42 Ill. Ct. Cl. 41, the amount of the CUDIS Policy will not be "set-off" under section 26 of the Court of Claims Act. (Ill. Rev. Stat. ch. 37, par. 439.26.) As to whether the other insurance recoveries are to not be "set-off" will depend upon whether the Claimant meets its burden of proof as established in *Keller v. State* (1984), 36 Ill. Ct. Cl. 99. Therefore, it is ordered that the motion of the Respondent to dismiss is denied, and this claim be returned to the Commissioner for trial.

OPINION

MITCHELL, J.

The claim for damages in excess of $100,000 was brought by Claimant, Ann Fejes, executrix of the estate of Joseph M. Fejes, alleging that Respondent was negligent in causing the death of Joseph Fejes. The claim arises out of an accident involving a single motor vehicle driven by Mr. Fejes striking a bridge abutment on U.S. Route 45,

approximately three-tenths of a mile south of Champaign County Road 2300N on June 27, 1984.

In the complaint, Claimant states that "Respondent owed Plaintiff a duty to exercise reasonable care in maintaining, repairing and improvement of highways within the State." (Complaint, par. 3.) Claimant alleges that Respondent breached its duty by committing one or more of the following negligent acts or omissions:

1. Negligently failed to place a guard rail around a certain bridge abutment on U.S. Route 45 in Champaign County, Illinois between the municipalities of Urbana and Rantoul.

2. Failed to provide or post adequate warning of the presence of said unguarded bridge abutment to the users of said highway at the above place.

The complaint includes a bill of particulars in paragraph 13, detailing damages as $193,440 for loss of income, $150,000 for loss in value of business and $4,289.90 for funeral expenses, for a total of $347,729.90.

A hearing was conducted on December 23, 1991. After the close of Claimant's case in chief, Respondent moved for a directed verdict which was taken under advisement and Respondent proceeded with its defense without waiving its motion.

Claimant's Case In Chief

In the presentation of her case in chief, Claimant called four witnesses: Douglas A. Reifsteck, an occurrence witness; Terry A. Klutts, the State trooper responsible for investigating the accident; Jongin Cragg, a former real estate broker; and Matt Fejes, the son of decedent. Ann Fejes testified as a rebuttal witness. The testimony of Charles D. Sanders, Respondent's witness, is used by Claimant in her brief to support her case.

Claimant presented 27 exhibits of which 25 were offered into and admitted into the record. Claimant's exhibits nos. 1 through 23 are photographs depicting various views of the northbound and southbound lanes of U.S. Route 45 at or near the subject bridge abutment. Claimant's Exhibit No. 24 is the Illinois State Police Traffic Accident Report No. 6877834. Claimant's Exhibit No. 25 is an October 4, 1984 letter signed by Cragg confirming that Matt Fejes and Joe Fejes received and turned down an offer of $750,000 to purchase the building and business of the Town & Country Steak House. Claimant's exhibits nos. 26 and 27 were used to refresh the recollection of Matt Fejes, but were not offered into or made a part of this record. Exhibits nos. 26 and 27 are attached to the transcript.

Claimant presented a certified copy of the Life Tables, dated 1978 and published by the U.S. Department of Health and Human Services. The parties stipulated that the 1978 table indicated a life expectancy of an average white male of the age of Mr. Fejes at his death was 11.6 years. The Commissioner took judicial notice of the stipulation and information, and the tables were not made part of the record.

The unrebutted testimony presented in Claimant's case in chief is as follows:

Mr. Fejes was traveling to Rantoul by himself on June 27, 1984, in his daughter's car, a 1967 Volvo. Mr. Fejes had trouble shifting the car because it was a stick shift and he had never driven it on the highway.

Douglas A. Reifsteck, a farmer from Tolono, witnessed the accident on U.S. Route 45 that resulted in the death of Mr. Fejes at about 10:50 a.m. on June 27, 1984. Mr. Reifsteck was hauling grain with a tractor-trailer from

an elevator in Thomasboro, a small town between Urbana and Rantoul. Mr. Reifsteck first observed Mr. Fejes turning around in Thomasboro and heading south, the direction Mr. Reifsteck was traveling. U.S. Route 45, where the accident occurred, is a four-lane divided highway, two lanes being for southbound traffic.

As Mr. Reifsteck picked up speed going south out of Thomasboro, Mr. Fejes passed him, going about 45 to 50 miles an hour. Mr. Fejes passed Mr. Reifsteck about half a mile before the accident occurred. Mr. Reifsteck watched as the car Mr. Fejes was driving veered into the passing lane, and then moved off to the right and hit a concrete bridge abutment, all in about two seconds time. Mr. Reifsteck stopped his truck, put on his four-way flashing lights and called for police and ambulance on his citizens band radio. The abutment hit by Mr. Fejes is identified as survey station 2573 on U.S. Route 45 between Thomasboro and Urbana.

On cross-examination, Mr. Reifsteck stated that he did not see any brake lights and did not see the vehicle skid. He did not see any movement back to the left by the vehicle to try to get it back on the road.

State Police trooper Terry Klutts was one of the police officers who responded to the call. Trooper Klutts observed that Mr. Fejes had collided with the bridge abutment. He determined that Mr. Fejes was not breathing and had no pulse, and he administered CPR until the ambulance came. The coroner's physician determined that Mr. Fejes died within seconds of the accident.

After Mr. Fejes was taken away by ambulance, trooper Klutts took measurements and interviewed witnesses. Trooper Klutts determined that Mr. Fejes had left the road 173 feet before he hit the abutment. Klutts

determined that it would take a vehicle traveling 60 miles an hour between two and three seconds to travel 173 feet.

According to trooper Klutts' measurements, the southbound lane of the road at the bridge where Mr. Fejes was killed was 25 feet 10 inches wide, wall to wall. The pavement of the southbound lane was 22 feet wide and the bridge wall was one foot, ten inches from the edge of the pavement. On cross-examination, Klutts reviewed his report and stated that the roadway at the bridge was 25 feet 10 inches from curb to curb, therefore the bridge walls would then be a total of 29 feet 6 inches apart. The bridge abutment itself was 3 feet 10 inches high and 11 inches wide. A rain gutter, four inches deep, extends along the side of the roadway north from the bridge, about 130 feet 9 inches.

There were guardrails at three of the four approaches to the bridge, but none at the corner of the bridge abutment that Mr. Fejes hit.

There was a driveway or an entrance to a field on the west side of U.S. Route 45 and approximately 10 feet to the north of the bridge. The field had no fences, but was open, without any demarcation lines from the ditch that ran under the bridge all the way north to County Road 2300N. County Road 2300N is about three-tenths of a mile north of the accident scene.

In the beginning of 1984, while Mr. Fejes was still alive, Jongin Cragg, a real estate broker employed by Norrick and Morrow, conveyed an offer to purchase the Town & Country restaurant for $750,000 from Yen Ching, Inc. The offer to purchase was turned down because Mr. Fejes thought the business was worth more. After the death of Mr. Fejes the real estate was sold for

$600,000 on March 1, 1985, to the same people who had made the previous offer. Although Claimant asserts that both offers were for the business and real estate, Cragg testified on cross-examination that at the time of the sale the business was closed. She then stated that the closure would not affect the purchase price because the buyers were buying "real estate not business."

Matt Fejes, son of the decedent, testified that the Town & Country restaurant was owned by J.M.J. Associates, which was a partnership consisting of Mr. Fejes, Matt, and his brother-in-law, Jim Splitic. Mr. Fejes had put $290,000 into the business; Jim Splitic had put $85,000 into the business and Matt Fejes had put $8,000 into the business. He also stated that basically the three were one-third partners.

Matt Fejes stated that at the time of Mr. Fejes' death, there was a business debt of about one million dollars. In any sale, the proceeds were to be divided up with Mr. Fejes getting back his $290,000, Mr. Splitic getting back his $85,000, and Matt Fejes getting back his $8,000. If there was a reduction in sales proceeds, the biggest loser was Mr. Fejes, who had put $290,000 into the business.

Mr. Fejes took a salary of $15,000 a year out of the business, and in addition the business paid for an automobile, entertainment expenses and food for Mr. Fejes, so that the total value of the compensation he took out of the business was from $25,000 to $30,000 a year. On cross-examination, Matt Fejes stated that the salary paid to Mr. Fejes was for Mr. Fejes and his wife, the Claimant, who worked as hostess.

During the time that Mr. Fejes owned and operated the restaurant, he arranged with a State agency to provide

jobs for mentally-retarded children, doing janitorial work in the restaurant. From 15 to 20 mentally-retarded children were trained at the restaurant by the Fejes family.

On cross-examination, Matt Fejes acknowledged that Mr. Fejes had been hospitalized recently and had a lung biopsy performed. He was diagnosed with Wegner's granul omatosis, was on medication, had ulcer problems and high blood pressure.

The life expectancy for white males 69 years of age, Mr. Fejes' age, was 11.6 years pursuant to Life Tables dated 1978.

Respondent's Motion for Directed Verdict

The Respondent moved for a directed verdict at the close of Claimant's case in chief. The Commissioner ruled that the motion would be taken under advisement and that Respondent could present its defense without waiving the motion.

The Court in *Secor v. State* (1991), 44 Ill. Ct. Cl. 215, ruled:

"When considering a motion for directed verdict, the evidence presented in claimant's case must be viewed in its aspect most favorable to the opponent of the motion. The motion should be granted when all of the evidence, viewed most favorably to claimant, totally fails to establish one or more essential elements of the cause of action. [Citations omitted.]

The claimant must prove the Respondent had a duty to claimant, breached its duty and the breach proximately caused his injury." *Secor* at 217.

In deciding a motion for directed verdict, the Court must look solely to the evidence presented by Claimant in his case in chief. *Stanley v. Board of Trustees of the University of Illinois* (1985), 39 Ill. Ct. Cl. 107.

The record shows that the Commissioner, upon an inquiry by Claimant's counsel prior to the presentation of Claimant's case in chief, stated that the departmental

report was made a part of the record and would be considered as evidence in the case. There was no objection made by Respondent to this ruling. Under the circumstances presented here, the Court will allow the evidence included in a departmental report to be utilized when deciding on a motion for directed verdict.

On the element of Respondent's duty to the Claimant, the Claimant did not present any testimony or other evidence that the Respondent is "responsible" for the maintenance, repair and improvement of U.S. Route 45 in Champaign County, as alleged in paragraph 2 of the complaint. A liberal reading of paragraphs 2 and 3 of the complaint together could be interpreted to form the basis of an allegation that Respondent owed Claimant a "duty" to exercise reasonable care in maintaining, repairing and improvement of U.S. Route 45 at or near the scene of the accident.

This liberal interpretation of the allegations is supported by Claimant's argument I in its brief, that, "The State of Illinois Was Negligent In Not Providing A Guardrail At Survey Station 2573, The Bridge Abutment Hit By Mr. Fejes."

There is no doubt Claimant presumed that Respondent was responsible for, and had a duty to exercise reasonable care in, maintaining, repairing and improvement of U.S. Route 45. None of the witnesses testified to any facts that, if proven true, would establish that Respondent had a duty, or even a responsibility, for maintaining, repairing and improvement of U.S. Route 45. No exhibit offered by the Claimant demonstrates that the Respondent had any duty or responsibility in regards to U.S. Route 45 and the respective bridge abutment. Although the evidence viewed most favorably to Claimant as presented in Claimant's case in chief fails to establish the Respondent had any duty, there is sufficient evidence in

Respondent's departmental report that indicates Respondent had a duty, or responsibility, for maintenance and repair of U.S. Route 45 and the abutment. Viewing the material included in the departmental report in its aspect most favorable to the Claimant, the Court finds that Claimant does not fail to establish the element of duty.

In relation to the second element that the Respondent breached its duty, Claimant has presented evidence of a motor vehicle striking a bridge abutment along U.S. Route 45. Claimant asserts that the abutment was approximately one foot and ten inches from the edge of the roadway pavement.

No evidence was presented to indicate that Respondent should or could place a guardrail at the abutment. Claimant did not present any evidence, nor does she cite any legal authority or acceptable safety standards, that would specify that a guardrail should be placed at the abutment.

The nexus of the first prong of Claimant's argument is that Respondent should have designed and constructed the bridge abutment, and the highway, to include a guardrail at the place of the accident. The second prong of Claimant's argument is that Respondent failed to provide adequate warning of the presence of an unguarded bridge abutment to the users of the highway.

It is clear that the basis of the first prong of Claimant's claim is not that Respondent failed to maintain or repair the bridge abutment. Claimant makes no allegation the condition of the unprotected abutment caused the injury, but instead alleges that the location of the unprotected abutment caused the injury. It is not alleged that a defect existed in the condition of the abutment that proper maintenance or repair could have corrected.

It is not clear what is meant by Claimant's allegation that Respondent breached its duty to exercise reasonable care in the "improvement" of the highway, but it is reasonable to conclude Claimant is asserting that at a point in time subsequent to the original design and construction of the abutment and highway a guardrail should have been installed. No evidence was presented in Claimant's case in chief, or in the departmental report, that would show that acceptable safety standards would have required a guardrail, or that subsequent to the original construction a guardrail would have been required. The only relevant evidence on the element of breach of duty is that: (a) the abutment on the east side of the approach to bridge has a guardrail, but the abutment on the west side of the bridge does not have a guardrail; and (b) there is a field entrance (or driveway) approximately 10 feet north of the abutment. Claimant does not cite any authority which stands for the propositions that an unprotected abutment approximately one foot ten inches from an edge of the pavement of a highway is as a matter of law a breach of a duty on the part of the entity responsible for the condition, or that it creates a *per se* hazardous condition.

Claimant's theory as to the breach of duty is essentially as follows: guardrails are attached to the bridge abutments on the east and west side of the northbound lane of U.S. Route 45. A guardrail is attached to the bridge abutment on the east side of the southbound lane of U.S. Route 45 but there is no guardrail attached to the abutment on the west side of the southbound lane. Claimant therefore maintains that the existence of guardrails at three of the four bridge abutments demonstrates that Respondent was aware of the hazard of unguarded abutments at the location. Claimant also presented evidence

of a driveway or field entrance immediately (approximately 10 feet) north of the abutment and in the location where she asserts that Respondent should place a guardrail. Claimant did not present any evidence as to ownership of the field entrance or the reasons for its existence or whether it is legally entitled to be located at that place.

The allegation that Respondent was negligent because it failed to exercise reasonable care in the "improvement" of U.S. Route 45 may be construed liberally to mean that Respondent should have constructed a guardrail as an improvement of the highway and abutment. The Court may find that the evidence, *i.e.*, an absence of a guardrail, in Claimant's case is sufficient to withstand the motion for directed verdict. The Court has previously noted that the duty of a public authority may be breached when it does not erect railing or barriers along the highway at places where they are necessary to make the way safe and convenient for travelers. Among the material facts to be considered are the character and amount of travel, the character of the road itself, its width and general construction, the character and extent of the slope or descent of the bank, the direction of the road at the place, the length of the portion claimed to require a railing and whether the danger is concealed. *Nass v. State* (1979), 32 Ill. Ct. Cl. 487, 494.

In considering the material facts as stated in *Nass*, specifically the width and character of the highway, and because the Claimant's evidence tends to show the abutment to be within two feet of the pavement, the Court finds Claimant's evidence does not fail to establish the element of breach of duty. *Nass* at 487.

The Court finds the evidence on the element of causation is sufficient to withstand the motion. The report of coroner's physician states the condition which gave rise to

immediate cause of death and it shows that the striking of the abutment was a cause.

On the element of damages, there is evidence that the decedent was earning a salary, therefore the evidence is sufficient on the element of injury or damage. Based upon the foregoing, the Court denies Respondent's motion for a directed verdict.

Respondent's Case in Chief

The Respondent presented Charles D. Sanders, a policy development engineer in the Bureau of Design, Department of Transportation, responsible for the preparation of policies, including the use of guardrails and other safety policies on interstate highways. The Commissioner found that Mr. Sanders is an expert in policy design.

Mr. Sanders testified that an effective guardrail could not have been designed at the location of the accident. The 10 feet of space between the abutment and the field entrance is not enough room to construct a guardrail.

There was a warning sign, referred to as a "hazard marker," on the bridge to warn motorists of a hazard. Mr. Sanders opined that the Respondent made a reasonable effort to warn the decedent.

Although decedent left the pavement over 170 feet from the abutment, there was no attempt to recover. The coroner's report indicates Mr. Fejes was on medication and had been advised not to drive.

Sanders explained that the two guardrails attached to the east and west side abutments of the northbound lanes and the abutment on the east side of the southbound lane, were installed according to design standards that were in effect at the time of construction. The purpose of the guardrail was to redirect the motorist from hitting the

abutment. The field entrance, located north of the subject abutment, could not be blocked, therefore an effective guardrail could not be installed. The design standards permit the Respondent to move the field entrance if the entrance does not have to be moved onto another person's property.

Sanders stated that according to today's design standards, a couple hundred feet was necessary to put an effective guardrail at the location. At the time the abutments were originally constructed 100 feet was necessary to install an effective guardrail. The design standards do not permit a guardrail to be installed within the 10 to 15 feet between the field entrance and the abutment.

Sanders did not have any personal knowledge as to why the field entrance was not moved. The departmental report included two memoranda, one dated August 19, 1985, and the other July 18, 1986, on that question. Both memoranda indicate that a guardrail was not installed at the abutment in question because it would block access to the property north of the stream (or bridge) and there was no history of accidents at the bridge. If the entrance was not necessary, Respondent would have placed a guardrail at the location. An improperly installed guardrail, one with too short of a taper, becomes a greater hazard.

In 1982, when the bridge was last worked on, the design standards did not require the installment of a guardrail at the abutment in question.

Rebuttal Witness—Claimant

Ann Fejes testified as a rebuttal witness. She was with Mr. Fejes the last time he saw a doctor. She did not know of any restrictions placed by any doctor in terms of Mr. Fejes' ability to drive.

Case Law

Claimant cites several cases in her brief. The cases do not address the issue of when or where the Respondent may be negligent for the failure to construct a guardrail.

Claimant argues that it is reasonably foreseeable that a motorist would hit a bridge abutment one foot ten inches from the pavement. Claimant cites *Keller v. State* (1982), 36 Ill. Ct. Cl. 99, in support of her argument. In *Keller,* a motor vehicle left a highway and slid into a previously-damaged guardrail. The claimants in *Keller* alleged that Respondent was negligent in permitting the dangerous condition (the previously-damaged guardrail) to exist for over three months. (*Keller* at 101.) *Keller*, unlike the circumstances in the present dispute, is a case where there was evidence of a failure in Respondent's maintenance duty.

Claimant cites *Seifert v. State* (1988), 42 Ill. Ct. Cl. 8, for the propositions that it is reasonable to assume that vehicles leave the paved surface of the highway from time to time and that the Respondent has a duty to maintain the shoulder of the roadway in a reasonably safe condition. In *Seifert*, it was undisputed that the shoulder was in a general state of poor repair. (*Seifert* at 10.) The case at bar is styled, regardless of the allegations, as a case where Claimant is alleging improper design or construction, not maintenance. Claimant has not cited any case addressing the issue of when the State is liable for not designing or installing a guardrail.

In *Brockman v. State* (1975), 31 Ill. Ct. Cl. 53, Claimants alleged that Respondent was negligent in designing a highway. The *Brockman* court noted the well-settled law that the State is not an insurer of the safety of all persons who use its highways. (*Brockman* at 56.) The *Brockman*

claimants presented no testimony to indicate that the design of the highway and drains were not in conformity with accepted standards in the industry at the time they were constructed. The Court ruled that a single instance of a drain becoming clogged is not proof of negligent design. *Brockman* at 57.

The case at bar is similar to *Brockman* because Claimant did not present any testimony or exhibit that indicated that the design of the highway and the abutment were not in conformity with accepted standards in the industry at the time they were constructed. The Claimant did not present any evidence that the failure to place a guardrail at the location in question violated any accepted standards in the industry at the time of the accident.

The Court has addressed the issue of whether the State was negligent for not constructing a guardrail at other locations.

In *Nass v. State* (1979), 32 Ill. Ct. Cl. 487, the Court found that Respondent was not negligent in failing to erect a guardrail at the site where a car left the highway. In *Nass*, the testimony established that when the highway was built, a guardrail was not mandated at that location. (*Nass* at 495.) The Court, in denying the claim, stated that there was no evidence the State violated design criteria in not erecting a guardrail.

In *Vaughn v. State* (1985), 38 Ill. Ct. Cl. 27, the Court entered an award where a dip in the highway caused a vehicle to leave the road and crash into a lake. In *Vaughn*, Claimant called a State trooper as a witness and he testified that there had been other accidents at that location and he had talked to the highway department about putting up protection or a guardrail to keep people from running into the lake. *Vaughn* at 29 and 30.

The *Vaughn* case is distinguishable from the case at bar because the *Vaughn* claimant left the highway because of a condition, the dip, on the highway. In the present case, there is no apparent reason why Mr. Fejes' motor vehicle left the highway. Contrary to the facts presented here, in *Vaughn* there was evidence of prior similar incidents and the opinion of a State trooper that a guardrail should have been present.

Although no cases have been located wherein a motorist struck an abutment not protected by a guardrail, *Hodge v. State* (1981), 35 Ill. Ct. Cl. 50, involves a fact scenario where a motorist struck the concrete headwall of a culvert. The *Hodge* claimant alleged that the location and construction of the concrete culvert was negligent and introduced evidence that highway standards in existence on the date of the accident were such that concrete culverts were obsolete. The evidence showed that the culvert met the construction standards at the time of construction. The Court found that there was no evidence that the headwall should have been removed. The Court noted:

"Further, it is not unreasonable to conclude that monetary limitations would prevent the State from completely redoing every State highway at any time that the State adopts new construction standards for reconstructed or new highways. The impossibility of such a responsibility both from the standpoint of public finances and available manpower militates in favor of a rule that would not require the State to undertake massive reconstruction of existing facilities." *Hodge v. State* (1981), 35 Ill. Ct. Cl. 50, 55.

In the present case, there is no evidence that would prove the Respondent was not in compliance with accepted safety standards, either at the time the abutment and the highway were initially constructed, or on the date of the accident. Claimant argues that the Respondent has not demonstrated that the field entrance could not be relocated. Respondent does not need to demonstrate that the field entrance could not be relocated. The only relevant testimony on compliance with

safety standards was by Sanders. The Court finds that Sanders' testimony establishes that the absence of a guardrail did not violate accepted safety standards.

Furthermore, the Court finds that Respondent did not breach its duty to the decedent by failing to warn him of the nonexistence of a guardrail. The case cited by Claimant in support of her argument was in relation to the State failing to post a second speed limit sign on an exit ramp designed in an "S" configuration. (*Starcher v. State* (1988), 36 Ill. Ct. Cl. 144.) The State posted a speed limit sign for the first curve of the "S" configuration but not the second curve. The State knew from prior testing that the maximum safe speed of the second curve was significantly less than the maximum safe speed posted for the first curve. The present case is distinguishable, because the State in *Starcher* did not just fail to warn, but the warning the State gave misled the motorist to believe the posted speed was safe for the entire "S" configuration. 36 Ill. Ct. Cl. 144, 146.

Claimant did not present evidence of what type of warning should have been present, although she baldly asserts that, "the State should have erected a warning sign warning motorists of the lack of a guardrail, so that the motorist would be properly alerted to take special precautions in crossing the bridge." In the case at bar, the evidence indicated that a warning (hazard marker) sign was placed immediately north of the subject abutment. The Respondent's expert, Mr. Sanders, opined that Respondent made a reasonable effort to warn decedent. Based upon the evidence, including the clear weather conditions, it is reasonable to conclude that the abutment and the warning sign were readily visible to decedent.

For the foregoing reasons, the Court holds that the Respondent did not breach a duty to decedent because of

the absence of a guardrail and an additional warning sign. The Court further holds that Claimant failed to prove by a preponderance of the evidence that Respondent was negligent. Therefore, the claim is denied.

(No. 86-CC-3406—Estate of James Crider awarded $50,000; Claimant Shirley Crider awarded $50,000; Claimant George Crider awarded $20,000; Claimant Linda Keasler awarded $10,000; Claimant Michael Crider awarded $10,000; Claimant Gail Rasmussen awarded $10,000.)

SHIRLEY CRIDER, Administrator of the Estate of JAMES CRIDER, Deceased *et al.*, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed May 13, 1994.

BRYAN J. O'CONNOR III, for Claimant.

ROLAND W. BURRIS, Attorney General (GREGORY ABBOTT, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*estate and family of deceased mental patient compensated for pain and suffering and loss of society.* Where a default judgment was entered against the State on the issue of liability for the death of an inmate who escaped from a mental health center and froze to death, the Court considered the continuing supportive environment provided by the inmate's family, despite the inmate's decade long struggle with chemical dependency that grew into mental illness and self-destructive behavior, and compensated the estate for pain and suffering experienced by the inmate plus funeral expenses, and compensated immediate family members for loss of society.

OPINION

MITCHELL, J.

On January 11, 1985, 27 year-old James Crider's (James) decade-long battle first with drugs and alcohol and ultimately with severe schizophrenia ended when he escaped from the Elgin Mental Health Center (EMHC)

and apparently froze to death in a farm field less than one-half mile from the facility.

This cause comes before the Court on the claim of James' mother, Shirley Crider, for damages under the Survival Act, damages under the Wrongful Death Act, and for funeral and burial expenses, including claims by James Crider's parents and siblings for loss of consortium and society.

A default judgment was entered in Claimant's favor on the issue of liability. Therefore, the only question for this Court is the amount of the damages.

Detailed testimony was heard from each of the members of the family concerning their relationship with James, both as he was growing up and after the onset of his mental illness. Having heard all testimony and viewed the detailed Claimant's exhibits, it is clear that James grew up in a supportive environment and that even if James' father's work caused him to sacrifice some family time in order to support his family of eight, there were obviously many good times shared by James with his family before the serious problems of chemical dependency and mental illness set in.

The Crider family was worn out from riding the roller coaster of emotions caused by having a mentally-ill family member. (James was hospitalized for 1,174 days but that means he must have been home for nearly 2,000 days between hospitalizations during that last decade of his life.) They would be less than human if, upon learning of James' death, they did not feel at least to a small degree a sense of relief both that James' battle with the demons within him was finally over, and that their own conflicting emotions over what James had been and what he had become could be put aside and grieving over the loss of

the former begun. Further, it was impossible for the Crider family to detect when James' behavior caused by chemical dependency changed into actual mental illness from which no amount of detoxification could save him.

Because the sole question before us is damages, we must limit our holding to that area.

We find Claimant's comparison to *Copland v. State* (1989), 41 Ill. Ct. Cl. 125, inappropriate as regards the amount of monetary damages.

In *Copland*, the decedent was a hopelessly retarded but very loving boy whose life revolved around his relationship with his family, who exhibited an almost incredible outpouring of affection for this boy who would remain a perpetual infant, but was at least capable of returning a child's love.

By contrast, James Crider was no longer able to profit from the love or affection of his family as his illness became more pronounced and his withdrawal from the real world more complete.

Family reaction in the two cases is likewise dissimilar. Scott Copland's family had no reason to expect Scott's death; James Crider's family knew of his self-destructive behavior. James Crider's family understood that their efforts were largely futile, and for the most part, with the exception of his mother, visited him only ancillary to visits to the home when James happened to be there. It was a logical reaction to a painful situation which they felt helpless to reverse. Nonetheless, the comparison to *Copland* is inappropriate.

James Crider, although obviously not in his right mind, walked into subfreezing temperatures wearing only a thin nightgown. We can only hope that he was not aware

of the suffering his body endured in freezing to death. A large portion of the loss occurred before James' death because of his mental illness, for which the State of Illinois is not liable, and the amount awarded reflects that fact. For the pain and suffering decedent suffered prior to death, we award to the estate of James Crider the sum of $50,000, including expenses of funeral and burial. To Shirley Crider, who remained a regular visitor to James and, even in the face of his threat upon her life, suffered the pain of watching him deteriorate, we award the sum of $50,000 for loss of society. To his father, George Crider, we award the sum of $20,000 for loss of society. To his sister, Linda Keasler, we award the sum of $10,000 for loss of society. To his brother, Michael Crider, we award the sum of $10,000 for loss of society. To his sister, Gail Rasmussen, we award the sum of $10,000 for loss of society.

(No. 87-CC-0048—Claim denied; motion for reconsideration denied.)

M. JAMIL HANIFI, Claimant, *v.* THE BOARD OF REGENTS OF THE REGENCY UNIVERSITIES SYSTEM OF THE STATE OF ILLINOIS, Respondent.

Opinion filed September 20, 1993.

Order filed January 21, 1994.

Order filed March 17, 1994.

Order filed May 12, 1994.

M. JAMIL HANIFI, *pro se*, for Claimant.

GRIFFIN, WINNING, LINDNER, COHEN & BODEWES (GEORGE M. SHUR and R. MARK MIFFLIN, of counsel), for Respondent.

EMPLOYMENT—*wrongful discharge—termination was voluntary—hearing was not wrongfully denied*. A State university professor, who signed a letter of

resignation when confronted with the fact that he had plagiarized his doctoral thesis, published a book with plagiarized material, and used the plagiarized material in his application for his current job, cannot complain that he was improperly denied a hearing on the propriety of his discharge where, despite the Claimant's uncorroborated allegation that he was coerced into signing the letter of resignation, numerous witnesses presented credible evidence that Claimant voluntarily chose to resign when faced with the alternative, which would have included a well-publicized hearing on the matter.

OPINION

FREDERICK, J.

The Claimant, M. Jamil Hanifi, filed his amended verified complaint in the Court of Claims on November 17, 1986. Claimant alleged that the Respondent, Board of Regents of the Regency Universities System of the State of Illinois, breached the Claimant's contractual and due process rights to a hearing in relation to employment discharge proceedings after Claimant's resignation of his employment with the Respondent and that the resignation of the Claimant was coerced by Respondent and involuntary and, therefore, invalid.

The cause was tried by Commissioner Whipple, who was assigned to this case.

The Facts

The Claimant, M. Jamil Hanifi, had been employed with Northern Illinois University since 1969. It is undisputed that the Claimant plagiarized his doctoral thesis, which he obtained from Southern Illinois University in 1969. In addition, Claimant later published the plagiarized material in a book. Included in the Claimant's book and doctoral thesis was plagiarized material from a book written by Mr. Manfred Halpern and material from an essay written by Professor Robert Bellah. Three of the nine substantive chapters of the Claimant's book were plagiarized. The plagiarized doctoral thesis and book were

used in conjunction with Claimant's application to obtain tenure on the faculty of Northern Illinois University.

Professor Robert Bellah first became aware of Claimant's plagiarism in 1976. Claimant testified that Professor Bellah wrote to him by letter of June 29, 1976. Claimant claims that he discussed this letter with Professor Ronald Provencher, the then chairman of the Department of Anthropology at Northern Illinois University. Mr. Hanifi claims that Professor Bellah accepted his apology and assurance that there would be no repetition of his plagiarism. Claimant also testified that Professor Provencher ultimately indicated that he did not like the way that Professor Bellah had handled the case and he tore up his copies of the letters from Professor Bellah and put them in the wastebasket.

Professor Provencher testified that he had been called by Professor Bellah in 1976 and that he had asked Professor Bellah to write a letter to Mr. Hanifi, detailing the plagiarism and to send Professor Provencher, as the chairman of the Department of Anthropology, a copy of this letter. Professor Provencher indicated that he never received the follow-up letter detailing the allegations from Professor Bellah and, therefore, the matter was dropped at that time. Professor Provencher denied that he ever told Mr. Hanifi that he did not approve of Professor Bellah's handling of this matter. Professor Provencher also denied that he tore up any letters from Professor Bellah.

The publisher for Mr. Manfred Halpern had first confronted Mr. Hanifi concerning the plagiarism of the Halpern material in 1977. At that time, Mr. Hanifi paid a financial settlement of $750 and apologized for his plagiarism of the Halpern book. Mr. Hanifi did not inform Southern Illinois University, where he had obtained his

doctoral degree, or Northern Illinois University, where he was then employed, of the Halpern plagiarism in 1977. In 1981, Southern Illinois University became aware of the Claimant's plagiarism of the Halpern book. The then acting dean of Southern Illinois University, Mr. John Jackson, confronted Mr. Hanifi with the charges of plagiarism of the Halpern book by letter dated January 16, 1981. Mr. Hanifi responded to Dean Jackson by admitting that he had plagiarized the Halpern book in a letter to Dean Jackson dated January 22, 1981. Acting on behalf of Southern Illinois University, Dean Jackson further inquired of Mr. Hanifi as to whether or not there had been any plagiarism in addition to the Halpern book. Mr. Hanifi responded, in writing, to Dean Jackson, assuring him that there was "No other plagiarism involved in the dissertation."

By letter dated April 24, 1981, Southern Illinois University formally advised Northern Illinois University of Mr. Hanifi's plagiarism of the Halpern book. At the time of the disclosure of the plagiarism to Northern Illinois University, Mr. Hanifi's application for the chairmanship of the Anthropology Department at Northern Illinois University was being considered. Mr. Hanifi met with the chairman of the department, Stanley Witkowski, who recommended that Mr. Hanifi withdraw his application for the chairmanship of the department. Mr. Hanifi testified that he met with chairman Witkowski on May 4, 1981, and was advised by Witkowski that the dean of Northern Illinois University wanted Mr. Hanifi to withdraw his application for the chairmanship of the Department of Anthropology. Chairman Witkowski denied that Dean Norris of Northern Illinois University had requested the withdrawal. Mr. Hanifi sent a letter to Dean Norris, withdrawing his application for the chairmanship of the Department of Anthropology. Dean Norris formally

acknowledged the fact that Mr. Hanifi had withdrawn from the candidacy for the chairmanship of the Department of Anthropology by letter dated May 7, 1981. Dean Norris testified that he had not solicited Mr. Hanifi's withdrawal from the candidacy for the chairmanship, nor had he discussed Mr. Hanifi's withdrawal with any other individuals involved prior to the Claimant's withdrawal.

Mr. Hanifi testified that he met with Dean Norris on May 8, 1981, and the dean told him at that time that his resignation from the chairmanship of the Department of Anthropology was sufficient discipline with reference to his admitted plagiarism. Dean Norris specifically denied that he ever told Mr. Hanifi that his withdrawal from the chairmanship candidacy was sufficient punishment for his admitted plagiarism. Dean Norris had not investigated the charges of plagiarism and, thus, had no opinion as to whether or not Mr. Hanifi should withdraw from the chairmanship prior to the time that Mr. Hanifi withdrew his candidacy.

John LaTourette, the current president of Northern Illinois University, who was the vice-president and provost of that university in 1981, acknowledged that plagiarism is "probably the most serious charge against a faculty member that one could imagine." The president of the university in 1981, William Monat, similarly acknowledged that plagiarism is "probably one of the greatest offenses that can occur in the academic community." Mr. Hanifi, himself, has written to others and admitted during his testimony that plagiarism involves "a complete lapse in professional judgment, moral sense and respect for academic ethics," "a most serious violation with dishonor, shame and guilt," "unethical conduct," "dishonorable and unprofessional conduct," and "dishonorable act and reprehensible and condemnable," "a violation of basic scholarly activity

and serious misconduct," "a despicable act and a serious mistake." Mr. Hanifi acknowledged that the plagiarism is not erasable.

After Mr. Hanifi's withdrawal from the candidacy for the chairmanship of the Department of Anthropology, Mr. Hanifi went out of town to Washington, D.C. While Mr. Hanifi was out of town, in accordance with the instructions of Dean Norris, Professor Donn Hart investigated and confirmed the allegations of plagiarism which had been included in Dean Jackson's letter from Southern Illinois University to Northern Illinois University. Upon receipt of this information, Dean Norris wrote to Mr. Hanifi, indicating that the two of them should meet right away.

In response to the letter from Dean Norris, Mr. Hanifi telephoned the dean from Washington, D.C. on June 13, 1981. During the course of the hearing, Mr. Hanifi testified that Dean Norris raised the issue of his resignation during this telephone conversation. The statement, however, is contrary to statements made during the prior deposition of Mr. Hanifi, during which he indicated that Dean Norris had not mentioned resignation during this telephone conversation. On cross-examination, Mr. Hanifi acknowledged that he had, himself, first raised this issue of resignation in his letter of January 22, 1981, to Dean Jackson at Southern Illinois University when the Halpern book plagiarism had first come to light. In this letter, Mr. Hanifi specifically acknowledged that he was prepared to accept the decision and consequences of Southern Illinois University and asked only that he be advised of the decision before it was made public so that he could "resign if need be * * * and return to Afghanistan." Dean Norris testified that Mr. Hanifi first raised the possibility of his resignation with him at their meeting held on July 7, 1981.

Following this telephone conversation with Dean Norris on June 13, 1981, and before Mr. Hanifi returned to Northern Illinois University from Washington, D.C., Mr. Hanifi spoke with a colleague of his, Professor Cecil Brown, concerning this matter. Mr. Hanifi testified that Professor Brown told him that he should resign for the sake of the department and that Southern Illinois University was looking to Northern Illinois University to take action and the Board was looking to Northern Illinois University to take action. Professor Brown acknowledged that he had recommended to Mr. Hanifi that he resign. However, Professor Brown specifically denied that he told Mr. Hanifi that Dean Norris, Southern Illinois University, or the Board of Regents wanted his resignation or wanted Northern Illinois University to take action against Mr. Hanifi.

Mr. Hanifi met with Dean Norris on July 7, 1981, upon Mr. Hanifi's return to Northern Illinois University from Washington, D.C. According to Mr. Hanifi, Dean Norris indicated during this meeting that he had two items for Mr. Hanifi. One was a resignation letter and the other was an envelope containing "the machinery to dismiss you." Mr. Hanifi testified that Dean Norris told him he could see what was in the envelope if he did not sign the resignation letter. Mr. Hanifi testified that Dean Norris told him that the Board was looking to secure Mr. Hanifi's resignation or to fire him and that Southern Illinois University was looking to Northern Illinois University to take action against Mr. Hanifi. Mr. Hanifi also testified that he was overwhelmed by the dean's statements and was absolutely intimidated. Mr. Hanifi testified that he did not want to resign, but he went ahead and signed the letter of resignation. Mr. Hanifi testified that he did not read the letter of resignation but he did indicate that he asked that the phrase "for personal reasons" be

inserted into the letter. Mr. Hanifi testified that he was not shown a letter to him from the provost, which detailed the charges of his plagiarism and which referred to Mr. Hanifi's rights under the university constitution and by-laws, including a summary of the evidence and witnesses against him and containing the recommendation of the provost that Mr. Hanifi be discharged for cause immediately.

Mr. Hanifi testified that he was not told of his right to a hearing at this meeting with Dean Norris on July 7, 1981, and that he was not aware of his right to a hearing notwithstanding his position of professor at Northern Illinois University and having been employed there since 1969. However, on cross-examination, Mr. Hanifi admitted that in a letter which he wrote on February 24, 1982, to Professor Carroll Riley at Southern Illinois University that Mr. Hanifi had acknowledged that Northern Illinois University had offered him the option of an open hearing which he declined because "it would have made public the stain on Southern Illinois University, my department here, and would have led quite likely to my immediate dismissal." The letter of resignation is a one-paragraph letter which simply states Mr. Hanifi resigns his position for personal reasons effective May 15, 1982. Mr. Hanifi testified that he was not aware that he would be allowed to teach the upcoming academic year when he signed the letter on July 7, 1981.

Dean Norris testified that he specifically read the letter from the provost to Mr. Hanifi, which detailed the charges of plagiarism, during this meeting between Mr. Hanifi and Dean Norris on July 7, 1981 and that he gave a copy of the letter to Mr. Hanifi at that time. This letter included reference to Mr. Hanifi's rights under the university constitution and by-laws. Dean Norris also had a copy of the constitution and by-laws available for Mr.

Hanifi. Dean Norris testified that Mr. Hanifi asked if the hearing would be secret and that Dean Norris indicated that the proceedings were confidential, but the fact that the hearing was going on would probably not be able to remain confidential. Mr. Hanifi indicated to Dean Norris that he was concerned about the impact of a public hearing on his family.

Dean Norris then asked Mr. Hanifi to sign a receipt for his copy of the charges detailed in the provost's letter. Mr. Hanifi then asked if there was any way that these proceedings could be avoided and Mr. Hanifi raised the possibility of his resignation. Dean Norris advised Mr. Hanifi that if he resigned from the university, the issue would be moot. Dean Norris testified that as a result of his conversation with Mr. Hanifi, the dean asked his secretary to prepare a letter of resignation, which Mr. Hanifi then signed. Dean Norris denied that the resignation letter had been typed prior to his meeting with Mr. Hanifi. Dean Norris indicated that the effective date of May 15, 1982, resulted from Mr. Hanifi's request. Mr. Hanifi's son graduated from high school in May of 1982. Dean Norris officially accepted the letter of resignation from Mr. Hanifi by letter dated July 10, 1981.

Dean Norris specifically denied the allegations of Mr. Hanifi with reference to comments made about Southern Illinois University and the Board of Regents. Dean Norris testified that neither the Board of Regents nor Southern Illinois University was requesting the resignation of Mr. Hanifi, nor had they requested Northern Illinois University to take action against Mr. Hanifi. Further, Dean Norris specifically testified that he had not told Mr. Hanifi that the Board of Regents or Southern Illinois University was requesting his resignation or was requesting that action be taken against him.

In accordance with the letter of resignation, Mr. Hanifi taught his regular course load the next 1981-1982 academic year. However, Mr. Hanifi testified that he was "in a daze" from July through the fall semester of 1981. In December, he met with the president of Northern Illinois University to review the procedures followed in his resignation and to inquire about pressure from the Board of Regents. By letter dated January 19, 1982, President William Monat of Northern Illinois University responded that he refused to review the resignation or to reverse the actions of the dean. Significantly, President Monat testified that "the seriousness of plagiarism is probably one of the greatest offenses that can occur in an academic community," and that it was his sense that Mr. Hanifi would have been discharged had he not resigned. This is true even though the charges brought related exclusively to Mr. Hanifi's plagiarism of the Halpern book. Dean Norris was not aware of Mr. Hanifi's plagiarism of Professor Bellah's work until three years after the resignation of Mr. Hanifi.

Mr. Hanifi did nothing further until April of 1982 when he went to see Dave Murray, the chairman of the Board of Regents at the time. Mr. Hanifi testified that Mr. Murray told him that he should not have resigned and that he had legitimate reasons to pursue a legal case against Dean Norris and Northern Illinois University. Mr. Hanifi also testified that Mr. Murray told him that he knew of a case of plagiarism in the Department of Foreign Language at Illinois State University where the individual continued to teach. Mr. Murray recalled the meeting differently. Mr. Murray testified that he had absolutely not told Mr. Hanifi that he thought Mr. Hanifi had legitimate reasons to file suit and that he would never, and did never, express any opinion of Mr. Hanifi's

lawsuit. Mr. Murray denied telling Mr. Hanifi that he should not have resigned and denied telling him that he thought Mr. Hanifi should pursue this matter in the courts. Instead, Mr. Murray's testimony was that he simply told Mr. Hanifi that he should see an attorney and do whatever the attorney said and he referred Mr. Hanifi to an attorney. Mr. Murray denied advising Mr. Hanifi that an Illinois State University professor accused of plagiarism continued to teach and, in fact, testified that it was his recollection that the Illinois State University professor accused of plagiarism was either terminated or resigned.

The Law

Claimant has the burden of proving by a preponderance of the evidence that he had contractual and/or due process rights to a hearing prior to discharge by the Board of Regents of the Regency University System of the State of Illinois after his resignation was accepted by the Respondent. The Claimant must also prove that such contractual or due process rights were violated by Respondent and that he 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, he cannot recover and we do not reach the issues as to contractual or procedural rights, a violation of those rights and damages.

From the lack of authorities cited in the briefs and our research, we find this particular factual situation to be one of first impression in the Illinois Court of Claims. However, the threshold issue we must first determine has been litigated in the civil courts and is an issue of voluntariness and coercion or lack thereof that can be determined from the evidence presented and from determining the credibility of the witnesses, including the Claimant.

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 his 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 his resignation was involuntary, coerced or the product of duress. The testimony of Claimant and Respondent's witnesses is at loggerheads. To believe Claimant's testimony as to coercion, duress and involuntariness, we would have to disbelieve numerous other witnesses and find some grand conspiracy among the top officials at Northern Illi-

nois University to injure Claimant, which would include mass perjury. Claimant has presented no compelling evidence to corroborate his testimony and therefore in light of the credible testimony disputing his claim, we find his testimony incredible. Frankly, we do not believe this admitted plagiarizer when he claims his will was overcome and he did not know what he was doing.

The Claimant has failed to pass the threshold question. He has failed to prove by a preponderance of the evidence that his resignation was not voluntary. Claimant made a voluntary and knowing resignation when faced in his mind with the options of seeking a hearing or resigning. Claimant alone made the choice to resign. The Respondent did not coerce the Claimant into resigning. Once Claimant voluntarily resigned, he had no right to a hearing and may not complain of an alleged illegal discharge.

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

ORDER

FREDERICK, J.

This cause coming on the Claimant's motion for reconsideration, and the objection thereto, and the Court having reviewed the pleadings and testimony, and the Court being fully advised in the premises.

Wherefore, it is ordered that the motion for reconsideration is denied.

ORDER

FREDERICK, J.

This cause coming on the Claimant's request to reopen and remove Claimant's attorney, Respondent's

objection to request for extension of time, and Claimant's objection to the objection to request for extension of time.

Wherefore, the Court finds:

1. That on September 20, 1993, the Court rendered an opinion denying Claimant's claim.

2. That the opinion was signed by four judges of the Court of Claims.

3. That the Commissioner assigned to the case did not write the opinion.

4. That the opinion indicated that Claimant had failed to meet his burden of proof. Issues of credibility were resolved adversely to Claimant in great part leading to the opinion of the Court.

5. That on January 21, 1994, the Court denied Claimant's petition for rehearing. In ruling on the petition for rehearing, the Court reviewed the entire court file and transcripts and the determination of credibility and findings of fact and findings of law. The Court believed the opinion was properly entered, was properly based on the evidence and law, and the Court did not change its opinion. The petition was denied.

6. That pursuant to sections 790.220 and 790.230 of the Court of Claims Regulations (74 Ill. Adm. Code 790), the Claimant has requested a rehearing and same has been denied.

7. That the regulations state, "Neither the claimant, nor the respondent, shall be permitted to file more than one application or petition for rehearing." Section 79.230.

8. That the *pro se* request to reopen filed February 14, 1994, is an impermissible attempt to seek a rehearing a second time.

9. That Claimant's objection to request for extension of time is not well taken. This Court ruled on the evidence. This Court did not consider in any way Claimant's race, creed or culture. The Court ruled based solely on the evidence and the law.

10. That Claimant filed his claim, presented his case at trial, and did not obtain the result he had hoped for. He is not entitled to a second trial.

Therefore, it is ordered:

A. That Claimant's request to reopen is denied.

B. That the motion for extension of time is denied.

ORDER

FREDERICK, J.

This cause coming on for hearing on Claimant's petition for a rehearing filed March 18, 1994, and Claimant's revised petition for a rehearing filed March 28, 1994, and the Court having reviewed the pleadings, and the Court being fully advised in the premises, wherefore, the Court finds:

1. That on January 21, 1994, the Court denied Claimant's first petition for rehearing.

2. That pursuant to sections 790.220 and 790.230 of the Court of Claims Regulations (74 Ill. Adm. Code 790), the Claimant has previously requested a rehearing and the request has been denied.

3. That the regulations state, "Neither the claimant nor the respondent, shall be permitted to file more than one application or petition for rehearing." Section 790.230.

4. That the March 14, 1994, and March 28, 1994, petition for rehearing and revised petition for rehearing

are an impermissible attempt to seek a third and fourth rehearing. (See order entered March 17, 1994, previously denying the second request for rehearing.)

5. That there must be finality to cases and the Court's prior opinion is final denying Claimant's claim for the reasons stated therein.

Therefore, it is ordered that Claimant's petition for a rehearing filed March 18, 1994, and the revised Claimant's petition for a rehearing filed March 28, 1994, are denied.

(No. 87-CC-0180—Claim denied.)

DEBRA O'NEILL, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed November 30, 1993.

GRURMAN & NATHAN (PATRICIA FLORIO, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (GREGORY ABBOTT, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*what Claimant must show*. For a Claimant to recover in a negligence claim, she must show by a preponderance of the evidence that the Respondent owed the Claimant a duty, the duty was breached by a negligent act or omission to act, and that the act or omission proximately caused a compensable injury.

SAME—*State's duty of care*. The State has a duty to exercise ordinary care in maintaining its premises in a reasonably safe manner.

SAME—*slip and fall near water fountain—claim denied*. In a negligence claim arising out of a slip and fall near a water fountain in a Department of Public Aid office, the Claimant was denied recovery, since she failed to prove that the State had notice that there was water on the floor on the day in question, and, given the Claimant's history of prior back injuries, there was no showing of a causal connection between her fall by the water fountain and her back pain.

OPINION

PATCHETT, J.

The Claimant brought this action against the State of Illinois for its alleged failure to exercise ordinary care and its failure to operate its premises in a reasonably safe manner for persons lawfully upon its premises. The claim arises from an accident which occurred on August 2, 1984, at the Illinois Department of Public Aid offices located at 5822 North Western Avenue in Chicago, Illinois. On that date, the Claimant was lawfully on the premises awaiting an appointment with her caseworker. While waiting to meet the caseworker, she decided to get a drink of water from a water fountain. As she approached the water fountain, she slipped and fell on her tailbone.

The Claimant testified that she did not notice any water prior to the fall. Several Public Aid employees helped her up and asked her if she would like an ambulance. The Claimant refused an ambulance and walked to her home about three blocks away. The Claimant and her mother then went to Edgewater Hospital for treatment. At the hospital, x-rays were taken, and she was referred to Dr. Arnold. Dr. Arnold gave the Claimant heat treatments on the day of the accident. She returned to Dr. Arnold to receive numerous treatments over the next 10 weeks.

The Claimant has a history of prior injuries. In 1976, she tripped and fell backwards down five stairs, fracturing her coccyx, or tailbone. In addition, she injured her lower back at that time. She never received any treatment for that injury. She testified that the pain she suffered as a result of the 1976 fall remained with her as of the date she answered interrogatories in this claim in 1986. She suffered further injury to her tailbone and lower back

during a fall in 1980. She received no medical treatment for that injury either.

For a Claimant to recover, she must show by a preponderance of the evidence that the Respondent owed the Claimant a duty, the duty was breached by negligent act, or omission to act, and that the act, or omission, proximately caused a compensable injury. (*McCoy v. State* (1985), 37 Ill. Ct. Cl. 182.) The Respondent has a duty to exercise ordinary care in maintaining its premises in a reasonably safe manner. *Fleischer v. State* (1983), 35 Ill. Ct. Cl. 799.

There is no doubt that the Respondent owed the Claimant a duty, and there was no doubt she was injured. There is a doubt that the Respondent had notice of a defective condition before the accident in question. The Claimant testified that she was in the Public Aid office on the day before the accident. She noticed on that day that the water fountain had an out-of-order sign on it. There is no testimony, or other evidence, to indicate that the water on the floor which may have caused her fall somehow resulted from the out-of-order water fountain. She did testify that the area where the water fountain was located was well lighted, and she was able to clearly see the floor.

Most importantly, the Claimant did not establish that the Respondent had notice that there was water on the floor on the day of the accident, August 2, 1984. Her testimony clearly indicated that the water causing her fall was minimal and not noticeable to the naked eye. In fact, she was only aware of the water after the fall. She simply failed to prove that the Respondent breached its duty to maintain the premises in a reasonably safe condition due to the lack of notice of the unsafe condition.

It is also fundamental that the Claimant show a causal connection between her pain and the fall in question.

There is ample evidence in the record of the two prior injuries to her tailbone and lower back area. The Claimant admitted on cross-examination that her back pain was a result of the 1976 injuries. Although the testimony on direct examination was clearly very different, the commissioner who had the opportunity to observe the witness testify clearly felt that the Claimant failed to prove her case regarding damages by a preponderance of the evidence.

For the reasons above stated, we hereby deny this claim.

(No. 87-CC-0223—Claim denied; Petition for rehearing denied.)

RICHARD T. COULSON, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed March 16, 1993.

Order on petition for rehearing filed December 10, 1993.

COULSON & GRIMM (WESLEY J. COULSON, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (THOMAS S. GRAY, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*duty of persons approaching place of danger—highways*. Persons approaching a place of danger have a duty to do so cautiously and with a proper degree of care for their own safety, and drivers utilizing highways of the State are charged with the duty of looking and seeing things which are obviously visible.

SAME—*collision with street sweeper—Claimant failed to exercise reasonable caution—claim denied*. Where the Claimant sought damages for personal injuries and loss of income, alleging that the State negligently operated a street sweeper causing the Claimant's vehicle to collide with the rear of the sweeper which in turn caused the Claimant's vehicle to be struck from behind by a pick-up truck, the claim was denied, since the evidence showed that the proximate cause of the accident was the Claimant's own negligence

in failing to exercise reasonable caution and care as he approached a dust cloud apparently created by the sweeper.

OPINION

FREDERICK, J.

Claimant, Richard T. Coulson, filed his cause of action in the Court of Claims on August 6, 1986. He alleged that the State negligently operated a street sweeper resulting in Claimant's vehicle colliding with the rear of the street sweeper and that Claimant's vehicle was, in turn, struck from the rear by a pickup truck that had been following the Claimant. Claimant alleges that he sustained personal injuries as a result of the collisions and seeks compensation from the State for those injuries, including loss of income.

The Facts

Claimant testified that in the morning of August 4, 1984, he was operating his vehicle westbound on Route 162 as it approached the I-55—I-70 overpass near Troy, Illinois. Claimant testified it was a "nice day" and hot. The speed limit at the accident site was 45 miles per hour. The Claimant was driving about 40 miles per hour as he approached the I-55—I-70 overpass. As Claimant approached the scene of the accident, a tractor trailer rig made a turn in front of Claimant, and Claimant started to slow down. The tractor trailer rig began to access the entrance onto the interstate highway and Claimant veered to his left to pass the tractor trailer rig. Claimant passed the truck on the left as the truck was going onto the northbound entrance ramp for the interstate highway.

Claimant testified there was traffic congestion in the area and he was concerned about getting through the intersection safely. After making it through the intersection,

Claimant focused his attention on the westbound lane of Route 162 where he observed a dust cloud. There was no traffic ahead of him on the westbound lane of Route 162. Claimant testified that he "didn't know what he was getting into" and was concerned about what the dust cloud was or if there was traffic ahead of him. Claimant testified that when he first went into the dust cloud, he immediately took his foot off the accelerator and started tapping his brakes. Claimant testified that he could not observe how far west he had proceeded on the bridge overpass when he tapped his brakes because the dust was so intense he did not know exactly where he was at. Claimant testified he didn't know if he was going to hit something in the dust cloud, or if somebody was going to hit him in the rear because there was traffic behind him. Claimant testified he was afraid to stop completely for fear of getting struck in the rear. Claimant testified it was a thick dust cloud and he started pumping his brakes attempting to stop his vehicle. When Claimant applied his brakes, he testified he started sliding as if on icy pavement but did not have traction and very poor braking power. Claimant testified that as he was pumping his brakes and sliding he looked up and saw striped diagonal white lines eight or ten feet in front of him, and then he hit the vehicle which, as it turned out, was a State-operated street sweeper. He did not observe the lights on the back of the street sweeper and there was no "trail" vehicle behind the street sweeper. There were no flagmen or signs indicating street-sweeping operations in the area. Claimant testified that after a definite delay, his vehicle was struck from the rear, and his vehicle was pushed forward. Claimant was taken from the scene of the accident by an ambulance and the medical evidence indicates he suffered neck injuries.

The operator of the street sweeper, Robert William Gordon, was called by the State, and testified that he had swept the eastbound lanes on the bridge overpass, and in turn was sweeping the westbound lanes of Route 162 on the bridge overpass at the time of the accident. He testified the conditions were dry and dirty on the day of the accident. He was sweeping at a walking pace or three miles per hour. Gordon testified that the speed at which streets are swept depends on the debris and dirt that is involved "because he will create a lot of dust, which is unsafe to use yourself * * * if you go too fast." Gordon testified he could see the amount of dust that he was making behind him. Gordon testified that he had no dust problem sweeping the westbound lanes of Route 162. Gordon was keeping dust down with water, and was looking in his rearview mirror. Gordon did not observe any unusual dust cloud behind the machine at any time on the date in question. Gordon testified there was a breeze or wind from the northwest. He testified that the travel lanes were clean and dry and the dirt was in the gutter up next to the curbing. The street sweeping machine takes the dirt away from the curbing using gutter brooms that are turned inward, and the dirt is thrown into an elevator that dumps the dirt into a hopper on the street sweeper.

Gordon did not feel the impact of the collision. The street sweeper was damaged when struck by Claimant's vehicle in the rear by shearing off one of the pickup brooms off of its drive shaft. Gordon became aware of the accident when he looked in his rearview mirror and saw that he was picking up no dirt. Gordon observed a heavy amount of dirt and a car sitting back at an angle through his rearview mirror. Gordon stopped 40 or 50 feet in front of the Claimant's vehicle. Gordon testified there was a little bit of material on the road where the vehicles were

located, but not in the westbound lanes where he had swept.

On cross-examination, Gordon testified that the reason the bridge was being swept was in anticipation of the application of a concrete preservative oil and not because there was debris on the overpass. Gordon testified that the area of the overpass was in no different condition on the day of the accident as it had been on occasions when he had swept it before.

David Hill was operating his 1982 Chevrolet pickup truck behind Claimant's vehicle at the time of the collision. Hill testified that there was a large amount of dirt on the bridge overpass which he noticed when he was traveling east on Route 162 shortly before returning in the westbound lanes. He had earlier noticed that trucks traveling westbound on 162 were creating "an enormous amount of dust" as they went across the bridge. Hill was familiar with that location, having traveled it many times earlier. Hill had stopped just east of the accident scene, and when he pulled onto Route 162 there was a green station wagon in front of him which he later determined was Claimant's automobile. Claimant was stopped, allowing a large tractor trailer rig to come out of the frontage road and make a "U-turn" onto the interstate ramp. Hill didn't remember if Claimant had come to a complete stop or not. Hill recalled that he couldn't have been going more than 30 or 35 mph at that point. The tractor trailer rig continued on its journey onto the interstate ramp. Hill observed Claimant veer left and head up the overpass and Hill followed him up.

Hill testified that there was a point in time in which the tractor trailer rig that turned onto Route 162 and then turned off onto the interstate ramp was obscuring the view of traffic further west in the westbound lane of

Route 162. Hill testified that after the truck entered onto the entrance ramp and Claimant's vehicle went left around the tractor trailer rig, Hill could see a cloud of dust ahead of him and Claimant's vehicle on the overpass. Hill testified that Claimant's car headed up toward the cloud of dust and so did his vehicle. Hill assumed that there was another vehicle ahead of them that had gone across the bridge and had created the dust as Hill had noticed other vehicles doing earlier as he had crossed the bridge headed east.

Hill testified that after the tractor trailer rig turned onto the interstate entrance ramp, he saw that Claimant had not yet driven into the cloud of dust, but it was just another second or two before Claimant's vehicle went into the cloud of dust. At that time, Hill testified that he was three or four car lengths behind Claimant's vehicle. Hill described the cloud of dust as "totally encompassing" the entire lane and 20 feet tall. Hill said the dust was a "dark cloud" and fairly dense. Hill said that the cloud of dust he observed was comparable to the dust he saw trucks raising earlier when he had traversed the bridge overpass headed east. Hill testified that once Claimant's vehicle went into the cloud of dust it was no longer visible to him. He stated that when he went into the cloud of dust he assumed that he would come out the other side and it would dissipate. Hill did not see the street sweeper at any time before his vehicle struck Claimant's vehicle. Hill stated that it seemed like as soon as he went into the cloud of dust at the rate of approximately 30 miles per hour, the first thing he noticed were tail lights and he was hitting them. Hill said that the impact was almost instantaneous after he entered the cloud of dust. When Hill first observed the street sweeper, the rear brush was broken and the sweeper was still moving. Hill stated that the

street sweeper was not continuing to raise dust at that time.

Hill testified that he looked at the surface of the overpass and there was at least an inch and a half of dusty, dry, loose dirt all over the road surface. Hill testified that you could see the dirt had been thrown to the side with swelling motions, but there was still an awful lot of dirt there. Hill demonstrated a powdery handful of dirt to a police officer who was at the scene of the accident.

A Troy police officer named Steven Howe testified that he came on the scene of the accident and observed that the surface of Route 162 where the vehicles were located was dirty. Howe testified that it was hard to determine the point of impact because there was quite a bit of dirt on the bridge. Howe testified that there was dirt on the westbound lanes all the way back to where the entrance ramp for northbound traffic on the interstate turned off of Route 162.

Keith Owings, an expert witness for the Claimant, testified that he had been employed by Delta Sweeping Company for 14 years and was familiar with the type of sweeper involved in this accident. Owings testified that trail vehicles with warning signs should be used in street sweeping operations where traffic speeds exceed 40 miles per hour, and that in his opinion, under the facts and evidence of this case, a trail vehicle with an arrow board should have been used behind the street sweeper alerting oncoming traffic behind it. Further, Owings testified that the speed at which Gordon testified he was operating the street sweeper was too fast, and should have been reduced to probably a half a mile an hour to a quarter of a mile an hour, which would have been an appropriate speed to control dust at the site of this accident.

Claimant contends that Robert William Gordon was negligent in operating the street sweeper at a rate of speed too fast for the conditions he encountered on the bridge overpass, and in the creation of a large dust cloud behind the street sweeper, creating a condition which resulted in the accident and the Claimant's injuries. Furthermore, Claimant contends that Respondent was negligent in its policies and practices in relation to the use of "trail vehicles" to warn vehicles approaching a street sweeper from the rear. Respondent contends that the evidence did not establish that there was a heavy or unusual amount of debris or dirt on the overpass or that the street sweeper was being operated in a negligent manner. Respondent concedes the existence of a dust cloud at the time of the occurrence but argues that the street sweeper was not the proximate cause of the accident, but that the failure of Claimant to keep a proper lookout, or to operate his vehicle reasonably and prudently was the proximate cause of Claimant's injuries.

The Law

In *Witt v. State* (1969), 26 Ill. Ct. Cl. 318, the employees of Respondent had started a fire which blanketed an adjoining highway with smoke impairing the vision of drivers of motor vehicles on the highway. Claimant had operated his vehicle into the rear of a truck which was unseen and stopped on the highway, thus causing the alleged damages. Respondent argued in *Witt, supra*, that when the Claimant could see the smoke enveloping the highway, and was aware of the condition and continued to operate his vehicle through the smoke, he had failed to proceed with caution or with the care of an ordinarily prudent person.

The Court held in *Witt, supra*, that the Claimant had not acted with due care and caution by driving into dense

smoke which was clearly visible from a distance and proceeding at 25 to 30 miles per hour without being able to see what was in front of him. This Court cited with approval from *Ames v. Terminal Railroad Assn*. (1947), 332 Ill. App. 187, 75 N.E.2d 42, where the Illinois Appellate Court held that persons approaching a place of danger have a duty to do so cautiously, and with a proper degree of care for their own safety. A person has no right to knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of care for his own safety. 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. *Adams v. State* (1981), 35 Ill. Ct. Cl. 216.

In *Ames, supra*, the evidence presented on behalf of the claimants demonstrated that they first saw the smoke when their car was 80 or 90 feet east of the place where there was a vehicle stopped. The plaintiffs' car traveled about 40 feet in the first smoke that was encountered by the plaintiff which obstructed the view so that they could not see too well and that the driver of the car took his foot off the accelerator, which automatically reduced the speed of the car, but at no time did he apply his brakes. The evidence also showed that the car was driven a distance of 30 to 40 feet in the dense smoke, which was so dense that the driver could not see beyond the hood of the automobile before it ran into the end of a bus. The driver made no attempt to stop the automobile upon becoming apprehensive of the danger involved in driving in the dense smoke where he could not see beyond the hood of his car, nor did the plaintiffs' passengers warn the driver of a danger or request him to avoid the danger.

This Court, in *Witt, supra*, at 323, stated as follows, "Where the highway is of such condition that one can see

nothing ahead, it is not reasonable to proceed at 25 to 30 m.p.h., if at all."

Claimant cites *Schuett v. State* (1984), 36 Ill. Ct. Cl. 61, in support of the proposition that the State must exercise reasonable care in the performance of its duties of maintaining the highways in a safe condition. In *Schuett, supra*, the State had piled snow eight feet high onto the median of the road, thereby blocking the vision of motorists. The Court held that the State's own plowing operations created the dangerous condition, and made an award to the claimant because she went into the intersection inch by inch before she was struck. The State, however, is not an insurer of all accidents upon its highways. *Adams v. State* (1981), 35 Ill. Ct. Cl. 216.

This Court distinguished *Schuett, supra*, from its ruling in *Aetna Insurance Co. v. State* (1981), 34 Ill. Ct. Cl. 167. In *Aetna Insurance Co., supra*, the claimant intended to make a left-hand turn but found his vision obstructed by snow plowed six feet deep into the median. Claimant pulled slowly into the intersection and upon finally seeing an oncoming car, claimant attempted to accelerate through the intersection where claimant was struck. The Court held that claimant was negligent in rolling out into the intersection when he saw the oncoming traffic. The Court pointed out that claimant had every opportunity to stop his vehicle and did not "inch out" into the intersection as had other cars that were observed, but rolled out into the intersection without stopping at any point. The Court concluded that the claimant in *Schuett*, *supra*, who pulled forward an inch at a time had used as much caution as was possible to navigate an intersection made dangerous by the State's snow-plowing techniques unlike the claimant in *Aetna Insurance Co., supra*.

Expert witnesses called by both the State and the

Claimant in the present case testified that the operations of street sweepers are prone to create dust. Based on Claimant's Exhibit 1, it appears that Claimant observed the cloud of dust sufficiently in advance of having reached it, to have decreased the speed of his vehicle considerably, or to have stopped altogether due to the potential impairment to his vision. However, although Claimant "didn't know what he was getting into" he accelerated toward and into the dust cloud. He took his foot off the accelerator and started "tapping his brakes" but only started pumping his brakes after he had gotten into the dust cloud and had found that it was more intense than he expected. Claimant "kind of thought" that the dust cloud might go away as quickly as it had come. Claimant described "tapping" his brakes by "just touching them" and "pumping" his brakes as "pushing the brake down, releasing it, pushing the brake down and releasing it."

Hill, the driver of the vehicle immediately behind the Claimant's vehicle, testified that he observed Claimant's car pass the rear of the exiting tractor trailer on the left and Claimant's car proceed up the incline toward the bridge. Hill observed the exiting tractor trailer move out of his line of sight, and he then saw a cloud of dust on the overpass with Claimant's car headed directly toward the cloud of dust. Hill's vehicle was also headed toward the cloud of dust. Hill assumed there was another vehicle ahead of Claimant's vehicle that had gone across the bridge, and created the dust similar to that which he had noticed other vehicles doing when he was earlier traveling east on Route 162. When Hill observed the scene after the truck exited Route 162, Claimant's vehicle had not yet driven into the cloud of dust and it was just another second or two before Claimant went into the cloud of dust. Hill's vehicle was only three or four car

lengths behind Claimant's vehicle at that point. Hill's vehicle entered the cloud of dust at a rate of 35 miles per hour. Hill testified it was five seconds more or less from the time he first saw the cloud of dust until his vehicle entered it. On cross-examination, Hill testified that after the tractor trailer had exited Route 162 to the right, both Hill's vehicle and Claimant's car accelerated toward the cloud of dust, and that the distance between Hill's vehicle and Claimant's car was increasing. Hill testified that both vehicles had increased their speed "from almost nothing to 30, 35 m.p.h."

Hill also testified that he lost sight of Claimant's vehicle upon its entry into the dust cloud. Hill did not think that he was accelerating, but had hesitated and entered the dust cloud at close to 30 miles per hour. Hill testified, "I didn't accelerate more, but eased off the gas as I entered it."

It seems no less unreasonable for the Claimant in this case to have accelerated into a dense cloud of dust at approximately 30 miles per hour and sustain damages for which recovery is sought, than it was for the claimant in *Aetna Insurance Co., supra*, to have rolled out into the intersection when his vision was obscured. In both cases, there was a clear danger. In both cases, the driver proceeded despite the obvious clear danger resulting in an accident. Despite the intervening application of the rules of comparative negligence, the proximate cause of the damage sustained by the Claimant was not the alleged negligence of the State but the negligence of the operator of the vehicle in proceeding in the operation of his vehicle when there was obvious and present danger.

The Claimant had a duty to maintain a proper lookout and to stop or slow to a very slow speed prior to entering the dust cloud. As such, the question of negligence

and proximate cause of the accident is properly a question for the finder of fact. The weight of the evidence supports the conclusion that Claimant was negligent and the proximate cause of the accident for failing to exercise reasonable caution and care when approaching the dust cloud no matter how the dust cloud was created. *Price v. State* (1985), 38 Ill. Ct. Cl. 60.

The adoption of comparative negligence in Illinois did not extinguish the requirement that Claimant must establish proximate cause on the part of the Respondent and the failure of Claimant to so establish proximate cause precludes liability and negates the need to compare fault. *Harris v. State* (1986), 39 Ill. Ct. Cl. 176.

There is no evidence in the record to suggest that had Claimant prudently applied his brakes when he observed or should have observed the dense dust cloud confronting him that he could not have avoided a collision with the rear of the street sweeper.

It is therefore our order that this claim be denied.

ORDER

FREDERICK, J.

This cause coming on for hearing on the Claimant's petition for rehearing and the Respondent's objection thereto, and the Court having reviewed the evidence, testimony, pleadings and prior opinion, the Court having heard oral arguments, and the Court being fully advised in the premises, wherefore, the Court finds:

1. That the evidence supports the opinion of the Court filed March 16, 1993.

2. That the Court properly found Claimant's negligence to be the cause of his injuries.

3. That the Court's opinion was not against the manifest weight of the evidence.

Therefore, it is ordered that the petition for rehearing is denied.

(No. 87-CC-0877—Claim denied.)

UTILITY MECHANICAL CONTRACTORS, INC., Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed November 12, 1993.

POPE & JOHN (BRUCE R. MECKLER, of counsel), for Claimant.

FELDMAN & WASSER (CARL R. DRAPER, of counsel), for Respondent.

LAPSED APPROPRIATIONS—*contracts—Court will limit awards so as not to exceed amount of funds appropriated and lapsed*. In breach of contract claims, whether the claims are before the Court of Claims on their merits or for approval of a settlement, it is the Court's policy to limit awards so as not to exceed the amount of funds, appropriated and lapsed, with which payment could have been made, for to do otherwise would be tantamount to making a deficiency appropriation.

SAME—*contract claim—settlement reached but insufficient funds appropriated to fund judgment—claim denied*. In the Claimant's lapsed appropriation claim seeking payment under a contract with the Capital Development Board, the parties reached a settlement which the Court indicated it would have approved but for the insufficiency of appropriated money to fund a judgment and, though the claim was denied, the Court noted for potential consideration of the settlement by the General Assembly that the lack of available funds was the sole reason for denying the agreed upon award.

ORDER

SOMMER, J.

This cause comes on to be heard on the parties' joint motion for entry of agreed order, due notice having been given, and the Court being advised, finds:

Claimant Utility Mechanical Contractors, Inc. brought this claim seeking payment of $1,251,068 pursuant to a contract it entered into with the Respondent's Capital Development Board (CDB). The parties entered into a settlement agreeing to the entry of an award in the compromised amount of $200,000. The settlement is now before the Court for approval.

In relevant part the motion at bar states as follows:

"1. The parties have entered into a settlement agreement, a copy of which is attached hereto and made a part hereof as Exhibit A.

2. The Claimant was seeking payment for $681,000 worth of work that it claimed was performed on that project as part of the damages it was claiming.

3. The CAPITAL DEVELOPMENT BOARD agrees that the Claimant is justly entitled to the sum of Two Hundred Thousand and no/100 Dollars ($200,000) and requests this court to enter an order providing for payment in the sum of $200,000 as the full compensation from this cause, together with other monies to be contributed to the contributory trust fund of the CAPITAL DEVELOPMENT BOARD by the surety company.

4. Both parties request that this action be taken and that the agreed order be entered and that this cause be dismissed upon payment."

On August 26, 1993, the Court took up the motion and, although noting that the record in this matter was lengthy, held the decision in abeyance ordering that additional information be placed in the record. Specifically, the Court sought a copy of the settlement agreement and information on the funding of the project. That information has now been provided.

The settlement agreement itself, referred to as Exhibit A in the motion, adds an explanation of the controversy as well as reciting the terms of the compromise. It was entered into by the CDB, the Claimant, Philip A. and Leah Marcus, and United States Fidelity and Guarantee Co. In relevant part it provides as follows:

"WHEREAS, in or about June, 1985, Utility Mechanical Contractors, Inc. was awarded a contract commonly referred to as Bid Package Number 5 for the conversion of the Abbott Power Plant on the Champaign Campus of the University of Illinois; and

WHEREAS, the Capital Development Board of the State of Illinois was the contracting party on behalf of the State of Illinois; and

WHEREAS, in or about August, 1985, United Fidelity Guarantee Company issued a Labor and Material Bond and Performance Bond on behalf of Utility Mechanical Contractors, Inc. to assure the payment for work performed by Utility at the Abbott Power Plant Project; and

WHEREAS, in or about July, 1981, United States Fidelity and Guaranty Company entered into a Master Surety Agreement with Philip A. and Leah Marcus which, *inter alia*, guaranteed the performance of Utility Mechanical Contractors, Inc. under the respective Labor and Material Payment and Performance Bonds relating to, *inter alia*, the Abbott Power Plant Project; and

WHEREAS, subsequent to the commencement of the work at the Abbott Power Plant Project, a dispute arose between Utility Mechanical Contractors, Inc. and the Capital Development Board resulting in the Capital Development Board terminating the contract of Utility Mechanical Contractors, Inc.; and

WHEREAS, Utility Mechanical Contractors, Inc. believed that its termination was wrongful, illegal and violated the laws of the State of Illinois and the contract documents; and

WHEREAS, Utility Mechanical Contractors, Inc. initiated an action in the Court of Claims of the State of Illinois entitled *Utility Mechanical Contractors, Inc., an Illinois corporation, Claimant vs. Capital Development Board of the State of Illinois, Respondent*, No. 87-CC-0877; and

WHEREAS, United States Fidelity and Guarantee Company initiated an action in the Circuit Court of Cook County, Illinois entitled *United States Fidelity and Guarantee Company v. Utility Mechanical Contractors, Inc. and Philip and Leah Marcus*, 87 L 21954, which sought indemnity for amounts that United States Fidelity and Guarantee Company have paid in connection with the Labor and Material Payment Bond and Performance Bond for the Abbott Power Plant Project; and

WHEREAS, the Capital Development Board of the State of Illinois believed that the termination of Utility Mechanical Contractors, Inc. was appropriate and that their actions prior to termination and the result of the termination have cost the State of Illinois significant damages; and

WHEREAS, the Capital Development Board of the State of Illinois instituted an action in Champaign County entitled *People of the State of Illinois, ex rel. Skoien v. Utility Mechanical Contractors and United States Fidelity and Guarantee Company*, No. 90-L-292 (the "Champaign County Action"); and

WHEREAS, Utility Mechanical Contractors, Inc. instituted an action in the Champaign County action against United States Fidelity and Guarantee Company which alleged, *inter alia*, that United States Fidelity and Guarantee Company breached its obligations of good faith and fair dealing with Utility, which allegations were denied by United States Fidelity and Guarantee Company.

WHEREAS, all parties believe that it is in the best interest of each to completely settle the matters between themselves.

NOW THEREFORE IT IS AGREED THAT:

1. Neither the Capital Development Board of the State of Illinois, Utility Mechanical Contractors, Inc., United States Fidelity and Guarantee Company nor Philip A. and Leah Marcus by entering into this agreement in any manner concedes that any actions taken by any of them are improper or wrong and this settlement is solely for the purpose of resolving the litigation between themselves.

2. The Capital Development Board of the State of Illinois agrees that it shall enter into this stipulation and seek the entry of an order in the Court of Claims in Cause No. 87-CC-0877 for payment to Utility Mechanical Contractors, Inc. in the sum of Two Hundred Thousand and no/100 Dollars ($200,000.00) (the "Court of Claims Judgment") and shall assist and take all actions reasonable to assure the passage of any necessary legislation for the appropriation of said sums. Upon payment to Utility Mechanical Contractors, Inc. of the Court of Claims Judgment, the Capital Development Board shall dismiss with prejudice the Champaign County Action.

3. United States Fidelity and Guarantee Company shall pay the sum of One Hundred Thousand and no/100 Dollars ($100,000.00) to Utility Mechanical Contractors, Inc., which funds (the "USF&G Payment") shall be placed in the contributory trust fund of the Capital Development Board and said funds shall be paid over to Utility Mechanical Contractors, Inc. upon the appropriation and payment of the Court of Claims Judgment. Upon payment to Utility Mechanical Contractors, Inc. of the USF&G Payment, Utility will dismiss with prejudice its action against United States Fidelity and Guarantee Company in the Champaign County Action.

4. Simultaneous with the disbursement of the funds provided in paragraphs 2 and 3 hereof, each of the parties shall sign the Mutual Release, a copy of which is attached hereto and made a part hereof as Exhibit A, releasing each party from the other from any liability, claims, demands, damages, costs, loss of services, expenses and compensation growing out of the contract disputes at the Abbott Power Plant Project, CDB Project Number 0830-010-055. At the time of execution of this Agreement, the Capital Development Board will also execute a release, a copy of which is attached hereto and made a part hereof as Exhibit B, which will release to Utility Mechanical Contractors, Inc. the remaining proceeds of the Retention Trust at the Harris Trust & Savings Bank, which represents amounts retained from payments previously made to Utility Mechanical Contractors, Inc. for work performed at the Abbott Power Plant Project.

5. Utility Mechanical Contractors, Inc. by the execution of this Agreement acknowledges that it is a corporation in good standing in the State of Illinois and that all corporate actions necessary for the execution of this Agreement have been taken.

6. The parties agree that in the event that the Court of Claims Judgment is not paid to Utility Mechanical Contractors, Inc. by March 31, 1994,

then Utility Mechanical Contractors, Inc. may declare this settlement null and void. In the event that Utility elects to declare this settlement null and void pursuant to this paragraph, all parties hereto shall retain all rights that they had against each other that they possessed prior to execution of this Settlement Agreement."

The information on the State's funding of the project can be summarized as follows. The source of the funding is CDB bond money in the 141 fund. Appropriations of the money appear to be rolled over and augmented from year to year. Thus no money for the project technically has lapsed. The project is still ongoing and payments are from fiscal year 1994 funds. Although $72,838.43 remains released and unexpended in the current appropriation, all but $21,948.19 was obligated as of September 4, 1993, and that money is being used to pay for phase IV of the project.

The Court of Claims is not bound by such settlements. The Court does however encourage parties to resolve their disputes and we do not seek to interpose controversy where none appears to exist. In this case the settlement appears to have been entered into by parties knowledgeable of the facts and the law and it appears fair and reasonable.

But for the insufficiency of appropriated money to fund a judgment we would approve the settlement. As explained in *Graham, O'Shea & Hyde v. State* (1992), 44 Ill. Ct. Cl. 175, 177 and the cases cited therein,

"In breach of contract claims, whether the claims are before us on their merits or for approval of a settlement, it is the Court's policy to limit awards so as not to exceed the amount of funds, appropriated and lapsed, with which payment could have been made." (Settlements of cases to be funded with available current appropriations do not require Court approval.) "To do otherwise, *i.e.*, to award money for debt incurred beyond the sum allotted by the General Assembly, would be tantamount to making a deficiency appropriation. The appropriation of State funds for governmental operations is the constitutional prerogative of the General Assembly. It is this Court's duty to uphold that process and advise the General Assembly."

It is for that purpose that the information on funding of the project was ordered to be placed in the record. Due to the lack of money the claim must be denied. For purposes of potential consideration of this settlement by the General Assembly, the Court advises that this is the sole reason for denying the agreed upon award.

The Court also notes the parties have agreed in effect that the settlement is voidable by the Claimant if Claimant is not paid by March 31, 1994. The Claimant is advised that if the General Assembly considers this case, the schedule may not permit final action by said date. If the option of voiding the agreement becomes available to the Claimant, the Court suggests to the Claimant that the option not be exercised without prior investigation of the process.

Wherefore, it is hereby ordered that this claim be, and hereby is, denied.

(No. 87-CC-0878—Claim denied.)

JOSEPH DOE, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed June 2, 1994.

RUTHANNE K. DEWOLFE, of Legal Assistance Foundation, for Claimant.

ROLAND W. BURRIS, Attorney General (JOHN A. SIMON and TANYA SOLOV, Assistant Attorneys General, of counsel), for Respondent.

NEGLIGENCE—*injury caused by defendant's negligence and third party's illegal wrongful act—proof required.* When a Claimant alleges that an injury was caused by defendant's negligence and a third party's illegal wrongful act, the Claimant must prove by a preponderance of the evidence that the third party committed the illegal or wrongful act.

PRISONERS AND INMATES—*alleged sexual assault by fellow inmate—burden of proof not met—claim denied.* Where the Claimant alleged that the State negligently failed to protect him from a sexual assault by another inmate while he was incarcerated at a youth correctional facility, but he offered several inconsistent versions of the attack which raised doubt as to whether the alleged incident ever occurred, the Claimant failed to prove the third party's wrongful act by a preponderance of the evidence and the claim was denied.

OPINION

MITCHELL, J.

This matter comes before the Court of Claims as a negligence action against the State of Illinois and Illinois Department of Corrections (IDOC).

Claimant alleges that while incarcerated at IDOC Youth Center in St. Charles the IDOC negligently failed to protect him from sexual assault by another inmate. Claimant contends that the negligence of the IDOC was the proximate cause of the Claimant's sexual assault and that Claimant suffered $75,000 in damages.

Facts

On August 23, 1985, Claimant was convicted of armed robbery and sentenced to six years imprisonment. On August 29, 1985, Claimant arrived at the reception and classification unit of the IDOC Youth Center in St. Charles.

Upon arrival, Claimant was immediately examined by Dr. Baker, an IDOC psychiatrist at St. Charles. Dr. Baker reviewed the Claimant's psychiatric history, which spanned seven years and included hospitalizations on at least five occasions, and extensive outpatient psychotherapy. At the conclusion of the examination, Dr. Baker made a diagnosis of childhood schizophrenia and continued Claimant on the psychotropic drug, Prolixin. Dr. Baker recommended that Claimant receive a permanent assignment in a special intensive treatment program.

While Claimant waited for an opening in the special treatment program, he was housed in Robinson cottage at the reception and classification unit, where he had a series of roommates.

On September 14, 1985, James Roe was assigned as Claimant's roommate. Roe was a fourteen year-old delinquent who was committed to the IDOC for the offense of aggravated battery. The two youths shared the room without incident for two weeks.

On September 29, 1985, Claimant retired to his room about 9:00 p.m. At approximately 10:00 p.m. Roe returned to the room. Claimant testified that he and Roe had an argument and that Roe threatened Claimant. Claimant testified that he banged on his cell door and begged Lowell Edwards, the youth supervisor, to let Claimant see the team leader and requested to be transferred to Roosevelt cottage. Claimant testified that he persisted in his requests but that the supervisor ignored him.

Claimant first reported the alleged incident to another inmate by stating that James Roe had attempted to rape Claimant, but that Claimant had avoided the attack.

Approximately 10 days after the alleged incident, Claimant recounted the alleged attack to three employees and an IDOC investigation was instituted. Claimant reported that while he slept, James Roe stuffed a sock down Claimant's throat, tied Claimant's hands and forcibly raped him.

In another version of the incident, Claimant told polygraph examiner Michael Musto that Claimant had engaged in a consensual sex act with Roe in exchange for cigarettes.

At trial, Claimant testified that Roe ordered Claimant to blow on Roe's arm or leg and to suck on his penis. He further testified that Roe then pushed Claimant down on the bed, forced himself on top of Claimant and sodomized him.

At trial, Lowell Edwards, the unit supervisor on duty on September 29, 1985, testified that nothing unusual happened that night. He stated that no requests were made by any youths to see their team leaders or to go to Roosevelt cottage and that no youth reported a sexual assault. Claimant was housed at the St. Charles Robinson cottage until October 15, 1985, when he was transferred to a special treatment program in Setlen House. Claimant's psychiatric condition worsened. He was depressed and paranoid and reported hearing voices telling him to kill two other juvenile residents who were pressuring him for sex.

On November 14, 1985, Claimant was transferred to the Illinois State Psychiatric Institute ("ISPI") because his doctors felt that his condition warranted immediate attention. After four months at ISPI, Claimant returned to IDOC and the balance of his stay was uneventful.

Claimant brings this action against the State of Illinois alleging negligence by the State employees at St. Charles Youth Center. When a claimant alleges injury was caused by defendant's negligence and a third party's illegal wrongful act, the claimant must prove by a preponderance of the evidence that the third party committed the illegal or wrongful act. (*Woodward v. Mettille* (1980), 81 Ill. App. 3d 168, 284 N.E.2d 934, 943.) Claimant has failed to establish by a preponderance of the evidence that he was, in fact, sexually assaulted. Claimant first reported the alleged attack to a fellow inmate by stating that the attacker had attempted to rape Claimant but that he had

avoided the attack. Approximately 10 days after the incident, Claimant reported the alleged attack to three IDOC employees. Claimant reported that while Claimant slept the offender stuffed a sock down Claimant's throat, tied his hands with a sock and then forcibly raped him. Claimant later recanted that version of the facts.

In Claimant's statement to IDOC employees he also claimed that after the attack he screamed, kicked and pounded on his room door. In his deposition testimony, Claimant stated that he did not scream or kick on his door. At trial Claimant testified that he did pound on his room door after the incident. The unit supervisor on duty that evening testified that nothing unusual occurred on the night of the alleged incident.

In yet another contradictory version, Claimant also interviewed with IDOC polygraph examiner Michael Musto. Following the lie detector test Claimant voluntarily told Musto that he had engaged in a consensual sex act with the alleged offender in exchange for cigarettes. Statements made by a person after being administered a lie detector test are admissible evidence. *People v. Sickley* (1983), 114 Ill. App. 3d 167, 448 N.E.2d 612.

Further, Claimant's trial account of the alleged facts is at best improbable. The prison records indicate that at the time of his admission to IDOC in August of 1985, Claimant was five feet, six inches tall and weighed 150 pounds and would turn 17 years old in September, 1985. Prison records also indicate that in September, 1985 the alleged offender was five feet, four inches tall, weighed 140 pounds and was 14 years of age. Yet Claimant testified that the alleged offender overpowered him, and held Claimant down with one hand while the alleged offender used the other hand to apply hair grease to his penis.

Dr. James Guidi, a licensed clinical psychologist, testified on behalf of Claimant. Dr. Guidi testified that Claimant's admitted prior exaggeration of the amount of force used, i.e., that he was tied down and a sock was stuffed down his throat, and the delay in reporting the attack to the staff are typical of victims of sexual assault. However, the repeated inconsistencies in Claimant's testimony and the physical improbability of the Claimant's most current version raises a significant doubt as to whether the alleged incident of sexual assault ever occurred.

In light of the inconsistencies, Claimant's testimony cannot be considered credible. Claimant has, therefore, failed to prove the third party's wrongful act by a preponderance of the evidence and the Court need go no further. Therefore, the claim is denied.

AMENDMENT TO OPINION

MITCHELL, J.

For purposes of publication of this opinion, the Claimant's name shall be changed to Joseph Doe and his roommate's name shall be changed to James Roe.

(No. 87-CC-1081—Claim denied.)

CARROLL ALEXANDER, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 26, 1994.

CARROLL ALEXANDER, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (CHRISTOPHER K. WELLS, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*what necessary for State to be liable for attack on inmate by another inmate.* The State is not an insurer of the safety of persons under its control, and before the State can be held liable to an inmate for an attack by another inmate, proof of foreseeability or of potential harm must be shown and the Claimant must also show that the State's agents anticipated or should have anticipated that third persons would commit criminal acts against a particular inmate.

SAME—*Claimant assaulted in prison kitchen—no notice to State of imminent attack—claim denied.* There was no evidence offered by an inmate in his negligence claim arising out of an attack by a fellow inmate in a prison kitchen to indicate that the State's agents had any advance warning of the dangerous propensity of the Claimant's attacker or that an assault on the Claimant by his attacker was imminent, and the inmate's claim was therefore denied.

SAME—*State was not liable for providing inmate with inadequate medical care*. Since the Claimant inmate provided no evidence to establish that the medical care afforded him after he was attacked by another inmate in a prison kitchen deviated from the applicable standards of care, the State was not liable for providing the Claimant with inadequate medical care.

OPINION

PATCHETT, J.

The Claimant was an inmate with the Illinois Department of Corrections. He seeks damages for personal injuries in the sum of $100,000 as a result of an attack on him on August 11, 1986. This attack took place in the kitchen at Menard Correctional Center. He was assaulted by another inmate and sustained injuries to the arms, hands, and head.

The Claimant further alleges that two days after the incident, he received what is basically a pass to report to the medical unit for examination, but the correctional officers refused to allow him to go.

At the hearing on this case, the Claimant testified that on August 11, 1986, he went to work at the usual time at the kitchen. During his work shift, correctional officers permitted him to remain unsupervised with other inmates while they were performing other duties. He

contends that during this time, another inmate attacked him, hitting him on the thumb and back of his head with a steel paddle. He contends that if an officer had been present to supervise the inmates, the injuries might have been prevented.

The Claimant testified that he had to have stitches in his hand and he suffered headaches from the gash to his head. The Claimant contends that his whole arm goes numb as a result of the injuries in question. He further testified that he requested medical help for those conditions, but "they can't do nothing."

The Claimant testified that there was a rule at the penitentiary that there should always be an officer present, and that they were supposed to have an officer working at the back door of the kitchen. The Claimant claimed that he read the rule book, but he could not produce the rule in writing or give a citation. He stated that at the time of his injury, there was no officer working the back door.

On cross-examination, he testified that he was sitting in the back of the kitchen talking when another inmate came running through with a paddle in each hand. The inmate swung at the Claimant, and as the Claimant threw his hands up, he got cut with the paddle and hit in the head. Although the Claimant knew the assailant, he testified that he had never had any confrontations with him and had never been threatened previously. The Claimant had never informed the correctional officers that he might be attacked because he had no reason to think that he would be attacked. He admitted that the guards could not have known that the other inmate was going to attack him in advance.

The Claimant received medical treatment from the health care unit who gave him stitches in his thumb. He

does not recall if he was given an ice pack for his head. A couple of days after he was injured the guards refused to let him go to the medical unit for examination until 3:00 p.m. He contends that this caused permanent injuries. He further contends that he was denied pain killers, even though it was requested on numerous occasions.

This court has consistently held that the State is not an insurer of the safety of persons under its control. (*Dorsey v. State* (1977), 32 Ill. Ct. Cl. 449.) There the Court stated as follows:

"The rule in the State of Illinois and other jurisdictions is that before the State can be held liable in a situation such as the present one, the State would have had to have knowledge of the dangerous propensities of the assailant * * * and guarded against him." 32 Ill. Ct. Cl. 449, 451.

The *Dorsey* case was followed and approved in *Bock v. State* (1991), 43 Ill. Ct. Cl. 299, 305. Here, as in the case cited above, there was no advance warning of the dangerous propensity of the inmate who attacked the Claimant. In addition, correctional officers were not provided any warning or information that an attack might be imminent or expected by the inmate. Without advance notice, there was no way for the correctional officers to foresee the assault in question.

In cases where inmates have been assaulted by other inmates, this court has determined that proof of foreseeability, or of potential harm, must be shown, and that Respondent's agents anticipated, or should have anticipated, that third persons would commit criminal acts against a particular inmate. *Carey v. State* (1981), 35 Ill. Ct. Cl. 96; *Childs v. State* (1991), 38 Ill. Ct. Cl. 196; *Phipps v. State* (1991), 44 Ill. Ct. Cl. 105.

For the reasons stated above, we hereby deny this claim. In addition, as to the portion of the claim in which the Claimant alleged he was provided inadequate medical

care, the Claimant failed to establish that agents of the Department of Corrections deviated from applicable standards of care. (*Bock v. State* (1991), 43 Ill. Ct. Cl. 299, 304.) Since the Claimant offered no evidence that the medical care afforded to him deviated from the applicable standards of care, there is no liability established.

(No. 87-CC-1806—Claimant awarded $26,056.21; motion for new trial or rehearing denied.)

BERNIE J. GILDEHAUS, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed June 30, 1993.

Order filed September 21, 1993.

CHADWICK KASTEN, for Claimant.

ROLAND W. BURRIS, Attorney General (THOMAS GRAY, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*duty of motorist approaching from rear*. While a motorist struck from the rear is not always entitled to judgment as a matter of law and the facts of each case must be considered in resolving rear-end collisions, it is the driver approaching from the rear who has the duty to maintain a safe lookout and it is he who must consider the possibility of having to stop suddenly.

SAME—*Claimant's burden of proof*. The Claimant in a negligence action bears the burden of proving by a preponderance of the evidence that the State was negligent and that the State's negligence was the proximate cause of the Claimant's injury.

SAME—*rear-end collision—State liable*. Where the State offered no testimony to refute a motorist's claim that the driver of a State vehicle negligently operated the vehicle so as to cause it to collide with the rear end of the motorist's vehicle, the State was liable for injuries proximately caused by the collision.

SAME—*burden of proving damages rests with Claimant*. The Claimant has the burden of proving his damages with certainty and, absent such proof,

no award may be entered, but damages are not deemed uncertain merely because they are uncertain as to amount, as distinguished from those which are too uncertain to be recoverable because they are not the certain results of the wrong that has been committed.

SAME—*rear-end collision—damages awarded for neck injuries but not for pre-existing back condition*. In a negligence claim stemming from a collision in which the Claimant's vehicle was struck from behind by a State vehicle, the Claimant was awarded damages for a neck injury based on evidence that he suffered a cervical strain as a result of the accident, but there was no credible medical or other evidence to indicate that the low-impact collision, which resulted in minimal property damage, was in any way related to the Claimant's pre-existing back condition and damages for that condition were denied.

OPINION

FREDERICK, J.

Claimant, Bernie J. Gildehaus, in this tort action, seeks recovery from the State of Illinois for personal injuries he allegedly received in an automobile accident which occurred on September 11, 1986. The accident occurred when Claimant was operating his 1976 Pontiac vehicle westbound on Lincoln Highway at its intersection with North Illinois Street in Fairview Heights, St. Clair County, Illinois. Claimant was attempting to make a left turn and proceed south on North Illinois Street. The Respondent's agent was operating a State truck immediately behind the Claimant, proceeding in the same direction.

Claimant testified that he was on his way to the grocery store with his wife and children and was in the left-hand lane expecting to turn left. There were several cars in front of the Claimant. When the light turned green, one of the cars in front of Claimant at the intersection stalled out, for a few seconds, but finally went through the intersection.

By the time the Claimant proceeded to the actual intersection, the traffic control light turned yellow and the Claimant hit his brakes. Respondent's truck then

struck Claimant's vehicle in the rear. The Claimant testified his body went forward and on impact, he broke the turn signal switch off and hit the panel. Claimant discovered he had been hit by an orange State of Illinois truck being operated by Respondent's agent. The damage to the rear of Claimant's car is shown in two photographs admitted into evidence. The damage appears to be extremely slight. The only damage appears to be a small dent about a foot from the trunk key hole, however the damage resulted in the car being "totaled" as far as Respondent's payment for damages to the vehicle was concerned. The damages were $453 and the car was only valued at $500.

The police were not summoned to the accident scene. At the time of the accident, Claimant was not hurt and didn't feel the need to call the police. The Claimant testified that the next day he went down and made out a police report at the police station with his wife.

Claimant continued to work after the accident. He worked all but two days between the 11th and 28th of September. He also worked for four days in November. Claimant's job was at Steak 'n Shake as a maintenance man and this job involved some lifting. Claimant testified he had pain from his neck to his feet so he went to a physician. Claimant first saw Dr. Naguit on September 30, 1986, nineteen days after the accident. This was the first doctor he saw after the accident. Dr. Naguit is a general practitioner. Claimant's main complaint of pain was involving the Claimant's neck.

Claimant denied ever having had any problems with his back or any problems doing his job prior to the accident. Dr. Naguit prescribed physical therapy for Claimant, but Claimant denies that it did any good. Claimant continued treating with Dr. Naguit, who referred Claimant to

Dr. Murphy, a physician whose specialty is neurological surgery. Dr. Murphy originally tried to put Claimant through a "work hardening program" which Claimant did not complete. In May of 1988, Dr. Murphy admitted Claimant to the hospital and put metal plates and bolts in Claimant's back. The hardware was removed upon Claimant's rehospitalization in 1990. Claimant wears a back brace. Claimant stood up during the hearing before the Commissioner because, he testified, that every time he sits, it cuts off circulation in his left leg and causes pain.

Claimant testified he experiences pain every day which is a sharp pain going from his neck to his lower back and legs, as though somebody stabbed Claimant with a knife.

Claimant has been treated once or twice a month with spinal blocks since the accident. Claimant has never been released to return to work by his doctors since the time he started treatment.

At the time of the hearing, Claimant was 36 years of age and he was married with three children, aged four, six and nine. Claimant attended school for nine years. His first job was at a cemetery digging graves with his father. Claimant began working at the Steak 'n Shake Restaurant in 1976 for $1.90 per hour. At the time of the accident, Claimant was a general maintenance man working the midnight shift at Steak 'n Shake making $4.50 per hour. Claimant testified that he received approximately a $.25 per hour raise each year. Prior to the accident, Claimant had done odd jobs for extra money, including work at an auto sales agency as an auto mechanic and he also did body work. Claimant also continued to dig graves. Claimant's wage information showed that in 1986, he made slightly more than $6,000 prior to the accident, but that he did not include money from the car agency or digging graves or

other odd jobs. The evidence showed that in 1982, Claimant made $10,428; $9,816.99 in 1983; $9,735.67 in 1984; and $8,516.52 in 1985.

After the accident, Claimant testified he attempted to return to work but just couldn't "do it." Claimant testified that his personal life with his wife has also been affected by his injuries. Claimant is able to drive a car for about an hour and a half until he has to pull off the road. At the time of the hearing Claimant was still taking large amounts of medication. Claimant testified that nothing anybody had done for him had helped him after his surgery. Claimant further testified, without objection, that his medical bills totaled $64,613.88. A portion of these bills had been paid by the State of Illinois.

Respondent's cross-examination of the Claimant elicited that Claimant's job as a maintenance man and gravedigger involved heavy lifting.

Dr. Michael Murphy, the specialist, testified that he diagnosed Claimant's condition as spinal stenosis. Spinal stenosis is a condition in which there is a congenital decrease in the cross-sectional area of the canal through which the nerve roots travel in the lower portion of the lumbar spine. Dr. Murphy's opinion was that the spinal stenosis probably pre-existed the automobile accident of September 11, 1986. As congenital usually means "from birth," this opinion is well taken.

In response to Claimant's counsel's question, "Doctor, do you have an opinion you can state to a reasonable degree of medical certainty as to whether the automobile accident aggravated the pre-existing condition," the Claimant's specialist responded, "I think it's possible that it could have aggravated the pre-existing condition." Dr. Murphy gave no basis for this opinion. According to Dr.

Murphy, Claimant probably had the condition long before the accident. The MRI of July 7, 1987, shows degenerative disc disease at L2-3 and L5-S1 without evidence of herniation.

By February of 1988, Claimant had an 11-month history of claudification. He had extensive stenosis for such a young man. Dr. Murphy performed a laminectomy on Claimant on May 25, 1988. This was to take the pressure off of the nerves in the nerve canal. He did a fusion along with the laminectomy. Dr. Murphy certainly hoped Claimant would not need any further surgery. Dr. Murphy is not sure when Claimant could return to work. When he does return to work, he will not be able to lift over 50 pounds. Dr. Murphy testified Claimant had a temporary permanent disability. Dr. Murphy's final diagnosis was spinal stenosis and degenerative disc disease. Dr. Murphy made no mention of a herniated disc.

On cross-examination, Dr. Murphy admitted that no one had ever described the accident to him or had shown him any pictures of the Claimant's vehicle after the accident. Dr. Murphy had no idea as to a percentage of the extent this accident may have aggravated the pre-existing condition. Dr. Murphy had no idea as to whether the degenerative disc disease was a pre-existing condition. He did not know if a rear-end collision which caused a slight dent in the rear of Claimant's car would cause degenerative disc disease. Dr. Murphy filed a lien for his fees in the sum of $10,895.

Dr. Naguit, the general practitioner, testified that on September 30, 1986, Claimant gave a history of denying any injuries at the time of the accident. On October 8, 1986, Dr. Naguit formed a diagnosis of acute cervical strain. On November 28, 1986, the diagnosis was acute low back pain. This doctor further testified that,

"This condition that he had in May of 1988, whether aggravated or whether it was brought on by the accident, that is the spinal stenosis that he had between L2, L3 and L4 was most likely aggravated by the accident and this herniated disc at L2 and L3 was probably brought on by that accident."

The specialist's testimony and the general practitioner's testimony are contradictory. The earlier MRIs did not show a herniated disc. Dr. Naguit relied heavily on the history given by Claimant and the subjective complaints of Claimant. Dr. Naguit had no past medical records of Claimant. Dr. Naguit's testimony and the credibility thereof can best be tested in the light of his testimony concerning advising Claimant to go to the Mayo Clinic for further treatment. Dr. Naguit testified he did advise Claimant to go to the Mayo Clinic for further treatment. His rationale was that he had treated Claimant for three years and Claimant had surgery, all with no relief. It would be Claimant's "best bet" to get another opinion and go to Mayo Clinic. Dr. Naguit went on to testify as follows:

"* * * I've had patients that I've sent across the river to be seen at Barnes and St. Louis U and they spent all that money and don't get any relief, and then I send them over to Mayo Clinic and in just one visit they get the correct diagnosis and correct treatment, and they're more happy about it and considering that he has had all the possible treatments, including surgical intervention for him, I think by telling him to go across the river, he'll probably spend some more money without getting any relief. So I feel that if I want the patient to get the ultimate in treatment and diagnosis after having had no relief for the last three years, it is imperative that I refer him to a clinic which, in my own opinion, is probably superior to any place in the country, and that's why I told him to go to Mayo Clinic."

This testimony causes this Court to give less weight to the testimony of Dr. Naguit for the reasons set forth in this quoted passage of testimony and for the reason that the specialists' opinions differ. It is important to note that Dr. Naguit never gave a basis for any of his opinions. The bare opinions standing alone do not support a finding of causation in regard to the back injury and spinal stenosis. A close review of the doctors' depositions shows that Claimant's major complaints related to a neck injury on

September 30, October 8, October 15, November 7, and November 21, 1986. The very first complaint of lower back spasm was at the hospital on November 28, 1986. There had been no complaints of back pain prior to November 28, 1986, nearly two and one-half months after the accident. The diagnosis on November 28, 1986, was acute low back pain.

In December of 1986, Dr. Murphy thought Claimant had a chronic problem with muscle strain in the paraspinous muscles and in the truncal muscles. On July 7, 1987, an MRI showed degenerative disc disease of Ls-2 and L5-S1 *without* evidence of herniation. (Emphasis added.) A subsequent MRI on December 14, 1987, showed no significant change from the prior MRI and again was "without evidence of herniation." Dr. Murphy, the specialist, did not diagnose a herniated disc.

The Respondent called no witnesses and offered no testimony in support of Respondent's case. As incredible as the testimony was from Dr. Naguit, it is just as incredible to the Court that the Respondent failed to present any testimony. We must therefore decide the case without the testimony of Claimant's employer, the State truck driver, and an independent medical examination. This Court, however, cannot postulate as to what should have been presented but must and will decide the case on the evidence before the Court.

There are two issues before the Court, namely liability and damages.

As to the question of liability, the only evidence in the record tends to establish that Respondent's agent operated Respondent's vehicle in a manner that caused it to collide with the rear end of Claimant's vehicle, and that the operation of Respondent's vehicle was the sole and

proximate cause of this accident. There is no evidence *in the record* from which it can be seriously contended that Claimant did, or failed to do, any act which caused or contributed to cause this collision. (Emphasis added.) Without the testimony of the State truck driver or any other witness to try to establish an unavoidable collision or some comparative negligence, we have only the testimony of the Claimant from which to determine the facts.

While a motorist struck from the rear is not always entitled to judgment as a matter of law and the facts of each case must be considered in resolving rear-end collisions, it is the driver approaching another from the rear who has the duty to maintain a safe lookout and it is he who must consider the possibility of having to stop suddenly. (*Economy Fire and Casualty v. State* (1984), 36 Ill. Ct. Cl. 214.) While Respondent disputes liability and asks us to look at the facts of the case, it must be stated again that the State failed to call the truck driver or any other witness to the accident to dispute the Claimant's version. In the *Economy Fire* case, both drivers testified and the Court found some comparative negligence. We only have the Claimant's version in this case and his testimony establishes liability. Claimant bears the burden of proving by a preponderance of the evidence that the State was negligent and that the State's negligence was the proximate cause of Claimant's injury. (*Mackowiak v. State* (1982), 35 Ill. Ct. Cl. 315; *Jager v. State* (1986), 39 Ill. Ct. Cl. 21.) Respondent's driver had a duty to maintain a safe lookout and not drive into the rear end of Claimant's vehicle. Respondent's driver's breach of this duty was the proximate cause of the accident. (*Guffey v. State* (1987), 40 Ill. Ct. Cl. 179.) If Claimant caused this accident or was comparatively negligent, it does not appear in this record.

The issue of damages is a very difficult issue for the Court. The Claimant has the burden of proving his damages with certainty and absent such proof, no award may be entered. (*Harris v. State* (1989), 41 Ill. Ct. Cl. 184.) However, damages are not deemed uncertain merely because they are uncertain as to amount, as distinguished from those which are too uncertain to be recoverable because they are not the certain results of the wrong that has been committed. *J.F. Inc. v. State* (1988), 41 Ill. Ct. Cl. 5.

For the Claimant to recover, the Court must find that Claimant's injuries were caused by the Respondent's negligence by a preponderance of the evidence. There is no question that Claimant had significant medical problems, significant pain and suffering, significant and considerable medical bills, and significant lost wages after September 30, 1986. If we do find that the spinal stenosis and/or the degenerative disc disease and/or the herniated disc and/or the acute low back pain were either caused or aggravated by the collision of September 11, 1986, then we must take the Claimant as we find him for purposes of finding the amount of damages. *Gillmore v. State* (1987), 40 Ill. Ct. Cl. 85.

Additionally, pursuant to Chapter 23, Section 11—22 of the Illinois Revised Statutes, any award must be reduced by $8,943.79 which is the amount proven by the Respondent's exhibit as the amount paid by the Illinois Department of Public Aid for medical assistance for Claimant from June 1, 1987, through March 1, 1989.

In determining damages, this Court preliminarily must determine what injuries were more probably than not proximately caused by the collision of September 11, 1986. Claimant claims injuries to both his neck and back as a result of the accident. After careful consideration of

all the evidence, and all reasonable inferences to be drawn from the evidence, this Court first finds that the Claimant has failed to prove by a preponderance of the evidence that the back injury complained of was proximately caused by the September 11, 1986, accident.

This finding is based upon several factors. First, the impact itself was a low impact collision resulting in only minimal property damage. The Claimant himself admitted that the only damage caused as a result of this collision was a small dent in the rear trunk.

Second, there is no credible medical evidence that the back condition resulting in surgery was more probably than not proximately caused by what occurred on September 11, 1986, when this minimal impact occurred.

It is undisputed that Claimant had a pre-existing back condition, namely spinal stenosis and degenerative disc disease. Dr. Murphy, the neurosurgeon, is in the best position to offer an opinion as to the cause of the condition which he surgically treated. When addressing the causation issue, he stated, "[I] think it is possible that it could have aggravated the pre-existing condition." In fact, Dr. Murphy admits he never had received a history of the accident. He further admits that he could not give any percentage of aggravation caused by the accident since he knew nothing of the accident. Accordingly, this Court finds Dr. Murphy's purported opinion on causation to be speculative. It is without medical basis or foundation.

This Court likewise finds Dr. Naguit's opinion on causation to lack credibility. While he generally states that the pre-existing back condition was aggravated by the accident, it is only a bare assertion on his part without any medical basis or foundation. This Court has already discussed above why any of Dr. Naguit's opinions lack credibility. This

includes his continued treatment of Claimant despite his belief that sending him to Mayo would be the best course to take care of his problems and the fact that he talks about a herniated disc when the treating surgeon makes no mention of the same.

Finally, Claimant's own actions belie a finding that the back condition is in any way related to any trauma suffered in this minor collision on September 11, 1986. The first time Claimant sought any medical treatment at all was 19 days after the accident. He made no complaints of injury at the scene of the accident. When he went 19 days later, he complained only of neck pain. In the interim, he continued to work at his job as a maintenance person at Steak 'n Shake which included heavy lifting.

He continued to treat with Dr. Naguit after he began treatment on September 30, 1986, and again only mentioned problems with his neck. He admitted in cross-examination that he would tell the doctor all of the symptoms he was experiencing. He saw Dr. Naguit on October 8, October 15, November 7 and November 21, 1986, and made no mention of any back problems.

The first time the Claimant ever mentioned a low back problem was when he was seen at the hospital on November 28, 1986. This was nearly two and a half months after the accident. The diagnosis at that time was acute low back pain. Again, in the interim from the accident until this onset of acute low back pain, the Claimant had continued working as a maintenance person.

This Court cannot speculate as to what transpired to cause the Claimant to go to the hospital emergency room to get treatment for an acute low back condition. Neither can this Court speculate that a minor accident two and a half months before, which caused no immediate symptoms

and did not require any medical treatment for a back problem, cause or contribute to cause this subsequent acute back condition. Accordingly, this Court finds that more probably than not the low back condition was not caused by the accident of September 11, 1986.

This Court does find that the injuries more probably than not caused by the September 11, 1986, only relate to Claimant's neck. This Court finds that Claimant has met his burden in this regard and has shown by a preponderance of the evidence that he suffered a cervical strain as a result of the collision. This is the condition for which Claimant first treated with Dr. Naguit. This is the condition which Claimant complained of to the doctor for the first few months. He is entitled to damages for medical expenses reasonably necessary to treat this condition and pain and suffering and disability associated with this aspect of his condition.

In determining the amount of damages to be awarded to Claimant for his neck injury, there is a difficulty in separating out the amount of medical expenses related to treatment of the neck condition alone and the amount of pain and suffering and disability solely associated with the neck condition and not the back condition. However, after a careful review of the evidence and medical bills presented by Claimant, this Court finds that the pain and suffering, disability and reasonable and necessary medical expenses relating to the neck injuries and the vehicle damage require an award in the amount of $35,000. This Court does find that the Claimant failed to properly prove any future medical expenses by a preponderance of the evidence as to any medical condition caused by the September 11, 1986, collision.

As previously stated, this award must be reduced by $8,943.79 pursuant to 305 ILCS 5/11—23. An award is

therefore made to the Claimant, Bernie J. Gildehaus, in the amount of $26,056.21 and the Illinois Department of Public Aid is ordered to be paid $8,943.79 pursuant to 305 ILCS 5/11—23.

ORDER

FREDERICK, J.

This cause coming on for hearing on Claimant's motion for a new trial or in the alternative, petition for a rehearing, and the Court having reviewed the motion, and the Court being fully advised in the premises, wherefore, the Court finds:

1. That the Court's opinion is not against the manifest weight of the evidence.

2. That Claimant was given a fair trial with the opportunity to present all relevant evidence.

3. That this Court carefully considered the evidence and the credibility of the witnesses in rendering its opinion.

4. Claimant failed to prove by a preponderance of the evidence that the back injury was causally connected to the low impact collision on September 11, 1986.

5. That the alleged new evidence as to future damages (from the date of the trial) is not sufficient evidence to reinstate a new trial but was taken into account by the Court and previously considered by the Court in granting the award the Court made which included future expenses.

6. The evidence and record before this Court did not establish by credible medical evidence that the back injury and all the subsequent care were the result of the accident.

Therefore, it is ordered that the motion for a new trial or in the alternative, petition for rehearing is denied.

(No. 87-CC-2150—Claim denied; motion for new trial denied.)

WARREN HARRIS, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed February 22, 1989.

Order filed May 25, 1989.

Order filed March 29, 1994.

WARREN HARRIS, *pro se*, for Claimant.

NEIL F. HARTIGAN, Attorney General (SUSANNE SCHMITZ & KIMBERLY L. DAHLEN, Assistant Attorneys General, of counsel), for Respondent.

PRISONERS AND INMATES—*negligence—State's duty to safeguard inmate's property.* The State has a duty to exercise reasonable care to safeguard and return an inmate's property when it takes actual possession of such property, as during the course of the transfer of an inmate between penal institutions, or when the institution issues receipts for the property, and the loss of bailed property while in the possession of a bailee raises a presumption of negligence which the bailee must rebut by evidence of due care.

SAME—*loss of inmate's legal documents—State liable.* Liability on the part of the State was established in an inmate's claim for the value of a transcript and legal papers for which the inmate was issued a receipt upon being transferred between penal institutions, since the property was not returned and the State offered no proof of due care.

SAME—*damages—set-off under Crime Victims Compensation Act.* Where the evidence in a case indicates that the Claimant is indebted to the State, then a set-off must be made, and under the Crime Victims Compensation Act, the State may be subrogated to the rights of the crime victim and be paid back for an award made to the victim as a result of a violent crime involving the Claimant.

SAME—*lost personal property claim—State's set-off exceeded inmate's award—claim dismissed.* Although an inmate who had been convicted of murdering a man was entitled to an award of $976 for the value of legal documents lost by the State, the State had a lien against the award for $1,652.95 for its crime victims payment to the murder victim's family and, since the set-off exceeded the amount the inmate could recover, the claim was dismissed.

OPINION

MONTANA, C.J.

Chief Justice Montana delivered the opinion of the Court.

Claimant filed his claim seeking damages against the Illinois Department of Corrections for loss of his legal transcripts and documents on February 23, 1987. Claimant alleged that in June of 1986, when he was transferred from Joliet to Danville, the Department of Corrections inventoried his legal papers, stored them, but then lost the documents. He claimed $5,000 in damages for loss of his legal papers. The State raised an affirmative defense that a set-off against a crime victim's award for $1652.95 must be made against any recovery by Claimant.

Trial was held before the Commissioner on November 5, 1987. The evidence consists of the transcript of evidence, Respondent's Exhibit "1," the departmental report, Claimant's Exhibit "1 through 9," and the crime victim's award order in *Howard v. State*, 77 CV 493. This cause has been fully briefed by both parties.

The Facts

In May of 1986, Claimant was an inmate with the Illinois Department of Corrections. Claimant was transported to Chicago to testify in Federal court and was staying at the prison in Joliet. On June 17, 1986, all of Claimant's personal property, including his legal papers, were packed for Claimant's trip to the prison in Danville, Illinois. The personal property was packed by Officer J.H. and inventoried. Claimant received the pink copy of the inventory and the yellow copy went with the property. The inventory record, Claimant's Exhibit "1," which was corroborated by the State's departmental report, shows as inventoried one transcript and one stack of legal papers.

Claimant testified his property consisted of his court transcript, one stack of legal papers in a double garbage bag, some cosmetics, and a suit and shirt.

When Claimant arrived at the Danville prison on June 18, 1986, and was called in to receive his personal property, he noticed his bag of legal papers was missing. The officials at Danville attempted to locate the legal papers, but were unsuccessful. The missing legal papers consisted of about 1300 pages of common-law records. The transcript from Claimant's trial was 185 pages and he had two depositions from a prior lawsuit. One of the depositions was a copy of the original. The evidence indicated the transcript of depositions would cost $300. The Claimant testified that to replace the lost documents would cost $50 and to replace his trial transcript it would cost $626.

Claimant's Exhibit "4" is the Department of Corrections review board decision. The decision indicates the legal papers were shipped on the transfer bus but were not received at Danville. The claim was denied because there was no way the prison board could determine what was actually shipped because their employee only wrote down "1" court transcript and "1 stack" legal papers. The form used by the State had room to expand upon the nature of the personal property inventoried but was not filled out in this case by the officer.

The Claimant testified that the State lost an affidavit from a witness which he planned to use in a petition for post-conviction relief. The affidavit was part of the stack of legal papers. The witness cannot presently be located. Additionally, Claimant spent $14 in mailing to the Court of Claims.

The State brought out at the hearing that the Claimant

was convicted of murder in 1977 for the killing of Ernest Ellis Howard. The lost papers were mainly related to his conviction. Both his appeal and post-conviction petition of the 1977 conviction were unsuccessful. With the assistance of counsel, Claimant filed a Federal *habeus corpus* petition in 1980. The petition was denied. His attorney had copies of some of his legal papers and his deposition. The lawyer paid for the deposition and Claimant did not have to pay for his original trial transcript as he was a poor person. He also had never purchased a record in his *habeus corpus* proceedings. The Court of Claims granted $1652.95 to Arthur E. Howard in cause 77 CV 493 for the funeral expenses of Ernest Ellis Howard as a crime victim's award.

The Law

The State has a duty to exercise reasonable care to safeguard and return an inmate's property when it takes actual possession of such property, as during the course of the transfer of an inmate between penal institutions, or when the institution receipts for the property. *Lewis v. State* (1985), 38 Ill. Ct. Cl. 254; *Doubling v. State* (1976), 32 Ill. Ct. Cl. 1.

In this present case, the Claimant was transferred between penal institutions and received a receipt for his property. His trial transcript and legal papers were not returned. The loss of bailed property while in the possession of a bailee raises a presumption of negligence which the bailee must rebut by evidence of due care. (*Moore v. State* (1980), 34 Ill. Ct. Cl. 114.) The State has not rebutted the presumptions of negligence and is liable for the loss of Claimant's transcript and legal papers. There was no proof of due care.

The issue of value is more difficult. The Claimant has

the burden of proving his damages or he cannot prevail. (*Rivera v. State* (1985), 38 Ill. Ct. Cl. 272.) Claimant testified that the cost to replace the depositions was $300, the cost to replace lost documents would be $50, and the cost to replace his trial transcript would be $626. The court has justified such awards at the cost to replace the transcripts. *Willis v. State* (1980), 34 Ill. Ct. Cl. 242.

However, the State argues that any recovery by Claimant must be off-set by the State's prior payment to this crime victim's father. (Ill. Rev. Stat (1985), ch. 37, par. 439.24—6.) Where the evidence in the case indicates that the Claimant is indebted to the State, then a set-off must be made. *Progos v. State* (1960), 23 Ill. Ct. Cl. 207; *Choiniere v. State* (1974), 30 Ill. Ct. Cl. 174.

The Claimant is entitled to $976 for damages, but the State is entitled to a recoupment of the entire amount towards the crime victim's payment of $1652.95. The Crime Victim's Compensation Act allows the State to be subrogated to the rights of the crime victim and to be paid back for the award. (*Hamilton v. State* (1985), 37 Ill. Ct. Cl. 452.) The Respondent properly raised this set-off in its affirmative defense and is entitled to the same. The State, in effect, has a lien for $1652.95 and may reduce an award to recoup that amount. (*Gettis v. State* (1975), 30 Ill. Ct. Cl. 922.) Where the set-off exceeds the amount the Claimant would recover, it has been the court's practice to dismiss the claim. *Dawson v. State* (1983), 35 Ill. Ct. Cl. 874.

Accordingly, the amount due the State by the Claimant exceeds the award for the loss of the legal documents and the Claimant is denied a recovery.

Therefore, this claim is dismissed.

ORDER

MONTANA, C.J.

Claimant has filed a motion for a new trial. The Court has carefully considered Claimant's submission. We find that it does not set forth sufficient grounds for the Court to vacate the order filed February 22, 1989.

Accordingly, Claimant's motion is denied.

ORDER

JANN, J.

This cause comes on to be heard on the Claimant's emergency motion to vacate judgment, it appearing that due notice has been given, and the Court being advised, it is hereby ordered that the Claimant's motion be, and is, denied.

(No. 87-CC-3605—Claim denied.)

GLOBAL FIRE PROTECTION CO., Claimant, *v.*
THE STATE OF ILLINOIS, Respondent.

Opinion filed June 23, 1994.

GEORGE A. HESIK, for Claimant.

ROLAND W. BURRIS, Attorney General (PAUL ARVITES, Assistant Attorney General, of counsel), for Respondent.

CONTRACTS—*construction contract—Claimant was entitled to notice of deficiency in performance of contract—improper deductions made by State.* Where the plain language of the Claimant's contract with the Capital Development Board for plumbing and fire protection work on a State construction project provided that the Claimant was entitled to three-days written notice in order to cure any deficiencies in its performance, but the State failed to

give the requisite notice, the State could not deduct from its contract with the Claimant amounts paid to other companies to remedy the deficiencies.

LAPSED APPROPRIATIONS—*construction contract—Claimant entitled to award but there were insufficient funds to pay the claim—payment of claim subject to legislative appropriation.* Although the Claimant was entitled to an award of $30,455 from the State Capital Development Board as a result of the State's improper deduction of funds under a contract with the Claimant for plumbing and fire protection work relative to construction of a State office building, the fact that the Board used the money deducted to pay for other aspects of the project required the Court of Claims to deny the claim; but the Court, in fulfillment of its responsibility as an advisory body to the General Assembly did state that an award should be made if sufficient funds are appropriated.

OPINION

JANN, J.

This matter came to be heard for trial on or about September 19, 1991. After hearing, both parties were afforded an opportunity to submit briefs, however, only the Claimant submitted a brief.

At trial, the evidence was for the most part not disputed and was received into evidence by way of stipulation. (See Defendant's Exhibit 1, which is attached to the trial transcript.) As stated in the stipulation, the construction project which is the subject of this action is what was known at the time as the State of Illinois Center and known as the James Thompson Center (hereinafter "the Center"). The Center was constructed for the use of the State of Illinois by the Capital Development Board (hereinafter "The CDB"). The CDB's project executive for the Center was Mr. Frank Conroy. The architect/engineer for the Center was Murphy-Knight. Murphy-Knight prepared the construction contract documents for the Center, and provided architecture/engineering services during the construction of the Center. Murphy-Knight's project manager was Mr. Ed Wilkas who is a licensed architect. Construction of the Center was let in several

bid packages. The work in controversy in this lawsuit was bid package number four (4) which was issued on February 1, 1983. On June 2, 1983, Claimant Global Fire Protection (hereinafter "Global") entered into a contract with the CDB, CDB contract number 83-070943, for the plumbing and fire protection work under bid package number four (4). (Defendant's Exhibit 2). The contract stated that Global was to complete its work 450 days from June 2, 1983, which would be August 25, 1984. Global received an authorization to proceed with its work on June 30, 1983, and Global timely completed its work. The contract further provided in pertinent part that if a contractor such as Global failed to diligently execute progress on the contract, the contractor and its surety were to be given three days written notice so that the contractor could remedy the problem. Specifically, section 3.05 of the conditions of the contract states:

"RIGHT TO CARRY OUT THE WORK If the Contractor neglects or fails to carry out the Work in accordance with the Contract or fails to perform any portion of the Contract, CDB may make good such deficiencies after giving three working days written notice to the Contractor and his surety. This shall be without prejudice to any other remedy CDB may have. CDB may deduct for the payments then or thereafter due the Contractor the cost of correcting such deficiencies, including, but not limited to, the cost of additional Architectural/Engineering and Construction Management Services made necessary by such neglect or failure. If the payments then or thereafter due the Contractor are not sufficient to cover such amount, the Contractor shall be liable in such amount to CDB."

In the course of performing its contractual duties, Global accidentally cored through conduit installed by another contractor, accidentally failed to seal around a riser as called for in the contract and cut holes in the drywall to install the fire protection sprinkler system, but did not patch the holes. As a result of the above contractual failures, the CDB issued three deductive change orders from the Global contract. These deductive change orders involved were numbers 27, 60 and 64. They amounted to

$743, $2,949 and $26,763 respectively. (Defendant's Exhibit 1.) The charges were the amounts paid to other companies to remedy the deficiencies in Global's work. (Defendant's exhibits 10, 11 and 12.) In regards to each of the deficiencies in Global's performance for which there were deductive change orders, neither Global or Global's surety was given three days notice by the CDB as required by the contract. The Respondent produced no evidence that Global or its surety were given any written notice of any deficiency in its performance of its contractual duties. In addition, Global was never notified of the deficiencies which were the subject of these deductive change orders. Global produced specific evidence that it attempted to prevent the deficiencies by, for example, seeking access panels for its sprinkler system.

The dispute in this case centers around whether the Respondent was permitted to make the deductive change orders and therefore, could lawfully deprive the Claimant of $30,455. Paragraph 3.05 of the contract clearly states that the CDB must give the contractor and his surety three days written notice before making good on the deficiency. The purpose of giving the contractor and his surety this short period to cure any defect is obvious. The Claimant contractor submitted evidence that he never received the written notice required by the contract. The Respondent submitted no evidence that it had given the required three days *written* notice which as the language of the contract clearly indicates is a condition precedent to the CDB taking remedial action.

Although given ample opportunity, the Respondent has offered no argument or explanation as to why the plain language of section 3.05 of the contract drafted by the Respondent and its agents should not control and permit Global to recover.

The plain language of section 3.05 of the contract required that the contractor be given three days written notice so that he could cure any deficiency with regard to his performance. No such notice was given and a condition precedent to the CDB's action was not met. The Claimant should be paid $30,455.

On October 1, 1993, an order was entered herein directing that certain details on the funding of the project be filed. That information was submitted May 11, 1994. In its response to the Court's order, the CDB stated that no funds lapsed on the project. The CDB apparently used the money deducted to pay for other aspects of the project. To actually enter an award under such circumstances would be tantamount to making a deficiency or supplemental appropriation. See *Graham, O'Shea & Hyde v. State* (1992), 44 Ill. Ct. Cl. 175, and line of cases cited therein.

The claim will have to be denied. However, in fulfillment of our responsibilities as an advisory body to the General Assembly and for purposes of possible further consideration of this matter by the General Assembly, if an appropriation is made, the Claimant should be paid $30,455.

(No. 87-CC-3623—Claimant Karen Henning awarded $261,208.62; Claimant Robert Henning awarded $5,000; ANPAC awarded $3,791.38.)

KAREN L. HENNING and ROBERT F. HENNING, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed November 10, 1993.

ARIANO, ANDERSON, BAZOS, HARDY, KRAMER & CASTILLO (WILLIAM CASTILLO, of counsel), for Claimants.

ROLAND W. BURRIS, Attorney General (PETER BUSTAMANTE and ELIZABETH LOOBY, Assistant Attorneys General, of counsel), for Respondent.

NEGLIGENCE—*duty of operators of State vehicles—liability for negligent acts*. Operators of State vehicles are charged with the same duty of care as other drivers and are liable for damages proximately caused by their negligent acts.

SAME—*rear-end collisions—driver's duty of reasonable care*. Where a case involves a rear-end collision, the trier of fact must determine whether the rear driver was acting reasonably under the circumstances, and a driver's duty of reasonable care includes keeping a proper lookout and keeping his vehicle under control so as to avoid collisions, as well as a duty to maintain reasonable speed so that his vehicle may be safely stopped within the distance that objects may be seen ahead.

SAME—*Claimant's vehicle rear-ended by State vehicle—damages awarded with deduction for insurer's lien*. In a married couple's personal injury claim seeking damages arising out of a collision in which a State vehicle rear-ended the Claimant's vehicle, the State was found liable and damages were awarded for the wife's medical bills, pain and suffering and disability, and for the husband's loss of consortium, based on evidence of the State driver's negligence and his plea of guilty to a traffic offense, but a deduction was made from the Claimant's award in the amount of a lien filed by a medical insurer.

OPINION

SOMMER, C.J.

This is an action by the Claimants, Karen L. Henning and Robert F. Henning (hereinafter referred to as Mrs. Henning and Mr. Henning respectively) against the State of Illinois, Respondent, for personal injuries sustained by Mrs. Henning when the vehicle in which she was a passenger was struck by a vehicle owned by the State and operated by a State employee.

Facts

On July 4, 1985, at approximately 8:00 p.m., the Claimants, Mr. and Mrs. Henning, were travelling westbound on Route 20. Mr. Henning was driving the vehicle, and Mrs. Henning was in the right front passenger seat. Route 20 is a divided highway with two lanes for eastbound

and two lanes for westbound traffic. The Hennings' vehicle was travelling westbound in the far right-hand lane.

At the time of the incident, the traffic was heavy and gradually slowing as vehicles approached the McLean Boulevard exit. The Claimant's vehicle was struck from behind by a State-owned vehicle driven by Leonard Anderson, a State of Illinois employee working at Herrick House in Bartlett, Illinois. Mr. Anderson was driving in the course of his duties.

Mr. Henning testified that he remained in the far right-hand lane the entire time he was travelling on Route 20. He further stated that he was travelling about five miles per hour when he noticed the vehicle driven by Anderson rapidly approaching from the rear. Mr. Henning described the impact as a "very powerful, very dramatic, high impact," other witnesses described the impact in similar terms.

Mr. Anderson, on the other hand, testified that the Hennings' vehicle was travelling westbound in the left lane of traffic when it moved into the right lane, cutting off Mr. Anderson's vehicle. Anderson testified that he was unable to stop, and he struck the Hennings' vehicle.

Anderson was issued a citation for failure to reduce speed to avoid an accident, and he subsequently appeared in Court and pled guilty to the offense.

Mrs. Henning seeks damages against the Respondent for medical bills, pain and suffering, disability, and lost earnings as a result of the accident. Mr. Henning seeks damages for loss of consortium.

Liability

It is undisputed that on July 4, 1985, Leonard Anderson was employed by the State of Illinois Department

of Children and Family Services and that he was within the scope of his employment at the time of the incident. It is also undisputed that the Claimant's vehicle was struck from behind by the State-owned vehicle operated by Anderson and that Anderson was issued and pled guilty in court to a citation for failure to reduce speed to avoid an accident.

Operators of State vehicles are charged with the same duty of care as other drivers and are liable for damages proximately caused by their negligent acts. (*Hewitt v. State* (1981), 35 Ill. Ct. Cl. 288, 289; *Santiago v. State* (1977), 31 Ill. Ct. Cl. 322.) Where a case involves a rear-end collision, that fact does not automatically create an inference that the driver of the rear car was negligent. It is for the trier of fact to determine whether the rear driver was acting reasonably under the circumstances. A driver's duty of reasonable care includes keeping a proper lookout and keeping his vehicle under control so as to avoid collisions. In addition a driver is required to maintain reasonable speed so that his vehicle may be safely stopped within the distance that objects may be seen ahead. *Hewitt v. State* (1981), 35 Ill. Ct. Cl. 291.

The courts have also repeatedly held that an admission of guilt in a criminal proceeding is an admission against interest on that issue in a subsequent civil proceeding. *People v. Chavez* (1985), 89 Ill. Dec. 525, 480 N.E.2d 1268.

In this case the facts strongly support the conclusion that Anderson failed to act reasonably under the circumstances. It is our finding that Anderson was negligent, and his negligence was the proximate cause of the resulting injuries. It was a clear, dry summer evening and the traffic was heavy. Anderson failed to maintain a proper lookout and a reasonable speed for the heavy traffic conditions.

There was no evidence to support Anderson's testimony that the Claimant "cut him off."

It is undisputed that the traffic was heavy and slowing, and even if the Claimant's vehicle had changed from the left-hand lane to the right-hand lane in front of Anderson, Anderson should have been able to reduce his speed and avoid the collision instead of creating a high impact collision. The fact that Anderson appeared in Court and entered a plea of guilty to the traffic offense further supports the Claimant's contention of Anderson's negligence.

Damages

Mrs. Henning testified that the night after the accident she suffered from a headache, stiff neck, and a stiff back, and was unable to hold her head up by the next morning. On July 5, 1985, she went to Sherman Hospital Emergency Room where she was fitted with a cervical collar. After the emergency room treatment, Mrs. Henning made an appointment with Dr. Edward Kinn, an osteopath, and saw him on July 8, 1985. At that time, Mrs. Henning was experiencing weakness and tingling in her neck, headaches, tightness and pain in her entire back. Dr. Kinn gave Mrs. Henning an osteopathic manipulation to loosen her muscles and realign the bones in her back, and a dynawave. Mrs. Henning treated with Dr. Kinn two to three times a week for the remainder of 1985.

Mrs. Henning testified that throughout 1985, although her neck became better, she was having increased pain in her lower back and left leg such that on some days she could not walk and experienced sharp shooting pains in her legs. In March 1986, Dr. Kinn hospitalized Mrs. Henning for the severe pain in her lower back and legs. Mrs.

Henning testified that the pain severely limited her normal activities. At her discharge, Dr. Kinn diagnosed her with left sciatic neuritis secondary to a herniated disc.

From April 15, 1986, through approximately October 22, 1987, Mrs. Henning treated with Dr. Carey B. Dachman, a board certified specialist in rheumatology, a specialty which covers all disorders of the muscles and skeleton including arthritis. Under Dr. Dachman's care, Mrs. Henning was subjected to hundreds of trigger-point injections and seven or eight epidural steroid injections into the lower lumbar area and physical therapy, consisting of heat packs, massage, and electrical stimulation. From April 1986 through October 1987, while under Dr. Dachman's care, Mrs. Henning noticed that the pain in her muscles, joints, lower back and legs improved intermittently for short periods of time. Dr. Dachman noted that the results of an MRI performed on Mrs. Henning on March 15, 1986, were consistent with a herniated disc located in the lower lumbar spine. Dr. Dachman performed an EMG on Mrs. Henning in April 1986, which confirmed that the disc in question was pinching a nerve. After treating Mrs. Henning in April 1986, Dr. Dachman diagnosed her as having a herniated disc and a secondary problem called fibrositis, which is an inflammation of all of the soft tissues, which manifests itself through tissue tenderness and is brought on by trauma. Treatment includes physical therapy and muscle relaxers. Dr. Dachman also diagnosed Mrs. Henning as suffering from facet disease, which is similar to fibrositis except that the inflammation is in the joints, rather than the soft tissues. The treatment for facet disease is identical to the treatment for fibrositis. During the latter part of the summer of 1986, Dr. Dachman prescribed epidural injections for Mrs. Henning. In late August 1986, Dr. Dachman diagnosed Mrs.

Henning as suffering from *severe* facet disease. Dr. Dachman also testified that both fibrositis and facet disease can become chronic, meaning long-standing and permanent. Dr. Dachman continued to treat Mrs. Henning through 1986 and late 1987 on approximately 40 occasions.

After November 1987, Mrs. Henning discontinued treatment with Dr. Dachman until August 1991; during this period Mrs. Henning resumed treatment with Dr. Kinn. Dr. Kinn prescribed osteopathic manipulators, dynawave, and medications. Dr. Kinn's testimony substantially concurred with Dr. Dachman's regarding Mrs. Henning's condition and the causal connection of the auto accident to the injury. Dr. Kinn also offered unrebutted testimony that in his opinion, based upon a reasonable degree of medical certainty, Mrs. Henning suffered from severe chronic pain syndrome which is permanent in nature and will require additional medical treatment in the future.

On August 7, 1991, Mrs. Henning returned to Dr. Dachman with the same complaints for further evaluation. Dr. Dachman ordered an MRI and CAT scan, and Dr. Graham performed an EMG in late August 1991. Both the EMG and the CAT scan showed a bulging disc in the lower lumbar spine.

Finally, Dr. Dachman testified that based upon a reasonable degree of medical certainty, the condition with which he diagnosed Mrs. Henning in 1986 and again in August 1991, and for which he has rendered treatment to her, bore a causal relationship to her automobile accident of July 4, 1985. Dr. Dachman testified that the car accident in 1985, and the trauma she sustained, were the proximate causes of Mrs. Henning's condition. Dr. Dachman gave unrebutted testimony that Mrs. Henning's conditions were permanent, and that Mrs. Henning would

require further treatment, consistent with the treatment she is receiving now, for years to come. Dr. Dachman also testified that based upon a reasonable degree of medical certainty it was his opinion that Mrs. Henning would not be able to engage in full-time employment which would involve any lifting.

The Respondent did introduce evidence of a prior existing back complaint. Mrs. Henning had been treated by Dr. Kinn on November 2, 1981, for strain in the cervical spine, and was treated with osteopathic manipulation and dynawave. Mrs. Henning was again treated by Dr. Kinn on November 5, 1981, for lumbar-sacral and sacroiliac back pain. These strains and back pain were attributed by Dr. Kinn to Mrs. Henning's carrying her infant and were stated to be common among mothers with young children and were not permanent.

From the evidence presented, this Court finds that the proximate cause of Mrs. Henning's injuries was the auto accident of July 4, 1985. Additionally, this Court finds that Mrs. Henning's injuries were proven to be objective by the testimony of Drs. Kinn and Dachman and the fact that Mrs. Henning underwent literally hundreds of injections during the 1986-87 period in an attempt to relieve her condition. The Court believes that Mrs. Henning would not have undergone such if she were not genuinely in distress.

The Claimants have requested damages in the following categories: past and future medical bills, past and future pain and suffering, disability and lost earnings, and loss of consortium by Mr. Henning.

In the matter of Mrs. Henning's medical bills, we find that at the hearing that certain medical bills were stipulated to, others were testified to by Dr. Kinn and Dr. Dachman

as being necessary and reflecting reasonable and customary charges, and incurred as a result of the injury complained of. The Claimant, Mrs. Henning, testified to other bills indicating that they had been paid. The State did not object to Mrs. Henning's testimony, but did by agreement exclude portions of the bills offered by Dr. Dachman as not being incurred as a result of the injury complained of.

The Claimant's brief indicates that the total of the medical bills admitted into evidence was $45,000. The State did not object to this amount in its brief. The Court, upon detailed examination of the transcript and the voluminous bills, finds the sum of $45,000 is substantially accurate.

Mrs. Henning can certainly anticipate future medical treatment for her condition. To this point, Mrs. Henning's treatment has been conservative. There was no testimony in the record concerning possible surgical intervention. On the other hand, Dr. Dachman testified that Mrs. Henning may require a conservative treatment of therapy, medication by injection, and anti-inflammatory drugs for many years. At the trial longevity tables were introduced which showed that Mrs. Henning could expect on the average to live another 43.3 years. Dr. Dachman and Dr. Kinn testified that her condition was permanent, but whether conservative treatment would be necessary throughout Mrs. Henning's life was not stated. We find that an award discounted to present cash value of $20,000 for future medical treatment is proper. If surgery is undertaken that amount would be adequate for both the surgery and recovery, and if conservative treatment is chosen, she would have available to her sufficient funds for said treatment.

In a claim such as this, we find that though disability and pain and suffering are two separate bases for recovery

under the law, they are intertwined. But for the pain, there would be no disability, and to the extent the pain is relieved, the disability would diminish.

In the claim for disability, we find that the Claimant has suffered injury which has diminished the quality of her life. Mrs. Henning was previously quite active, but now many activities that Mrs. Henning engaged in before the injury are not presently possible because of her disability. Such activities include gardening, normal maintenance work around the house and yard, sports and school activities. Both physicians testified that Mrs. Henning's condition was both permanent and chronic. Therefore, for both past and future disability, we award the Claimant $100,000.

In the claim for pain and suffering, we find that the Claimant's pain and suffering was substantial after the accident. She was in such pain that she could not walk and had to be hospitalized. After her hospitalization, in order to reduce her pain, she underwent hundreds of injections. Finally, she was able to return to Dr. Kinn's care for osteopathic manipulations, dynawave treatments, and medications. Later she went back to Dr. Dachman just prior to trial and had further tests. Both doctors testified that Mrs. Henning's condition was chronic and permanent and that further treatment would be necessary for many years to come. We find that Mrs. Henning was in great pain for the first year or so after the accident, but after being in the care of Dr. Dachman until October of 1987, she returned to Dr. Kinn who continued his conservative treatment of manipulation, dynawave, and medication. Whether Mrs. Henning's pain had subsided when she returned to Dr. Kinn is not in the record. We do note that she had no further hospitalization between October 1987 and 1991, nor were substantial medical tests performed

on her in that period. We conclude that though the Claimant had pain, the treatments of Dr. Dachman and Dr. Kinn alleviated the pain somewhat. Mrs. Henning reported at the time of the trial that she had difficulty sleeping because of pain. She testified that she sleeps on the couch three nights a week in order to get sleep, but her sleep is disturbed every three or four hours because of pain. Therefore, for both past and future pain and suffering, we award Mrs. Henning $100,000.

The Claimant has made a claim for lost earning capacity. The test is whether the Claimant is able to perform meaningful work for which she is qualified. There is nothing in the record to indicate that the Claimant had any particular training or educational background. Mrs. Henning testified that it was her desire to become a nurse. She had taken introductory courses in nursing the year prior to her accident and had worked at doctors' offices and hospitals. She was not working at the time of the accident nor was she taking nursing training. This Court finds that whether Mrs. Henning would have become a nurse is speculative. Dr. Dachman testified that the Claimant could do sedentary work but could not work as a nurse as such would require lifting. The Claimant introduced no other evidence of her desire to return to work, and was not working at the time of the accident, but she did have a work history. No evidence was introduced to show a diminution of her earning capacity because of her condition if she were to return to work which she had previously done or for which she was qualified. Therefore, we find that Mrs. Henning has not proven her claim for lost earning capacity. We will make no award for lost earning capacity.

As for the claim of loss of consortium, there was very little testimony on the matter. The Claimant's post-trial

brief does not cite consortium as an element of damages sought, though the reply brief does. Mrs. Henning testified that she and her husband previously engaged in extensive social activity including bowling together often, but since the injury the couple's social activity has declined to almost nothing. Mrs. Henning also testified that there was a drastic decline in the couple's sexual activity since the injury. No claim was made for loss of services, nor was any value established for any loss of services. The Court finds that the Claimants have proven a minimal loss of consortium, for which we will award to Mr. Henning the sum of $5,000.

In summary, we award:

$ 45,000	—past medical
20,000	—future medical
100,000	—past and future pain, suffering
100,000	—disability
5,000	—loss of consortium
$270,000	—Total

Furthermore, a lien in the amount of $3,791.38 has been filed by a medical insurer, ANPAC. We will deduct this amount from the Claimant's award.

Therefore, it is ordered that ANPAC be awarded $3,791.38 in satisfaction of its lien, and Karen Henning be awarded the sum of $261,208.62 in full and complete satisfaction of her claim, and that Robert Henning be awarded $5,000 in full and complete satisfaction of his claim.

(Nos. 87-CC-3636, 87-CC-4231 cons.—Claims denied.)

RUTH CROWELL, EVERETT STEELE, and JOHN HERRON *et al.*, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed January 6, 1994.

JOHN HERRON and JUNE ANN TROSPER, *pro se*, for Claimants.

CRESWELL, FARES & RAYN (DAVID J. FARES, of counsel), for Claimants CROWELL & STEELE.

ROLAND W. BURRIS, Attorney General (COLLEEN MCCLOSKEY VON OHLEN, Assistant Attorney General, of counsel), for Respondent.

PRACTICE AND PROCEDURE—*when summary judgment should be granted*. Summary judgment is to be granted in all of the pleadings, depositions, admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

NEGLIGENCE—*State's liability for defective condition of highway*. Although the State has the duty to maintain its highways in a reasonably safe condition, it is not an insurer against all accidents which may occur by reason of the condition of its highways, and the State has no absolute duty to discover and remedy all defects but rather a defect must be substantial enough and exist for such a length of time that reasonable persons would conclude that immediate repairs should be made or warning signs posted.

SAME—*burden of proof in negligent highway maintenance claim—notice.* In order to prevail on a claim of negligent highway maintenance, a Claimant has the burden of proving that the State had either actual or constructive notice of the dangerous condition.

SAME—*automobile accident—State had no notice of missing stop sign—claims denied*. Where the Claimants did not offer evidence to refute testimony by State employees that no reports or complaints had been made concerning a missing stop sign at a rural intersection, and a State sign maintainer testified that he did not observe a missing sign when he patrolled the intersection several weeks before an automobile accident involving the Claimants, the State could not be charged with actual or constructive notice of the missing sign, the State's motion for summary judgment was granted, and the claims were dismissed.

ORDER

PATCHETT, J.

This cause coming to be heard on Respondent's

motion for summary judgment, due notice having been given and the Court being fully advised in the premises, the Court makes the following findings:

These two lawsuits arise from the collision of two automobiles on June 26, 1986, at the intersection of Illinois Route 17 and Stateline Road. On June 26, 1986, Claimant Everett Steele was driving his car westbound along Illinois Route 17. Steele's sister, Ruth Crowell, was a passenger in Steele's car. The weather was good.

Claimant John Herron was travelling southbound on Stateline Road, a gravel road. His father, Raymond Herron[1] and brother-in-law Joseph Horvath were passengers in Herron's car. At approximately 8:30 a.m., Steele's car collided with Herron's car at the intersection of Route 17 and Stateline Road.

Both the "Steele parties" and "Herron parties" filed suit against the State in this Court, and these two cases have been consolidated. However, in addition to the present action, this accident instigated other litigation as well. On May 18, 1989, the "Herron parties" settled the circuit court action with the "Steele parties," paying $11,000 and $4,000 to Steele and Crowell respectively.

In this action, Claimants allege that the State is liable for their personal injuries resulting from the accident because the stop sign that was supposed to control the traffic on Stateline Road at its intersection with Route 17 was down. The accident occurred in Kankakee County, Illinois. The area in which the accident occurred is maintained by District 3 of the Illinois Department of Transportation (IDOT). District 3 covers approximately 2200 miles of State highway, encompassing 11 counties.

[1]Raymond Herron died on April 4, 1987, of cancer. (Exhibit "B" p. 39.) A claim for Raymond Herron's personal injuries has been brought by his administrator, June Ann Trosper.

Route 17, a paved State highway, is maintained by IDOT's District 3. Stateline Road is not maintained by IDOT. According to Edmund Wallens, the District 3 traffic engineer for IDOT, Stateline Road appears to be a county road to the south of its intersection with Route 17. To the north of its intersection with Route 17, Stateline Road is gravel and appears to be a township road. Stateline Road is also a "country road," which does not have a center line because it consists of gravel, which cannot be painted.

It is not disputed that at the time of the accident, there was not a stop sign at the intersection at issue. It is also undisputed that although Stateline Road is not maintained by IDOT, the Department does maintain the stop sign at the intersection of its Route 17 with Stateline Road, on the northwestern corner. IDOT sign maintainer Richard Arnold testified at deposition that the last time he patrolled the intersection at issue before the accident was sometime between May 20, 1986, and June 6, 1986. Arnold did not testify that during this patrol of the intersection at issue he noticed that the stop sign was missing. Department policy mandates that when a downed stop sign is reported directly to the field office, a temporary sign is to be erected within four hours and a permanent sign is put up within two days of the notification.

There is no firm evidence concerning the date which the stop sign went down. Yet, it is clear that after the accident, when IDOT had notice that the stop sign was down, it immediately erected a new one. Specifically, IDOT sign maintainer Arnold erected a brand new stop sign on the day after the accident.

IDOT is notified of missing or malfunctioning traffic devices by a variety of means. First, every IDOT worker, whether they are with the Bureau of Maintenance or Traffic, looks for downed signs during the daily course of

their duties. Second, members of the Department's Bureau of Traffic make routine sign inspections as well. IDOT also receives notice from the State Police if a stop sign is down or missing. Additionally, IDOT receives telephone calls from citizens concerning complaints about the signs.

The facts at bar clearly indicate that IDOT did not have notice of the missing sign before the accident. Stanley Martin, an IDOT field supervisor, testified at deposition that "it (the stop sign) was never reported to the Department as being down." Mr. Martin's testimony that the Department did not have notice that the stop sign was down is corroborated by Edmund Wallens, District 3's traffic engineer. Wallens testified that besides the telephone call that sign maintainer Arnold received *after* the accident, the Department never received any complaints about the stop sign at issue. Furthermore, in Respondent's answers to Claimants' interrogatories, A. Thomas Muraro, chief of IDOT's Bureau of Claims, answered under oath that IDOT never received any complaints about the traffic controls at or near the accident site prior to the accident.

Conclusions of Law

Summary judgment is to be granted if the "pleadings, depositions, admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ill. Rev. Stat. 1991, ch. 110, par. 2—1005.

Although the State has the duty to maintain its highways in a reasonably safe condition, it is not the "insurer against all accidents which may occur by reason of the condition of its highways." (*Scroggins v. State* (1991), 43

Ill. Ct. Cl. 225, 226-27.) A defective condition on a State highway is not in itself negligence on the part of the State. (*Id*. at 226.) This Court has also stated that the State has no absolute duty to discover and remedy all defects, and it would be unreasonable for the State to be held liable for every possible defect in its highways. Furthermore, a defect must be substantial enough and exist for such a length of time that reasonable persons would conclude that immediate repairs should be made or warning signs posted. *Stege v. State* (1972), 27 Ill. Ct. Cl. 399, 403.

This Court has consistently held that in order to prevail on a negligent highway maintenance claim, a claimant has the burden of proving that the State had either actual or constructive notice of the dangerous condition. *Scroggins* at 226-27, citing *Stills v. State* (1989), 41 Ill. Ct. Cl. 60, 62.

As evidenced by the deposition testimony of Stan Martin and Edmund Wallens, in addition to the department's response to interrogatory number 11, the State did not have *actual* notice that the stop sign at the intersection of Route 17 and Stateline Road was down. There were clearly no reports or complaints made to the Department concerning the missing stop sign.

Just as Claimants cannot prove that the State had actual notice of the downed stop sign, nor can they prove that the condition existed for a long enough time to put the State on *constructive* notice of its existence. 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* at 227-28.

In *Webee v. State* (1985), 38 Ill. Ct. Cl. 164, this Court was presented with a downed stop sign case. In that case, two cars collided at an intersection where the stop sign that was maintained by IDOT was down. As in this case, there was no evidence that the State had actual notice of the missing stop sign.

Thus, the determinative issue before us is whether the State should be charged with constructive notice of the defective condition. In the *Webee* case, we found that "the evidence at trial indicated that the sign was missing for a period of a month, possibly as long as six weeks." *Id.* at 168.

As already noted, IDOT sign maintainer Richard Arnold testified that he patrolled the intersection at issue sometime between May 20, 1986 and June 6, 1986. Thus, giving a liberal interpretation which yields the greatest possible benefit to Claimants, it is clear that because of Arnold's inspection of the site in May/June of 1986, the stop sign could only have been down since May 20, 1986 at the latest. This would have been five weeks before the accident. Although in *Webee v. State* we found that the absence of a stop sign for four to six weeks is a long period of time, we also found that "it should be noted that the absence of a stop sign on a rural, gravel-topped road is not likely to be noticed as quickly as on a major thoroughfare." *Id.* at 168-69.

Similarly, the stop sign at issue controlled traffic on Stateline Road, a *gravel* road maintained by a township and a county. Stateline Road is a country road, not a major thoroughfare, and because of its nature, a missing stop sign would not be as noticeable on it as it would be on a busier road. Just as we found in *Webee v. State* that the State should be allowed a longer period of time before it is charged with constructive notice of a downed stop sign

on a country road in a small town or village, so too we find that the State should be granted a longer period of time before it is charged with constructive notice of the missing stop sign on the gravel-topped Stateline Road. Thus, we hold that in the case at bar the State did not have constructive notice of the missing stop sign at issue.

Conclusion

The law is clear that in order to prevail on a claim that the State was negligent in the maintenance of its highways, a claimant must prove that the State had notice of the alleged defect. As outlined above, it is clear from the deposition testimony and sworn interrogatory answers of the Department's employees that the State did not have actual notice of a defective condition at the accident location. No calls were ever received by IDOT from the State Police or citizens informing IDOT that the sign was down.

Similarly, the State cannot be charged with constructive notice of a defect. The last inspection of the intersection occurred sometime between May 20, 1986, and June 6, 1986. The accident occurred on June 26, 1986. Consequently, even giving the benefit to the Claimants that IDOT did not inspect the intersection before the accident since May 20, 1986, and the stop sign went down immediately thereafter, this is not enough time to put the State on notice of a downed stop sign on a rural, gravel-topped road. Therefore, because the State cannot be charged with constructive notice of the missing stop sign, there is no genuine issue of material fact, and the State is entitled to judgment as a matter of law.

It is hereby ordered that Respondent's motion for summary judgment is granted, thereby terminating this case.

(No. 88-CC-0342—Claim denied.)

KIMBERLY WHITE, Claimant, *v.* THE BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES and LOUIS V. HENCKEN, Respondents.

Opinion filed October 15, 1993.

PEDERSEN & HOUPT, for Claimant.

DUNN, GOEBEL, ULBRICH, MOREL & HUNDMAN (HELEN E. OGAR, of counsel), for Respondent.

CONTRACTS—*university did not breach housing contract with student—claim denied*. A student at a State university who entered a contract with the institution for dormitory housing but subsequently moved into sorority lodging could not recover on her claim alleging that the university breached the contract by failing to refund her payment for a semester's dormitory housing, since there was no evidence that the Claimant's dormitory building contained asbestos or that she had experienced any related health problems, and she had declined the university's offer to place her in alternate dormitory accommodations.

OPINION

MITCHELL, J.

Kimberly White was a student at Eastern Illinois University "EIU" residing from August, 1983 to December, 1984 in Lawson Hall. In January, 1985 she moved to room 429 in Taylor Hall. In anticipation of her junior year, she signed a housing contract dated April 8, 1985, with the university. The cost of $1,074 per semester can be proportioned to 57% ($612.18) for food costs and 43% ($461.82) for room costs.

Meeting with Lou Hencken, housing director for EIU, in mid-November of 1985, she told him of her wish to move into Sigma sorority house in January. There was no mention by her of any health problems. Hencken replied that university policy would not allow her to cancel the contract, but she could live in a different dorm or a different room in her current dorm. White declined the

two alternatives and in December of 1985 she paid $1,074 for her second semester, remaining in room 429 at her request.

Shortly after White's meeting with Hencken, her father, Robert White, phoned John Flynn (a fraternity brother and director of financial aid at EIU) to ask how his daughter could cancel the contract. Flynn stated that unless she met one of the circumstances specifically set forth in the contract she could not be released. There was no mention of any health problems but only her wish to move into the sorority housing.

In early December, Robert White called Hencken and talked about the possibility of Kimberly White moving into off-campus housing. Once again, no mention of health problems was made.

During this period, EIU had conducted a survey and issued a press release stating that there was "asbestos containing material" in certain university buildings; however, Kimberly's dorm room was not listed. In January of 1986, a memo to the residents from Hencken was distributed stating that "asbestos containing materials" were found in Taylor Hall. On or about January 17, 1986, Kimberly advised Hencken by letter that she would be moving out of Taylor Hall and that she was requesting a refund of the payment for the semester. She subsequently paid approximately $1,074 for off-campus room and board.

After the university did not refund her money, she filed suit for breach of contract, seeking actual damages and attorney's fees (Count I), and breach of implied warranty of habitability, seeking punitive damages, interest and attorney's fees (Count II). On December 28, 1987, the Court of Claims dismissed Count II for failure to

state a cause of action. Count I was tried before Commissioner Michael E. Fryzel on July 14, 1990.

Prior to her January 17, 1986, letter to Louis Hencken, there is no documented evidence that Kimberly White advised any person at the university or a doctor of any health problems (other than her allergies and childhood asthma). On the contrary, her physical for the swim team found she was healthy. In her several conversations with coach Ray Padovan wherein he expressed concern that she was missing practices (due in his belief to her time being taken up with sorority matters), she never mentioned any health problems that were causing her to miss practice. Kimberly White produced no witnesses (other than her father) or evidence of her complaints about her health during the time period before she moved out of Taylor Hall.

There is no proof that her dorm building contained asbestos. Per Jack Richie, even if the material around the elbow pipe was asbestos, it was well "encapsulated," with "no punctures, nothing friable that would indicate there would be any cause for any human concern." The air samples they took showed figures well below EPA/OSHA action levels. There is no evidence that any unreported health problems Kimberly White may have had were caused by her living conditions. Even if she believed such to be the case, she knew she had the options of moving to another room in that dorm or an entirely different dorm and declined both options.

The university contracted to provide Kimberly White with room and board for the academic year 1985-86. There is no evidence that they did not meet those contracted requirements—there is no breach of contract by the university. There is no statute, rule of law, stipulation or agreement which would allow Claimant payment for

attorney's fees and costs of litigation. Therefore, the reasonableness of such fees (which could be proven at a later date) is moot. Therefore, judgment is for the Respondent and against the Claimant.

(No. 88-CC-0667—Claim denied; petition for rehearing denied.)

DEWAYNE WILLIAMS, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed April 12, 1994.

Order on petition for rehearing filed June 27, 1994.

DEWAYNE WILLIAMS, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (ROBERT SKLAMBERG, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*necessary elements of medical malpractice claim.* An inmate who files a claim against the State alleging medical malpractice must establish through expert testimony a breach of duty, the Respondent's deviation from the standard of care, and that the deviation was a proximate cause of the Claimant's injury, and the standard of care which the Claimant must establish is that care which is provided by reasonably well-trained medical providers in the same circumstances in a similar locality.

SAME—*failure to establish causation defeats claim of medical negligence.* Failure of the Claimant to establish that an act of medical negligence proximately caused the injuries suffered defeats the claim, but the Claimant sustains his burden by proving, generally through expert testimony, that Respondent's breach of the applicable standard of care is more probably true than not the cause of Claimant's injury.

SAME—*medical malpractice—burden of proof not met—claim denied.* An inmate's claim alleging that the State negligently treated a bite wound inflicted by a fellow inmate thereby necessitating subsequent surgery to remove a cyst and foreign bodies was denied, since the Claimant did not establish the applicable standard of care, the State's deviation from that standard, or the existence of a causal relationship between the State's treatment of the bite injury and the later surgery to remove the cyst and foreign matter.

OPINION

FREDERICK, J.

Claimant, Dewayne Williams, an inmate in the Illinois Department of Corrections, filed his claim in the Court of Claims on September 24, 1987. Claimant's claim is a claim for medical negligence. The cause was tried before Commissioner Fryzel.

Claimant testified that on June 26, 1984, while he was an inmate at the Menard Psychiatric Center, a homosexual touched him so Claimant hit him. Claimant was put in segregation for 15 days for hitting the other inmate. After his release from segregation, the other inmate ran up behind Claimant, jumped on Claimant's back, and bit Claimant on the shoulder. Claimant was taken to the hospital where the wound was treated with a white cream and bandaged.

In 1985 or 1986, when Claimant was transferred to Joliet, he kept going to the hospital for pain in his shoulder. For several years, Claimant was told that he had a well-healed scar and nothing could be done for him. Sometime later he had x-rays taken of his shoulder. He had surgery and a cyst was removed from his shoulder. Claimant believes it may have been a tooth removed from his shoulder. He saw an x-ray and a little piece of something that looked like a chipped tooth was in his shoulder. The medical records indicate a cyst and foreign bodies were removed on August 10, 1987. According to Claimant, the x-rays disappeared. Claimant has a scar on his shoulder. He also had pain in his shoulder. Claimant seeks $6,000 in damages for pain, suffering, and for refusing Claimant medical treatment. Claimant presented no expert medical testimony. The Respondent presented no evidence.

Claimant's claim is a cause of action sounding in

medical negligence. An inmate who files a claim against the State alleging medical malpractice must establish a breach of duty through expert testimony, establish that the Respondent deviated from the standard of care, and establish through expert testimony that the deviation was a proximate cause of Claimant's injury. (*Pink v. State* (1991), 44 Ill. Ct. Cl. 295.) Claimant has 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 the Claimant's injury. (*O'Donnell v. State* (1980), 34 Ill. Ct. Cl. 12.) The standard of care is that care which is provided to a patient by reasonably well-trained medical providers in the same circumstances in a similar locality. The standard must be generally accepted in the medical community, and it is not sufficient for the patient's expert witness to testify that he would have acted differently in the same circumstances, or that alternative methods of proceeding exist. (*Wilsman v. Sloniewicz* (1988), 172 Ill. App. 3d 492.) The Claimant must establish the standard of care. *Thomas v. State* (1987), 40 Ill. Ct. Cl. 188; *Bock v. State* (1991), 43 Ill. Ct. Cl. 299.

The facts of this case are similar to the facts found in *Ray v. State* (1992), 44 Ill. Ct. Cl. 173. In *Ray, supra*, this Court denied the claims of an inmate who broke his finger in an altercation. In that case, it was alleged there was inadequate and negligent medical treatment, including delays in treatment and in obtaining an x-ray of the hand, which caused the finger to heal improperly. However, the Claimant failed to adduce proof as to the applicable standard of care and the State's deviation from that standard and the claim was denied.

While the Court has indicated a deviation from the standard of care may be found if the inadequate care is

obvious, such as where a sponge is left in during surgery, there still must be proof that the deviation was a proximate cause of the alleged injury. *Bock v. State* (1991), 43 Ill. Ct. Cl. 299; *Purtle v. Hess* (1986), 111 Ill. 2d 229.

The Court finds that inadequate care is not obvious in this case and the Court would have to rely on expert testimony to establish the standard of care and a deviation thereof. There is no competent proof of what foreign bodies were removed with the cyst or that the cyst was related to the bite. There is nothing in the record to establish the standard of care and if there was a deviation of that standard. There is also absolutely no competent evidence that the pain or seriousness of the injury was exacerbated by the State's treatment or lack thereof and was therefore a proximate cause of Claimant's injury.

The standard of proof for causation is that Claimant must prove by a preponderance of the evidence that Respondent's conduct was a proximate cause of the injury. (*Wise v. St. Mary's Hospital* (1978), 64 Ill. App. 3d 587.) Proximate cause is an essential element that must be proved in every medical malpractice case. Failure of the Claimant to establish that an act of medical negligence proximately caused the injuries suffered by the Claimant defeats the claim. (*Tops v. Logan (*1990), 197 Ill. App. 3d 284.) The Claimant sustains his burden by proving, generally through expert testimony, that Respondent's breach of the applicable standard of care is more probably true than not the cause of Claimant's injury. *Borowski v. Von Solbrig* (1975), 60 Ill. 2d 418; *Bishop v. Baz* (1991), 215 Ill. App. 3d 976.

Proximate cause is not established where the causal connection is contingent, speculative or merely possible. (*Newell v. Corres* (1984), 125 Ill. App. 3d 1087; *Pumula v. Sipos* (1987), 163 Ill. App. 3d 1093; *Mazur v. Lutheran*

General Hospital (1986), 143 Ill. App. 3d 528; *Piano v. Davidson* (1987), 157 Ill. App. 3d 649.) The testimony in this cause as to proximate cause is non-existent. As the Claimant must establish that the failure to treat and x-ray to a reasonable degree of medical certainty more probably than not caused the injury, he has failed to sustain his burden of proof. *Pumula v. Sipos* (1987), 163 Ill. App. 3d 1093.

In this case, Claimant has failed to establish that a direct causal relationship exists between the Respondent's alleged deviation from the standard of care and the Claimant's resulting injury.

Those practicing in the medical arts in the penitentiary are held to the same standard of care as those practicing in the communities of our State. To hold otherwise would be to abandon reason and common sense. We must recognize, however, that constraints necessarily exist in correctional institutions which have or may have a negative impact on the ability to deliver medical services. The medical arts practitioner should not be held liable for injuries resulting from these constraints. However, these constraints, while interfering with proper medical care, do not lessen the standards required of the medical arts practitioner. There is nothing unduly burdensome in holding that physicians employed by the Department of Corrections give inmates whom they treat the same duty of care which they owe their patients in private practice. (*Madden v. Kuehn* (1978), 56 Ill. App. 3d 997, 1002.) In this case, however, there is no competent evidence that the prison physicians and medical providers deviated from the standard of care or that any actions of the physicians or medical providers proximately caused the injury of Claimant.

Based on the foregoing, it is the judgment of this Court that Claimant's claim is denied.

ORDER

FREDERICK, J.

This cause comes on Claimant's petition for rehearing, and the Court having reviewed the entire file and the Court's opinion, and the Court being fully advised in the premises, wherefore, the Court finds:

(1) That the Court properly decided this cause in its opinion rendered on April 12, 1994.

(2) That Claimant failed to meet his burden of proof.

(3) That Claimant failed to prove by competent evidence that medical providers deviated from the standard of care which proximately caused the injuries complained of by a preponderance of the evidence.

Therefore, it is ordered that the petition for rehearing is denied.

(No. 88-CC-0687—Claimant awarded $100,000.)

CAROL J. ZIMMERMAN, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed May 10, 1994.

ROBERT W. BACH, for Claimant.

ROLAND W. BURRIS, Attorney General (THOMAS GRAY, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*State's duty to prevent prisoners from inflicting foreseeable injury.* The State has a duty to exercise reasonable care so that individuals under its custody will not have the opportunity to inflict foreseeable injury upon others, and foreseeability only requires that the risk to the victim involve a recognizable danger, based upon some knowledge of existing facts, and some reasonable belief that harm may follow.

SAME—*negligence—Claimant attacked while performing x-rays on inmate—State liable.* The State was liable in the Claimant's negligence action stemming from an inmate's attack on her while she performed x-rays at a State correctional facility, since the State had knowledge of the inmate's dangerous propensities and of security problems which existed in the x-ray facility, but it failed to provide a guard to escort the inmate or to implement other security precautions.

SAME—*attack by inmate—Claimant awarded statutory maximum—no set-offs allowed.* Based upon evidence of severe physical and mental injuries sustained by the Claimant in an attack by a prison inmate, the statutory maximum $100,000 in damages was awarded, and no set-offs were allowed, either as a result of workers' compensation payments made to the Claimant, since they arose from a collateral source, or a judgment obtained by the Claimant against the inmate, since that judgment had not been collected and did not affect the Claimant's right of recovery against the State.

OPINION

PATCHETT, J.

This is a claim for injuries which were sustained by the Claimant, Carol J. Zimmerman, when she was attacked by James Armstead. At the time of the attack, Ms. Zimmerman was employed by Correctional Health Services, Inc., which had a contract with the State of Illinois to provide x-ray and other health-related services to the Pontiac Correctional Facility. James Armstead was an inmate at the Pontiac Correctional Facility, which is a maximum security facility operated by the Illinois Department of Corrections.

Following the attack, Ms. Zimmerman's employer paid $29,550 in medical bills, $9,710 in temporary total disability benefits, and $30,000 in a lump sum settlement. The employer waived any lien they had against any monies that might be collected through this claim.

As her first witness, Ms. Zimmerman called Dale Bent. Mr. Bent is currently the chief phlebotomist at Stateville Correctional Center and had been working for the Department of Corrections for eight years at the time

of the attack. He was working at the Pontiac Correctional Center Hospital on that occasion in the lab, which was next door to the x-ray room where Ms. Zimmerman worked. There was no door between the lab and the x-ray processing area. Mr. Bent received blood test results on his computer which was located in the x-ray processing room next to his lab. This made it necessary for him to go into the hallway, down the hall to the door of the x-ray room, and into the processing area to receive the computer report. Ms. Zimmerman knocked on the wall to notify Mr. Bent to come and get the reports when they came in. The door from the x-ray room into the main hallway was steel with one small window about five feet off the floor. There were no windows along the common wall between the x-ray room and the hallway. There was an officer's room next to Mr. Bent's lab, which was approximately 45 feet from the door to the x-ray room. Following the attack, a door was installed between the lab and the x-ray processing room.

The x-ray room and lab had been remodeled in March 1985. After moving in, Bent and Zimmerman discussed with Assistant Warden Washington, who was in charge of overseeing all the hospital programs, the problems caused by the physical layout of the officer's room, lab, and x-ray areas. They specifically noted the problem of access to the x-ray room. They were concerned for both convenience and security reasons. Warden Washington agreed that there were problems with security and access in the new facilities, and he told both Bent and Zimmerman to send him a memo on the subject. Mr. Bent sent a memo to Warden Washington suggesting that a door be installed between the lab and the x-ray processing area in order to improve security and facilitate access to the processing area for both officers and Bent. Mr.

Bent reiterated their earlier discussions concerning the problems with security. No response to the memo was received. About three weeks after the attack on Ms. Zimmerman, the door was installed.

Bent testified that after Ms. Zimmerman was attacked, she knocked on the access panel located in the wall between the lab and the processing room to attract his attention. He went out of his lab and down the hall into the x-ray area, where he saw the Claimant in the x-ray processing room. She was behind the door between that room and the x-ray room. Since Bent did not have a key to this door, and the Claimant was too severely injured to open it, she had to slide the keys under the door. Before opening the door, he ran back to the desk in the x-ray room to call for help. He found the line busy. He then ran into the hall and called for a sergeant who was in the officer's room.

Upon cross-examination, Bent testified that the door leading from the x-ray room to the processing area was self-locking. There was also a self-locking solid steel door between the processing area and the dark room. There were correctional officers stationed in the health care unit. Unless an inmate was actually seeing a doctor, he was to be kept in a holding area, the protective custody holding area, or in the actual in-patient hospital.

There was no alarm button or warning signal in the x-ray area. There was no monitor that allowed the officers to observe what was going on in the x-ray area. The only phone in the x-ray area was in the x-ray room itself. An alarm system, which included a button to summon help, was built into the newly-remodeled infirmary area. Only one person, a nurse, worked in the infirmary area where the alarm was located.

The Claimant testified in her own behalf. At the time of the attack, she was 46 years of age, four feet, eleven inches (4' 11") tall, and weighed approximately 113 pounds. She had six children and began working outside her home in November 1972. She worked part time for three different employers while raising her six children through April 1980. She began x-ray training at Illinois Central College. After graduating as an x-ray technician, she found full-time employment with Correctional Health Services and was assigned to the Pontiac Correctional Center in July 1983.

Ms. Zimmerman participated in the conversation between Assistant Warden Washington and Dale Bent. During that conversation, she expressed concern for her safety, especially in the darkroom and processing room. She also expressed concern about the response time of officers in the event of a problem. A memo from Ms. Zimmerman to Assistant Warden Washington, dated March 18, 1985, was introduced into evidence. The memo suggested that a doorway be installed between the x-ray room and Mr. Bent's lab, and also referred to Bent's memo of March 15, 1985. There was never a response from Assistant Warden Washington, nor any action taken as of October 29, 1986, to improve access to the x-ray suite. No alarm system or monitors were installed in the x-ray area. As stated previously, there were no windows between the lab and the hallway.

Ms. Zimmerman was never given instructions with regard to self-defense or security when dealing with prisoners. She was not supplied with self-defense equipment; in fact, such items were expressly prohibited.

When prisoners were to be x-rayed, they would come into the x-ray lab with either a requisition from the prison doctor or a pass. The Claimant would let them into

the lab area and x-ray them, either at the examining table or at the wall. While the x-rays were being performed, she would stand behind the protective lead wall in the x-ray room. She then would send the inmates back to the holding area. Afterwards she would take the film to the film processor, which was located in a separate room located between Bent's lab and the x-ray room. There was a self-locking door between the x-ray room and the processing room. While the x-rays were being performed, the door from the x-ray room to the hall would be closed to prevent radiation from going into the hall. Ms. Zimmerman could not see out the window in this door because it was too high off the floor. She was never instructed to keep the door between the processing room and the x-ray lab closed. Ms. Zimmerman would take twelve to fifteen x-rays per day. She assumed the inmates would be screened by the doctor who saw them for violent propensities. Only those inmates who were from protective custody were escorted by guards. There had never been a guard assigned to her on a regular basis. If an inmate from protective custody was having an x-ray, the guard would stand behind the protective lead wall with the Claimant.

On October 29, 1986, inmate James Armstead came for a finger x-ray. Armstead was described as being approximately six feet tall, 180 pounds, and very muscular. He seemed cooperative and calm on that occasion. She x-rayed his finger and sent him back to the holding area while she went back to process the x-ray film. After she put the film in the processor, she heard a knock at the door from the x-ray room to the hallway. She found Armstead, who told her that she had x-rayed only one finger. Supposedly, two had been injured. Since she was unsure whether she had overlooked something on the requisition,

she had Armstead sit at the x-ray table while she checked the requisition. It indicated that only one finger was to be x-rayed. She then attempted to call the emergency room doctor to ask if she should x-ray the other finger. The line was busy. As she was hanging up the phone, she heard the film coming out of the processor and went into the processing room to get it. While in the processing room, she felt a presence behind her. She turned to find Mr. Armstead in the room with her.

Armstead said, "I'm going to kill you, bitch!" He then knocked her to the floor, choking and beating her on the face. Ms. Zimmerman temporarily lost consciousness during the attack. She awoke to find Armstead continuing his attack on her. She tried to poke him in the eyes and squeeze his groin to get him off of her. This was unsuccessful. Her last thought before losing consciousness was, "I'm gonna die."

After regaining consciousness again, she noticed the door between the lab and the processing room was closed. She tried to scream, but no one heard her. She pulled herself up to a standing position and noticed that she was unable to see except for a small area out of the right eye. She went to the plumbing access panel between the lab and the processing room and banged on it to alert Bent. She and Bent had previously agreed that if she had trouble, she would knock continuously.

After a short time, Bent came to the door leading into the processing room. The Claimant could not open it because her hands were bloody and kept slipping off the knob. She finally slid the keys under the door, and Bent opened the door from the other side.

Ms. Zimmerman was taken from Pontiac Prison to St. James Hospital. She was in intensive care for the first

day and night. She experienced severe pain in the head, neck, shoulders, knees, and generally throughout her body. She stayed at the hospital for four days before she was released. After her release, she was apprehensive, unable to sleep, and extremely frightened. Although she had lived alone in an apartment in Pontiac prior to the attack, she felt she could not be alone after the attack. She lived with different relatives for periods of time because she was too weak to take care of herself. Due to the injuries to her eyes, she experienced blurred vision for several weeks.

On December 1, 1986, approximately one month after the attack, Ms. Zimmerman was living with her daughter, Linda Pfister. She began having psychotic episodes. She made a telephone call to her daughter-in-law and told her to take her son, Joey, out of the house because Danny, Ms. Zimmerman's son, was going to kill him. During the course of the evening on December 1, 1986, Ms. Zimmerman believed that her mother's face turned into someone else's. She became combative and tried to hit her mother. She was taken to St. Francis Hospital and remembers being combative before she lost consciousness. She woke up in the morning strapped to a bed and locked in her room at the psychiatric unit at St. Francis Hospital in Peoria. She was kept in isolation for two or three days. She then began seeing Dr. Remolina, a psychiatrist. She was prescribed Haldol, a neuroleptic, and Norpramin, an antidepressant. In addition, she attended group therapy sessions. She was discharged on her own request just before Christmas 1986 and went to live at the St. Augustine Manor.

In January 1987, Ms. Zimmerman noticed that she was very confused and had difficulty dealing with any kind of stress. During a trip to California to visit relatives,

she experienced intermittent periods of crying, inability to concentrate, and great fear. She had never experienced any of these problems before the attack.

In February 1987, Ms. Zimmerman returned to St. Francis Hospital to visit a friend and became overwhelmed. She was unable to function and was admitted to the hospital psychiatric unit. On this occasion, she was hospitalized for approximately three weeks. She received medication and therapy under the care of Dr. Remolina. After her release from the hospital, Ms. Zimmerman began living in a rental house. She continued to see a psychiatrist on an out-patient basis and was taking Asendin, an antidepressant, and Loxitane, a neuroleptic. She also saw a psychologist on two or three occasions.

On June 16, 1987, Ms. Zimmerman attempted to return to Pontiac Correctional Center in her old job as an x-ray technician. She worked at Pontiac for three weeks and four days. At that point, she felt overwhelmed again, and she did not feel safe working at the hospital. She asked Vickey Bibey, who was at that time the hospital administrator, to have a guard present in the x-ray room while working. No guard was posted in the area. On July 17, 1987, Ms. Zimmerman considered suicide. She was once again hospitalized at St. Francis. During this hospitalization, she was administered electroshock therapy on six occasions. She remained hospitalized in the psychiatric unit for one month and began seeing Dr. Pinto, another psychiatrist.

In November 1987, approximately one year after the attack, Ms. Zimmerman returned to work for the first time since her three-week work period at Pontiac Prison in June 1987. She was employed by Peoria Ear, Nose and Throat as an x-ray technician on a full-time basis and made approximately $8 an hour. She worked at this job

for approximately two months. She felt the job was overwhelming and had difficulty learning the new aspects of it. She left that employment on January 22, 1988, after being terminated. She next worked at Central Illinois Hearing Aid Center in April 1988, making $4 an hour. She worked there for five months before quitting due to the fact that she did not feel she could handle the job. From August 1988 to February 1989, Ms. Zimmerman worked one day a week as an x-ray technician at Midwest Medical Services and also cleaned houses. She earned approximately $125 per week between the two jobs. Ms. Zimmerman felt relieved that she could handle working as an x-ray technician for one day a week.

In March 1989, Ms. Zimmerman began working for East Peoria Multi-Specialty Group as an x-ray technician earning $9 an hour on a full-time basis. She continued to work there until July 6, 1990, at which time she was fired. Ms. Zimmerman stopped taking the medications and seeing Dr. Pinto in September 1988. At the time of the hearing, she was not seeing any doctors or taking any prescriptions. She was working at Midwest Medical Services one day a week earning $10 an hour. She did not expect this job to become full-time employment.

Before the attack took place, Ms. Zimmerman never experienced feelings of being overwhelmed by her work duties. She has never been terminated from a job, and she has never felt fearful for her personal safety. She now feels unsafe in crowds and in the presence of strangers.

Ms. Zimmerman testified that she filed a suit in Livingston County against James Armstead for the attack. She received no funds or proceeds from a judgment obtained against him in the amount of $350,000. Her only recovery to date has been as a result of worker's compensation. The total award was approximately $30,000.

Linda Pfister, Ms. Zimmerman's daughter, testified that while she was growing up, Ms. Zimmerman cared for her six children, being almost totally in charge of income production, household management, and raising the children. Ms. Pfister testified that Ms. Zimmerman received very little help from Mr. Zimmerman. Ms. Pfister described her mother as mild-mannered, timid, and very easy to get along with prior to the attack. She was a good mother who handled the stress of working and raising a family without complaint. After the attack, Ms. Pfister noticed that her mother was very fearful, could not eat, and could not sleep. She noticed that even when she attempted to help her mother by paying bills, her mother was very suspicious and paranoid. She describes her mother now as very susceptible to any sort of stress and unable to handle people or work. Her mother is also now more irritable and gets upset easily. She has a hard time controlling her emotions, and her personality is almost the opposite of what it was prior to the attack.

Ms. Zimmerman introduced the testimony of Dr. Remolina. Dr. Remolina was a psychiatrist licensed to practice in the State of Illinois who first saw the Claimant during her first admission to the St. Francis Hospital psychiatric unit. On that occasion, Ms. Zimmerman appeared to have difficulty dealing with reality and her emotions. She was very irritable and agitated. The doctor testified that the history obtained from the Claimant was that she had been attacked by an inmate in October 1986 and had no prior history of psychiatric difficulties. Dr. Remolina's diagnosis was that the Claimant was suffering from an acute psychotic episode with depressive manifestations consistent with a depressive disorder. As previously indicated, he prescribed medications and followed her on an out-patient basis.

Dr. Remolina testified that during the second hospitalization, his diagnostic impression was once again that of

manic depressive disorder. He prescribed different medications, as previously indicated. Once again, after her release Dr. Remolina continued to see her on an outpatient basis.

In July 1987, after attempting to return to work at the prison, Ms. Zimmerman was once again admitted to the psychiatric unit. On that occasion, she was very depressed and he was concerned about the possibility of suicide. At that point, Dr. Remolina felt that her condition was one of major depressive disorder recurrent, meaning that she continued to suffer recurrence of the symptomatology of depression. She was treated during this hospitalization with medication and electroshock treatments. After she was discharged on that occasion, she started seeing Dr. Arun C. Pinto, who had been covering for Dr. Remolina during his vacation.

In Dr. Remolina's opinion, Ms. Zimmerman was experiencing anxiety, lack of motivation, difficulty in decision making, difficulty in concentrating, physical symptoms, and an inability to carry on the ordinary affairs of daily life. These were all symptomatic of psychiatric depression. He further opined that there was a direct and definite causal connection between the attack and the psychiatric problems. He felt that Ms. Zimmerman would continue to have problems in holding a job, and that stressful types of situations could definitely influence a recurrence of her depressive disorder.

Ms. Zimmerman also introduced the testimony of Dr. Pinto. Dr. Pinto is also a psychiatrist, board certified in both adult and child psychiatry. He obtained a history from Ms. Zimmerman that she had been a fairly well-functioning woman until she was attacked at the prison. The history included the possibility that she had been raped. There was no history of any previous psychiatric

problems. Psychological testing done while in the hospital indicated that Ms. Zimmerman had no evidence of minimum, major, psychiatric, or personality deviation problems other than a major depression recurrent. This depression had a definite post-traumatic quality to it.

Dr. Pinto began seeing Ms. Zimmerman on an outpatient basis after she was released from the hospital in August 1987. He noted that she had substantial problems with employment. He described Ms. Zimmerman as a person who tried very hard to cut down on her medication so that she would be able to feel more confident. On each visit, he would try to decrease the medicine. Dr. Pinto's opinion was that the Claimant's problem in holding a job following her attack was caused by her feelings of being overwhelmed, inadequacy, and of not being fully functional. These were consistent with his diagnosis of a depressive disorder.

In Dr. Pinto's opinion, there was a direct causal connection between the attack of October 29, 1986, and Ms. Zimmerman's psychiatric problems. He felt her prognosis was guarded. He stated that she could continue to have difficulty for a while, and maybe forever, based on this injury. The doctor stated that the difficulty he referred to would manifest itself in terms of feeling inadequate, unsafe, a lack of trust of other people, and inability to maintain employment. Given the history of Ms. Zimmerman's difficulties for over a year following the attack, Dr. Pinto believes that the disability is permanent.

Ms. Zimmerman also introduced into evidence the disciplinary records of James Armstead. These records reveal that Armstead was sentenced to twenty years in the Department of Corrections for the offense of rape and six years for the offense of residential burglary. He was a parole violator who was sentenced as a career offender.

He entered the Joliet Correctional Center on November 2, 1983. He remained at Joliet until February 1986, when he was transferred to the Logan Correctional facility, a medium security facility. He remained at Logan for only seven months, until September 1, 1986. At that point, he was re-classified as a maximum security risk and transferred to Pontiac. He was involved in a physical altercation with another inmate on August 31, 1986, and had a physical altercation with a guard in November 1984. His record contains references to psychiatric problems, suicidal thoughts, suicidal ideation, and sexual deviation. All this information regarding James Armstead was contained in his master file prior to October 29, 1986.

The Claimant has the burden of proving by a preponderance of the evidence that the State was negligent for failing to exercise reasonable care over an individual in order to prevent foreseeable injury to Carol J. Zimmerman. The Claimant has overwhelmingly satisfied this burden. Despite the extremely serious nature of the disciplinary record of the inmate in question and his documented psychiatric problems, he appeared at the door of the x-ray room on the day in question completely unescorted by guards. During the time the Claimant x-rayed Armstead's finger, she had no means of communicating with persons outside of the room other than the one telephone in the x-ray room. She had no means of protecting herself from attack and no means to make others aware of an attack once it had begun. In addition, there was no way for anyone outside the x-ray suite to observe what was going on within these rooms.

The law in the State of Illinois is clear that the State has to exercise care that individuals under its custody will not have the opportunity to inflict foreseeable injury upon others. (*Berkin v. State* (1972), 28 Ill. Ct. Cl. 154.) In this

case, the State not only failed to exercise that care, they virtually made such an attack by an inmate inevitable. Armstead, who was six feet tall and weighed 180 pounds, was left completely alone with a woman who was four feet, eleven inches tall and weighed 113 pounds. The facts clearly show a breach of the Respondent's duty to care. The Respondent was clearly put on notice of the problems in the x-ray suite by the memos of Bent and the Claimant. Corrective action was taken immediately after the attack.

A guard could have been assigned to escort Armstead and other inmates in need of x-rays. Testimony showed that inmates in protective custody were in fact supervised by guards. Respondent argued in its brief that the cost of providing guards to escort all inmates during x-rays would be too costly and therefore impracticable. No such evidence, however, was presented by the Respondent at trial. Furthermore, it is clear that guards are present at all times in this area of the hospital facility. Testimony from Bent and the Claimant indicated that the officer's room was only a short distance down the hall from the x-ray suite. The court finds that there was no practical reason why guards could not have been available to escort inmates into the x-ray room, considering the physical layout of the x-ray facility. As previously indicated, there was no alarm or monitors installed in the x-ray unit. Incredibly, the only signal available to the Claimant was knocking on the plumbing access panel in the wall between the x-ray processing room and the lab in which Bent worked. There was no evidence introduced by the State to show that installing an alarm or a monitor were infeasible, impracticable, or unnecessary. It defies reason that a civilian employee left alone in an x-ray suite in a maximum security facility would have no means to summon help, other than to bang on a wall.

In its brief, the Respondent argues that the evidence fails to show the attack was foreseeable. This argument is totally without merit. Foreseeability only requires that the risk to the victim involve a recognizable danger, based upon some knowledge of existing facts, and some reasonable belief that harm may follow. (Prosser on Torts ch. 5, sec. 31, at 146 (4th ed.).) It is uncontroverted that both Ms. Zimmerman and Dale Bent discussed with the assistant warden the problems regarding security. In fact, the evidence suggests that Assistant Warden Washington agreed that security problems existed. Nothing, however, was done to correct the situation until after the attack. This clearly shows that the State was on notice with regard to the need for better access to this area.

Based on the facts stated above, we find liability.

The sole remaining issue is that of damages. The Claimant's damages are limited to $100,000 pursuant to the provisions of 705 ILCS 505/8(d). The evidence introduced by the Claimant would justify an award far in excess of this. Photographs of the Claimant introduced into evidence graphically portrayed the horrible physical injuries which she suffered as a result of this unprovoked, brutal attack. As a result of the attack, she was hospitalized in a psychiatric unit on three separate occasions. She received numerous medications and electroshock treatments. It is not an exaggeration to say that her entire personality and her life were irreparably damaged as a direct result of this attack. The immense pain and suffering, both physical and mental, suffered by Ms. Zimmerman was shown by clear and uncontroverted evidence.

Evidence established that the Claimant has had difficulty holding any job since the attack which involves the slightest stress. Prior to the attack, she was making $353.08, or $18,360.16 per year. In 1987, her total gross

income from all sources was $6,464, and in 1988 her total income was $7,733. Lost wages for those two years alone amount to $23,123.32. At the time of the hearing in this case, she was working one day a week, eight hours a day, for $10 per hour. Assuming that at age 50 she is going to work for another 15 years, these facts would support a claim for future lost wages in the amount of $213,000.

In regard to the medical damages in this case, the parties stipulated that $29,550 was paid by workers' compensation. Arguably, there could be a set-off of $4,500 pursuant to section 2—1205.1 of the Code of Civil Procedure (735 ILCS 5/2—1205.1.) However, this amount, as well as the $30,000 lump-sum settlement paid to the Claimant, and the $9,703.68 payment for temporary total disability was obtained by reason of the employer's statutory obligation under workers' compensation. The case of *Paschal, Buesing Bros. Trucking, Inc. v. State* (1990), 43 Ill. Ct. Cl. 229, controls with regard to the question of set-offs in this matter. That case, citing *Sallee v. State* (1990), 42 Ill. Ct. Cl. 41, holds that workers' compensation payments are not to be "set-off" unless the employer has filed its lien as per the Workers' Compensation Act. The employer's lien can then be satisfied from the award of the Claimant. Both the *Sallee* case and *Paschal* case are based upon an interpretation of section 26 of the Court of Claims Act (705 ILCS 505/26), which states:

"There shall be but one satisfaction of any claim or cause of action and any recovery awarded by the court shall be subject to the right of set-off."

Both *Sallee* and *Paschal* hold that the law in the State of Illinois is that the collateral source rule is now applicable in the Court of Claims. The collateral source rule would be invoked to deny a set-off of workers' compensation payments since they arise from an independent statutory source. The collateral source rule holds, in effect, that

a tortfeasor is not entitled to a set-off for any sum paid from a source created by the plaintiff. Only in a case where a joint tortfeasor has made a payment to the plaintiff should that amount be set-off. The principle which underlies this rule is fully discussed in the Restatement of Torts, specifically section 920(a), which states as follows:

"920A. Effect of Payments made to Injured Party.

A payment made by a tort feasor or by a person acting for him to a person whom he has injured is credited against his tort liability, as are payments made by another, who is, or believe he is, subject to the same tort liability.

Payments made to or benefits conferred on the injured party from other sources are not credited against the tort feasor's liability although they cover all or a part of the harm for which the tort feasor is liable. Therefore, under Illinois law, the Defendant is not entitled to the benefit of credits which he did not help to create. This has been held to be the law in this State for many years with regard to a variety of different types of payments received by injured parties, including workers' compensation payments. (*Bryntesen v. Carroll Construction Co.*, 36 Ill. App. 2d 167, 184 N.E.2d 129, affirmed (1962), 27 Ill. 2d 566, 190 N.E.2d 315; *Rylander v. Chicago S.L.R. Co.* (1959), 17 Ill. 2d 618, 161 N.E.2d 812)."

In this case, Ms. Zimmerman's employer is not a joint tortfeasor. Her cause of action against the employers arises not from tort, but from its statutory obligation under the Workers' Compensation Act of this State. Therefore, the employer's payments arise from a "collateral source." No set-off will be allowed as a result of the workers' compensation payments.

Finally, the Respondent argues that the Claimant is not entitled to an award because judgment was entered against the inmate who attacked her in the amount of $350,000. The record in this case clearly shows that a stipulation was entered into by counsel for both parties that the only claim for set-off by the Respondent would be for medical expenses paid as a result of the workers' compensation. We find that stipulation binding on subsequent counsel for the Respondent. In addition, however, a judgment against an inmate serving a lengthy prison term with

no obvious source for paying the judgment does not prohibit a Claimant from recovering from the State of Illinois. The Claimant has a duty to exhaust her remedies. She did that by suing Armstead and receiving the $350,000 judgment. The argument advanced in the Respondent's brief to the effect that any monies for which Armstead is liable should be set-off against the award of this Court, whether or not Armstead paid them, ignores the clear meaning of section 26 of the Court of Claims Act. Therein, the words "satisfaction" and "recovery" are clearly used to indicate that a set-off only applies to monies collected. In this case, the uncontroverted testimony was that no monies had been collected as a result of the judgment against Armstead. The Respondent's theory of set-off is not supported by any prior decision of this Court.

In summary, the Claimant has overwhelmingly met her burden of proof. Respondent's negligence clearly was a proximate cause of her injuries. We award Carol J. Zimmerman the sum of $100,000.

(No. 88-CC-1130—Claimant awarded $14,000.)

LLOYD FRANCIS, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed May 13, 1994.

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

ROLAND W. BURRIS, Attorney General (TERENCE J. CORRIGAN, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*duty owed by State to inmates*. The State owes a duty to prison inmates to provide safe working conditions, including

safe and adequate tools with which to perform their assigned work, and the State also has a duty to supervise inmates as they work in order to provide a safe working environment.

SAME—*inmate's finger caught in glue press—State was negligent—award granted.* The State was liable in a claim for damages sustained by an inmate when his finger became caught in a glue press which he and another inmate had been directed to clean, since prison officials failed to provide the inmate with a long-handled brush or other proper equipment for cleaning the device, and did not give proper instructions, training, or supervision with respect to cleaning the machine.

OPINION

FREDERICK, J.

Claimant, Lloyd Francis, an inmate in the Illinois Department of Corrections, filed his complaint sounding in tort on October 28, 1987. An amended complaint was filed on July 29, 1988. The amended complaint alleges Claimant lost part of his thumb through the negligence of the Respondent when he was ordered to clean a glue press machine without proper training and which was not properly equipped.

The cause was tried before Commissioner Johnson.

The Facts

In July of 1987 the Claimant, Lloyd Francis, was incarcerated by the Illinois Department of Corrections (IDOC) in the Graham Correctional Center in Hillsboro, Illinois, as a result of a theft conviction. At that time, Claimant had been at Graham for about eight months.

The Graham Correctional Center operated a small furniture factory in one large room. The view across the factory was obstructed by the office area.

Claimant's work assignment was to make cardboard boxes and to place furniture into those boxes. This had been his work assignment for six months or more, prior to the date of his injury on July 13, 1987.

Mark Everett was employed by the State of Illinois Correctional Industries at Graham in July 1987. He was the "lead worker" which meant that he was the floor foreman.

On July 13, 1987, the Claimant was in an accident involving a glue press machine. The glue press was about 20 feet from the area where Claimant worked with the boxes. On the day of the accident, Claimant and John Williams were told to clean the glue press by a supervisor. The supervisor's name was Mr. Nisely. The glue press had just been used for gluing particle boards and there was glue on the rollers of the machine. Claimant and Williams proceeded to try to clean the glue press with soap, water and a rag. Claimant was wiping the rollers with the rag. Claimant was not told to use the rag by supervisor Nisely.

The glue press was on while Claimant was wiping a roller with the rag. The roller pulled the rag into the machine and Claimant's right thumb was caught in the roller. Claimant tried to pull back and part of his thumb was pulled off. Blood shot out of his thumb and he felt pain.

Williams wrapped a rag around Claimant's thumb and took him to the front desk of the factory. Claimant was then rushed to the prison health care unit where he was seen by Dr. Baggia. During this time, Claimant did not see either Mr. Nisely or Mr. Everett. Claimant remained in the prison health care unit for about one half hour and then was taken by prison officials to the Hillsboro Area Hospital emergency room where he was examined by Dr. McFarlin. After receiving emergency care from Dr. McFarlin, the Claimant was transported by ambulance to Memorial Medical Center in Springfield. During this time, Claimant's thumb was throbbing and he was in a great deal of pain. Before being placed in the ambulance for the trip to Springfield, Claimant was given Demerol.

Mr. Everett was not near the glue press when the accident occurred. It was Mr. Everett's job to circulate around the shop supervising a number of different stages of the operation. Mr. Everett could not remember how many stages he was supposed to have been supervising at the same time. Mr. Everett was informed of Claimant's accident by the officer on the desk, Officer Shroyer.

There was a warning on the glue press not to put hands near the rollers. Claimant was aware of this warning. The manufacturer's instruction manual for the glue press indicated a long-handled brush should be used to clean the rollers. The manufacturer's manual for the glue press states, in part:

"READ AND UNDERSTAND THESE OPERATING AND SAFETY INSTRUCTIONS BEFORE OPERATING, CLEANING OR SERVICING THIS MACHINE. This instruction manual is a must for machine operators. It should be kept available so that they will become familiar with the operation, adjustment, lubrication, and safety instructions * * *.

EMPLOYER'S RESPONSIBILITY TO: PERMIT ONLY trained and authorized employees to operate equipment * * *. INSTRUCT, TRAIN AND SUPERVISE the safe method of work. AN ACCIDENT IS MOST LIKELY TO OCCUR WHEN OPERATOR IS UNFAMILIAR WITH MACHINE * * *. BE SURE YOUR OPERATOR IS PROPERLY TRAINED AND SAFETY RULES ARE CLEARLY UNDERSTOOD BEFORE YOU GIVE PERMISSION TO OPERATE OR CLEAN-UP.

MACHINE CLEAN-UP Operator is closer to machine during clean-up than during production. Extra care should be taken; follow these basic principals: DO NOT BEGIN CLEAN-UP UNTIL YOU HAVE READ AND UNDERSTAND THE CLEAN-UP INSTRUCTIONS. THE REVERSING FEATURE ON THIS MACHINE ENABLES IT TO ALMOST CLEAN ITSELF IF PROPER PROCEDURES ARE TURNING. HANDS SHOULD NEVER TOUCH ROLLS WHILE THEY ARE TURNING. WHENEVER ONE HAND IS NEAR A REVOLVING ROLL, KEEP OTHER HAND ON OPERATING CONTROL BAR * * *. If rolls must be wiped, STOP the rolls, wipe accessible area, (with operating bar) job in reverse to another position, STOP rolls and wipe-repeat until rolls are wiped clean. Use paper wipes.

BRUSH with long handles may be used for clean-up * * *. When used, hold brush at end of handle as far from roll as possible with other hand on operating control bar."

Mr. Everett testified he warned all workers who used the machine about using safety around this machine.

This usually was a ten-minute proceeding when new workers came in. He could not specifically remember warning Claimant but was sure he had done so. This was a dangerous machine requiring safety precautions.

At Memorial Medical Center in Springfield, the Claimant underwent surgery for a right thumb tip amputation. The surgery was performed by Dr. Zook who found that Claimant had suffered an avulsion of the palm side of his thumb beginning at the interphalangeal joint and extending to the tip of the thumb, that a segment of the distal phalanx bone was exposed, and that nerves as well as blood vessels had been avulsed. According to Dr. Zook, the damaged area was approximately 3 by 2.5 centimeters.

On the day of the accident, Dr. Zook performed a cross-finger flap operation in which he connected Claimant's right thumb and index finger in an effort to repair the damage to Claimant's nerves and blood vessels. This operation entailed grafting skin from Claimant's left groin.

Claimant was released from Memorial Medical Center and returned to the prison where he was placed in the health care unit. He remained there for about a week and a half to two weeks. On July 30, 1987, the Claimant was brought back to Memorial Medical Center in Springfield where a second operation was performed to divide the cross-finger flap. In both operations, Claimant was given general anesthesia through an endotracheal tube. On August 10, 1987, Dr. Zook found that the Claimant's wounds were "almost healed."

At the time of the trial, the Claimant was 33 years old. He was a high school graduate. At the time of the trial, the Claimant was incarcerated on a burglary conviction in Galesburg and his job assignment was to sweep with a broom. The Claimant continued to be paid his

prison wages after the accident, even though he could no longer work in the factory.

The Law

The State owes a duty to prison inmates to provide safe working conditions, including safe and adequate work tools with which to perform their assigned work. *Reddock v. State* (1978), 32 Ill. Ct. Cl. 611; *Hughes v. State* (1984), 37 Ill. Ct. Cl. 251.

The manufacturer's manual stated that a long-handled brush should be used to scrub glue off of the rollers and the State's only witness, Mark Everett, testified that using such a brush was the proper way to clean the machine. A long-handled brush was an essential work tool needed to safely clean the rollers of the glue press, but there was no brush of any kind available to Claimant on the day of the accident. The State negligently caused Claimant to be injured by failing to provide him with the proper equipment, namely a long-handled brush, to scrub the glue off of the glue press rollers.

The glue press manufacturer's manual specifically calls for using paper wipes to use in wiping off the rollers after first scrubbing the rollers with a long-handled brush. The State provided Claimant with only rags to use to wipe off the rollers, instead of the paper wipes specified by the manufacturer's manual. Paper wipes are safer to use on rollers than rags because a paper wipe is more likely than a rag to tear away, rather than to pull a worker's hand into the machine. The State negligently caused Claimant to be injured by failing to provide him with the proper equipment, namely paper wipes, to wipe the rollers.

IDOC has a duty to supervise inmates as they work in order to provide a safe working environment. (*Hughes v. State* (1984), 37 Ill. Ct. Cl. 251.) No supervisor was

present while Claimant and another inmate were trying to clean the glue press, nor could Mark Everett, the supervisor, see across the factory from where he was to the glue press. The State negligently caused Claimant to be injured by failing to provide proper supervision for the inmates cleaning the glue press.

The manufacturer's manual stated in several places that anyone who was going to clean the glue press should read the instructions in the manual before attempting to do so. Contrary to the manufacturer's instructions, Claimant was never given the glue press manual to read before he was told to clean it.

The State violated the manufacturer's safety recommendations by not having inmates who cleaned the glue press first read the manual on how to do so and thereby negligently failed to provide proper supervision and training in how to safely clean the glue press and negligently failed to provide a safe work environment.

Assuming that Claimant had received some instructions on how to clean the glue press in the past, those instructions were not proper or sufficient as, at most, those were a few minutes of perfunctory verbal instructions, given quite some time before Claimant worked on the glue press, without having Claimant read the instruction manual, without warning about the danger of the rollers to one's hands, without warning that whenever one hand was near a roller, another hand should be on the operating control bar, and without warning that when scrubbing or wiping the rollers, the machine should be stopped and a hand should be kept on the control bar.

The State negligently caused Claimant to be injured by failing to properly instruct Claimant on how to clean the glue press. The glue press ripped off part of Claimant's

thumb, tearing it down to the bone and damaged both blood vessels and nerves. Claimant suffered severe pain at the time of the accident and for weeks thereafter.

Claimant underwent two (2) operations to repair the damage to his thumb and both of those operations required general anesthesia. The first and more extensive of those operations entailed not only sewing the thumb and index finger together, but also grafting tissue from Claimant's groin to graft onto his thumb. Claimant's injury was to his right thumb and he is right-handed.

Claimant has been left with a permanent disability whereby the bottom of his thumb from the joint to the tip lacks feeling and the remainder of the bottom of his thumb is overly sensitive to sensation and thus affects Claimant's ability to pick up small objects and to write. The Claimant had no medical bills or lost wages.

As an inmate, the Claimant was required to take orders and carry them out. To refuse to do so would subject him to disciplinary action. He did not occupy a position of independence which a person outside a penitentiary occupies. His choice of actions being limited, he kept silent and did as he was ordered. (*Goodrich v. State* (1984), 36 Ill. Ct. Cl. 326.) However, with the advent of comparative negligence, the Court has looked at the conditions under which the inmate acts in the face of known danger to determine if any comparative fault should be assessed. *Douglas v. State* (1989), 41 Ill. Ct. Cl. 29.

In the present case, the glue spreading machine was self-cleaning, it was proper to leave the machine turned on during the cleaning operation. Claimant was aware that he should not put his hands near the moving rollers. There were some warnings to the Claimant not to put his hands near the rollers.

We, therefore, find that Claimant was 30% negligent. The value of Claimant's injury is $20,000. This total must be reduced by Claimant's 30% comparative negligence to $14,000.

Therefore, it is ordered that an award of $14,000 is hereby entered in favor of Claimant, said award being in full and complete satisfaction of Claimant's claim.

(No. 88-CC-1298—Claimant awarded $7,500.)

LINDA M. OLESON, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed April 12, 1994.

TALBERT & MALLON (LANCE R. MALLON, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (DAVID BO MATTSON, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*elements of negligence claim*. To prevail on a negligence claim arising out of a fall on State property, the Claimant must prove by a preponderance of the evidence that the State had the duty to maintain the area in question, that it breached that duty, and that such breach was the proximate cause of Claimant's injury, but the State is entitled to notice of the existence of hazards posed to the public and a sufficient period of time to cure such problems.

SAME—*slip and fall on debris in State park—State liable—award reduced by Claimant's comparative fault*. Where the State had received several prior complaints about the deteriorating condition of a roadway and scenic overlook in a State park but did nothing to repair the hazard or warn visitors of its existence, the State was liable in a woman's negligence claim stemming from her fall over a pile of debris at the scenic overlook, but the woman's damages were reduced by 25% to reflect her comparative fault.

OPINION

PATCHETT, J.

This claim arises out of a slip and fall which occurred on April 7, 1987, at the Pere Marquette State Park. Mrs. Oleson, accompanied by her husband and son, were at the park at approximately 6:00 to 6:30 p.m. They stopped at a scenic overlook to dispose of trash. The Claimant's car pulled along side the trash can, leaving a space of four feet to open the door. When she stepped out of the car towards the trash can, Mrs. Oleson's right foot slipped and caught on a pile of debris. The debris was described as chunks of asphalt or rocks, ranging in size from 12 inches to small pebbles. Mrs. Oleson twisted her ankle and right arm from her elbow to her shoulder. After the fall, she looked where she had fallen and saw chunks of debris in a pile about three feet by one foot wide.

Prior to exiting the vehicle, Mrs. Oleson had noticed the difference in level between the road and shoulder. The road had a jagged area between it and the gravel shoulder. This was not the area where Mrs. Oleson fell. She states that she never saw the pile of chunks on her many previous visits, but she had noticed on prior visits that the edge of the road had become jagged. Mrs. Oleson did not report the accident to the park but left to go to the hospital. It was still light outside at the time of the accident, and it should be noted that Mrs. Oleson was wearing Nurse-Mate rubber-soled shoes at the time of the fall.

Mrs. Oleson went directly to the Alton Memorial Hospital. She returned the next morning and was examined by Dr. Michael Taylor. An arthrogram was performed on the Claimant and fluid was removed from her shoulder. She received a shoulder immobilizer. The diagnosis

was a contusion injury and sprain to the right shoulder capsule with subsequent development of inflammation.

The doctor ordered physical therapy. His opinion was that the injury was causally connected to the fall of April 7, 1987, in the park. The doctor treated her up until July 1987 and once in 1991 when she received a cortisone injection. He also saw her once in 1992. When he released her in May 1987, he recommended follow-up visits. She did not follow up with the doctor because she received free care from the doctor for whom she subsequently became employed. Her employer prescribed an anti-inflammatory medication which she takes on a daily basis.

Mrs. Oleson missed six weeks of work immediately following the accident. She claims to continue to have pain in her right arm, limiting her activities. She attended a class at Lewis & Clark Community College for pain management.

Claimant's special damages are specified as follows:

Alton Memorial Hospital	$106.86
Alton Memorial Hospital	228.87
Alton Physical Therapy	326.00
Alton Medical Imaging Consultants	15.00
Dr. Michael Taylor	483.00
Total medical damages	$1,239.73
Lost wages from 4/8/87 through 5/25/87	$1,200.00

Richard Brown, a former park superintendent, testified that the roadway at the overlook was jagged as a result of wear and tear. He also testified that there were no warnings posted about the jagged roadway or resulting debris. Mr. Brown had received complaints about road conditions along the overlooks prior to 1987, and he had

received complaints about the overlook in question in April 1987. The staff at the park would patch the potholes when they could, but complete re-pavement or shoulder work was the responsibility of the Capital Development Board. The park superintendent testified that he requested that the Capital Development Board repair the roads and overlooks prior to 1987, but the request was denied.

Mr. Richard Niemeyer, the current park superintendent, testified that he was aware of the jagged area along the roads and overlooks, but had not noticed the broken-off fragments. His testimony in other respects was basically consistent with that of Mr. Brown.

To prevail on her claim, Mrs. Oleson was required to prove by a preponderance of the evidence that the State had the duty to maintain the area in question, that the State breached the duty, and that such breach was the proximate cause of her injury. (*Dellorto v. State* (1979), 32 Ill. Ct. Cl. 435; *Preikschat v. State* (1985), 37 Ill. Ct. Cl. 29; *Calvert v. State* (1985), 38 Ill. Ct. Cl. 104.) The State is entitled to notice of the existence of danger or hazards posed to the public and a sufficient period of time to cure such problems. *Merkel v. State* (1949), 19 Ill. Ct. Cl. 106.

We hereby hold that the State had sufficient notice in the present case. Complaints had been made about the overlook in question in April 1987. The superintendent had requested assistance from the Capital Development Board, but that assistance had been denied. We find that the State breached its duty by allowing the roadway and overlook to deteriorate, thereby causing a hazard to individuals using the park. The State even anticipated that the particular area in question would be used by people, as evidenced by placing a trash can at the site of the overlook.

In addition, the State failed to post any warning as to the danger of crumbling asphalt and debris. The State has a duty to warn visitors against conditions in the park that might endanger pedestrians. *Dumermuth v. State* (1966), 25 Ill. Ct. Cl. 353.

Despite this, we find that the Claimant had some degree of comparative fault. Reasonable people should always look where they are placing their feet when walking. Therefore, we assign the Claimant 25% comparative fault. We set the total damages of a sum of $10,000, and after deducting 25% comparative fault, we award the Claimant $7,500.

(No. 88-CC-1443—Claimants awarded $32,400.)

PAT FRANK DE LEO and NORMAN HAFRON, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed May 10, 1993.

Order filed September 24, 1993.

HINSHAW & CULBERTSON (PAUL L. PAWLOWSKI, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (THOMAS L. CIECKO, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*State's duty to business invitee.* The State owes a duty to a business invitee to use reasonable care in keeping the premises reasonably safe and to discover any dangerous conditions existing on the premises and, while the invitee need not prove that the State had actual knowledge of the dangerous condition, the invitee must prove that the State could have discovered the condition by using reasonable care.

SAME—*State not an insurer against accidents on State property.* The State is not an insurer against accidents occurring to invitees on State property and invitees assume the normal, obvious, and ordinary risks attendant on

the use of the premises, and to show negligence, a claimant must prove the State was negligent in its maintenance of the premises in that it had actual or constructive notice of a dangerous condition.

STIPULATIONS—*parties' joint stipulation required further proof of State's negligence—amended joint stipulation approved*. Although the Court of Claims initially refused to approve the parties' joint stipulation awarding damages to the Claimants because there was insufficient proof that the State's negligence caused injuries to a business invitee, the parties' amended joint stipulation was approved, the Claimants were entitled to contribution and awarded $32,400, and they were directed to provide the State with a release of liability containing their signatures and that of the injured business invitee, and to pay all award proceeds to the invitee.

ORDER

FREDERICK, J.

The Claimants filed their complaint seeking thirty thousand dollars ($30,000) on November 12, 1987. The troubled history of this claim is set forth in the Court's order of February 26, 1993, denying Claimants' motion to reconsider the joint stipulation filed January 9, 1989.

The case is back before the Court on what is in effect the parties' third attempt to satisfy the inquiries of the Court as to why this Court should approve the parties' stipulation awarding damages to Claimants.

This Court, from the beginning, has wanted to know just how the State was liable and we have used our authority that stipulations are not necessarily binding on this Court to deny the parties' stipulation to date. *Moore v. State* (1987), 40 Ill. Ct. Cl. 212.

From the pleadings, we can determine that Beatrice Steward was a business invitee. The State's duty to a business invitee is that the State owes such visitors the duty to use reasonable care in keeping the premises reasonably safe and this duty includes the duty to use reasonable care to discover any defects or dangerous conditions existing on the premises. The invitee need not prove the State had

actual knowledge of the dangerous condition which caused the invitee's injury, but the invitee must prove that the State, by using reasonable care, could have discovered the condition. *Long v. State* (1987), 40 Ill. Ct. Cl. 39.

The State, however, is not an insurer against accidents occurring to invitees on State property. (*Schrup v. State* (1990), 42 Ill. Ct. Cl. 257.) Invitees on State property assume the normal, obvious and ordinary risks attendant on the use of the premises. (*Thornburg v. State* (1986), 39 Ill. Ct. Cl. 139.) To show negligence, a claimant must prove the State was negligent in its maintenance of the premises in that it had actual or constructive notice of a dangerous condition. (*Samuelson v. State* (1986), 38 Ill. Ct. Cl. 257.) The duty of the State, therefore, may be different than that of the non-State property owner.

With this background, we must carefully review the stipulation and pleadings of the parties to determine if we should approve in whole or in part the stipulation of the parties. (*A & H Plumbing & Heating v. State* (1990), 42 Ill. Ct. Cl. 195.) Close scrutiny of the latest stipulation and prior pleadings fails to show that the parties have agreed or that there is proof that the State was negligent and that it had actual or constructive notice of a dangerous condition that caused the injuries of Beatrice Steward. There is also no agreement or proof as to whether and how the State's negligence, if any, exceeded that of Claimants. We invite Claimants and Respondent to file an amended stipulation spelling out in detail the answers to our two remaining inquiries. In the event the amended stipulation answers those questions to the Court's satisfaction, we will look favorably on entering an award as we do not seek to stop the parties from settling. However, we do have an obligation and a duty to review stipulations and any order of payment where the State is negligent.

For the foregoing reasons, the joint stipulation of the parties filed March 23, 1993, is not approved and the cause is remanded to the Commissioner assigned to the case for further proceedings.

ORDER

FREDERICK, J.

This cause coming on the amended joint stipulation of the parties and the Court being fully advised in the premises:

Wherefore, the Court finds:

(A) That the amended joint stipulation filed July 27, 1993 adequately responds to the Court's concerns regarding liability.

(B) That while the Court is not bound by stipulations we do not seek to inject controversy where none exists.

(C) That the amended joint stipulation filed July 27, 1993 by the parties is adopted by the Court as the findings of the Court.

Therefore, it is ordered:

(1) That Claimants are entitled to contribution.

(2) That Claimants are awarded thirty two thousand four hundred dollars ($32,400).

(3) That the draft shall be made payable to Beatrice Steward, Pat Frank De Leo and Norman Hafron.

(4) That concurrent with the delivery of the draft the Claimants shall provide the Respondent with a full and final release signed by Beatrice Steward and both Claimants, their heirs and assigns, releasing the State from any further liability from the occurrence stated in

the complaint and amended joint stipulation and which waives, releases and relinquishes any other claims against the State by Claimants and Beatrice Steward arising out of and in connection with the incident complained of.

(5) That the entire amount of the proceeds awarded herein shall be paid by Claimants to Beatrice Steward.

(No. 88-CC-2461—Claim dismissed.)

BROMENN HEALTHCARE d/b/a BROKAW HOSPITAL, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed August 5, 1993.

MARKOWITZ & LAWRENCE (WILLIAM B. LAWRENCE, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (CHRISTINE ZEMAN, Assistant Attorney General, of counsel), for Respondent.

CONTRACTS—*Court of Claims cannot order payment of claims for professional services in excess of contract amount.* The Court of Claims cannot order payment of claims for professional services in excess of the written contract amount, and claims for contract over-runs must be dismissed.

SAME—*claim for contract over-run dismissed.* A hospital's claim for professional services rendered under a contract with the State which exceeded the amount of the contract was dismissed due to a change in the State's pre-existing practice of paying contract over-runs, but the Court of Claims indicated that the Claimant could present its claim to the General Assembly, that sufficient funds had lapsed to pay for the services billed, and that, but for exceeding the contract limit, the amount claimed could have been paid.

ORDER

SOMMER, J.

This cause coming to be heard on the motion to dismiss filed by the Respondent and the motion of this

Court, due notice having been given, and this Court being fully advised, finds:

(1) That this Court is engaged in a program of clearing its dockets of cases in which no action has occurred for some years.

(2) That this claim involves a written contract between the Department of Mental Health and the Claimant to provide professional services.

(3) That this claim is for funds over and above the amount of the contract.

(4) That this Court cannot order payment of claims for professional services in excess of the written contract amount. *Brokaw Hospital v. State* (1979), 32 Ill. Ct. Cl. 810.

(5) That the Court finds it was a pre-existing practice to allow the contract amount to be over-run; and the payment of the over-run would be stipulated thereto by the Department and Attorney General.

(6) That in this claim and others in 1986, the Department and Attorney General suddenly refused to stipulate to the over-run.

(7) That this Court may not grant a judgment in *quantum meruit*.

(8) That the same subject matter and claim was briefed and decided in the claim of *Franciscan Sisters d/b/a St. Elizabeth's Hospital v. State* (1987), 86-CC-155.

(9) That this Court ruled in *Franciscan Sisters, supra,* that the claim for over-runs must be dismissed.

(10) That this Court must dismiss the present claim.

(11) That, however, the Claimant may wish to present this claim to the General Assembly due to the fact

that the pre-existing practice was suddenly changed by the Department and Attorney General.

(12) That for the purposes of presentation to the General Assembly, this Court finds that services were billed in the amount of $158,193.48 by the Claimant, and the amount was not contested by the Department, and could have been paid for but for exceeding the contract limit, which could have been amended. Additionally, according to the departmental report, sufficient funds did lapse from F.Y. 85 appropriation number 050-46220-4467-1500.

It is therefore ordered that this claim is dismissed.

(No. 89-CC-0022—Claimant awarded $25,000.)

NICOLETTE M. STEGER, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed October 15, 1993.

BRADY, MCQUEEN, MARTIN, COLLINS & JENSEN (LOREN S. GOLDEN, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (ARLA ROSENTHAL and ROBERT J. SKLAMBERG, Assistant Attorneys General, of counsel), for Respondent.

NEGLIGENCE—*State owes duty of reasonable care to invitees*. The State is not an insurer of the safety of persons visiting its buildings, but rather such visitors are owed a duty of reasonable care in maintaining the premises, and invitees are owed a duty of reasonable care for their safety.

SAME—*Claimant's burden in negligence action*. In order to prevail in a negligence claim, the Claimant must prove by a preponderance of the evidence that the State breached its duty of care, that Claimant was free from contributory negligence, that the State's negligence proximately caused the injury, and that the State had actual or constructive notice of the dangerous condition, but the State can only be charged with a duty when the harm is legally foreseeable.

SAME—*Claimant injured after slipping on substance on auditorium floor—damages awarded.* Where a manager at a university auditorium was notified of a spill on an area of the auditorium floor located near where she was stationed, and a janitor came to clean the spill three to four minutes thereafter, the State was liable for injuries suffered by the Claimant when she slipped on the substance prior to the janitor's arrival, since the manager was negligent in failing to go immediately to the area in question to warn others of the hazard.

OPINION

FREDERICK, J.

On May 14, 1988, the Claimant, Claimant's ex-husband, Robert Steger, and Claimant's children went to the Bone Center of the Braden Auditorium at Illinois State University to watch Claimant's son, Patrick, receive an award at a young writers/authors ceremony. Patrick was to receive an award for something he had written. There were several hundred people at the ceremony. The awardees were third and fourth grade children. The doors to the auditorium were opened at 1:00 p.m. and the Steger family entered at that time. Robert Steger, the father, noticed a slippery substance on the floor at the back wall near the door of the auditorium and saw a small child slip on that substance. Mr. Steger was the only one who saw this slip and he told no one about it.

Claimant and the others in their party went to their seats and sat down. About 15 minutes later, Mrs. Steger and her daughter went to get a program and walked to the back of the auditorium. Claimant walked behind her daughter. Claimant then slipped on some vomit on the floor and injured her right knee. This resulted in a torn ligament. Dr. Carson, Claimant's expert witness, indicated there would be some permanence to the injury. Claimant was on crutches about a month. The substance slipped on appeared to be vomit.

Three student managers were present in their office adjacent to the ballroom at the time of the accident. Angela Dahl testified by deposition and Jill Jacobs testified in person. Angela Dahl was advised of the spill from the woman in the lobby shop. Jill Jacobs called the building service worker and Angela walked to the ballroom to check on the spill. Angela believes it was about five minutes from the time she was told of the spill until she got down to the area of the spill. The janitor was just arriving to clean up the spill when she arrived. Jill Jacobs testified that her job included supervising building service workers and making sure rooms were properly set up and cleaned. She testified that she received notice at 1:15 p.m. that someone had thrown up. She wrote the time down. An unknown person reported it to the gift store, whose personnel radioed her. She testified that another student manager was on duty since two events were taking place in the building. She testified she was in charge of two buildings. After receiving notice of a "spill," she radioed a janitor to clean it up. The janitor cleaned it up within three or four minutes. She testified her room was 30 seconds from the room in which the "spill" occurred. She further testified that she then went to see the spill and saw Claimant on the floor and offered assistance. A janitor was already there cleaning the vomit from the floor. She estimated it took two minutes for the janitor to get to the "spill."

This student manager also testified that Claimant told her her knee went out. She stated that Claimant wanted to stay until the event was over. The manager said that if Claimant's husband went to the office, he could get a wheelchair for transport to the nurse's station or to go home in her car. She further testified that there was an individual who was the auditorium manager in charge of

ushers, staff and nurses. He was not in charge of the ballroom that day and his whereabouts were unknown.

The janitor then testified that it took him two to three minutes to get to the spill and only a few minutes to clean up the spill. He testified that the spill was about two feet long. A university nurse testified that she offered aid to Claimant at the scene. She also offered Claimant a wheelchair. Later on, she observed Claimant standing in the doorway of the first aid room. The nurse was surprised since she was going to get her a wheelchair. The nurse examined her and saw some swelling and discoloration with good movement to her ankle. Claimant told her that her knee had popped out before. Claimant declined to get x-rayed as she preferred to see her private doctor. Claimant subsequently underwent arthroscopic surgery on her knee.

Claimant's doctor's deposition shows that her prior knee injury had some part of but not most of what happened to cause the ligament surgery which resulted from the fall. The surgery she had in regard to this injury was for a torn ligament and torn cartilage. Claimant suffered pain, she could put no weight on her limb for 10 days, and she suffered discomfort for some time. Claimant also had physical therapy for six weeks. She lost two months from work. Claimant's medical bills and lost wages totaled $10,542.09. A substantial portion of the wage loss was covered by disability insurance leaving the total medical and wage loss at $7,982.09.

The evidence is that someone vomited or spilled something that looked like vomit in the university ballroom either shortly before or at about the time the doors were opened at 1:00 p.m. The evidence is that Claimant slipped on the "spill" between 1:00 p.m. and 1:15 p.m. The evidence further shows that upon notification by an

unknown individual, Respondent had it cleaned up in a few minutes. Claimant argues that 15 minutes (or more) is too long a response time to a dangerous situation. Respondent says there was no constructive or actual notice until 15 minutes after the spill occurred and that a response of three to five minutes afterwards is reasonable.

The State of Illinois is not an insurer of the safety of persons visiting its buildings but rather such visitors are owed a duty of reasonable care in maintaining the premises. Claimant was an invitee to whom a duty of reasonable care for her safety was owed by Respondent to Claimant. (*Berger v. Board of Trustees* (1988), 40 Ill. Ct. Cl. 120.) The Claimant has the burden of proving by a preponderance of the evidence that Respondent breached its duty of care, that Claimant was free of contributory negligence in line with our decisions on comparative negligence, that the negligence of Respondent proximately caused the injury, and that the State had actual or constructive notice of the dangerous condition from all the circumstances in the case. *Berger, supra,* at 124.

The State has no duty to clear away every possible source of injury. A legal duty requires more than the possibility of occurrence and the State, like any other person, is charged with a duty only when harm is legally foreseeable. The issues of foreseeability and duty involve many factors, including the magnitude of the risk, the burden of requiring the State to guard against the risk, and the consequences of placing this burden on the State. *Wilson v. State* (1989), 41 Ill. Ct. Cl. 50.

In the case before us we find that the possibility of slippery foreign substances being on the floor of this building with hundreds of people, including children being present, was clearly foreseeable. The burden of guarding against this risk was minimal as employees were

already on hand for this purpose. Unfortunately they were sitting in a room 30 seconds away as people were walking into the ballroom to find their seats.

We find this to be a very close case. In almost all other circumstances, three to four minutes of actual notice would not be sufficient to charge the State with a duty. However, in this case, the Claimant has proven by a preponderance of the evidence that the State had actual notice of a dangerous situation. The negligence occurred when one of the student managers, only 30 seconds away, did not immediately go to the area of danger and warn the Claimant and others of the danger. The testimony of Claimant and her doctor also satisfies the court that a causal connection exists for the injuries suffered by Claimant. Claimant was free from contributory negligence in that the substance was difficult to see. We note that the janitor had trouble finding the slippery substance on the floor.

We have reviewed the damages and believe that an award of $25,000 fairly compensates the Claimant for her past and future damages. It is therefore ordered that an award of $25,000 is hereby entered in favor of Claimant, said award being in full and complete satisfaction of Claimant's complaint.

(No. 89-CC-0632—Claim denied.)

AHMET T. ARGUDEN, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed August 10, 1993.

JOSEPH V. RODDY, for Claimant.

SIEGAN, BARBAKOFF & ASSOC. (NORMAN JEDDELOH, of counsel), for Respondent.

TORTS—*elements of false imprisonment claim*. False imprisonment consists of an unlawful restraint, against the will of an individual's personal liberty or freedom of locomotion, and false arrest is one means of committing false imprisonment, but a claimant has the burden of proving by a preponderance of the evidence that the State imprisoned him without probable cause to detain or arrest him, and that he suffered damages therefrom, and an arrest authorized by statute cannot be grounds for civil liability.

SAME—*what Claimant must prove to prevail in malicious prosecution claim.* For the Claimant to prevail in a malicious prosecution claim, he must prove by a preponderance of the evidence that a criminal proceeding was commenced by the Respondent, that the proceeding terminated in favor of the Claimant, that probable cause was lacking, that the Respondent acted with malice, and that the Claimant suffered special damages.

SAME—*Claimant charged with theft from university bookstore—claim alleging false arrest and malicious prosecution denied.* The Claimant could not recover in his claim alleging false arrest and malicious prosecution in connection with his alleged theft of a pair of gloves from a State university bookstore, since there was no evidence of malice on the part of the State, and there was probable cause under State law for the Claimant's arrest and prosecution for theft of the gloves which had been removed from their box and were balled up and barely visible in the Claimant's hand as he proceeded past the cashier and toward the exit.

OPINION

FREDERICK, J.

The Claimant, Ahmet T. Arguden, filed his complaint in the Court of Claims on September 1, 1988. Claimant alleged that on September 29, 1986, he was the victim of a false arrest in regard to an alleged theft at the Chicago Circle Center Book Store on the University of Illinois Chicago Circle campus. In Count II of the complaint, the Claimant alleged a malicious prosecution claim against the Respondent for causing criminal charges to be lodged against Claimant.

The cause was tried by the Commissioner assigned to the case.

The Facts

Claimant was a student and was also teaching at the

University of Illinois, Chicago campus, in the fall semester of 1986. Claimant had completed his Masters degree in 1984 and was working on his Ph.D. in geology. Claimant completed his Ph.D. in 1989.

At about noon on September 29, 1986, Claimant went into the University bookstore to purchase a pair of handball gloves. In the bookstore there was an open area immediately inside the electronic doors. Further inside, there was a charge desk and several cashiers. Past the other side of the charge desk and cashiers' stations was where the merchandise was located. The handball gloves were in the very back of the store. Claimant went to the back of the store and picked out a pair of handball gloves. Claimant testified the gloves were in disarray and he had to go through the pile to find a matching pair. Claimant then proceeded to the charge desk. Claimant testified there were lines of people at the charge desk. One such line extended into the merchandise section of the store and another line extended into the area between the counter and the entrance to the bookstore.

Claimant further testified that while he was waiting in line by the charge desk, he was approached by Steven Bradd, a security officer-employee of the bookstore. Claimant testified that Bradd held Claimant's right arm and led Claimant out of the line and downstairs to an office.

Claimant was brought into an office and informed that he was accused of stealing the handball gloves. Claimant was requested by Bradd to sign a form admitting that he had stolen the gloves. Claimant was advised that if he did sign the form the matter would be referred to the university discipline committee. He was further advised that if he did not sign the form, the university police would be called. Claimant refused to sign the form and police officers were called. Claimant was handcuffed,

led through the bookstore, through the Circle Center building, and through part of the campus to the police car. Claimant was then taken to the police station where he was charged with theft. He was detained until Dr. Rodolfo, a professor at the university, arrived and posted bond for Claimant. Claimant was charged with misdemeanor retail theft and appeared in court at least three times. At the last court appearance, the charges against him were stricken with leave to reinstate. The charge was never reinstated.

Claimant testified that the aggravation and trauma of the incident caused a delay in the completion of his Ph.D. dissertation of about one year.

The Claimant acknowledged that he was familiar with the University Bookstore and had been in the bookstore many times prior to the incident. Claimant knew that it was necessary to go to a charge desk to get a charge slip before charging goods. Claimant testified he waited in charge line A until his turn came. At that point, he asked the charge desk attendant for the price of the gloves. However before he had the opportunity to do anything else, according to the Claimant, Bradd approached him in the line, touched him on the arm, and told Claimant to come with him to the lower level of the bookstore and accused him of theft. Bradd was polite to Claimant.

The Claimant testified that at the first court appearance, his own lawyer asked for a continuance and that there was never a finding by a court of "not guilty" on the criminal charge. Claimant asserts that he suffered emotional upset due to this incident and that he was required to pay an attorney $500 to defend the criminal charge.

The Claimant prepared a statement describing the incident one day after the incident to assist him in accurately

remembering and providing testimony. Claimant says that the statement is inaccurate since it suggests that he was actually in charge line B at the time of the Bradd apprehension. The Claimant contends that the statement is inaccurate because he temporarily went to charge line B but then returned back to charge line A.

The Claimant never saw any counselor or medical provider as a result of this incident. Claimant is not aware of any damage to his reputation and does not claim any form of disability. Claimant does not know of any situation in which the university "published" any information about this incident to any person and he suffered no adverse action in his own department as a result of the incident.

Dr. Rodolfo, a geology professor at the University of Illinois at Chicago for over 20 years, testified that Claimant's reputation for truth and veracity was of the highest nature. Dr. Rodolfo also testified that he went with Claimant to the bookstore the next day to go over the incident with Claimant step by step. Dr. Rodolfo observed the racks of gloves but testified the racks of gloves were not in a state of disarray when he viewed them. Dr. Rodolfo was the Claimant's faculty advisor and knew Claimant well. Dr. Rodolfo considers himself to be a friend of Claimant's. He also asserted that the Claimant was delayed in the completion of his Ph.D. by one year as a result of his obsession with the incident.

Steven Bradd was a security guard at the University Bookstore on September 29, 1986. Bradd testified he observed the Claimant enter the bookstore and go to the handball glove rack. Bradd considered the handball glove area a "trouble spot" because it was in a secluded area where retail thefts occur more frequently. Bradd had previously inspected the whole store and made sure the

handball glove racks were neat. Bradd observed the Claimant remove a pair of gloves from a box, try them on, then throw the box onto the rack and walk away with the gloves folded up in his hand.

Bradd recovered the box and then followed the Claimant to the charge desk. Bradd positioned himself so that he did hear the Claimant ask the person behind the charge desk the price of the gloves. After the Claimant went to the charge desk, the handball gloves were balled up in Claimant's hand so that they could hardly be seen. Bradd testified that the Claimant looked around from time to time throughout the incident.

Bradd testified that after Claimant asked the price of the gloves, the Claimant looked to his left and right, walked by a cashier line and began walking towards the bookstore exit. At that point, Bradd apprehended the Claimant.

Bradd testified he identified himself as "bookstore security" and requested the Claimant to accompany him to discuss the incident. He took the Claimant to an office and accused him of committing retail theft. Bradd told the Claimant that he could either resolve this matter through the student disciplinary proceeding or Bradd would call the police. According to Bradd, the Claimant initially refused to sign the letter referring the matter to student discipline but later offered to sign it as the police were handcuffing him.

Bradd testified he acted to detain the Claimant solely because he believed the Claimant was committing retail theft.

On September 29, 1986, there was an electronic gate at the store. The gate would set off an alarm if goods not deactivated were carried through it. The price tag would

set off the alarm. Cashiers at the time of purchase deactivated the alarm. The price tag on the handball gloves was on the box. The gloves Claimant had were out of the box.

Michael Landeck, the store's general manager, testified that, when he came to the University Bookstore, he established a loss prevention program to minimize retail theft. Landeck wrote a training manual for that purpose and trained Steven Bradd in appropriate techniques for minimizing retail theft. He stated that it was consistent with the training manual and a good practice to apprehend and detain suspects in an area between the last point of purchase and the doorway to the exterior. He also stated that this was consistent with practice in the industry. Landeck also confirmed that the price tags on the products trigger the bookstore's electronic gate unless desensitized by bookstore cashiers using a procedure obvious to any customer at the bookstore.

It was Landeck's responsibility to keep track of court dates for the Claimant's case. He conceded that, after several appearances, the case was, in effect, dismissed for lack of prosecution because the witnesses from the University failed to attend.

The Law

The Claimant seeks a finding of liability on the theory of false imprisonment and on a theory of malicious prosecution. False imprisonment consists of an unlawful restraint, against the will of an individual's personal liberty or freedom of locomotion. (*Dutton v. Roomac, Inc.* (1981), 100 Ill. App. 3d 116, 426 N.E.2d 604.) False arrest is one means of committing false imprisonment. (*Shemaitis v. Froemke* (1955), 6 Ill. App. 2d 323, 127 N.E.2d 648.) Claimant has the burden of proving by a preponderance of the evidence that the security officer imprisoned

him, that the security officer did not have probable cause to detain or arrest him, and that he suffered damages therefrom. *Ivancic v. Stole* (1961), 24 Ill. Ct. Cl. 81.

In *Dutton, supra*, the Court stated that "an arrest authorized by statute cannot be grounds for civil liability." Since security officer Bradd detained and arrested the Claimant pursuant to section 16A—5 of the Criminal Code (720 ILCS 5/16A—5), the detention and arrest herein cannot be grounds for false imprisonment. Section 16A—5 states:

"Any merchant who has reasonable grounds to believe that a person has committed retail theft may detain such person, on or off the premises of a retail mercantile establishment, in a reasonable manner for a reasonable length of time for all or any of the following purposes:

(a) To request identification.

(b) To verify such identification.

(c) To make a reasonable inquiry as to whether such person has in his possession unpurchased merchandise and, to make reasonable investigation of the ownership of such merchandise.

(d) To inform a peace officer of the detention of the person and surrender that person to the custody of a peace officer * * *."

A detention pursuant to the aforesaid statute does not constitute an unlawful arrest or unlawful detention and does not render the merchant liable to the person detained. (720 ILCS 5/16A—6.) Additionally, section 16A—4 of the Criminal Code states that

"If any person: (a) conceals upon his or her person or among his or her belongings, unpurchased merchandise displayed, held, stored or offered for sale in a retail mercantile establishment; and (b) removes that merchandise beyond the last known station for receiving payments for that merchandise in that retail establishment such person shall be presumed to have possessed, carried away, or transferred such merchandise with the intention of retaining it or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the full retail value of such merchandise."

To conceal merchandise means that, although there may be some notice of its presence, that merchandise is not visible through ordinary observation.

Security Officer Bradd testified that he had Claimant under constant surveillance from the time he entered the store until he was apprehended. Bradd observed the Claimant look around nervously. The Claimant also discarded the package back on the rack. The package had the price tag affixed which would trigger the security alarm unless desensitized by a cashier after the purchase. The gloves were balled up and barely visible in Claimant's hand while he carried them. Claimant passed the cashier and proceeded toward the doors. All of these actions would indicate to a reasonable merchant that a theft was occurring and that there was probable cause for the arrest. There was no evidence of malice shown on the part of Bradd. It appeared that Bradd acted politely and professionally. Claimant even testified that Bradd did not wish to cause him harm. Bradd's testimony is credible and reasonable.

A thorough review of the contradictory testimony of Claimant and Bradd leaves the Court with the finding that all of the contradictions in their testimony can be attributed to the point of view of the person giving that testimony except for the matter of the place of arrest. One could view the Claimant as one who becomes confused when he picks up a pair of gloves without a price tag. With the crowded conditions and the different lines, he goes beyond the correct line and has no real intent to steal. However, in view of the security officer, the furtive looks, the discarding of the box, the balling up of the gloves, and the going beyond the last point of payment reasonably add up to probable cause for an arrest for retail theft.

The point of the initial contact between Claimant and Bradd is the most troublesome part of the case. Claimant argues he was in line to pay. Bradd testified Claimant was past the last point of payment and heading

for the doors. We find that the area where Bradd testified he encountered Claimant was an appropriate area to effectuate a shoplifter under the law. The issue becomes one of credibility. Bradd was unimpeached. Claimant appeared very credible except on one point. Claimant testified the gloves were in a state of disarray. Bradd had recently checked the glove area and he testified the gloves were neatly racked and boxed. Being neat helped Bradd as he watched for shoplifters. Professor Rodolfo viewed the glove area the next day. The gloves were not in a state of disarray. Although the gloves were viewed on the next day by Professor Rodolfo, this is important evidence which leads the Court to find the testimony of Bradd more credible than the testimony of Claimant. We therefore find that Claimant has failed to prove by a preponderance of the evidence that he was falsely arrested. Probable cause existed for the arrest.

For the Claimant to prevail in his malicious prosecution claim he must prove by a preponderance of the evidence that a criminal proceeding was commenced by a defendant, that the proceeding terminated in favor of plaintiff, that probable cause was lacking, that the defendant acted with malice, and that the plaintiff suffered special damages. *Joiner v. Benton* (1980), 82 Ill. 2d 40, 411 N.E.2d 229.

As we have previously found that probable cause existed for this arrest and because we find that Claimant failed to prove any malice on the part of Respondent, this claim must also fail. The burden of proof is upon Claimant to establish that Respondent acted with malice and had no probable cause to institute the theft proceeding. Even if Claimant and Bradd's testimony were equally credible (and we have found Bradd's testimony to be more credible), Claimant would not prevail. (*Ivancic v.*

State (1961), 24 Ill. Ct. Cl. 81.) We, therefore, find that Claimant has failed to bear his burden of proving the elements of his case and this claim is denied.

(No. 89-CC-0781—Claimant awarded $147.48.)

OLAF EUGENE OLSON, JR., Claimant, *v.*
THE STATE OF ILLINOIS, Respondent.

Opinion filed January 25, 1994.

OLAF OLSON, JR., *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (LAWRENCE C. RIPPE, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*loss of personal property during shakedown—inmate awarded damages.* Where several items of an inmate's clothing were confiscated and destroyed during a prison shakedown, and the inmate produced credible evidence as to the value and lawful acquisition of such clothing, the State's failure to show that the clothing was contraband due to its deteriorated condition, or was rightfully removed from the inmate's possession and destroyed, entitled the inmate to money damages for the value of the property less depreciation.

OPINION

FREDERICK, J.

Claimant, Olaf Eugene Olson, Jr., an inmate with the Illinois Department of Corrections, seeks money damages from Respondent, State of Illinois, in the sum of $202.75 for the loss of property confiscated by Respondent's agent during a shakedown.

Claimant testified that on October 20, 1987, while he was incarcerated at Pontiac Correctional Center, the shakedown took place. Items of clothing were removed

from Claimant's possession by the agents of the Respondent. These items are listed on the exhibit attached to Claimant's complaint. Claimant filed a grievance and it was ruled to be without foundation. The grievance was denied because of information given to the grievance committee that all of Claimant's clothing had been "ripped" and that Claimant's clothing had been destroyed. Upon Claimant's appeal to the Administrative Review Board, the decision of the Institutional Grievance Committee was affirmed, once again based on the report indicating that the clothing had been torn or altered. At the hearing in this case, Claimant denied that his clothing was ripped or torn when removed from his possession.

The Respondent offered no evidence.

The clothing items in question were fully described in the "Bill of Particulars" set forth in paragraph 9 of Claimant's complaint for a claimed total value of $202.75. Similar items are listed under different names on the shakedown record dated October 20, 1987.

The property alleged to have been confiscated from the Claimant and destroyed is listed as follows:

(a) One (1) full power suit	$36.95
(b) One (1) full power suit	$36.95
(c) One (1) full power suit	$36.95
(d) One (1) bench shirt	$36.95
(e) One (1) dead lift shirt	$36.95
(f) One pair squat briefs	$18.00

Claimant's Exhibits 1 through 6 were offered and received into evidence as follows:

Claimant's Exhibit 1—Request for Payment dated 11/5/86 for a total of $45.00 for a dead lift shirt and protein;

Claimant's Exhibit 2—Portion of Personal Property Inventory Record dated 7/7/87 showing Claimant's possession of 5 super suits, 1 super suit bottom and 1 knee wrap;

Claimant's Exhibit 3—Personal Property Receipt dated 11/20/86 from Frantz Sports Center for 3 cans of protein powder and one dead lift shirt;

Claimant's Exhibit 4—A Personal Property Receipt dated 7/2/87 from Frantz Sports Center for one squat suit and 2 pair of squat wraps;

Claimant's Exhibit 5—A Request for Payment dated 6/9/87 to Frantz Sports Center for $42.90 for one squat suit and 2 pairs of squat wraps;

Claimant's Exhibit 6—A Shakedown Record dated 7/2/87 showing receipt by Respondent's agents of 4 pairs of super wraps, 1 super suit, and 1 flag football belt.

The values described of the lost items by the Claimant were the purchase price. Claimant testified that one of the squat suits was brand new and cost $36.95. Claimant testified that he had not even had a chance to try it on. The other items were used and had an effective useful life of from two to three years. The other items were less than a year old.

For reasons known only to the agents of the Respondent, Claimant's items of clothing were confiscated from his possession and destroyed. Respondent chose not to introduce any evidence at the hearing. Claimant introduced credible evidence of the value of his clothing and of the fact that he lawfully acquired and possessed some articles of like clothing of an apparent value or cost as set forth in the complaint. Upon the proof in the case at bar,

the burden of proceeding with evidence that the clothing was, indeed, contraband due to its deteriorated condition, or was rightfully removed from the possession of the Claimant and destroyed, fell upon Respondent. (*Doubling v. State* (1976), 32 Ill. Ct. Cl. 1.) The Respondent has failed to meet its burden.

Under these circumstances, the Claimant is entitled to an award of money damages. The Claimant should be awarded the full purchase price of the new "squat suit" valued at $36.95 and two-thirds of the value of the remainder of the personal property claimed using a one-third allowance for depreciation, bringing the total award to $147.48.

For the foregoing reasons, the Claimant is hereby awarded $147.48 in full satisfaction of his claim.

(No. 89-CC-1501—Claim denied.)

ORAL WILCOXEN, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed April 13, 1994.

ORAL WILCOXEN, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (TERRENCE T. ROCK, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*slip and fall in prison shower—claim denied.* The Court of Claims denied an inmate's negligence claim against the State alleging that the inmate slipped and fell after stepping into an unlighted shower at the direction of a prison official and was initially denied treatment for his injuries, since the inmate presented conflicting testimony and pleadings as to when he was injured and when he obtained medical care, and there was no independent evidence of the alleged fall or the circumstances surrounding the incident.

OPINION

SOMMER, J.

The Claimant, an inmate with the Illinois Department of Corrections, seeks judgment against the Respondent, State of Illinois, in the sum of $40,000, arising from injuries allegedly sustained by the Claimant when he slipped and fell in the shower at the Graham Correctional Center in Hillsboro. The Claimant's complaint alleges that in the morning of May 17, 1988, he left his cell to go to the shower. He attempted to turn the light on in the shower room, but the light would not come on. He alleges that he went to the housing unit control center and told a correctional officer that the light was not working. He contends that he was told by the correctional officer that it was known that the light was not working, but that the Claimant should still use the shower. The Claimant alleges that when he went to the shower, he stepped on a piece of soap, fell and injured his right elbow and back.

At the hearing the Claimant testified that he had just arrived at this cellhouse and had been medicated with a parasite preventative. He had been ordered to take a shower to wash the remnants of that medication off of his body.

The shower room was approximately six feet by five feet with a concrete floor and concrete walls. The floor was level, but there was a berm approximately six inches high that had to be stepped over to get into the shower. Water from the shower flowed up against the berm to prevent flooding. There was a light attached to the ceiling in the shower. The Claimant described the light as being a single bulb sticking out of the ceiling but screwed into an electrical socket.

There was no one in the shower when the Claimant went in. There were others present who had taken showers, and others were apparently waiting to use the shower. When an inmate enters the shower, he has to push a button to start the water running. Hot and cold adjustments of the shower water are done by correctional officers at some other location.

The Claimant estimated that he had used this particular shower approximately 10 times, and had not had difficulty. The Claimant was not in a hurry, but wanted to get the medication off of his body because it was itching.

The switch to the shower room was on the outside of the room, and was operated with a key. The key was like an ordinary house key. It functioned as a dual key to the inmates' rooms and to turn the shower light on and off. This special kind of switch is found in penitentiaries so that persons cannot turn switches on and off with their fingers. As the Claimant approached the shower, the light was off. The door to the shower was open, and the light in the room was dim, according to the Claimant. The Claimant attempted to turn the light on, but failed. The Claimant "hollered" at the officers, and they heard him because they raised their hands in a salute to indicate that they had heard him. The Claimant testified that the guards told him to go ahead and take a shower.

He stepped over the berm and on to a piece of soap that threw his feet out from under him, and he fell on the concrete. He testified that he hurt his back and his right arm. Other inmates helped him to his bunk.

The Claimant contends that the correctional officers would not send him to seek medical care for a day and a night, and he testified that the next morning he went on sick call and showed his injuries to prison medical personnel.

There was swelling, and x-rays were taken of the right elbow, back and head. The Claimant was taken to the doctors in Centralia, and ultimately underwent surgery on two separate occasions.

The Claimant was a sixty-year-old man who had spent most of his adult life as an inmate with the Illinois Department of Corrections. He contended that his back and right arm bothered him, and that his right arm was hurting during the hearing. He described the pain as "stinging." He testified that he had headaches all the time, and had been treated for the headaches with Anacin and Motrin.

The Claimant contended that prior to the injury, he could lift, but he couldn't lift at the time of the hearing. He used to drive trucks but he cannot drive trucks now because it involves sitting straight all the time. The Claimant did not believe he could work in sheet metal as he had in the past. His right arm had not been injured prior to this incident, and he had had no back injuries before this incident. The Claimant contends that the headaches he has had since the injury were greater than those he had experienced prior to the injury.

The Claimant stated that on past occasions when he had taken a shower, the shower room floor was normally wet. He had seen small pieces of soap on the floor previously. The Claimant stated that as he approached the shower room, he did not look at the floor. He stepped over the berm or curbing at the entrance to the shower room, and when he put his weight down he fell. The Claimant states that he was shown the piece of soap he fell on, and it was approximately 2 inches long and half an inch thick.

William A. Whitley was called by the Respondent as a witness for the State. Whitley is the maintenance super-

visor at the institution in question. He testified that light bulbs that expire are repaired through a work order. Whitley stated that he reviewed the work orders for the month of May, 1988. Whitley testified that he had no work order for a burned out light bulb in a shower from May 15, 1988, through May 21, 1988, when asked that question by the Commissioner. Whitley testified that he could not say whether there were light bulbs burned out in the shower on the day in question.

Under questioning by the Commissioner, Whitley testified that it is not unusual for it to take five days to replace a burned out light bulb after a work order. Whitley testified that it was possible for a light bulb to go out on the eighteenth or nineteenth of May that would not be repaired until the twenty-fifth. Usually work orders are dated on the day that they are sent in. Sometimes the work orders do not bear a date. Whitley did not know how long it took work orders to get to him. When Whitley receives a work order to replace a bulb with no date, he does not know how long the light bulb had been out.

Whitley testified that all light bulbs in the shower rooms have a protective cover. Under the cover there is a single light bulb. Work orders must be utilized to change defective light bulbs. Guards are not allowed to "mess" with any of the electrical or maintenance needs of the institution. The covers on the lights in the showers can only be removed through the use of special equipment.

Correctional officer Matthew Wells was called and testified on behalf of the Respondent. Wells did not remember any incident where the Claimant claimed to have been hurt falling down in the shower. The witness testified concerning the degree of light that exists in the shower rooms. There was a window in the shower room. The witness stated that, in his opinion, there was defi-

nitely sufficient light to take a shower because "there is as much light in that shower with the light off as there is in the shower in my house at home." Photographs marked as exhibits 1, 2 and 3, were identified, marked and admitted into evidence showing the hallway and different views of the shower room or a shower similar to the one in which the Claimant contended he was injured; but there was no indication whether the light was on or off in these photos.

On cross examination by the Claimant, Officer Wells testified that he did not remember refusing a request by the Claimant to take the Claimant to the hospital. Officer Wells did not recall the Claimant ever complaining of having been injured. Officer Wells stated that it was the policy of correctional officers, when medical attention is requested, to allow the inmate to declare a "medical emergency." If the inmate elects to declare a "medical emergency" and this is not confirmed by medical staff, then the inmate will receive disciplinary action initiated by the medical staff. Wells testified this is the procedure he would have followed had the Claimant requested medical assistance and been willing to declare a "medical emergency." Also, if an inmate stated that he was injured an incident report would have been made.

During the testimony of Officer Wells, it was noted that an order had been entered by the Commissioner against the Respondent to comply with a request to produce. It was further noted that the response to the request to produce did not contain a single incident report or any indication that the incident alleged by the Claimant ever occurred.

Briefs were not submitted by either party.

Though there was some confusion by the Claimant as to the date of the injury, the complaint and the testimony

indicate that the Claimant was injured on the seventeenth of May. In his deposition, he stated that he was injured on the nineteenth of May—a date which he said was mistaken when he testified at his hearing.

The Department Report states that the Claimant was received at Hillsboro on May 18, and the Medical Report indicates the Claimant underwent reception lab work by the nurses on May 18. Notations on the medical notes from May 18 include "Rt. forearm." The Claimant's complaint indicates that he was injured on the seventeenth but continued to ask for treatment until the twenty-first, when he was seen. In his testimony, the Claimant said that he had medical treatment the day after the injury.

Institutional medical records submitted as a part of the departmental report indicate that on May 21, 1988, the Claimant presented himself complaining that he fell down "on the ground" and injured his elbow. The medical records are hard to interpret, but it appears that the Claimant's right arm was diagnosed as having an infected wound at the right elbow with swelling. It further appears that on May 24, 1988, that x-rays were taken of the elbow which was then acutely swollen due to an acute infection of the wound and bursitis of the right elbow. On May 26, 1988, a complaint of vertigo was noted. On May 27, 1988, the medical record showed that the Claimant returned from St. Mary's Hospital with his right elbow in a sling, after having arthroscopic surgery the day before. On May 31, 1988, the medical record speaks to an elbow abscess with minimal drainage. On June 13, 1988, he had a debridement of scar tissue at St. Mary's Hospital. On July 22, 1988, his elbow was said to be healing well. No history, surgical notes, or hospital records were a part of the State's answer to production or contained in the depart-

ment report. The department report reflects a total absence of "incident reports."

The Respondent offered no other evidence. Neither party filed a brief.

The Claimant's theory of liability is based on the facts as recalled by the Claimant. The Claimant testified that he was seriously injured because of the lack of light in the shower. He contended that he sustained injuries to his right arm, his back, his head, was knocked unconscious, and had to be assisted by other inmates back to his cell or room. The Claimant contended that when he was first able to do so, he requested medical assistance which was initially, arbitrarily denied by Officer Wells. Wells testified emphatically that any inmate requesting medical treatment had to be given the option of declaring a medical emergency. In that event, Wells testified emphatically that he would have seen to it that the Claimant was delivered to medical personnel at the institution immediately. Apparently the Claimant did not wish to declare a medical emergency, and he stated that he waited until the following day before he was given any medical attention. Although the medical records submitted by the State in its departmental report are scant, it clearly appeared that the condition for which the Claimant's elbow was treated was an abscess resulting from what was believed to be an infected wound. The abscess was subsequently drained and repaired through two separate surgical procedures. The scant medical notes reflect that the Claimant's history was that he had fallen to the ground, and he did complain of vertigo on May 26, 1988.

There appear to be no incident reports, inmate injury reports, investigation reports, results of grievance procedures, or any other documentation tending to either substantiate or refute the Claimant's testimony.

The Claimant testified there was a bare light bulb protruding from the ceiling of the shower. The maintenance engineer testified that this would definitely not be allowed to occur, and that all the shower lights were covered by protective covers that could be removed only with special equipment.

The Claimant testified that the light from outside the shower and through the small window provided little lumination, but he could dimly see the shower apparatus. Officer Wells testified that the light from outside the shower and the shower room window provided as much light as he had in his shower at home, and that there was enough light to see to take a shower.

The Claimant contended that he sustained back injuries and has had problems with unusually severe headaches since his injury was sustained. The medical records do not reflect complaints of back pain or headache pain relative to the onset of the Claimant's complaints.

The Claimant had spent most of his adult life as an inmate, and knew the system. Officer Wells was emphatic in his testimony that he would have permitted the Claimant to obtain immediate medical treatment had the Claimant opted to declare a medical emergency. The risk to an inmate in declaring a medical emergency is that if he attends the medical unit and the medical personnel determine that the need for medical assistance was not "an emergency" a disciplinary ticket would be generated. The Claimant contended that despite serious injuries, he was simply refused medical attention.

The Claimant, additionally, made conflicting statements as to the date he was injured and how many days he went without treatment. The departmental report

indicated that the Claimant arrived on May 18, though the Claimant states he was injured on May 17. Interpreting the matter in favor of the Claimant, it is possible he arrived on May 17. He stated that he went on sick call the next day, but the departmental reports and medical reports indicate that he had reception lab work by the nurses that day, which is given to all new arrivals. The report of this lab work has the cryptic note "Rt. forearm," with no mention of treatment. No injury was noted to the Claimant's elbow.

The Claimant's elbow did not become an issue until May 21 when he reported that he fell on the ground and was diagnosed as having an infected wound in the elbow. He was then observed not to be in distress or pain. The presence of swelling was noted. Acute swelling was noted on May 24. The Claimant testified to acute swelling the day after his fall when he went on sick call.

There is no independent evidence that the Claimant was injured as indicated. There were no incident reports or other internal documentation of the fall. Officer Wells remembered nothing of the sort. There was no work order for the shower light readily evident, and there was conflicting evidence as to whether there would be sufficient light in the shower if the bulb was burnt out.

The many conflicts in the Claimant's testimony and pleadings as to when he was injured and when he obtained medical care, coupled with there being no independent evidence of the Claimant's alleged fall or of the circumstances he states, compels this Court to find that the Claimant has not proven his case.

Under the law, the Claimant bears the burden of proof. He is required to offer testimony and other evidence that would tend to prove his theory of recovery by

the preponderance of the evidence. We find that the Claimant has not proven his case by the preponderance of the evidence. Accordingly, it is the ruling of this Court that this claim is denied.

(No. 89-CC-1874—Claim denied.)

SILVERIO RODRIGUEZ, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 21, 1994.

SILVERIO RODRIGUEZ, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (CHRISTOPHER K. WELLS, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*inmate hurt in fall near shower was more than 50% contributorily negligent—claim denied.* An inmate who was injured when he slipped on a puddle of water which had leaked onto the floor near a prison shower could not recover in his negligence claim against the State despite the Court's finding that a dangerous condition existed and that the State was aware of the hazard, since the inmate, who had been a porter and previously cleaned up water in the same location, knew of the leaking water problem and was more than 50% responsible for the accident.

OPINION

SOMMER, J.

The Claimant, an inmate with the Illinois Department of Corrections, seeks judgment against the Respondent, State of Illinois, for injuries sustained by the Claimant in a fall at the Danville Correctional Center on November 17, 1988. The Claimant's complaint alleges that at approximately 7:30 p.m., on the date in question, he was walking into the lower level of a shower area when he slipped on a puddle of water that had leaked from the upstairs shower.

The Claimant contends that the water should have been cleaned up, but was not. He alleges that he hit the window leading to the control hub with his head resulting in "busting the right side of my head."

The Claimant contends that the wound in his head was sutured with seven stitches. He seeks damages against the Respondent in the sum of $100,000.

At the hearing, the Claimant testified, through an interpreter, that on the date in question, he was walking in the lower level of the shower area outside of the shower. He testified that he slipped on a puddle of water that leaked from the upstairs shower. The Claimant testified that the "puddle" should have been cleaned up, but was not. He testified that he struck his head on the ground, despite the fact that in his complaint he alleged that his head struck the window leading to the control hub. At the hearing, the Claimant indicated that he had been injured on the upper portion of his forehead above the outer aspect of his right eye. He contended at the time of the hearing that he gets "dizzy" and can't see well from his right eye.

In further testimony, the Claimant contended that the water on the floor was hard to see because the floor was waxed and shined, and that you "can barely see the water on the ground." The Claimant was a porter and had cleaned up water in the same area before "as a porter." He testified that there had been leaking in this location for four months and "the guy had to clean it," and that the Administration was supposed to fix the leak.

The Claimant received medical attention consisting of the suturing of the wound and was sent back to his cell. The Claimant contends his skull was fractured but denies that any x-rays were taken. The Claimant stated that he

took Tylenol as a result of problems with the injury, but he was not given any other medication.

The Claimant testified that he had not complained to a doctor at the Hardin County Work Camp because "before we see a doctor here, we have to be almost half way dead." He had been at Hardin County eight months. He denied having headaches or getting dizzy before the injury.

The Claimant admitted that he was wearing "shower shoes" at the time of his fall. He had acquired the shower shoes at the commissary. He was in the process of washing his "hot pot" at a sink near the shower on the lower level when he slipped. He testified that there was water on the floor everywhere because people came out of the shower and were tracking water onto the floor. The Claimant testified he knew there was a leak and the water was coming down because he was the porter in that area, although he couldn't see the water because the wax made the floor shine.

Although the Claimant testified that the moisture on the floor in the area of the sink and shower was difficult to see, he readily admits being aware of a water problem in the area for four months. Indeed, the Claimant testified he was a porter in the area and had been required to clean water in the area where he fell. This Court has pointed to the factor of concealment or lack of knowledge in slip and fall cases as being an important element of proof. For example, in *Double v. State* (1967), 26 Ill. Ct. Cl. 87, 91, this Court indicated that recovery could not be had in a slip and fall situation if the danger was, or should have been, apparent to the Claimant. As in the *Double* case, there is no proof in this case that the wet or damp condition of the floor was in any way concealed from the Claimant; and, indeed, the evidence strongly suggests

that the Claimant was well aware of a water problem in the area where the fall occurred. Further, there is evidence that porters, including the Claimant, had been assigned to this area for purposes at least in part, to remove water from the surface of the floor. He had himself performed that task.

It is the finding of this Court that though a dangerous condition existed and the State was aware of it, the Claimant was also aware of the condition and had a duty to proceed with due care. We find that the slip and fall was more than 50% the fault of the Claimant due to his special awareness of the situation. As the Claimant's negligence was more than 50% responsible for the accident, he may not recover. (735 ILCS 5/2—1116.) It is therefore the order of this Court that this claim is denied.

(No. 89-CC-2449—Claim denied.)

ANDRAY DEWALT, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed June 29, 1994.

ANDRAY DEWALT, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (MARY ELISE WALDEN, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*State not required to pay for all accidents on its premises—proof of negligence.* The State is not an insurer required to pay for all accidents that occur on its premises, rather the State must be found negligent, and to recover, a Claimant must prove by a preponderance of the evidence that the State has breached its duty of reasonable care, that the breach was the proximate cause of the Claimant's injuries, and that the Claimant was injured as a result of said negligence, and the Claimant must also show that the State had actual or constructive notice of the alleged defect.

SAME—*duty owed to persons legally on State premises*. The duty owed to persons who are legally on State premises is a duty of reasonable care and caution in keeping the premises reasonably safe for use by such persons, including the duty to exercise reasonable care in discovering defects or dangerous conditions existing on the premises.

SAME—*when medical testimony is needed to establish causation*. Generally, when proving a *prima facie* case of proximate cause in a negligence action alleging personal injuries, medical testimony is not required when there is a clearly apparent causal connection between the Respondent's act and the injuries sustained by the Claimant, but where the injury complained of is remote in time or place from the accident, or the condition is shrouded in controversy, layman testimony may be insufficient to establish a *prima facie* showing of a causal relationship.

SAME—*fall on step in prison visiting room—no unsafe condition existed—claim denied*. There was no evidence of the State's negligence in a woman's claim seeking compensation for injuries allegedly suffered when she tripped up a step leading to a guard platform in a prison visiting room, since the step was large, obvious, and did not constitute a hidden defect, and the woman failed to present medical evidence establishing a causal connection between her alleged injuries and the State's maintenance of the visiting room.

OPINION

SOMMER, C.J.

On February 6, 1989, the Claimant, Andray DeWalt, filed a complaint seeking compensatory damages for an alleged injury sustained in a fall at the Centralia Correctional Center.

On November 24, 1988, Andray DeWalt entered the premises of the Centralia Correctional Center to visit her brother, Willie Dantzler. At approximately 2:00 p.m., during DeWalt's visit, she went to a change machine.

Near the machine was a guard's platform with a desk, a chair, and a guard on top of it. There was one step approximately 8 inches high, 11 inches deep, leading to the platform, and the platform itself was visible. DeWalt testified that when she approached the change machine, "somehow or another * * * tripped up this step and fell back behind the platform." DeWalt stated that her

brother helped her after the fall. DeWalt continued her visit with her brother, and at approximately 4:00 p.m., DeWalt spoke with the Centralia Correctional Center officer, John Rolf. At this time, an incident report was filled out by Rolf. DeWalt left the Centralia Correctional Center at approximately 4:30 p.m.

The State is not an insurer required to pay for all accidents that occur on its premises, rather the State must be found negligent. (*Gillmore v. State* (1986), 40 Ill. Ct. Cl. 85.) To recover upon a negligence theory, the Claimant must prove by a preponderance of the evidence that the State has breached its duty of reasonable care, that the breach is the proximate cause of the Claimant's injuries and that the Claimant was injured as a result of said negligence. (*Acme Carrier, Inc. v. State* (1977), 32 Ill. Ct. Cl. 83.) The Claimant must establish the State had actual or constructive notice of the alleged defect before recovery is allowed. *Hitt v. State* (1982), 35 Ill. Ct. Cl. 798; *Becker v. State* (1983), 35 Ill. Ct. Cl. 704.

The Claimant was legally on the premises, therefore, the State owed a duty of reasonable care and caution in keeping the premises reasonably safe for use by such persons, including the duty to exercise reasonable care in discovering defects or dangerous conditions existing on the premises. *Owens v. State* (1989), 41 Ill. Ct. Cl. 109.

Before the State can be held liable for injuries caused by an alleged defective condition, there must be evidence showing the unsafe condition existed and that the State had notice of that condition. *Pigott v. State* (1968), 26 Ill. Ct. Cl. 2521; *Moore v. State* (1991), 43 Ill. Ct. Cl. 204, 205.

The Claimant testified that the guard platform was large enough to hold a desk, that the step up to the plat-

form was approximately 8 inches high and 11 inches deep, and that the platform was visible. The Claimant did not establish that the placement of the guard platform was unsafe. In fact, the Claimant stated that "somehow or another, I tripped up this step," unaware of how or why she fell. There is no hidden defect that would make this platform unsafe. There is no evidence showing an unsafe condition existed.

Further, there appears to be no apparent danger that would give the State actual notice of an unsafe condition, nor was there evidence of a hidden defect that could have been discovered by reasonable care, so as to put the State on constructive notice.

The Claimant failed to establish by a preponderance of the evidence that an unsafe condition existed, that the State had notice of an unsafe condition, or that the State breached its duty of reasonable care to the Claimant.

Further, the Claimant has failed to establish that her alleged injuries were caused by the fall at the Centralia Correctional Center.

Generally, when proving a *prima facie* case of proximate cause in a negligence action alleging personal injuries, medical testimony is not required when there is a causal connection between the Respondent's act or omission and the injuries sustained by the Claimant. (*Harris v. Day* (1983), 115 Ill. App. 3d 762, 770.) The causal connection, however, must be clearly apparent from the injuries and the circumstances attending them. *Id*.

It is unclear as to what, if any, injuries the Claimant sustained. The Claimant testified that she went to the Gateway Community Hospital in Centralia, Illinois and the Bonita Chiropractic in California. The Claimant testi-

fied only that she had problems with her neck, back and knee.

The alleged injuries do not create a clearly apparent causal connection with the placement of the guard platform or the Claimant's fall near the platform.

"Where the injury complained of is remote in time from the accident or the condition is one that is shrouded in controversy as to origin * * * layman testimony may be insufficient to establish a *prima facie* showing of a causal relationship." *Harris v. Day* (1983), 115 Ill. App. 3d at 770; *Hyatt v. Cox* (1965), 57 Ill. App. 3d 293, 299.

The Claimant failed to establish a connection, let alone a causal connection between her alleged injuries and the State's maintenance of the Centralia Correctional Center visiting room. The Claimant was the only witness who testified at the evidentiary hearing. No medical evidence as to her injuries was produced. Medical evidence of causation was necessary in the Claimant's case.

The guard platform was large, apparent to the naked eye and not a hidden defect. The Claimant failed to use reasonable care so as not to injure herself on the readily apparent guard platform.

The Claimant has failed to prove by a preponderance of the evidence, any of the elements needed to recover upon a negligence theory. The Claimant has not shown a breach of duty, that a breach of such duty was the proximate cause of her injuries, and that she in fact had injuries caused by the incident complained of. For these reasons, the Claimant's claim is denied and dismissed.

(No. 89-CC-3635—Claimant awarded $640.)

DONALD SICKLES, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed May 13, 1994.

APPLETON & MCHUGH (GREGORY J. MCHUGH, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (CHRISTOPHER K. WELLS, Assistant Attorney General, of counsel), for Respondent.

CONTRACTS—*damage to well caused by highway construction—contract language provided for recovery—award granted*. Where the language in a contract between the Claimant farm owner and the State provided for recovery of damages by the Claimant in the event that a well on his property was adversely affected by the State's construction of a highway over a portion of his land, the Claimant was entitled to compensation when the well dried up during construction of the roadway, since it was more probable than not that the damage was caused by the construction rather than as a result of drought or the natural water table.

OPINION

FREDERICK, J.

Claimant filed his complaint in the Court of Claims on June 2, 1989, seeking damages for alleged damage to a well of Claimant by the Illinois Department of Transportation during the construction of Highway 34. The case was tried before the Commissioner assigned to the case.

Claimant, Donald Sickles, is a farm owner, possessing land in Warren County, Illinois, approximately one mile from Monmouth, Illinois. Claimant has owned the land which is the subject of this litigation since 1972. At the time of purchase, Claimant testified that the land contained four working wells.

In 1976, the Respondent, through the State of Illinois Department of Transportation, entered into negotiations

to purchase a right-of-way for road project 404 from Claimant. The completed project is now known as Highway 34. The road project encompassed land contained within the boundaries of that owned by Claimant. Claimant's land is both north and south of the highway project. On April 9, 1976, negotiations were completed between Claimant and Respondent after which both parties entered into a contract for warranty deed and temporary easement. The negotiated price was $33,500 for the easement. The parties signed the agreement. Among the terms of the "Receipt for Warranty Deed and Temporary Easement" was incorporated the language which gives rise to this claim, "In the event that the well adjacent to the ROW (right-of-way) is adversely affected during or as a result of construction damages will be paid for same by the department." This language was incorporated into the agreement because Mr. Sickles had concerns his well might be damaged as it was close to the construction. The allegedly damaged well, referred to as well number 2 by the parties, is approximately 36 feet off the right-of-way purchased by the State.

Claimant testified to the existence of two distinct wells contemplated by the contract. These wells were most likely developed when coal miners lived in the area. Well number 2 allegedly fell within the actual area under construction and was lost to construction, according to Claimant. Illinois Department of Transportation Cite Engineer David Clark was in charge of this section of construction. Mr. Clark oversaw construction in the area. The area where well number 1 allegedly existed was given close work and attention because of old tires and debris in the vicinity. This work was done by bulldozers. According to Mr. Clark, no well was ever encountered in the right-of-way over which the highway now runs. Mr. Clark testified that had a well been located in the highway's right-of-

way, it would have been brought to his attention so that special construction precautions could be taken. Mr. Clark also testified that the excavation of earth in that area was completed between July and October, 1984.

According to Claimant, well number 1 was a main well with good water that Claimant used for spraying on the farm. It was a stone well over 25 feet deep. Well number 2 was stone but not as deep. Construction of the road started in the late 1970s and into the 1980s. Claimant testified that when well number 2 was covered over by the road that well number 2 almost immediately lost its water. He testified that prior to construction the well always had water but afterwards it was dry.

Gordon Benson also testified for the Respondent. Mr. Benson was a former I.D.O.T. employee, having retired in 1983. Mr. Benson testified that he had begun his I.D.O.T. employment as an assistant to the district soils engineer, later becoming foundation engineer and chairman of the State Soils Committee. He incorporated his background education in geology and worked on related problems in various I.D.O.T. districts. In regard to his knowledge of wells, witness Benson testified that he had done considerable work on problems of seepage and internal drainage and had personally inspected well number 2.

Mr. Benson indicated that well number 2 was approximately 36 inches in diameter and measured 12 feet deep. The well was located on a ridge and was hand dug and hand laid with limestone. The well was not covered which could allow an accumulation of foreign material resulting in the well becoming shallow to the point of being above the water table. Mr. Benson indicated that he believed the well to be approximately 90 years old and long abandoned when he observed the well.

Prior to construction, I.D.O.T. generated a cross section survey of the land in question. The cross section established a centerline for the survey along the area that was relevant in the building of the improvement. The cross sections represent a vertical slice down through the ground extending to either side of the center line of the survey. The cross section shows the character of the ground in a traverse direction to the roadway, demonstrating what the surface of the ground looked like along the centerline of the roadway surveyed. Mr. Benson testified to the approximate location of well number 2 and indicated no earth was moved within 80 feet of the well.

The centerline profile is a soil survey. The centerline profile indicates that holes were made at intervals of 100 feet alternating from the left to the right of the proposed centerline with each hole approximately 44 feet out from the centerline. These borings extend well below the depth of the improvement to see what types of soils will serve as the foundation for the roadway. The ground water level at the approximate site of the Claimant's well in 1975 was 714 feet above sea level. The bottom of the Claimant's well did not extend below 729 feet above sea level. These measurements were made in 1975 when the area had experienced an excessively wet period. Mr. Benson testified that an excessive amount of precipitation would affect ground water levels by raising the water table.

Alternatively in 1987, the approximate time Claimant's well was alleged to have dried up, the Monmouth area was approximately 10 inches below the average annual precipitation level. Mr. Benson testified that the lack of precipitation very definitely could cause a well to go dry. Mr. Benson also testified that the ground water could once again be reached by merely digging a 20-foot-deep well.

Claimant called as his witness water driller Roger

Acker. Mr. Acker testified that he personally inspected well number 2. The well appeared to be approximately 15 feet deep containing roughly 2-3 feet of water on the date of inspection. Mr. Acker testified that it was "possible" that cutting the angle of the hill down could have disturbed the natural water flow, but he had no knowledge of the land prior to the excavations. Mr. Acker also acknowledged that he was merely stating a general principle, that excavation resulted in a change in water flow. Mr. Acker indicated that the well was hand dug and fed by ground water, very possibly percolating from the north from a vein of sand. He also testified that in 1988 he experienced an increase in his local well-digging business as a result of drought. However, Mr. Acker testified that it is more likely true than not that well number 1 and well number 2 were connected by the water table.

As a replacement for the allegedly damaged 15-foot-deep well number 2, Mr. Acker proposed drilling a 200-foot-deep well at $15 per foot and attaching a pump for $1,350. This proposed well could produce 8-10 gallons of water per minute. Well number 2 had previously been used only sparingly for water to mix with chemicals and spray on crops or for providing Claimant's cattle with a secondary source of water when an adjacent creek went dry. Mr. Acker testified that a decrease in rainfall will often cause more shallow wells to go dry.

The evidence is clear that prior to the construction of Highway 34, Claimant had a working well on his land, known as well number 2. Claimant was concerned enough about the proximity of this well to the construction project that he asked for and received contract language drafted by Respondent that stated if the well is *adversely affected during or as a result of construction*, damages would be paid for same by Respondent.

The issue in the case is whether well number 2 was adversely affected during or as a result of construction. While there are questions about the existence of well number 1, there is no question concerning the existence of well number 2. There is also no question that well number 2 had water in it prior to the construction and during the construction was adversely affected by going dry. We find that it is more probable than not that the damage was caused by the construction and resulting change in the land than by a drought or because of the natural water table. The broad contract language allows for a recovery by Claimant as this language must be construed least favorably to the Respondent as they drafted the contract. *McDonnell-Douglas Automation v. State* (1983), 36 Ill. Ct. Cl. 46.

The issue of damages, however, is not as clear. Well number 2 was a 15-foot hole and only provided a small amount of water for limited agricultural purposes. The damages to this very old well are not properly measured by paying for a 200-foot well requiring a $1,350 or more pump. Mr. Benson testified ground water could be reached by digging down 20 feet. Such a remedy of finding ground water would put this well in the same condition it was in prior to the construction. By using the formula of Mr. Acker and giving some leeway for the time that has passed since the well went dry and the need to dig deeper than 20 feet, we would believe that an award of $640 is appropriate under the facts of this case.

Based on the foregoing, Claimant, Donald Sickles, is hereby awarded the sum of $640 in full satisfaction of his claim.

(No. 89-CC-3755—Claim denied.)

KEITH J. SENNSTROM, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed September 27, 1993.

KEITH J. SENNSTROM, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (CYNTHIA WOOD, Assistant Attorney General, of counsel), for Respondent.

CONTRACTS—*Claimant must prove existence of employment contract*. A Claimant seeking recovery on the basis of an oral employment contract must first prove the existence of a contract of employment.

SAME—*money sought for services rendered—claims based on oral contract and quantum meruit denied*. In a claim brought by a former employee of a bankrupt hotel concessionaire seeking $1,200 from the State for services allegedly rendered by the employee at the request of the Department of Conservation after the concessionaire's business closed, the Claimant could not recover based on an oral employment contract, since there was no competent evidence that such a contract existed, and his claim in quantum meruit also failed because the Court of Claims does not have equitable jurisdiction.

OPINION

FREDERICK, J.

Claimant, Keith J. Sennstrom, brought this claim before the Court of Claims seeking recovery for $1,200 of services he allegedly rendered to the Respondent. Claimant alleged that the Department of Conservation refused to pay him on the grounds that funds appropriated for such payments had lapsed. A hearing was held on June 16, 1992, before the Commissioner assigned to the case, for which there is no transcript, the parties having agreed to waive the need of a transcript.

Claimant testified that an individual named John Brooks operated a hotel and restaurant concession at Illinois Beach State Park in Zion, Illinois. The concession was granted from the State of Illinois by agreement with

Brooke Inns of Lake Forest. Claimant was the general manager for Brooke Inns, the concessionaire. The concessionaire ultimately filed for bankruptcy and went out of business.

Subsequent to the closing of the concessionaire's business, Claimant testified that he had a conversation with Bob Grosso, the site superintendent for the Illinois Department of Conservation, wherein Mr. Grosso agreed to pay him $10 an hour to help clean up the premises and wrap up the business affairs. Claimant moved into the hotel to help protect it from vandalism and to be available to meet with potential tenants or concessionaires. Claimant did not establish the exact nature or the extent of the work that he performed.

Claimant stated that he worked from January 3, 1988, through February 11, 1988, for a total of 120 hours. Claimant testified that on February 12, 1988, Bob Grosso told Claimant that a check would be forwarded to him.

Claimant presented one document, which was admitted into the record. Claimant's exhibit is a handwritten note to Claimant from Bob Grosso stating that "the only way to resolve [the dispute] is through the Court of Claims."

On cross-examination, Claimant stated that he did not enter into a written contract with Bob Grosso or the State of Illinois. Claimant agreed that he did not receive any document that would indicate that he was an employee of the State and had not received any checks from the State.

At the hearing, Respondent presented two documents, which were admitted into the record. One document is a March 6, 1991, memorandum from Bob Grosso, wherein he opined that Claimant, "* * * remained after the bankruptcy * * * to represent the interests of John Brooks."

The Claimant seeks recovery on the basis of an oral contract of employment, or in the alternative, on the basis of *quantum meruit.*

For the Claimant to prevail on a contract theory, he must first prove the existence of a contract of employment. (*Dilbeck v. State* (1990), 42 Ill. Ct. Cl. 222.) In the case at bar, as in *Dilbeck, supra*, Claimant has presented no competent evidence to establish an employment contract, oral or written. If Claimant had been employed, at the very least a W-4 form would have been filled out. No W-4 form was presented in evidence. Claimant also failed to prove that authority existed for Mr. Grosso to employ Claimant for the State. Claimant also failed to prove the nature and extent of the work he was to perform. The State has denied a contract of employment with Claimant. Based on the authority of *Dilbeck v. State*, *supra*, Claimant's claim of an enforceable oral contract must fail.

Claimant's claim in *quantum meruit* must also fail as this Court has steadfastly recognized it does not have equitable jurisdiction. *Ward v. State* (1981), 35 Ill. Ct. Cl. 398; *Melvin v. State* (1989), 41 Ill. Ct. Cl. 88.

This may seem to be a harsh result for Claimant but it is the correct result. Claimant failed to meet his burden of proving an enforceable oral contract of employment. Those dealing with the State are presumed to know the law and deal with the State at their own peril. *Potter v. State* (1983), 36 Ill. Ct. Cl. 26.

Based on the foregoing, it is ordered that this claim is denied.

(No. 90-CC-0741—Claim denied.)

GLENN SMITH, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 21, 1994.

GLENN SMITH, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (VERNE E. DENTINO, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*determining value of inmate's lost property—depreciation.* Some reasonable depreciation may be taken into account when considering the value of an inmate's lost property, and this depreciation depends upon the circumstances of the claim and should not be confiscatory.

SAME—*State adequately reimbursed inmate for depreciated value of lost radio—claim denied.* Following the State's $27.20 reimbursement to an inmate for the loss of his one-year-old radio which he had purchased for $40.65, the inmate's claim for the difference between the purchase price and the State's payment was denied, since the State's one-third depreciation of the radio, which had a useful life of three to four years, was reasonable and not confiscatory.

OPINION

SOMMER, C.J.

The Claimant, an inmate with the Illinois Department of Corrections, seeks judgment against the Respondent, State of Illinois, in the sum of $40.60 for the value of a Panasonic radio which the Claimant contends was lost or converted through the fault or neglect of the State of Illinois. The Claimant's complaint alleges that on January 26, 1989, he was possessed of the radio. On that date, he was transferred from the Illinois State Penitentiary at Joliet to the Illinois State Penitentiary at Pontiac. Thereafter, the Claimant alleges that the Respondent's agent advised him that his property had been stolen from the personal property room, and could not be returned to him.

At the hearing, the Claimant testified that he had

purchased the radio for $40.65 at Stateville Correctional Center, and that it could be expected to last four or five years. The radio was successfully transferred because the Claimant testified that he saw the radio after arriving at Joliet. The radio was taken from his possession at Joliet due to disciplinary problems. As a result of the Claimant's grievance, he was reimbursed the sum of $27.20 by the Respondent in spite of the fact that the Claimant had paid $40.65 for the radio. Upon hearing, the Claimant moved that his claim should be reduced to the sum of $13.40 due to the State's reimbursement of the Claimant in the amount of $27.20.

Upon cross-examination it was determined that at the time of the loss, the radio was approximately 12 months old, having been purchased in June of 1988. The Claimant testified that the estimated useful life of the radio was three to four years or possibly longer. The Claimant testified that in the five years preceding the hearing he had purchased three or four radios. The Claimant admitted that the State had apparently computed the amount of his damages by depreciating the value of the radio approximately 33 1/3%.

It appears, from the evidence at the hearing, that the Claimant has been compensated for the loss sustained by him through the voluntary action of the Respondent. The useful life of the radio is admitted to be three to five years. The Respondent paid the Claimant two-thirds of the purchase price of the radio.

This Court has previously ruled that some reasonable depreciation may be taken into account when considering the value of lost property of inmates. (*Hamilton v. State* (1993), 45 Ill. Ct. Cl. 324.) This depreciation depends upon the circumstances of the claim and should not be confiscatory. (*Seats v. State* (1993), 46 Ill. Ct. Cl.

418.) We find in this claim that the depreciation assigned by the department was reasonable and not confiscatory.

Accordingly, it is the judgment of this Court that this claim be denied.

(No. 90-CC-0989—Claimant Herman Johnson awarded $30,029.60; Claimant Trinity Insurance Co. awarded $7,037.43.)

HERMAN L. JOHNSON, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed April 7, 1994.

HAMM & HANNA (RONALD HANNA, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (ROBIN L. SCHMIDT, Assistant Attorney General, of counsel), for Respondent.

STIPULATIONS—*stipulated admission of physician's deposition waived State's objection to evidence at trial.* In a claim against the State seeking compensation for personal injuries and property damage, a stipulation by the parties to the admission of the discovery deposition of Claimant's treating physician acted as a waiver of any objection at trial to the evidence contained therein, but the stipulation did not establish the weight to be afforded that evidence.

DAMAGES—*negligence—awards granted to injured party and insurer.* Based upon the parties' stipulation regarding the Claimant's medical expenses and lost wages, as well as evidence of pain and suffering and potential future medical care, the Claimant was awarded $30,029.60 in damages in his claim resulting from a State vehicle striking his automobile windshield, and pursuant to a second stipulation, the Claimant insurer was awarded $7,037.43 for property damages as subrogee of the Claimant.

OPINION

JANN, J.

A hearing was conducted by Commissioner Parsons on the above-captioned matter on February 10, 1993, in

Peoria, Illinois. Case No. 90-CC-2825, titled *Trinity Insurance Subrogee of Herman L. Johnson v. State* was previously consolidated into this cause.

This case arises from an accident which occurred on August 2, 1989, on Route 24 in Peoria County, Illinois. Claimant was driving a 1988 Honda automobile when a grain auger being towed by a Department of Conservation vehicle broke loose from its hitch and struck Claimant's windshield. Claimant suffered injuries to his wrist, thigh, neck and back and substantial property damage to his auto.

Two stipulations were introduced into evidence at trial. The first was a letter from Assistant Attorney General Robin L. Schmidt to Mr. Lawrence Newman, representative of Trinity Insurance Co., the insurer of Claimant's auto. The letter confirms that the State will pay property damages to the insurer in the amount of $7,037.43. The second stipulation, signed by the parties, states that Respondent admits liability in the case and that Claimant has incurred the following damages:

Fulton County Ambulance	$ 240.00
St. Francis Medical Center	548.40
Western Avenue Clinic	1,483.00
Central Neurological Services	325.00
	$2,596.40
Insurance Deductible	250.00
Car Rental	783.20
Lost Wages	1,400.00
	$2,433.20

Claimant testified as to the facts of the accident, his injuries, treatment and lost earnings. The discovery deposition of Dr. Ronald L. Smith, Claimant's treating physician, was admitted into evidence by stipulation of the parties. The Assistant Attorney General raised objections to the

stipulation made by her predecessor assigned to the case. We find the stipulation by Respondent's counsel that Dr. Smith's deposition be admitted without previous objection acted as a waiver of any objection to the evidence contained therein at trial. (See *Gomez v. Resolute Insurance Co*. (1971), 2 Ill. App. 3d 180, 257 N.E.2d 69.) The stipulation by the parties that this cause be submitted on the issue of damages only estops either party from arguing issues of whether evidence was properly admitted. The stipulated admission of Dr. Smith's deposition does not establish the weight to be afforded the evidence. *LaRenta v. Mutual Trust Life Insurance Co.* (1955), 4 Ill. App. 2d 60, 123 N.E.2d 165.

The evidence indicates that Claimant suffered injuries requiring significant medical care. He was under doctor's care for over three months. Claimant testified that he continues to have pain in his neck, back and wrist. He further stated that he cannot perform certain tasks of daily life and in his occupation as an operating engineer as well as he could before the injury. Claimant's joint instability and degenerative spinal condition were exacerbated by the injury. He exhibits a loss of dexterity and agility and decreased strength and stamina in his daily activities.

Based upon the foregoing, we hereby award Claimant Herman Johnson $2,596.40 in medical expenses, $2,433.20 for lost wages, auto rental and insurance deductible and $25,000 for pain and suffering and potential future medical expenses. Claimant's total award is $30,029.60.

Claimant Trinity Insurance is hereby awarded $7,037.43 in property damage pursuant to the stipulation previously referenced herein.

(No. 90-CC-2426—Claimant awarded $50,000.)

TODD ANDREW SCHMIEDL, Claimant, *v.* THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Respondent.

Opinion filed June 23, 1994.

PELINI & SHEFFLER (GREGORY E. PELINI, of counsel), for Claimant.

THOMAS, MAMER & HAUGHERY (WILLIAM BRINKMANN, of counsel), for Respondent.

NEGLIGENCE—*quadriplegic student injured in fall from shower chair—damages awarded.* Damages for medical expenses and pain and suffering were awarded to a quadriplegic university student who was injured when a university employee hired as an aide to disabled students caused the Claimant to fall out of a shower chair, since the employee failed to exercise ordinary care, thereby breaching his duty to the Claimant and proximately causing him serious and permanent injuries including seizures, loss of voluntary control, and disorientation.

OPINION

PATCHETT, J.

As a result of an automobile accident in 1980 in which he sustained serious head and other injuries, the Claimant, Todd Andrew Schmiedl, hereinafter referred to as "Todd," is a quadriplegic. For about a year following the accident, Todd experienced hallucinations which he was advised might be the result of seizure activity. He took seizure medication. Todd cannot walk, has very little use of his hands and arms, and is confined to a wheelchair. He sits in a peculiar manner as a result of the specific nature of his injuries, and his upper body is unstable because of a tendency to sway or lean forward. Quadriplegics continuously shift their weight in order to prevent skin breakdown. The only way Todd can do this is to lean forward. Occasionally he will lean too far and is unstable to right himself. The leaning could cause a muscle spasm to intensify. Patricia Joseph, the attending nurse at the

Beckwith Living Center, hereinafter referred to as "Beckwith," indicated that both she and the aides at Beckwith were aware of Todd's instability. Todd also suffers from chronic spasticity. When Todd suffers muscle spasms, only one part of his body is affected, such as his foot or head, and the spasms do not radiate to other parts of his body. Todd's spasms are fairly regular and mild. Patricia Joseph indicated that when Todd experienced a muscle spasm—which she characterized as a "fine shake, a fine tremor"—it was his habit to shift his weight and lean forward.

In April 1989, Todd was a junior majoring in psychology at the Urbana-Champaign campus of the University of Illinois. He resided at Beckwith, a university-affiliated residence hall. Beckwith houses disabled students and hires live-in, non-skilled aides who attend to the needs of the residents. An in-house nurse is also available. In April 1989, the in-house nurse was Patricia Joseph. The rooms at Beckwith are single occupancy and similar to regular dormitory rooms. The exception is that adjoining rooms share an intervening bathroom. Beckwith provides shower chairs for disabled residents to take showers. A shower chair is similar to a regular wheelchair; however, it is smaller and less bulky. A person has less mobility and stability in a shower chair. Shower chairs are not electrically powered and contain hand rests on the back for manual pushing. While they have foot rests, they do not have straps or restraints. At Beckwith these chairs are left in the hallway for use by anyone. Beckwith did not provide any specific training to aides with regard to the use of shower chairs.

The live-in aides, usually pre-med or medical students, receive free room and board. They assist disabled residents in daily activities, such as dressing, feeding, and

bathing. Weekly schedules assigning aides to residents are prepared by the resident nurse. An aide is assigned to one or two residents for three or four days out of the week.

On April 27, 1989, the aide assigned to Todd was Steve Gordon, hereinafter referred to as "Gordon." The Board of Trustees of the University of Illinois admits that it employed Gordon as an aide at Beckwith. Todd had known Gordon since Gordon came to Beckwith in August 1988. Gordon had previously been assigned to Todd and assisted him with daily activities (dressing, eating, etc.). This included, on several occasions, showering.

Some time between 9:00 p.m. and 9:45 p.m. on April 27, 1989, Gordon approached Todd to determine where Todd was going to take a shower. Because the person who occupied the adjoining room was using the shower, they decided that Todd would take a shower in Gordon's room. Gordon's room was about 50 to 60 feet away. Todd drove down to Gordon's room in his electric wheelchair, and Gordon followed with the shower chair. Once in Gordon's room, Gordon assisted Todd in undressing. He lifted him into the shower chair, and wheeled him into the shower. Nothing was done to fashion a restraint on the shower chair.

When Todd finished showering, he was draped in a towel. Gordon pushed him in the shower chair back to his room. Typically, Todd was transferred directly from the shower chair to bed. Gordon left to retrieve Todd's electric chair. Todd's door was left open, and Todd was about six feet inside the door of his room, facing his window with his back to the door.

In a couple of minutes, Gordon returned with Todd's electric chair. Gordon tried to swerve the electric chair around the right side of the shower chair so that he could

close Todd's door. He stood behind the electric chair and leaned over. He was therefore behind and to the right of Todd. He used the joystick in an attempt to move the electric chair. In attempting to swerve around the shower chair, he accidentally bumped the right rear wheel of the shower chair with the left foot rest of the electric chair, causing the shower chair to lurch forward. Todd felt the shower chair lurch. He had a muscle spasm in his legs. He felt his legs slipping under the shower chair. He tilted forward but was able to right himself. He told Gordon to stop because he was going to fall. Gordon saw Todd tilt forward. He was aware that by continuing to try and swerve the electric chair around the shower chair, the shower chair might be bumped. Nonetheless, he continued in his efforts to swerve around the shower chair, thereby bumping the shower chair five to eight times with the electric chair. Gordon saw the shower chair lurch and Todd tilt forward with each successive bump. Todd heard the click of the electric chair's joystick, and he experienced a series of lurches. He finally fell out of the shower chair.

Todd isn't sure what he hit when he fell. He ended up on his left side, the left side of his head and his left shoulder hit the floor almost simultaneously. He immediately experienced sharp pain in his head, left shoulder, neck, and the side of his leg. He was bleeding from an open gash in his left forehead. His left leg and left arm were bruised, and he felt like he had pulled some muscles.

Gordon called for help. He and Alison Gaughan, Todd's girlfriend, attempted to turn Todd on his back so that he would be more comfortable. After one or two minutes, the attending nurse at Beckwith, Patricia Joseph, hereafter referred to as "Joseph," arrived. The three of them managed to lift Todd onto his bed. Joseph examined

the gash in Todd's head and told him that he needed stitches. Alison Gaughan drove Todd to the emergency room at Mercy Hospital in Urbana. Stitches were inserted to close the gash in his head, and he was given a day's supply of Tylenol 3 for pain and soma compound, a muscle relaxant. Todd incurred medical expenses of $290.49 for this treatment.

The following day, Todd experienced constant pain in his head, neck, shoulder, and all down his left side. In the week following, Todd saw the physical therapist at the Rehabilitation Education Center on three or four occasions and received diathermy treatment. This is the therapeutic use of high-frequency current to generate heat within the body. Laypersons commonly refer to diathermy as heat treatments.

About a week after the fall, the stitches were removed. Todd continued to experience pain, mostly in his neck and shoulder, although the pain had subsided. While some of the pain dissipated after about ten days, Todd's head and left shoulder hurt for a long time. He could not turn his head in a normal manner.

On June 19, 1989, Todd fell at Champion Federal, hereinafter referred to as "Champion." He was going down the ramp at Champion Federal when he became disoriented and lost voluntary control of his body. He fell. Since he was wearing a chest and waist strap, he did not fall out of his electric wheelchair. The wheelchair tipped over. He landed on his left side and hit his head. He also received some scrapes on his back and elbow. That evening his girlfriend, Alison Gaughan, drove him to the emergency room at Mercy Hospital. X-rays were taken, and he was advised that he was okay. He was told to return if he experienced any nausea or vomiting. He was not given any medications or prescriptions. The medical

expenses incurred by Todd with regard to this treatment were $267.84.

Soon after the fall at Champion Federal, Todd again fell while upstairs at Beckwith. He was backing up his electric chair and experienced the same type of disorientation and loss of voluntary control. He lost control of the wheelchair and fell against a wall. He received some scrapes, but he did not desire medical attention. According to Todd, on both occasions he had experienced an uncontrollable twitch in his left hand which radiated up his arm and throughout his body. He also experienced dizziness as if he were falling, loss of voluntary bodily control, and a sense of loss of touch with reality. Todd had never previously experienced these sensations.

Todd suffered more such episodes. In July 1989, soon after his second fall at Beckwith, he was maneuvering his electric chair down the sidewalk when he suddenly experienced a sensation of loss of control. This experience lasted thirty to forty seconds. He lost control of the left side of his arms, and his fingers twisted badly out of control. The following November, he started losing control of his arm while talking with a group of friends in front of Beckwith. The sensation, which lasted a minute to a minute and a half, radiated throughout his body. He asked those present to hold onto him so that he would not fall out of his wheelchair.

In January 1990, Todd's left arm started twitching badly while he was laying down and trying to go to sleep. He asked his girlfriend to hold onto him so that he would not fall out of bed. The sensation lasted about a minute.

After this last episode, Todd went to see Dr. Samuel Young, a neurologist at Christie Clinic in Champaign. Todd related that he had experienced two or three of the

episodes. He told the doctor that the jerking began in his left hand before radiating to his left arm and leg. He also informed Dr. Young that at some prior time, he had taken seizure medication. Dr. Young, however, saw no evidence that Todd had experienced any seizures since his accident in 1980.

Dr. Young was of the opinion that Todd was experiencing focal motor or Jacksonian seizures. He felt that they were probably due to some irritation of the right side of his brain. According to Dr. Young, focal motor seizures can be of varying duration and intensity. They can progress from one part of the body to another. They can, however, remain focal or localized, involving only one side of the body, as opposed to progressing into a grand mal seizure. Dr. Young recommended that Todd begin taking daily doses of Tegretol, an anti-convulsant. Dr. Young was of the opinion that Todd should remain on anti-convulsant medication, although it is his practice to taper a patient suffering idiopathic seizures off anti-convulsants if the patient is seizure free for two years. Idiopathic seizures are seizures of unknown etiology or cause. Dr. Young admitted, however, that tapering off anti-convulsant medication, or eliminating it altogether, entails a risk. Consequently, he restricts the activities of patients in such circumstances, and he cautions them to be very careful because of increased risk. In addition, he indicated that the probability of a complete cessation of medication is not better than fifty-fifty.

Todd also saw Dr. Kenneth S. Aronson, a neurologist at Carle Clinic in Urbana, Illinois. Dr. Aronson was also of the opinion that Todd had suffered focal motor seizures. He believed that Todd was predisposed toward seizure disorder as a result of the head injuries he had suffered in a car accident. He believed, however, that the

actual seizure activity commencing in June 1989 was triggered by Todd's fall and injuries in April 1989 after the shower. He explained that some people who are predisposed to seizure disorder, such as those who have preexisting brain injuries, may experience head injuries without any adverse effect. In others, such injuries may activate actual seizure activities. The type or severity of head trauma necessary to trigger such activity will vary depending on the person's stability and predisposition. In someone who is very unstable, a very minor head injury not involving loss of consciousness, may spark seizure activity. Dr. Aronson was of the opinion that since Todd was experiencing seizures, he would require anti-convulsant medication indefinitely.

Alan E. Dillingham, a Professor of Economics at Illinois State University in Normal, indicated that the present value of Todd's anti-convulsant medication expenses over the course of his anticipated lifetime is between $4,821 and $7,707. Both medical doctors agreed that the use of anti-convulsant medication would not guarantee that Todd would not suffer further seizures.

Up until the time of the hearing, the anti-convulsant medication had succeeded in stopping the twitching and sensation of loss of control. If Todd fails to take the medication, he experiences muscle twitching, becomes dizzy, and feels like he is flying. Todd has continuously been prescribed and taken such medication since seeing Dr. Young in January 1990.

Todd still suffers episodes of being disoriented, although not as bad as before. Because of the episodes in which he experienced loss of voluntary control and seizures, Todd has altered his lifestyle. He does not go out as much as before, and he restricts his activities for fear that he will have a seizure in public. He also takes

pains to insure that he is accompanied by someone who is aware of his condition and knows what to do in the event he suffers a seizure.

Todd has exhausted all applicable administrative remedies and sources of recovery on this claim. No payment or other action to compensate Todd has been taken on this claim by the Board of Trustees of the University of Illinois.

This court has exclusive jurisdiction to hear all claims sounding in tort against the Board of Trustees and the University of Illinois. The Claimant, Todd Andrew Schmiedl, complied with all applicable notice and statute of limitation requirements.

Steve Gordon was an employee of the Board of Trustees for the purposes of this claim. As such, Gordon was under duty to exercise ordinary due care for the safety of Todd.

Gordon failed to exercise ordinary care and breached his duty by causing Todd to fall out of the shower chair. As a result and proximate result of that negligence, Todd was seriously injured. Those injuries are severe and appear to be permanent. Todd has suffered pain and suffering, medical and medication expenses, and will have future medication expenses. In addition, the degree of his disability has been increased significantly as a result of this accident.

For that reason, we find liability to exist and set damages at the sum of fifty thousand dollars ($50,000).

(No. 90-CC-1512—Claimant awarded $50,000.)

JANICE RYAN, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 6, 1994.

JOSEPH V. RODDY LAW OFFICES (THOMAS J. PLEINES, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (ROBERT J. SKLAMBERG, Assistant Attorney General, of counsel), for Respondent.

POLICE AND FIREMEN—*"killed in the line of duty" defined.* 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 that injury arose from violence or other accidental cause.

SAME—*determination of whether heart attack victim was killed in the line of duty.* In determining whether an officer was killed in the line of duty when the fatal injury was a heart attack, awards have consistently been granted where the decedent has been on active duty and performing strenuous physical activities at the time of the attack, but in cases where the decedent was not performing strenuous physical activities at the time, the Court must examine whether the circumstances surrounding the decedent's performance of duties prior to the fatal heart attack may have precipitated the attack.

SAME—*on-duty policeman who suffered fatal heart attack while playing basketball was killed in the line of duty—award granted.* A police officer who suffered a fatal heart attack while playing basketball in the police department gymnasium was killed in the line of duty and his wife was entitled to compensation under the Law Enforcement Officers and Firemen Compensation Act, since the officer was on duty and performing strenuous physical activity at the time of the heart attack.

OPINION

FREDERICK, J.

This claim is before the Court by reason of the death of Randall M. Ryan, a sergeant with the Chicago police department. The decedent's widow, Claimant, Janice Ryan, seeks compensation pursuant to the terms and provisions of the Law Enforcement Officers and Firemen

Compensation Act (Ill. Rev. Stat. (1987), ch. 48, par. 281 *et seq.*), hereinafter referred to as the "Act."

On February 21, 1991, this Court entered an order remanding the cause to a Commissioner to conduct a hearing to determine whether Sergeant Ryan was "killed in the line of duty" as required and contemplated by the Act. The Court and Attorney General had been unable to determine if Sergeant Ryan had been killed in the line of duty. The case was tried before Commissioner Fryzel.

The Facts

On January 27, 1989, Sergeant Randall M. Ryan of the Chicago police department died of ventricular arrhythmia due to, or as a consequence of, coronary artery disease after playing basketball in the Department gymnasium. Sergeant Ryan was on duty as a training officer. He usually taught some classes and had some clerical duties. Sergeant Ryan was very concerned about physical fitness and the Department indicated physical fitness was a necessity. Sergeant Ryan played basketball in the gym and then collapsed. He was taken to the hospital but was pronounced dead. The application for benefits indicates Janice Ryan is the surviving spouse. There was no designation of beneficiary. A medical certificate of death was filed with the application. There is nothing in the record to indicate that Sergeant Ryan's death was caused by willful misconduct or intoxication.

The Law

Section 2(e) of the Act (Ill. Rev. Stat. (1987), par. 282e) defines "killed in the line of duty" to mean "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 that injury arose from violence or other

accidental cause * * *." In the present case, Sergeant Ryan was involved in a physical fitness activity while on duty when he had a heart attack.

This Court has considered a similar issue of whether a fireman was killed in the line of duty while playing football while on duty. (*In Re Application of Winchester* (1991), 44 Ill. Ct. Cl. 232.) In that case, the Court found that firefighters were encouraged to take part in physical activity since it helps maintain the physical conditioning necessary in that line of work. Firefighter Winchester was on duty at the time of his fatal accident. While waiting for instruction, he became involved in a scrub football game. While attempting to catch a pass, he lost his footing, fell and struck his head on the concrete resulting in his death. We made an award pursuant to the Act.

In determining whether an officer was killed in the line of duty when the fatal injury suffered was a heart attack, this Court has been consistent in its determinations. In cases where the decedent has been on active duty and has been performing strenuous physical activity at the time of the attack, the Court has consistently granted awards. In cases where the decedent was not performing strenuous physical activities when the heart attack was suffered, the Court has often denied such claims after closely examining whether the circumstances surrounding the decedent's performance of duties prior to the time of the fatal heart attack was suffered may have precipitated the attack. (*In Re Application of Cardwell* (1991), 44 Ill. Ct. Cl. 288.) Based on the foregoing, we find that Sergeant Randall M. Ryan was killed in the line of duty, that all requirements of the Act have been met by Claimant, and that this claim is therefore compensable.

It is therefore ordered that an award of $50,000 be, and is, hereby awarded to Janice Ryan, the surviving

spouse of decedent, Sergeant Randall M. Ryan, a Chicago police officer who was killed in the line of duty.

(No. 90-CC-1548—Claim denied.)

GLENN JONES, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed February 4, 1994.

GLENN JONES, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (WENDELL DEREK HAYES, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*inmate failed to prove beating by correctional officer—personal injury claim denied.* There was no evidence to substantiate an inmate's claim that, without provocation, he was struck and injured by a correctional officer while returning from a meal and that he was later handcuffed and beaten by the same officer, and the claim was denied, since the inmate's testimony regarding the incident was impeached on cross-examination and was directly contradicted by the clear and credible testimony of the correctional officer who indicated that the inmate was the aggressor.

OPINION

FREDERICK, J.

Claimant, Glenn Jones, an inmate with the Illinois Department of Corrections, seeks damages against Respondent, State of Illinois, in the sum of $100,000 for injuries sustained by Claimant by the actions of a correctional officer. Claimant's complaint contends that on September 21, 1989, Claimant was returning from the chow hall when he was struck and injured by a correctional officer for no reason.

At the hearing before the Commissioner, Claimant testified that on September 21, 1989, Claimant was an

inmate with the Illinois Department of Corrections. The institution was on deadlock but the inmates were allowed to leave their cells to eat. Claimant testified that when he was returning from eating, a correctional officer stopped the line and put his arm up and told Claimant to hold on and then hit Claimant in the mouth with his elbow. Claimant testified that he then pushed the officer back, was sprayed with mace, and was then later attacked by the same officer in the company of additional officers. Claimant contends that he was beaten while handcuffed. Claimant testified that he could not tell if the blow with the officer's elbow was deliberate because Claimant said he "wasn't even paying no attention to him, you know." No words had been exchanged. Claimant admitted that it could have been an accident. The blow to Claimant's head by the correctional officer's elbow did not cause any injury. Claimant contends that after receiving the blow, Claimant just pushed his hand down and said to the officer, "watch what you're doing." Claimant contends that he did not push the officer's hand down violently. Claimant had no previous problems with this particular correctional officer. Claimant testified that after he pushed the officer's hand down, the officer went for his mace. Claimant contends that after the initial incident, he was beaten and kicked by multiple officers. After the incident complained of, Claimant was given medication when medical personnel came to his cell to see him which continued for a week. Claimant contends that he does not suffer from his injuries.

Claimant received discipline by being placed in segregation for a year.

On cross-examination, Claimant testified that the officer whose elbow struck the Claimant was simply doing his job by directing the line traffic. On cross-examina-

tion, Claimant admitted that the correctional officer had accidentally struck Claimant with his right elbow in the nose. Claimant's nose did not bleed nor did he suffer any fracture, nor was the skin in his face injured. Claimant contends that when he pushed the officer's arm down, it was simply a "common reaction." Claimant admits that Claimant was not supposed to come in physical contact with an officer. Claimant further admits that when he touched the officer he, in a sense, assaulted the officer.

Claimant explained that his complaint arose not so much from the fact that he could have been written a disciplinary ticket for pushing the officer's arm down but that he was thereafter beaten or handled roughly by the officer in question and other officers.

Correctional Officer Raymond Hall was called to testify by Respondent. Officer Hall testified that on the date and time in question he had been instructed to move inmates upstairs. Inmate Jones was one of the inmates. Hall testified that he told the inmates to "take it upstairs." None of the inmates moved so Hall advised the inmates if they were not going to move, he was going to have to use chemical agents. Hall testified Claimant tried to "break past me." Hall extended his right arm out and Claimant pushed it down. Claimant then grabbed Hall by the hair and started hitting Hall about the face and head. At that time, the rest of the inmates jumped Officer Hall. Another officer "up on the catwalk" fired a shotgun warning shot. At that time, Hall jerked away from Claimant's grip while Claimant still retained a hold on Hall's hair. Hall gassed the Claimant and every other inmate who was in the flag area with his chemical agent. Hall testified that Claimant broke and ran down the gallery and up a back staircase. Hall went looking for the Claimant and another inmate named Michaels who had assisted Claimant in

assaulting Hall. When Hall found the Claimant, Hall attempted to restrain the Claimant with cuffs and Claimant struggled. Hall testified that necessary force was used to subdue the Claimant, get him cuffed, and remove him from the unit. Hall escorted the Claimant for medical treatment, advising medical personnel that Hall had sprayed Claimant with a chemical agent. Hall testified that following this incident, he was off work from nine months to a year with back and head injuries.

Hall testified that he had had no previous encounters with the Claimant.

Claimant's "version" of the incidents from which Claimant contends he was injured are substantially refuted by clear and credible testimony offered by Respondent's witness, Officer Hall. Indeed, not only was Claimant not injured in the manner alleged, but instead, Claimant was the aggressor against Officer Hall. There is absolutely no credible evidence to support Claimant's allegations.

The issues in this case are not complex. The evidence offered by Claimant is directly contradicted by Officer Hall. Claimant was impeached on cross-examination. Under the circumstances, we believe that the testimony of the correctional officer was more believeable than that of the Claimant. (*Peters v. State* (1987), 40 Ill. Ct. Cl. 99.) The Claimant has the burden of proof and we conclude he has not sustained his burden of proof. *Ball v. State* (1989), 42 Ill. Ct. Cl. 247.

It is therefore ordered that this claim is denied.

(No. 90-CC-2016—Claim denied.)

TERRY DOLL, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 26, 1994.

TERRY DOLL, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (VERNE E. DENTINO, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*State not insurer as to inmate's safety*. The State is not an insurer as to the safety of an inmate in its custody.

SAME—*inmate attacked by other inmates—negligence claim denied*. A claim by an inmate alleging that he was attacked by other inmates when the State negligently allowed him to return to his cell from the prison library during a riot at the facility was denied, where the evidence showed that the chain of events which led to the Claimant's injury began long after he was readmitted to the cellhouse, and neither the Claimant nor the State had any advance information which would have put the State on notice that the Claimant was likely to have been attacked.

OPINION

PATCHETT, J.

Claimant, an inmate with the Illinois Department of Corrections, seeks judgment against the Respondent, State of Illinois, in the sum of $100,000 for injuries allegedly sustained by the Claimant on January 12, 1988, as a result of an attack by other inmates.

During the trial of this claim, the Claimant testified that on January 12, 1988, he had just returned from the library to his cellhouse. He was on the flag leading upstairs to the gallery. An inmate walked up behind him and stabbed him in the back. When the Claimant turned to face the inmate, he saw a sharp object coming toward him. He raised his arm and was stabbed in the left arm.

Claimant contends that he was attacked by gang members known as "Latin Disciples." He further contends

that the situation in which he was involved was a riot, and it apparently started sometime in the morning while he was at the library. The Claimant was assisted by agents of the Department of Corrections to a secure area. In that area, he observed some of the same inmates attack other employees of the Department of Corrections.

Claimant testified that he could not identify his assailants. He was taken to the hospital for medical attention and transferred to the Chester Hospital, where he remained for several days for treatment.

Claimant argues that he should not have been allowed back into the cellhouse by the officer working the door because he "presumes" that the officer knew there were problems in the cellhouse. He himself learned of the conditions in the cellhouse after he had been stabbed and taken to the hospital, by overhearing corrections officers and inmates discuss the situation. He claims that if he had not been admitted to the cellhouse during a time of danger, his injuries would not have occurred. He further testified that most guards carry radios and problems are immediately announced over the radio network, allowing the guards to know of the situation. He testified that the radios work a "majority of the time," but had no idea if the radio possessed by the guard in question was working on the day in question.

Claimant testified that he had scars from his wounds and demonstrated the scars to the Commissioner of this Court. He denied that he was prevented from doing anything that he could do before the injury. He did however complain that he had constant back pain since he was stabbed in the kidney. He has been taking Tylenol and muscle relaxants that have not given him relief.

A departmental report was admitted into evidence pursuant to rules of the Illinois Court of Claims. Various

employees of the Department of Corrections have prepared reports which were part of the departmental report. In light of the departmental report, the Claimant's testimony is not persuasive. The weight of the evidence established by the Department of Corrections employees is that the chain of events which ultimately led to the Claimant's injury began long after the Claimant had returned to the cellhouse. The officer who allowed the Claimant back into the cellhouse was attacked and seriously injured subsequent to the time he let the Claimant in. The Claimant's own testimony established that Officer Derickson who checked his "cell pass" did not appear to be upset or agitated at the time he was let back into the cellhouse. Since the attack on Officer Derickson obviously took place after the Claimant was let back into the cellhouse, a significant amount of time had to pass between the time the Claimant was readmitted and the attack on him. The Claimant has failed to prove any negligence on the part of the Department of Corrections.

Furthermore, the Respondent is not responsible for acts of third parties under circumstances such as presented here. (*Mitchell v. State* (1989), 41 Ill. Ct. Cl. 124.) Neither is the State an insurer as to the safety of an inmate in its custody. (*Petrusak v. State* (1987), 39 Ill. Ct. Cl. 113.) Neither the Claimant or the State had any advance information which would have put the State on notice that the Claimant was likely to have been attacked.

Therefore, the State is not guilty of negligence and the claim is denied.

(No. 90-CC-2137—Claimant awarded $20,000.)

LELAND SHALGOS, d/b/a ILLINOIS BROODMARE, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed June 22, 1994.

LELAND SHALGOS, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (JOHN MORRISSEY, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*Claimant's burden of proof.* In a negligence action, the Claimant has the duty to prove that the State was negligent and that the State's negligence was the proximate cause of his damages.

SAME—*fire on State property killed racehorse—assumption of risk defense inapplicable—State liable.* In a negligence action stemming from the loss of the Claimant's racehorse in a fire on State property which was leased by a third party, the State was liable despite its contention that the lessee assumed the risks associated with the property by signing a lease clearly stating that the premises were unsafe, since the State breached its duty of reasonable care in maintaining the premises and left it in a negligent condition and, by statute, disclaimers of liability in connection with leases are void as against public policy.

OPINION

JANN, J.

This matter came to be heard for trial on or about February 1, 1991. After the hearing, both parties submitted briefs in the order selected by the parties.

At the hearing, the evidence was the following:

Leland Shalgos, doing business as Illinois Broodmare, contacted James Ferguson, an individual who trains, breeds and owns horses, to train a racehorse named "Don't Delay." In 1989, Mr. Ferguson trained horses in his stables at the Du Quoin State Fairgrounds. Mr. Ferguson moved his stable from the Du Quoin State Fairgrounds to the Springfield State Fairgrounds in April or May of 1989. Mr. Ferguson's wife signed a lease agreement with the Illinois

Department of Agriculture to lease space to stable his horses at the Springfield State Fairgrounds. One of the particular barns he leased space in was barn number 42. The lease was admitted into evidence. Mr. Ferguson took possession of the horse "Don't Delay" to train her to run in state races in Illinois, however, prior to taking possession of the horse, he inspected the horse. Mr. Ferguson concluded that the horse was a high quality two-year-old filly. Because the horse was Illinois bred, she was eligible to compete for 14 million dollars in potential winnings in Illinois.

On May 20, 1989, Mr. Ferguson was in Springfield training horses including "Don't Delay." After training the horses, he left Springfield for Marion, Illinois. However, prior to leaving barn 42 he noticed that a wire from a telephone pole had come off the barn and was on the ground emitting sparks. The other end of the wire was attached to a telephone pole. Mr. Ferguson contacted the security department regarding the sparking wire. On May 21, 1989, Mr. Ferguson received a telephone call in Marion, Illinois that barn 42 in Springfield was on fire. "Don't Delay" was badly injured in the fire and had to be destroyed on May 23, 1989.

The fire in barn 42 was investigated by the State Fire Marshall's Division of Arson Investigation. The fire marshall determined that the fire started due to a malfunction in an electrical outlet in the area of stall number 40, barn 42 as a result of conduit overheating which led to the outlet.

The contract executed by the Illinois Department of Agriculture and the Fergusons stated in summary that individuals leasing space in the buildings and on the premises of the Illinois State Fairgrounds are notified that the buildings and premises have been declared

unsafe and in violation of code by the Illinois Fire Marshall. The lease agreement further states that the signature of the lessee "specifically acknowledges that even in the face of these warnings and code and structural violations and occupancy violations, he is/are assuming the risk and is/are going to occupy the premises anyway."

The parties stipulated that the total out-of-pocket expenses incurred by Leland Shalgos d/b/a Illinois Broodmare for the breeding, feeding, training, etc. of "Don't Delay" were $6,947.28 to the date the horse was humanely destroyed.

The primary issue in this matter is whether the State of Illinois by the Department of Agriculture is liable for the loss of "Don't Delay" or whether the claim is barred by the doctrine of assumption of risk. Briefly, the State produced evidence that the lease agreement for the barn at the State Fairgrounds in which "Don't Delay" was lost explicitly informed the lessee that, in summary, the barns were unsafe, that the State Fire Marshall had found that barns were unsafe and that if the lessee rented the barns, he did so at his own risk. The State further argues that Mr. and Mrs. Ferguson were the agents of the Claimant since the Claimant put "Don't Delay" in their hands to train and house. As a result, the State argues that the claim must be denied. Claimant responds by essentially arguing that first, the Fergusons were not his agents and their conduct in knowingly housing the horse in an unsafe barn cannot be imputed to him; and second, even if the Fergusons were his agents, the State cannot avoid liability by invoking the defense of assumption of risk because that defense has been removed in Illinois by statute, specifically section 1 of the Lessor's Liability Act. 765 ILCS 705/1.

The statute states in relevant part:

"Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property, exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his or her agents, servants or employees, in the operation or maintenance of the demised premises * * * shall be deemed to be void as against public policy and wholly unenforceable."

An examination of the annotations to this statute does not indicate any exception for buildings owned or operated by the State of Illinois or its agencies. The plain language of the statute states that disclaimers of liability and waivers of liability in connection with leases are void as against public policy. The obvious rationale behind such a statute is to prevent a landlord from leasing property and avoiding liability by disclaimers in the lease. The statute forces the landlord to maintain the property or not to lease it. The State offered no other defense such as lack of notice or lack of proximate cause. The evidence demonstrated that the State was on notice of the unsafe condition of the barns. This is evident from the State's lease in which it acknowledges that the premises are defective and that the State Fire Marshall has found them to be in violation of the law. In addition, Claimant produced evidence that prior to the fire, a malfunction in the electrical wiring was brought to the attention of State personnel. There has been no argument by the State that it does not have an obligation to use reasonable care in the maintenance of its property. Finally, the State provided no evidence and made no dispute that the duty of reasonable care was not breached. The State maintained that all legal duties normally imposed on it were waived by the assumption of risk clause in the lease.

Claimant has the duty to prove that the State was negligent and that the State's negligence was the proximate cause of his damages. (*Hoekstra v. State* (1985), 35 Ill. Ct. Cl. 156, 159-160; *Hipka v. State* (1982), 35 Ill. Ct. Cl. 581.) In this case, there is no dispute that Claimant has met his burden. The State failed to maintain its property

and left it in a negligent condition. As a result of the State's negligence, the Claimant suffered a loss.

The evidence presented by the parties as to damages varied greatly. The State's expert witness Carl Becker, gave his opinion that "Don't Delay" was worth $300 to $1,000 at auction. Claimant's evidence put "Don't Delay's" value at $40,000 to $60,000. Claimant's evaluation was based upon the horse's pedigree, conformation, i.e., the horse's physical attributes, and the evaluation of the horse's trainer, Mr. Ferguson. Based upon all of the facts, the evaluation by William Rosenthal, an insurance broker and owner of a horse sale company, appears to be the most accurate. He valued "Don't Delay" at between $40,000 and $50,000 based upon the horse's pedigree, conformation and the trainer's assessment of her, unfortunately, untried racing ability. The State's expert admitted that two-year-old racehorses sold at auction are generally assumed to be defective and therefore sell for very low prices. All of the experts, including the State's Mr. Becker, agreed that Mr. Ferguson is a competent and knowledgeable trainer who would have the best insight into "Don't Delay's" potential as a racehorse and broodmare.

Based upon the foregoing, we hereby award Claimant $20,000 for the loss of his racehorse due to Respondent's negligent conduct.

(No. 90-CC-2446—Claim denied.)

GERALD HUNTER, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed May 18, 1994.

GERALD HUNTER, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (CHRISTINE M. GIACOMINI, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*State is not insurer of persons under its control—foreseeability.* The State is not an insurer of persons under its control, and will not be held liable for an attack on an inmate which is not foreseeable.

SAME—*attack on Claimant by other inmates was not foreseeable—claim denied*. Since the Claimant, in seeking judgment against the State for injuries sustained in an attack by other inmates, produced no evidence to establish that there had been previous disputes between him and his assailants, that the attackers had shown a propensity for violence, or that prior complaints had been made about inadequate security, the State could not foresee the assault, and the claim was denied.

OPINION

MITCHELL, J.

Claimant, an inmate with the Illinois Department of Corrections, seeks judgment against Respondent, State of Illinois, for injuries sustained by Claimant in an attack by other inmates. Claimant's complaint contends that Claimant was injured by an unprovoked attack upon his person by other inmates on March 20, 1989. Claimant contends that Respondent negligently neglected to provide for Claimant's health and safety. Claimant seeks damages in the amount of $10,000.

At the hearing, Claimant testified that on March 20, 1989, he was incarcerated at Menard Correctional Center. At approximately 2:00 p.m. on that date, he was in the gymnasium putting on his clothes after having played basketball. While Claimant was dressing, he was attacked by unknown assailants. Claimant's injuries consisted of a broken left cheekbone, and a cut under his eye on the right side of his face.

Claimant testified that there were a lot of people present, but no correctional employees. Yet, Claimant

testified that a shot was fired and Claimant heard Officer Bowles come up and say "break it up," and arrested one of Claimant's assailants. The shot fired was a warning shot.

Claimant was taken to the hospital and some stitches were put under his eye. He was given something for pain. Claimant was taken to an outside hospital where reconstructive surgery was done on his cheek. Claimant contended that he had scars under his eye, but the Commissioner could not, from a distance of 4 to 4½ feet, see the scars. Claimant received no additional treatment after he left the hospital, and has never complained to any physician concerning problems after that.

Claimant's theory of recovery is that Respondent does not have a strong enough visible presence at the gymnasium under circumstances where so many prisoners are at one time in a central location, and that the security is inadequate.

On cross-examination, Claimant stated that he was aware of only one correctional officer present at the time of the fight, and "the man in the tower" who did the shooting. Claimant testified that "there was no employees right there by the basketball court" when the first punch was thrown.

Respondent called a correctional employee named Jack Carlock. Carlock was working "in the tower" on the date of the occurrence. Carlock testified that it was the time of day to clear the gym of all inmates. After Carlock saw the fight start he fired the shot. He saw Officer Bowles and Officer Pearson on the floor separating the fight. Also a leisure-time activity employee named Miller was present. Carlock fired his gun instantly when he saw the fight. It looked to Carlock like it was a regular fist

fight. Officer Bowles was at the door letting inmates in and out. When Carlock fired the shot, Bowles and Miller were present to break up the fight. Miller came from the office 15 feet away from where the fight started.

In *Dorsey v. State* (1977), 32 Ill. Ct. Cl. 449, this Court held that the State is not an insurer of the safety of persons under its control. In *Dorsey*, the Claimant was seriously injured by being struck by another inmate with a baseball bat in an area used for recreational purposes. As in the case at bar, in *Dorsey* the record was devoid of any indication of a dispute between the individuals involved in the matter, and no evidence of any kind to show that there had been an argument or previous fight between the two men. As in the case at bar, in *Dorsey*, neither of the individuals involved had shown any propensity for violence or causing trouble. The circumstances present in the *Dorsey* case show that there were between 100 and 125 inmates assigned to the area where the assault took place, and that there were approximately eight guards. In the case at bar, it is unclear how many inmates were present except through Claimant's testimony that there were "maybe 50, 100." Multiple guards were present, one of whom was in a tower with a loaded shotgun, and another was approximately 15 feet from where Claimant was assaulted.

The rule of the *Dorsey* case was followed in *Bock v. State* (1991), 43 Ill. Ct. Cl. 299, 305. In the *Bock* case, Claimant was injured in an unprovoked attack by another inmate as he was walking down a hallway intending to go to the "dayroom" in the cellhouse. Claimant contended, among other things, that his injuries were the fault of the Respondent for the reason that there had previously been several violent offenses in that area of the prison, and there were insufficient staff present. There was no evidence that

anyone had ever complained about inadequate security. The Claimant contended that if there had been more correctional officers present, his injury would have been avoided. Following *Dorsey v. State, supra,* this Court held that liability could not attach to Respondent due to the fact that the attack on the Claimant was without warning, and was committed by a man that the Claimant barely knew. The State could not foresee the assault.

Upon the record in this case, and under the authority of the cases above cited, this claim is denied.

(No. 90-CC-2875—Claim denied.)

MICHAEL VARON, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed October 19, 1993.

PATRICK MAHONEY & ASSOC. (PATRICK E. MAHONEY & THOMAS A. GOLDRICK, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (MARY P. NEEDHAM & GEORGE M. SHUR, of counsel), for Respondent.

NEGLIGENCE—*State's duty as to premises under its control.* The State has a duty to maintain the premises under its control in a reasonably safe condition for persons who are legitimately on those premises, but the State is not the insurer of the safety of its invitees.

SAME—*Claimant's burden of proof.* The Claimant in a negligence action has the burden of proving by a preponderance of the evidence that the Respondent breached its duty of reasonable care, that the Claimant was free of contributory negligence, that the injuries were causally connected to the alleged negligence, and that the State had actual or constructive notice of the dangerous condition from all the circumstances in the case.

SAME—*Claimant injured while lifting weights—notice lacking—claim denied.* Where the Claimant was injured while weightlifting at a university facility when a weight bench on which he was stretching tipped over, his negligence claim against the State was denied, since there was no evidence that the State had notice that the unbolted bench constituted a dangerous condition of

which it was required to warn invitees, there was no proof of prior similar incidents, and the Claimant's act of stretching on the end of the bench was not customary practice and may have led to the accident.

OPINION

FREDERICK, J.

Claimant filed his claim in this Court on April 17, 1990. Claimant seeks $100,000 for injuries he alleges he received when a bench tipped over while he was preparing to lift weights in the weight room at Northern Illinois University. The cause was tried by Commissioner Sternik. The parties waived the filing of briefs.

The Facts

On August 28, 1989, Claimant was a student at Northern Illinois University. Claimant was involved in athletics and had lifted weights all through high school and was a sophomore transfer student from the University of Arizona. He had lifted weights for many years. On the aforesaid date he went to the Northern Illinois University weight room for the first time to lift weights. In the weight room there was an attendant, named Linda Fredericks, 15 feet away from where Claimant began working out. The attendant gave no instructions to him in the use of weights. Claimant had a workout partner, who had worked with him for three months as his spotter. A spotter is one who makes sure the weights don't fall while lifting. His partner helped him do warm up stretches before going on the weight bench. Claimant lifted weights for about 25 minutes. He did warm-ups including 135-pound lifts off the weight bench.

Claimant then did weight lifts on the bench adding more and more weights on the set until he got to 315 pounds. There was no sign on the weight bench that indicated a limit on the weight that could be used. The spotter

had positioned himself on all previous lifts in order to catch the weights if they fell. Claimant began to lift his arms over his head to stretch prior to doing another lift. Claimant did this in order to loosen his chest muscles and prepare for the lift. The spotter was not in spotting position for these stretches. At this point the far end of the bench began to lift up towards him and Claimant slid backwards. His shoulder blades and back hit the ground first and then the weights came down on top of him because the bench came over. Claimant received a fractured radius and a fractured right wrist. Claimant had not attempted to lift the bar holding the weights. Claimant testified that he lost about one and a half to two inches of wrist muscle because of this accident. After Claimant's wrist healed he was unable to play baseball or racquetball because of pain in his wrist. He previously engaged in such activities. He also was not able to work in the family restaurant because of his wrist. Claimant also testified the injury caused him problems with his schoolwork and planned time of education.

On cross-examination, Claimant admitted that in his experience of six years lifting weights there were never any posted signs as to limits on a weight bench. He also testified that the weights were on the racks with a bar between them and that when the accident occurred, his spotter was five feet away. He stated that the bench was not bolted down. Claimant testified that he needed no instruction as to weightlifting from the university bulletin board or from the attendant. Claimant further testified he now does a little floor backing and has begun lifting weights again but not at a level he was at.

The Claimant's witness, Mr. Soltis, was a physical education teacher and has worked as such for 25 years. He had been a fitness director for three of those years at

Maine West High School. He also sold weight benches during that time. He gave as his opinion, based on his experiences, that the bench Claimant used should have been bolted to the floor to prevent tipping. He stated that most benches have a support to keep from tipping, at least those he was familiar with. He stated that the Respondent could have purchased an anti-tipping bench or welded an anti-tipping device to the bench. When the witness had sold benches, he only sold benches that bolted to the floor or had anti-tipping devices. The witness stated that the standard of care is to have an anti-tipping device built in the bench or have the bench bolted to the floor.

Linda Fredericks, the weight room supervisor, testified that when Claimant began to stretch prior to lifting, she went and told the spotter that his person was about to lift and to go over to the Claimant's bench. She testified that Claimant lifted his hands through the bar and that is when the accident happened. The witness could recall no incidents in one year of a bench tipping. No students had been injured by bench tipping. Further, this witness testified that Claimant had previously been stretching his arms over his head and through the bar with no adverse effects or tipping. She also stated that people stretch before lifting but not on the bench. She had never seen stretches done on the bench before.

Respondent also called the director of campus recreation who had lifted weights for 12 years. He stated that he was aware of no requirement by the manufacturer that the bench had to be bolted down. In his role of director he had heard of no cases of a bench tipping over. The director had attended numerous workshops on weightlifting and testified that it is unsafe to do stretches on the weight bench. Specifically, he stated that in Claimant's

situation it was not appropriate to stretch with the weight on it. He further testified that one should not stretch lying backward on a bench. This is so since the center of gravity would shift way over to one side of the bench. He further testified that it was strongly recommended that all weightlifters have spotters when lifting in the weight room. He said an experienced weightlifter should know that. He stated that the standard is that if a person sits at a bench and is beginning the process of getting in place for activity, the spotter should be there. Further, Respondent had no notice by manual or flyer or otherwise from the manufacturer that the bench would tip under certain circumstances.

The Law

The State of Illinois has a duty to maintain the premises under its control in a reasonably safe condition for persons who are legitimately on those premises. (*Owens v. State* (1989), 41 Ill. Ct. Cl. 109.) However, the State is not the insurer of the safety of its invitees. (*Heiman v. State* (1977), 32 Ill. Ct. Cl. 111; *Fausch v. State* (1989), 42 Ill. Ct. Cl. 175.) The Claimant has the burden of proving by a preponderance of the evidence that Respondent breached its duty of reasonable care, that Claimant was free of contributory negligence (now in the context of comparative negligence), that the injuries complained of were causally connected to the alleged negligence, and that the State had actual or constructive notice of the dangerous condition from all the circumstances in the case. *Berger v. State* (1988), 40 Ill. Ct. Cl. 120.

The Claimant has proven that he was injured while stretching on the bench. However, there was no evidence presented that the State had actual or constructive notice that the unbolted bench constituted a dangerous condition for which the State had a duty to warn invitees and

protect them from harm. There was no evidence of prior accidents of this type or that the State had any warnings from the manufacturer or from any other source. *Belker v. State* (1983), 35 Ill. Ct. Cl. 704; *Boaz v. State* (1982), 35 Ill. Ct. Cl. 594; *Nolan v. State* (1983), 36 Ill. Ct. Cl. 194; *Senell v. State* (1979), 32 Ill. Ct. Cl. 430.

Claimant was an experienced weightlifter. However, his act of stretching on the end of the bench which was not a customary practice may have led to the bench tipping. The Claimant has not met his burden of proving that the State had actual or constructive notice of a dangerous condition since there was no evidence presented of prior accidents involving the weight bench although it had been in place for years. *Nolan v. State* (1983), 36 Ill. Ct. Cl. 194.

For the foregoing reasons, it is ordered that Claimant's claim is denied.

(No. 90-CC-3070—Claimant Sharon M. Koepp awarded $18,500; Claimant Bobby G. Koller awarded $3,000.)

SHARON M. KOEPP and BOBBY G. KOLLER, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed November 29, 1993.

HAMM & HANNA (RONALD HANNA, of counsel), for Claimants.

ROLAND W. BURRIS, Attorney General (THOMAS S. GRAY, Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*burden of proof in negligence claim.* The Claimant in a negligence action has the burden of proving, by a preponderance of the evidence, that the State was negligent and that such negligence was the proximate cause

of the Claimant's injuries, and the Court will also consider comparative negligence of the Claimant in adopting an award.

SAME—*motorists—willful and wanton conduct*. An act or omission to act is willful and wanton when a motorist proceeds under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of immediate danger, to exercise ordinary care to prevent it.

SAME—*ordinary negligence standards apply to operators of emergency vehicles.* Ordinary negligence standards apply to operators of emergency vehicles, and the duty owed to a motorist by a State trooper driving an emergency vehicle when dispatched to a disturbance is not a discretionary duty.

SAME—*State trooper's vehicle struck Claimants' automobile—State liable*. The State was liable for injuries sustained by the Claimants when a State trooper's vehicle which was responding to an emergency call collided with the Claimants' automobile, since the trooper failed to exercise due care and acted willfully and wantonly in driving a car with insufficient warning lights at a recklessly high rate of speed while passing cars near an intersection, and in failing to sound his siren to warn of his approach as required by statute, and the defenses of comparative negligence and public immunity were inapplicable.

OPINION

FREDERICK, J.

The Claimants, Sharon M. Koepp and Bobby G. Koller, filed this claim in the Court of Claims seeking damages from the Respondent for injuries they received when an Illinois State trooper drove into their vehicle while the State trooper was responding to a call. The case was tried before Commissioner Richard Parsons.

The Facts

This is an action against the State of Illinois for monetary damages for personal injury brought by Claimants, Sharon M. Koepp and Bobby G. Koller, for injuries they received in an automobile collision that occurred on March 4, 1990, on Illinois Route 88 near the intersection of Akron Road just north of Peoria, Illinois. The Claimant's vehicle was struck from behind by a State motor vehicle being operated by Illinois State trooper Meuser.

At the time of the occurrence, Claimants were traveling northbound on Route 88 near its intersection with Akron Road. Claimant, Bobby G. Koller, the driver, intended to make a left-hand turn onto Akron Road. He prepared for the left turn by turning on the left-turn signal and starting to slow down as he approached the intersection when he was struck by the State of Illinois squad car. The evidence establishes that the left-turn signal of the Koller vehicle was activated.

Illinois State trooper John Meuser was responding to a call concerning a fight at a dance club in Edelstein, Illinois, north of Peoria on Route 88. There was only one deputy handling the call so the trooper was in a hurry to respond. The trooper proceeded northbound on Route 88. The trooper testified he occasionally used his siren. Trooper Meuser also testified that he turned on his wig wag grill and back window lights.

Just prior to colliding with the Claimant's vehicle, trooper Meuser passed another vehicle which was driven by Gary Lewis. After passing the Lewis vehicle, trooper Meuser continued on north and as he attempted to pass Claimant's vehicle as it approached the Akron Road intersection, he collided with Claimant's vehicle. Gary Lewis and the occupants of his vehicle were independent and very credible witnesses who observed the squad car as it came up behind their car, passed their car, and then went down the road and collided with Claimant's vehicle. Mr. Lewis was only aware of the squad car's approach because he saw a vehicle in his rearview mirror coming up behind him traveling extremely fast. He thought the trooper was going 90 miles per hour. Witness Robert Dawson was not aware of the squad car's approach until it whipped past them with the back lights flashing. Mrs. Sandra Lewis saw flashing white lights in the squad car's grill as the squad

car came up to their car. The squad car came up very fast and he almost hit the side of their car, according to Mrs. Lewis. The squad car then went past and swerved back in to the right-hand lane.

The established facts are that the squad car did not have Mars lights on the top of the car and it is clear that trooper Meuser was not using his siren at or near the time of the collision. The trooper was also traveling considerably faster than the speed limit. Trooper Meuser testified that his warning lights on the front grill and in the back window were in operation. The lights in the back window were more difficult to see from the front because there is a shield between them and the driver to protect the driver's vision. The trooper also was of the opinion that the siren was inadequate to warn motorists who are in front of the squad car. However, he did acknowledge that he is required to use the siren when he is in pursuit of a vehicle. The trooper felt it would have been more difficult for him to hear his radio if he used the siren.

In the collision, Sharon Koepp was thrown from the front seat and was trapped in the back seat unable to move. She was in considerable pain. She received care and treatment from Dr. Jongerius and Dr. Hoffman. She received physical therapy at the Institute of Physical Medicine and Rehabilitation for a period of seven weeks and had to have help with her daily activities for several weeks. She suffered pain in her neck and back which continues. Her medical expenses were $3,207.21 and related to this soft tissue injury.

Bobby G. Koller's medical expenses were $363.56. His lost wages were $731.12. He continues to take over-the-counter pain medication for the aches and occasional sharp pain he still suffers.

The Law

Claimants have the burden of proving, by a preponderance of the evidence, that the Respondent was negligent and that the State's negligence was the proximate cause of the Claimants' injuries. *Bauman v. State* (1981), 34 Ill. Ct. Cl. 140; *Phillips v. State* (1991), 44 Ill. Ct. Cl. 89; *Mathews v. State* (1992), 44 Ill. Ct. Cl. 291.

The Court will also consider comparative negligence of the Claimant in adopting an award. *Alvis v. Ribar* (1981), 85 Ill. 2d 1; *Guffey v. State* (1987), 40 Ill. Ct. Cl. 179.

The trooper's conduct in driving an emergency vehicle is to be measured against specific statutory standards. The statutory exception for emergency vehicles authorizes drivers of emergency vehicles to violate various rules of the road, but only to the extent such violations do not endanger other persons. *Bauman v. State, supra*.

Section 11—205 of the Illinois Vehicle Code (625 ILCS 5/11—205(b)) states the following relevant law:

"(b) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this Section, but subject to the conditions herein stated.

(c) The driver of an authorized emergency vehicle may:

* * *

(3) Exceed the maximum speed limits so long as he does not endanger life or property;

(4) Disregard regulations governing direction of movement or turning in specified directions.

(d) The exceptions herein granted to an authorized emergency vehicle, other than a police vehicle, shall apply only when the vehicle is making use of either an audible signal when in motion or visual signals meeting the requirements of Section 12—215 of this Act.

(e) The foregoing provisions do not relieve the driver of an authorized emergency vehicle from the duty of driving with due regard for the safety of all persons, nor do such provisions protect the driver from the consequences of his reckless disregard for the safety of others."

Section 11—907 of the Illinois Vehicle Code (625 ILCS 5/11—907), while requiring drivers to stop and pull to the right for approaching emergency vehicles, states in paragraph (b) that, "This section shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highways."

Section 12—601 of the Illinois Vehicle Code (625 ILCS 5/12—601) states:

"§12—601. Horns and warning devices.

* * *

(b) No vehicle shall be equipped with nor shall any person use upon a vehicle any siren, whistle, or bell, except as otherwise permitted in this subsection. Any authorized emergency vehicle as defined in Chapter 1 of this Act may be equipped with a siren, whistle, or bell, capable of emitting sound audible under normal conditions from a distance of not less than 500 feet, but such siren, whistle or bell, shall not be used except when such vehicle is operated in response to an emergency call or in the immediate pursuit of an actual or suspected violator of the law in either of which events the driver of such vehicle shall sound such siren, whistle or bell, when necessary to warn pedestrians and other drivers of the approach thereof."

Section 12—215(d) of the Illinois Vehicle Code (625 ILCS 5/12—215(d)) requires the oscillating, rotating or flashing lights to be of sufficient intensity to be visible at 500 feet in normal sunlight.

When measured against the statutory standards, it is clear from the evidence that the trooper failed to drive with due regard for the safety of persons on the highway. He drove at a recklessly high rate of speed almost striking the Lewis vehicle, he failed to use his siren when necessary to warn pedestrians and other drivers of his approach, and the lights on his vehicle did not give enough warning as evidenced by the fact the Lewis vehicle witnesses did not see the squad car approaching until it was practically upon them.

Considering the fact that the trooper nearly collided

with the vehicle he passed and that he was traveling at a very high rate of speed in the immediate vicinity of an intersection, it was mandatory that the trooper use a siren complying with the requirements of the statute. Trooper Meuser should have foreseen that the use of his siren was necessary to warn motorists of his approach at the speed he was traveling. The Respondent was therefore negligent and it was this negligence that was the proximate cause of the two Claimants' injuries. An act or omission to act is willful and wanton when a motorist proceeds under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of immediate danger, to exercise ordinary care to prevent it. (*Breslin v. Bates* (1973), 14 Ill. App. 3d 941.) The evidence shows that the Claimant had his left-turn signal on. The evidence further shows that the collision occurred in the lane where Claimant was lawfully traveling. Whether the trooper was passing a vehicle he thought was going to pull over or was preparing to turn, he should have been sounding his siren and passing in the southbound lane.

We find that in addition to failure to exercise due care, the trooper acted willfully and wantonly in not sounding his siren and passing in the left lane at an intersection under these circumstances and particularly when the officer admits his warning lights are difficult to see from the front. *Kirshenbaum v. City of Chicago* (1976), 43 Ill. App. 3d 529; *Bauman v. State* (1981), 34 Ill. Ct. Cl. 140.

We also find that none of the actions of Claimant, Bobby G. Koller, proximately caused the collision to the extent required to apply any comparative negligence. (*Jager v. State* (1986), 39 Ill. Ct. Cl. 21.) The Claimant was given and evidently passed two field sobriety tests. There was no evidence of impairment and he was not charged with DUI. While Claimant was charged with driv-

ing while license suspended (for a financial responsibility suspension) and failure to wear a seat belt, the Claimants correctly point out that law violations are not, *per se*, negligence or contributory willful and wanton conduct. (*Beverly Bank v. Penn. Control Co.* (1974), 21 Ill. App. 3d 77.) There was no evidence offered that any of the alleged statutory violations was the proximate cause of the collision or injury. Furthermore, the failure of the Claimant to wear a seat belt cannot, by statute, be considered evidence of negligence nor can it be used to diminish any recovery for damages. 625 ILCS 5/12—601.1.

The Respondent has also raised the issues of sovereign immunity and public officials' immunity in bar of Claimant's claim. Ordinary negligence standards apply to operators of emergency vehicles. The duty owed to a motorist by a State trooper driving an emergency vehicle when dispatched to a disturbance is not a discretionary duty. (*Currie v. Lao* (1990), 198 Ill. App. 3d 625.) This cause is properly before the Illinois Court of Claims and is not barred by the public immunity doctrine.

Having found that the Respondent is liable to both Claimants, we turn to the issue of damages. Based on the testimony of Sharon Koepp concerning her injuries, pain and suffering and her medical expenses of $3,207.21, we find that she is entitled to an award of $18,500. Based on the testimony of Bobby G. Koller in regard to his injuries, pain and suffering, we find that he is entitled to an award of $3,000.

Therefore, it is ordered that Claimant, Sharon M. Koepp, is awarded the sum of $18,500 in full satisfaction of her claim and Claimant, Bobby G. Koller, is awarded the sum of $3,000 in full satisfaction of his claim.

(No. 90-CC-3191—Claimant awarded $46,139.57;
motion to substitute claimant allowed.)

ROBERT VASQUEZ, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed May 25, 1993.

Order filed September 21, 1993.

JOHN A. NUDO, for Claimant.

ROLAND W. BURRIS, Attorney General (STEVEN SCHMALL and ROBERT SKLAMBERG, Assistant Attorneys General, of counsel), for Respondent.

NEGLIGENCE—*State's failure to properly operate bridge—elements of negligence claim.* The State can be negligent in its failure to properly operate a bridge under its control, but the Claimant must prove by a preponderance of the evidence that the State was negligent, that such negligence was the proximate cause of the injury, and that damages naturally flowed therefrom, and the Claimant also has the burden of proving his damages.

SAME—*pedestrian injured by wrongful raising of bridge—State negligent—damages reduced for comparative negligence*. Although damages were awarded to a pedestrian who was seriously injured when a State employee negligently raised a bridge for river traffic while the man remained on the bridge's pedestrian walkway, the award was reduced by 7.5% to reflect the man's comparative negligence based on evidence of his consumption of alcohol and lack of proof that the bridge's warning lights and bells were not working.

SAME—*executor of pedestrian's estate substituted as Claimant*. In a pedestrian's claim for personal injuries sustained when a bridge on which he was walking was wrongfully raised, on motion of the executor of the pedestrian's estate the executor was substituted as Claimant in the action.

OPINION

FREDERICK, J.

The Claimant, Robert Vasquez, filed his complaint in the Court of Claims on May 25, 1990. The case was tried before the Commissioner assigned to the case. The evidence consists of the report of proceedings, the exhibits (Claimant's 1-4 and Respondent's 1-11), and the commissioner's report. The Claimant filed a brief. The Respondent failed to file a brief.

This action was brought by the Claimant for personal injuries he sustained on July 6, 1989, while he was crossing the Cass Avenue Bridge over the Illinois waterway via the pedestrian walkway in Joliet, Will County, Illinois. At the time of the incident, Needham Price was employed by the Illinois Department of Transportation as the tender of the Cass Avenue Bridge and Mr. Price was in control of the operation of the bridge. The Claimant claims negligence on the part of the State of Illinois, by and through its employee, Needham Price, for his failure to exercise reasonable care and caution for the safety of the Claimant, Robert Vasquez, in the operation of the bridge. The Claimant claims the State was negligent in the following respects: for its failure to keep a proper lookout for pedestrian traffic on the pedestrian walkway of the bridge; for failure to allow sufficient time for Robert Vasquez to cross the bridge prior to raising it for river traffic; for failure to exercise reasonable care when lifting the Cass Avenue Bridge; and for failing to know that to raise the bridge while Claimant was crossing it would place the Claimant in a position of danger.

It has been stipulated by the parties that the Cass Avenue Bridge and its operator, at the time of this incident, were under the jurisdiction of the State of Illinois.

At the evidentiary hearing conducted before the Commissioner, the Claimant, Robert Vasquez, testified that on July 6, 1989, between 10:30 and 11:00 p.m., he was crossing the Cass Avenue Bridge over the Illinois waterway on his way to downtown Joliet. When he was halfway across the bridge, it began to shake and rise. The Claimant grabbed the pedestrian handrail and rode up with the bridge, hanging from it until the water traffic passed and the bridge began to lower. As the two sides of the bridge began to close, Vasquez testified that, fearing

that he would be trapped between the two sides, he pulled himself over onto the pedestrian walkway. He was unable to keep his balance and tumbled down the walkway, falling onto the concrete sidewalk below and suffering a number of injuries to various parts of his body.

Officer Thomas Stein of the City of Joliet police department testified that on July 6th he was given a call to proceed to the Cass Avenue Bridge where there was a report of a man down. When Officer Stein and his partner, Patrick Blatti, arrived at the bridge, they found the Claimant, Mr. Vasquez, lying head down with "obvious broken legs." Officer Stein testified that witnesses stated that the Claimant was near the top of the bridge and had tumbled down after the bridge was lifted. Officer Stein testified that he interviewed the bridge tender, Needham Price, who advised him that he had not seen anyone on the bridge at the time he opened it. Stein further testified that he had prepared a police report in collaboration with his partner who interviewed witnesses at the scene who stated that the victim was near the top of the bridge and rolled down when the bridge was lowered.

In addition to Officer Stein, the State's only other witness, Mr. Lee Muir, an engineering technician with the Department of Transportation, testified to the mechanical operation of the Cass Avenue Bridge. Mr. Muir testified that usually the tender receives a signal from a boat, being one long and one short blast of the boat's siren, which indicates to the bridge tender to start procedures to raise the bridge. He further testified that the standard procedure is to first lower the gates. The gates are equipped with signal lights and bells which are automatically activated to notify pedestrians and vehicles to clear the bridge. The bridge is raised only after the bridge tender checks to be sure the bridge is clear.

Mr. Vasquez was taken to the St. Joseph Hospital where he was diagnosed as suffering from a comminuted fracture of his left femur, fractures to his left tibial plateau, fibula and condyle, and fracture to lumbar vertebra L1, L2 and L3. Vasquez was placed in skeletal traction and then a body cast. He was later transferred from St. Joseph Hospital to the Congress Health Care Center in Chicago for several months of treatment. At the present time, Mr. Vasquez ambulates with crutches, resides with his brother in Joliet, and suffers from a 3½ inch shortening of his left leg as well as a flail left leg, atrophy of the left calf, a condition of equinus in left foot, and other injuries. He has not worked since the incident and receives Social Security Disability due to his injuries. Dr. William B. Fischer testified that the Claimant's injuries were permanent in nature and a life expectancy table introduced into evidence indicated Mr. Vasquez had a life expectancy of 43.8 years.

Mr. Vasquez's left leg is now flail, which means it has a false joint in mid-femur and incapable of weight bearing. The left leg itself is now some 3½ inches shorter than the right leg, his left knee is passively supple between extension and 90 degrees of flexion which renders it incapable of weight bearing, his left foot and ankle are in equinus with only a trace of motion, and there is a marked disuse atrophy of some 2 inches on the left calf which Dr. Fischer regards as a "shriveling." Mr. Vasquez is now possessed of a reversed lumbar lordosis with the presence of very prominent spinous process. His spine lists to the right when weight bearing and there is a prominent residual scar about the size of a quarter on Mr. Vasquez's right forehead. Each of these conditions is directly related to the incident in question and each is permanent in nature.

Mr. Vasquez cannot ambulate without the use of crutches and he clearly is incapable of engaging in the type of construction and roofing work in which he has been employed in the past. With his limited educational attainment of merely eighth grade, Mr. Vasquez has no other skills and has clearly lost a good portion of his earnings capacity.

There is no question that the fractures sustained by Mr. Vasquez to three lumbar vertebrae, the comminuted fracture to his left femur, the fractures to his left tibial plateau, fibula and condyle were and are painful conditions. Mr. Vasquez testified to presently being in constant pain and Dr. Fischer agreed that such pain would be consistent with the Claimant's current condition. Mr. Vasquez spent some time in skeletal traction at the St. Joseph Hospital after a pin was placed through his left knee.

The testimony further indicates that Claimant had consumed three quarts of beer prior to the incident and that he had another broken quart of beer on his person at the time he was found by the police. The departmental report includes medical reports that indicate Claimant either jumped or fell from the bridge and that the incident was a possible suicide attempt. The medical reports in the departmental report further indicate that Claimant was HIV positive and was on parole. The medical records also indicate Claimant refused to follow through with physical therapy on several occasions. The progress notes of October 6, 1989, at 6:00 p.m. indicate Claimant was verbally abusive to the hospital staff, he threatened to blow up the place, and stated, "I'm going to die anyway so what the heck."

The Respondent did not call Needham Price or present his evidence deposition. The Respondent did not present any medical testimony to explain the medical

reports. We note these matters because the Court has some considerable concerns in regard to Claimant's physical and mental condition on the bridge in light of the warning devices on the gates and the medical reports indicating a possible suicide attempt. These concerns, however, are not answered in the Respondent's case.

The Illinois Department of Public Aid is granted a lien upon any recovery made by a Public Aid recipient from injuries sustained by him. (305 ILCS 5/11—22.) The purpose of this lien is to reimburse the State for medical assistance provided the recipient as a result of the injury.

In September of 1991, the Claimant filed a petition with the Court pursuant to section 11—22 of the Public Aid Code (305 ILCS 5/11—22) requesting the Court conduct an evidentiary hearing for the purpose of reducing and apportioning the amount of the lien claimed by the Illinois Department of Public Aid. The Department of Public Aid contends payments in the amount of $69,931.87 were made to or on behalf of Robert Vasquez between July 6, 1989, and August 5, 1991. While Mr. Vasquez's testimony does not disagree that payments in that amount were made by Public Aid, he does dispute that all of these payments related to treatment rendered to him as a result of this incident.

The unrebutted testimony clearly indicates that the total payments made to or on behalf of Mr. Vasquez by Public Aid as a result of this incident total $46,360.43. The total of $69,931.87 was paid to Claimant for this and other matters. Claimant does not dispute he received the total amount from Public Aid.

The State can be negligent in its failure to properly operate a bridge under its control. (*Federal Barge Lines,*

Inc. v. State (1973), 29 Ill. Ct. Cl. 25.) The *Federal Barge Lines, supra*, court, citing *Tugboat Rental Co. v. State*, 21 Ill. Ct. Cl. 360, stated that:

> "We are of the opinion that failing to raise the bridge when it had ample notice of the approach of the vessel, was a neglect of duty on the part of the Respondent. The State of Illinois, acting by and through its agent was guilty of negligence, which proximately caused the damages complained of by the Claimant."

While the facts of the *Federal Barge* case differ in that the claim was based on the failure to raise the bridge in Joliet for a boat to pass and the present case alleges the wrongful raising of the bridge which injured a pedestrian, there are some striking similarities. Both cases involve the same bridge and in both cases, the State failed to offer the bridge tender's testimony. The bridge tender's testimony and the medical personnel's testimony may well have proven a lack of causation or at a minimum additional comparative negligence. Unfortunately, this Court will never know since no such testimony was presented.

Claimant has the burden of proving by a preponderance of the evidence that the State of Illinois was negligent, that such negligence was the proximate cause of the injury, and that damages naturally flowed therefrom. (*Stanley v. State* (1986), 39 Ill. Ct. Cl. 107.) The Claimant also has the burden of proving his damages. *In re Application of Lopez* (1987), 39 Ill. Ct. Cl. 315.

It is the finding of this Court on the state of the record that the Claimant has met his burden of proof as to negligence and damages. While we have these aforementioned concerns as to causation, the Respondent failed to produce competent evidence to prove a lack of causation.

We do, however, find some competent evidence of comparative negligence. It is undisputed that Claimant

had three quarts of beer to drink and a fourth quart of beer in his possession on the bridge. There is also no evidence to indicate that the lights and bells were not working on the gates to give Claimant warning of the approaching boat and raising of the bridge. The award in this case will therefore be reduced 7.5% for comparative negligence. The Claimant had a duty to use care and caution while crossing a draw bridge when the lights and bells sounded to get off the bridge. *Guffy v. State* (1987), 40 Ill. Ct. Cl. 179.

We find Claimant's total damages to be in the amount of one hundred thousand dollars ($100,000). That sum is reduced by seven thousand five hundred dollars ($7,500) for comparative negligence. The award is further reduced by the sum of $46,360.43 pursuant to the lien of the Department of Public Aid. *Connors v. State* (1988), 40 Ill. Ct. Cl. 112.

Based on the foregoing, Claimant is awarded the sum of $46,139.57. The sum of $46,360.43 should be paid to the Department of Public Aid.

ORDER

FREDERICK, J.

This comes before the Court on the motion of Ramon Vasquez to be substituted as Claimant in this cause in his role as Independent Executor of the Estate of Robert Vasquez. The Court being fully advised in the premises it is hereby ordered that Ramon Vasquez as Independent Executor of the Estate of Robert Vasquez shall be substituted as Claimant in this cause.

(No. 90-CC-3480—Claim denied.)

NANCY RODES and WILLIAM RODES, Claimants, *v.*
THE STATE OF ILLINOIS, Respondent.

Opinion filed May 6, 1994.

DENNIS J. KELLOGG, for Claimants.

ROLAND W. BURRIS, Attorney General (PAUL CARLSON, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*what claimants must prove*. For the Claimants in a negligence claim to recover against the State, they must prove by a preponderance of the evidence that negligent acts of the State proximately caused their injury and that the Claimants were free from contributory negligence, but prior to making a determination of negligence it must be shown that the State had a duty to the Claimants and breached that duty.

SAME—*Claimant arrested and jailed in Arizona due to incorrect information supplied by Secretary of State—no duty breached—claim denied*. Where a woman and her father sued the State alleging that the Secretary of State's office transmitted incorrect driver's license suspension information which resulted in the woman's arrest and overnight jail detention in Arizona, the State was not liable to the Claimants despite the failure of its internal procedures to correct an error in a vehicle identification number supplied by the woman, since the State sent the requisite statutory notices informing the woman of the suspension, and her failure to respond to those notices proximately caused her arrest.

OPINION

SOMMER, C.J.

This cause comes before the Court on a complaint filed by the Claimants, Nancy Rodes and William Rodes. The complaint alleges that Nancy Rodes and her father, William Rodes, incurred damages because the Secretary of State supplied incorrect driver's license information to a Federal park police officer in the State of Arizona on September 25, 1989, indicating that the driver's license of Nancy Rodes was suspended. It is alleged that this transmittal of incorrect information caused Nancy Rodes to be jailed overnight in Arizona, to be made subject to arrest

proceedings, and to have her motor vehicle towed. The Claimants seek a total of $25,000 in damages.

A hearing was conducted on June 12, 1992. The Claimants were represented by counsel. Subsequent to the hearing, each party filed a brief in support of their respective positions.

Testimony of Nancy Rodes

Nancy Rodes (hereinafter referred to as "Nancy") testified that on September 25, 1989, she was driving a 1984 Chevy Blazer, license plate number ADK131, in the Petrified Forest National Park of Arizona. She was stopped for speeding by a Federal park police officer, and was arrested for driving while her driver's license was suspended. No speeding charge was made. She was searched, handcuffed, and driven to jail, and her vehicle was towed. She was told to shower and to put on clothes with the word "jail" on them. The jail and shower were in bad condition. She spent the night in jail and was released the next morning.

At the hearing Nancy said she was a little afraid of the woman in her jail cell. At her deposition, Nancy said she was not afraid of the other person in the jail cell. Nancy stated that her father told her that he wanted to fly out and drive back with her because he didn't want her to drive alone. She did not ask him to come out. He said he was afraid she would "suffer some kind of after-shock."

At the hearing Nancy said the incident still bothers her and she feels intimidated. In her deposition Nancy said that she was not suffering from the arrest incident in any way.

Nancy stated that she received the Claimant's Exhibit No. 5 in the mail and identified it as a Clean Air

Vehicle Emission Test Report with a test date of April 9, 1988, and with a pass sticker affixed. Nancy identified the Claimant's Exhibit No. 6 as a vehicle emissions test report with a test date of February 7, 1989, and with a pass sticker on it. The Claimant's Exhibit No. 7, receipts of the towing bill, were admitted without objection.

Nancy stated that she received a whole bunch of notices regarding emissions testing and took them with her to the IEPA emissions test station on February 7, 1989. IEPA personnel told her that she might as well test since she was there. She received another notice after the February 7 test but she disregarded it and "figured it was just caught up in the system."

Nancy testified that she moved from 238 Delphia, Park Ridge, to 248 Kosan Circle, Streamwood, sometime around September of 1988, and she notified the Secretary of State to change her driver's license to reflect the change in address. She believed her vehicle was registered at the Park Ridge address. She received vehicle emissions notices at the Park Ridge address. The notices told her to have her vehicle tested. She did not check the VIN on the notices. She stated that she did not know of ever receiving any notices in 1988 from the Secretary of State telling her that her license plates and driver's license were going to be suspended.

Nancy identified her signature at the bottom of the Respondent's Exhibit No. 3, which is an application for registration, dated June 5, 1987. The VIN on the application is 1G8CT1887E0188579. The Respondent's Exhibit No. 3 was admitted into the record without objection. The Respondent's Exhibit No. 4 is a registration application dated September 2, 1990. The Respondent's Exhibit No. 4 was admitted into the record over an objection for a limited purpose. The Respondent's Exhibit No. 4 references

a VIN where the eighth and ninth digits appear to be either "13" or "B."

The Claimant's Exhibit No. 8 is a registration application for Nancy's car. She agreed that the VIN on the Claimant's Exhibit No. 8 was the correct VIN and the VIN on the Respondent's Exhibit No. 3 was different. The Claimant's Exhibit No. 8 was admitted without objection.

Testimony of William Rodes

William Rodes, a resident of Chicago, Illinois, testified that on September 25, 1989, his son, who lived in Phoenix, called him and told him that Nancy had been arrested. William Rodes (hereinafter referred to as "William") called the county jail in St. Johns, Arizona and talked to a deputy sheriff and a matron. Subsequently, he called his son and called the matron to express his concern for Nancy's safety.

At approximately 10:40 a.m. on September 26, 1989, William had a telephone conversation with Nancy. Nancy called to inform William that the sheriff had released her. She called William later, and he informed her that he would fly out.

At the time of the occurrence, William worked as a rehabber, buying apartment buildings and rehabbing them. He was in the process of rehabbing a four-apartment building. He flew to Arizona on October 6. He stayed in Arizona five or six days before he and Nancy drove back to Chicago.

William stated that he was concerned for Nancy's physical safety while she was in jail. After arriving in Arizona he noticed that she was not as outgoing, happy or enthusiastic as she had been prior to the incident. Her

demeanor and attitude change continued for four to six weeks. She did not seek psychological counseling or see any mental health personnel.

William claims $2,109.43 in expenses. William identified a five-page document, marked as the Claimant's Exhibit No. 3, as a report prepared by him indicating the times he called various people. The first page is a summary of the expenses claimed by him, including expenses relating to telephone calls, air fares, motel, and loss of income. Pages two through five of the exhibit are copies of receipts in support of the claim. William specifies his income at $25 per hour. The Claimant's Exhibit No. 3 was admitted into the record without objection.

William testified that he reports paying himself $200 per day to the Internal Revenue Service. He does not draw a week's salary but pays himself when the building is sold. William was working on a project when Nancy first contacted him on September 26, 1989. He completed the work he had started and then went to Arizona on October 6, 1989.

Testimony of Nancy Anderson

Ms. Nancy Anderson, an employee of the State of Illinois, was called as a witness by the Claimants. Anderson has served as the manager of the Auto Emissions Section within the Office of the Secretary of State (hereinafter referred to as "Secretary"), since September, 1985. Her job involves the enforcement of the Illinois Vehicle Emissions Test Program. The emissions testing laws are enforced by suspending the driver's license of the owner of a motor vehicle if the motor vehicle and its owner are not in compliance with the emissions testing program. Anderson's section is responsible for suspending licenses and restoration of the licenses when the vehicle is in compliance.

When an individual's driver's license is suspended, the pertinent information is made available, through reciprocity, to other states. The data processing department of the Secretary of State prepares the suspension notices.

The Illinois Environmental Protection Agency (hereinafter referred to as "IEPA") notifies Anderson's section when a vehicle has not taken the emissions test. IEPA sends an enforcement computer tape for an assigned month. The tape describes motor vehicles by listing each vehicle's identification number, license plate, the year, the make, model, owner's name and assigned month.

The chronology of events leading to a suspension under the vehicle emissions testing procedures were described by Anderson as follows. A vehicle owner is assigned a month to have the emissions tested. The owner has four months from the time of the assigned month to have a vehicle tested. IEPA sends an initial notice to the owner a month ahead of the assigned month. In the event the vehicle does not pass or take the emissions test in the assigned month, IEPA would send a first warning notice the month after the assigned month. In the third month after the assigned month IEPA would send a final warning notice. At the beginning of the fourth month after the assigned month, IEPA would send the computer tape for the assigned month to Anderson's section.

Anderson's section would, within 15 days of receipt of the IEPA tape, send a first warning notice to the address (in this case Park Ridge) indicated on the IEPA enforcement tape informing the owner that the vehicle did not pass an emission test, and advising the owner that his or her driver's license will be suspended in 60 days unless the vehicle passes a test. In the fifth month after the assigned month, Anderson's section would send a final warning notice (in this case Streamwood) to the

address on the owner's driver's license stating that the owner's driver's license will be suspended if the vehicle has not complied with the emissions testing law. In the sixth month after the assigned month the vehicle owner would receive (in this case at Streamwood) a notice of driver's license suspension, with certification of mailing. That notice informs the driver that the suspension will be effective in another 30 days. Thus, the Secretary sends three notices before the suspension is entered, with at least one going to the registration address and the others to the driver's license address.

Anderson stated that Nancy Rodes' driver's license was suspended October 20, 1988. On or after September 25, 1989, someone communicated with a technician in Anderson's section regarding the driver's license of Nancy Rodes. As a result of the communication, the suspension of Nancy Rodes' license was removed on September 26, 1989.

Subsequent to the removal of the suspension, a form letter was sent to Nancy Rodes. The letter was marked as the Claimant's Exhibit No. 1 and was not offered into, and is not part of the record, but was used to refresh the recollection of the witness. Although Anderson's signature was stamped on the letter by a rubber stamp, she did not review the letter before it was mailed. The letter contained the statements "The suspension was entered in error," and "we regret any inconvenience this matter may have caused." Anderson explained that the statements meant, "(The error) was called to a technician's attention that the suspension should not have been entered. The individual had a document or something in their possession that we were not aware of, could not be aware of."

The letter also states, it was "caused during the process of updating vehicle registration information." Anderson explained that the statement meant, "The individual

obtained a registration or renewed a registration, and at a point an error was made in the vehicle identification number which resulted in the suspension." The Claimant's counsel asked Anderson whether the letter indicates Nancy Rodes actually had a valid Class A driver's license which had a later expiration date. Anderson responded by stating "Once the suspension was removed it was a valid license, yes." Anderson agreed with the conclusion that the driver's license of Nancy Rodes should not have been suspended within one year prior to September 25, 1989. Anderson agreed that the information regarding the suspension was communicated to the State of Arizona or its representatives. On recross examination, Anderson noted that the VIN on the letter was 1G8CT1887E0188579.

During cross-examination, Anderson identified and testified to the meaning of the three pages making up the Respondent's Exhibit No. 1. The first page of the exhibit certifies that:

> "A Vehicle Emissions Suspension was entered suspending the driving privileges of Nancy M. Rodes [ ], on October 20, 1988, and said suspension was removed from the record on September 26, 1989, based on evidence reviewed that the date indicating the suspension was entered in error during the process of updating vehicle registration information."

Res. Ex. No. 1, pg. 1.

Page three of the exhibit indicates that Nancy Rodes was mailed, on September 20, 1988, a notice of driver's license suspension stating that her driver's license was suspended effective October 20, 1988, for failure to comply with emissions testing laws. Page two of the exhibit is the notice of driver's license suspension indicating Nancy Rodes' address at 248 Kosan Circle, Streamwood, Illinois. The notice references VIN 1G8CT1887E0188579 and license plate number ADK 131. The exhibit was admitted into the record without objection. Anderson identified her signature on page three of the exhibit.

The Respondent's Exhibit No. 2 was identified by Anderson as three pages of photocopies of a microfiche copy of a print of a computer tape created when loading records into the enforcement data base. The Respondent's Exhibit No. 2 was admitted into the record without objection. The copies describe action taken by Anderson's section in regards to Nancy Rodes specifying that the record was received from IEPA for enforcement and that notice was sent on July 9, 1988. The VIN on the entry is 1G8CT1887E0188579 and the plate number is ADK 131, which are the same as indicated on the Respondent's Exhibit No. 1. This notice mailed on July 9, 1988, went to the address on Nancy Rodes' registration file (238 Delphia, Park Ridge) at the time of application for her license plate.

The second entry indicates that on August 17, 1988, a final warning notice was printed to be mailed to Nancy Rodes, page two, Respondent's Exhibit No. 2. The VIN and plate numbers are identical to the first entry. This notice was shown to have been mailed to the address of Nancy's driver's license (248 Kosan Circle, Streamwood).

The third entry indicates that on December 15, 1988, the enforcement data base ran a request to suspend the license plate ADK 131. The VIN is identical to the prior entries. Notice of this action would have been sent to the address on Rodes' current registration (238 Delphia, Park Ridge). This action did not include a suspension of Rodes' driver's license.

Testimony of Katherine Allen

Katherine Allen, an assistant administrator in the Office of the Secretary of State, is responsible for vehicle services operations in Cook County which involves registration and title of vehicles. She is familiar with the procedures for changing or correcting titles and registration

applications. Changes are made on the original application when an application cannot go through the system.

In relation to the Claimant's Exhibit No. 8, an application for registration initially dated June 5, 1987, Allen stated that the title number in the upper right hand corner had been scratched out and a new title number was assigned in the lower left hand corner.

Allen said the application was rejected by the computer as it was being keyed in. She believed the Secretary of State's office would have researched the problem. She noted that there is a serial number (VIN) underneath the one written in the appropriate area. In the event a vehicle registration application is put in and one digit of the VIN is wrong, the vehicle cannot be processed. The VIN on the application has to connect with and match the VIN on an existing title file. When it doesn't, it kicks out an error that must be manually researched.

Based upon the appearance of the Claimant's Exhibit No. 8, Allen thought that it represented an instance where a wrong VIN was submitted on the registration application, it was kicked out in error, manually researched, and was corrected. She noted that the serial number underneath the corrected serial number is 188. The exhibit does not indicate the date the change was made, but it does indicate that the validation date was June 5, 1987. A corrected application is not returned to the applicant.

Allen speculated that when Nancy Rodes filled out the application she transposed the numbers as 188 rather than 18B.

Analysis of Claim

For claimants to recover against the State, they must prove by a preponderance of the evidence that negligent

acts of the State proximately caused the claimant's injury and the claimants were free from contributory negligence. (*Bellamy v. State* (1990), 43 Ill. Ct. Cl. 337; *Arterburn v. State* (1990), 43 Ill. Ct. Cl. 246.) The requirements to be free of contributory negligence should be interpreted consistently with section 2—1116 of the Code of Civil Procedure. 735 ILCS 5/2—1116 (1992).

Prior to making a determination of negligence, it must be demonstrated that the State had a duty to the Claimants and breached that duty. Neither party has cited a case which would operate as a precedent for determining whether the State had a duty to the Claimants under the facts presented. A review of the reported cases before the Court do not reveal any case with a similar fact pattern. Whether or not the State owes a duty to a person is a question of law. (*Wheel v. State* (1990), 42 Ill. Ct. Cl. 231.) The Claimants allege in their brief that, by creating an internal procedure for correction, the Respondent has a duty to ensure the information contained in its records is accurate.

Based upon the evidence presented, the Court finds the facts to be as follows. On June 5, 1987, Nancy prepared and submitted to the Secretary, an application for registration of her motor vehicle. The application identified her address to be in Park Ridge. The VIN provided by Nancy included errors. The Respondent's Exhibit No. 3 is a copy of Nancy's application prior to corrections or changes, and shows the eighth digit of the VIN to be an "8." The Claimant's Exhibit No. 8 is a copy of the same application with corrections. The initial VIN is whited out or obliterated and a new VIN inserted with the eighth digit of the VIN being a "B." The Respondent's Exhibit No. 3 also identifies the old title number as "B6442074" and Claimant's Exhibit No. 8 shows that number crossed out and "C7541598" written above it.

When the information from the erroneous application was keyed into the Secretary's computer, it was rejected because the VIN number did not match any title records maintained by the Secretary of State's Office. The Secretary's staff, pursuant to its policy, manually checked the information and corrected the VIN on the application.

The Secretary is prohibited from registering or renewing a registration of a vehicle unless a certificate of title has been issued to the owner. (625 ILCS 5/3—101 (1992).) Section 3—409 of the Illinois Vehicle Code specifies in relation to registrations that "[t]he Secretary of State shall file each application received and when satisfied as to the genuineness and regularity thereof, and that the applicant is entitled to register such vehicle and to the issuance of a certificate of title, shall register the vehicle * * *." (625 ILCS 5/3—409 (1992).) The statute imposes a duty on the Secretary to satisfy itself on the genuineness and regularity of each application and on the applicant's entitlement to registration of the vehicle. In short, the Secretary should not issue license plates or renewal stickers until the registration application is correctly matched to a title on file. When first submitted in this case, the Secretary was unable to make that match.

The date that the Secretary corrected the application is not in the record. The date that the license plates or sticker, with a registration card, was issued or sent to Nancy is also not in the record. What is in the record is the admission of the Respondent that Nancy was not informed of the VIN error on her application, or of the corrections made to it.

Apparently the Secretary created some type of file or record with the erroneous VIN, together with Nancy's name and address, and a separate file or record with the correct VIN, and Nancy's name and address. The nature

of the file or record created with the incorrect VIN is not fully disclosed in this record.

The Illinois Vehicle Code requires the Secretary to provide the IEPA with information for the purpose specified in the Vehicle Emissions Inspection Law, including providing regular and timely access to vehicle registration records. (625 ILCS 5/13A—112 (1992).) Apparently files or records containing both VINs were made available to IEPA. The date and manner in which the files or records were made available to IEPA for emissions testing is not in the record.

The VIN with a "B" in the eighth digit is the correct VIN. The Respondent's exhibit nos. 1 and 2 pertain to the incorrect VIN with an "8" in the eighth digit. Under this fact scenario the Secretary was not under any requirement to create a file or record for an application for registration that would be accessible by IEPA until such time as the Secretary could satisfy himself that the vehicle could be registered. The Secretary could not have satisfied himself until the manual search was completed and corrections were made that allowed the VIN on the application to match the VIN on a title. Until such time the Secretary should have safeguarded and prevented the information from the erroneous application form being readily available to the IEPA. Having discovered the error, the Secretary should have safeguarded or prevented the erroneous information from being made available to the IEPA.

In the event the facts were to stop at this point the outcome of this case might be different. But, there is the matter of the notices being sent to Nancy.

The Respondent's Exhibit No. 1 shows that notice was mailed on September 20, 1988, to Nancy stating that her driver's license would be suspended on October 20,

1988, unless she acted. Albeit, the notice was for the incorrect VIN, with the "8" in the eighth digit, it was still notice to her. The notice came from the Secretary's office mailed to Nancy's Streamwood address. There is nothing in the record to indicate that she contacted the Secretary regarding a notice of suspension. Nancy denies receiving the notice of suspension.

The Claimant's Exhibit No. 5 shows that Nancy's vehicle, based upon the correct VIN with a "B," passed the emissions test on April 9, 1988, and was not scheduled for another test until February, 1989, when the Claimant's Exhibit No. 6 indicates Nancy's vehicle again passed the emissions test. There is nothing in the record that would indicate whether IEPA would have known that Nancy's driver's license was suspended at the time of the February, 1989 test.

A review of case law reveals two cases in which it was alleged that the negligence of the Secretary of State caused damages. Neither case is on point, but are helpful in the present analysis. In *Bank of Lyons v. State* (1966), 26 Ill. Ct. Cl. 104, the claim was made by a bank that held a security interest, identified on the certificate of title, to a motor vehicle as security on a loan to one of its customers. The customer defaulted on the obligations of the loan and applied to the Secretary of State for a duplicate certificate of title. Subsequent to the issuance of the duplicate, the bank obtained possession of the duplicate and the motor vehicle. The motor vehicle was later stolen from the bank's premises. The bank claimed that the Secretary's mistaken issuance of the duplicate caused the bank to lose the motor vehicle. The Court's opinion assumed negligence on the part of the Secretary, but held that the conduct of the Secretary was not the proximate cause of the bank's loss.

In a more compelling case, *Kirby v. State* (1979), 32

Ill. Ct. Cl. 419, the Secretary of State incorrectly reinstated a driver's license to an individual, although the applicant had not complied with the necessary laws and procedures. The individual subsequently was found to have caused the death of a person in an accident while driving under the influence of intoxicating liquor. The Court held that the State was not the proximate cause of the death of the person.

It is clear that Nancy provided the wrong VIN number when she registered her automobile. The Court understands the ease by which a wrong digit or letter could be entered in a 17 place VIN composed of numbers and digits, which seem random to the average car owner. This is one reason why the Secretary of State runs the VIN numbers submitted to it against master lists.

Nancy testified that she had a "whole bunch" of "vehicle emissions" notices. Her concern over these notices caused her to go to the IEPA testing station on February 7, 1989 to find out about them. When she showed the notices to the testing employees, they must have had no particular reaction, as they urged her to re-test as she had only a couple of months left on her 1988 sticker. She was not told that her license and plates had been suspended. This leads this Court to conclude the employees at the testing station were using only the VIN number—the correct one in this case, and failed to notice the subtle difference between the correct VIN and the wrong VIN on some of the notices.

In regard to the incorrect VIN number, Nancy had been sent a final warning and a notice of her driver's license suspension at her address at Streamwood, Illinois. Apparently, notices of revocation of her license plates were sent to her registration address at Park Ridge, Illinois.

Nancy testified that she received no final warning or notice of her driver's license suspension at her Streamwood address in 1988, though she testified that she received mail sent to her Park Ridge address, Streamwood address, and an address in Chicago during the time in question.

We find that Nancy was sent a final warning in August of 1988 and a notice of her driver's license suspension at her Streamwood address in September of 1988, though she testified she did not receive these documents. She did receive a variety of notices concerning emission testing, and she did inquire about these notices at the testing station in February of 1989.

We find that the Secretary of State did mail warnings and notices of suspension of Nancy's driver's license to the Streamwood address that she provided to the Secretary of State as her current address at the time, and had sent at least one notice in July of 1988 to the Park Ridge address. Nancy testified that she moved sometime between the summer and September to the Streamwood address. The August notice was mailed to the Streamwood address. The Secretary of State would have gotten this address when she moved and notified the Secretary of an address change. Of course, the suspension notice went to the Streamwood address in October of 1988. Though Nancy states that she received only emission notices, which would have to have been for both VIN numbers to have caused confusion, we find that the warnings of her license suspension were sent to both her Park Ridge and Streamwood addresses, and the suspension itself was properly certified as mailed to her at her Streamwood address, and, thus, constituted notice to her, even if she did not receive it. 625 ILCS 5/6—21(c).

In order for the State to be liable to Nancy, it must

have owed a duty to her, and been negligent in the performance of the duty, and such negligence must have been at least 50% of the proximate cause of the damages suffered that are compensable under the law. *Stanley v. State* (1985), 39 Ill. Ct. Cl. 107; *Berger v. State* (1988), 40 Ill. Ct. Cl. 120; *Wilson v. State* (1989), 41 Ill. Ct. Cl. 50; 735 ILCS 5/2—1176.

The Claimant argues that the State owed a duty to Nancy to ensure that the information in its records was accurate, and that duty was breached when the State mishandled its own internal correction procedures, and created two files on Nancy's automobile.

We believe that the Claimant has misidentified the duty owed to Nancy. Even though the State made an internal error nothing happened that was prejudicial to Nancy until the State suspended her driver's license. At that time the State had a duty to inform Nancy that her license was being suspended. The State fulfilled its duty by sending to Nancy the statutory notices of suspension to her Park Ridge and Streamwood addresses, and the suspension itself to her Streamwood address, which she had provided to the Secretary of State. Nancy then had a duty to respond to the Secretary of State, and this duty was breached by her failure to respond to the Secretary of State. Under the law, Nancy was given notice, and her claim of not receiving any of the notices does not change that.

We find that the State breached no duty to Nancy in the circumstances of this claim. Additionally, we find that Nancy's breach of her duty was the proximate cause of her arrest. Thus, the State is not liable for damages to Nancy. As William's damages are derivative from any liability by the State to Nancy, his claim is denied, also.

If for the sake of argument, the State was found to

have a duty to Nancy and be 50% of the proximate cause, it is apparent that Nancy's damages would be limited under the law.

Nancy has no cause of action against the State for false arrest, imprisonment, or detainment, as an element of such a cause of action is that the arresting officer acted unreasonably when he made the arrest. In this claim, the State did not make the arrest, and the actions of the Federal park police seem reasonable in light of the information given them. See *Howard v. State* (1993), 45 Ill. Ct. Cl. 214 for a thorough discussion of false arrest, imprisonment, etc.

Additionally, this Court cannot award Nancy damages for emotional or mental distress, as under Illinois law awards for emotional and mental distress cannot be made without physical injury to the Claimant. *Carlinville National Bank v. Rhoades*, 63 Ill. App. 3d 502, 380 N.E.2d.

Nancy's brief cites two cases in attempting to get around the rule of law requiring that emotional injury can be compensable only if accompanied by physical injury.

First, she cites *Davenport v. DiRobertis* (1987), 653 F. Supp. 649 (N.D. Ill.) for the proposition that it is possible to undergo confinement and suffer compensable emotional damages. However, as the Respondent's brief points out, Davenport involved inmates who had been in segregation for 90 days and spoke of "isolation in solitary confinement" causing compensable emotional damages.

Nancy was not in solitary confinement for 90 days, but was in a local jail for one night.

Second, Nancy cites *Levka v. City of Chicago* (1984), 748 F.2d 421. *Levka* is a strip search case involving intentional abuse of the arrestee, which is an exception to the general rule that physical injury must accom-

pany emotional damages. The conduct of the State towards Nancy was not intentional.

There was some mention in the record that Nancy lost out on a job because of her suspension, but this was not further developed and fails as a ground of recovery for lack of proof.

Thus, even if we had found the State to have had a duty to Nancy and to have been 50% of the proximate cause, Nancy's damages under the law would have been minimal.

This Court very much sympathizes with the plight in which Nancy found herself. None of us would like to be arrested, spend a night in jail, and then be sent a letter apologizing for the "inconvenience." However, this Court must follow the law, and we have seen the bulk of Nancy's claimed damages are not compensable under the law even if the State had been liable.

It is therefore ordered that this claim is denied and dismissed.

(No. 91-CC-0280—Claim denied.)

JAMES CRUMP, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed May 16, 1994.

JAMES CRUMP, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (CHRISTOPHER K. WELLS, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*claim for lost wages denied.* Since inmates do not have a right to employment, the Court of Claims denied an inmate's

claim for the difference between wages the inmate alleged he would have been paid during the time he was wrongfully placed on investigation status and not allowed to attend to his job duties, and the amount of reimbursement actually received from the State for that period.

OPINION

MITCHELL, J.

Claimant, an inmate with the Illinois Department of Corrections, seeks judgment against Respondent, State of Illinois, in the amount of $75.86. Claimant contends that Respondent is liable to Claimant for the amount claimed due as a result of lost wages which Claimant would have received but for the fact that Claimant was wrongly placed on "investigation status." Claimant was released on March 30, 1990 from investigation status without any disciplinary ticket being issued against Claimant for any offense. Claimant contends in this complaint that the actions of Respondent were negligent or willful, and that Claimant had sustained a loss of $75.86 in wages. It should be noted that Claimant alleges that Claimant was reimbursed by the State in the sum of $10 on an original lost wage claim in the sum of $75.86. Claimant's claim for damages is based on the balance of what Claimant contends is owed.

At the hearing, Claimant testified that he was placed on investigation status in February, 1990. The gravamen of Claimant's complaint is although he was not charged with any disciplinary offense as a result of his being placed on "investigation status," he was not treated as other inmates had been treated in the past when they were reimbursed in full for time spent on "investigation status." While Claimant was on investigation status, he was incarcerated and not permitted to attend his job duties. The $10 pay rate actually received by Claimant for the period he was on "investigatory status" was shown to

be apparently the amount applicable to persons held in "protective custody."

On cross examination by Respondent's attorney, Claimant admitted that the Department of Corrections has the right to assign jobs to inmates or to withhold those assignments through what is known as the "assignment committee."

Claimant was investigated because his brother was found to have been contemplating an escape. Claimant was found guilty of no misconduct. Claimant did not lose his job, but was returned to employment upon conclusion of the investigation. Claimant went through the "assignment committee process" a second time.

Respondent offered no evidence. Neither party filed a brief.

The recommendation in this case is predicated upon the case of *Pippion v. State* (1990), 43 Ill. Ct. Cl. 327. In *Pippion*, Claimant was employed and removed from his employment when he was convicted of certain rules infractions and placed in segregation along with the imposition of other penalties. Upon review, the Institutional Inquiry Board determined that the initial finding against the Claimant had been in error. The penalties that had been assessed against the Claimant were removed, and all restrictions were lifted against the Claimant. Claimant was returned to his job. In *Pippion, supra*, the Claimant then filed an action claiming back pay for the period of time that he was not working at his job. As in the case at bar, in *Pippion, supra*, testimony was presented that inmates do not have a right to employment.

In the *Pippion* case, this Court concluded that Claimant had lost nothing to which he had a right. This Court determined that the Claimant in *Pippion* was entitled only

to the amount of money allocated as "unassigned pay" which equaled $10 a month.

In the case at bar, Claimant has received the $10 for the month that he was on investigation status. Claimant did not have a right to the rewards of his employment. The case of *Pippion, supra*, is controlling.

Therefore, this claim is denied.

(No. 91-CC-0520—Motion to dismiss denied; claim dismissed.)

ROBERT GAYNOR, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed October 19, 1993.

Order filed June 27, 1994.

STEVEN A. GREENBERG, LTD., for Claimant.

KEEVERS & HITTLE (WILLIAM C. LINDSAY, of counsel), for Respondent.

PRACTICE AND PROCEDURE—*when complaint is considered filed*. Once a complaint has been accepted and stamped by the clerk, a filing has occurred, and it is beyond the power of the clerk's office to make a determination that the complaint is legally defective, and the complaint may only be stricken by order of the court upon its own motion or that of the Respondent.

SAME—*defective complaint was filed within statute of limitations—motion to dismiss denied—claim dismissed for failure to proceed*. The State's motion to dismiss the Claimant's complaint based upon the statute of limitations was denied because the complaint, while omitting certain information, was initially accepted and stamped by the clerk within the limitations period before being returned to the Claimant, but the complaint was ultimately dismissed due to the Claimant's failure to appear or proceed in good faith.

OPINION

SOMMER, C.J.

This is a claim for personal injury. The Respondent has filed a motion to dismiss based upon the statute of

limitations, which is two years, by virtue of section 22(g) of the Court of Claims Act. 705 ILCS 505/22(g).

The date of injury alleged was August 22, 1988. The Claimant filed his complaint on August 21, 1990. It was accepted by the clerk and stamped; whereupon the clerk later crossed out the stamp and sent the complaint back to the Claimant, along with a checklist indicating possible defects of a complaint. The items on the check-list marked relevant to this claim were:

"(5) Failure to furnish Claimant's Federal Employer Number or Social Security Number.

(6) Other: Please have the claimant sign where indicated. All copies need his signature."

The Claimant refiled on September 10, 1990. This refiling put the Claimant beyond the two year statute of limitations, as the Respondent points out in its motion to dismiss.

In this instance, the clerk essentially made a determination that the pleading was defective and sent it back.

In a somewhat similar case, *Oppe v. State* (1990), 86-CC-2861 (unpublished), this Court found that acceptance and stamping of a complaint without the filing fee amounted to a filing even though the Clerk had sent the complaint back to the Claimant who then refiled late, as in the present case. In the *Oppe* claim, the case of *Ayala v. Gold* (1988), 176 Ill. App. 3d 1091, 531 N.E. 1040 was cited. The *Ayala* case contained a full discussion of filings, citing other cases which hold that once a document is accepted and stamped by the clerk, a filing has occurred.

In the present claim, the insufficiencies cited by the clerk were failure to provide the Claimant's social security number and the absence of the Claimant's signature. The complaint was verified by the Claimant's attorney. Oddly,

neither of the alleged insufficiencies are expressly required by this Court's rules or the statutes, whereas the *Oppe* claim and the *Ayala* case concerned filing fee which are clearly required by both rule and statute.

As cited in the *Ayala* case, the rule in cases such as this, is that once the clerk has accepted and stamped the complaint, it is beyond the power of that office to make a determination that the complaint is legally defective and unfile it, by crossing out the date stamp and sending it back. If the complaint contains defects, it may only be stricken by order of the Court upon motion of the Respondent or the Court.

Therefore, we find that the complaint in this claim was filed on August 21, 1990 for the purposes of applying the statute of limitations, and that such filing was within the statute of limitations. It is therefore ordered that the motion to dismiss is denied.

ORDER

SOMMER, C.J.

This cause coming to be heard on the motion of the Court, due notice having been given, and this Court being fully advised, finds that the Claimant failed to appear, after notice was given, at status hearings on January 10, 1994, March 14, 1994, April 11, 1994, and May 9, 1994. Additionally, this Court finds that by virtue of section 790.260 of the Court of Claims Regulations (74 Ill. Adm. Code 790.260) "that the Claimant has made no attempt in good faith to proceed."

It is therefore ordered that this claim is dismissed.

(No. 91-CC-0926—Claimant awarded $24,432.25.)

EILEEN OWENS, n/k/a EILEEN BAGNELL, Claimant, *v.* ILLINOIS STATE UNIVERSITY and THE BOARD OF REGENTS OF THE REGENCY UNIVERSITIES SYSTEM, Respondents.

Opinion filed May 13, 1994.

HAYES, SCHNEIDER, HAMMER, MILES & COX (JAMES P. GINZKEY, of counsel), for Claimant.

JOSEPH J. GOLEASH, JR., for Respondents.

NEGLIGENCE—*fall on ice outside university building—damages awarded.* A woman who was injured when she fell on an icy sidewalk outside the door of a university building was awarded damages in her negligence claim against the State, since the State had knowledge of the abnormal accumulation of water and ice by the door which had persisted for some period of time, and the burden of rectifying the situation would not have been great.

OPINION

SOMMER, C.J.

A hearing in the above-referenced case was held in Bloomington, Illinois, on March 15, 1993. Both parties were represented by counsel. The Claimant and her husband testified. The Claimant also called as witnesses Pam Troxel; Illinois State University police officer, Ron Lewis; Dr. Seymour Goldberg; Manuel Cordero; and engineer, Moreley Brickman. The testimony of Crist Schwelle was presented by stipulation. The Respondent cross-examined all of the Claimant's witnesses, and also called Tim Kearney as a witness. The Claimant filed a brief, while the Respondent did not.

The Claimant fell at the One West door to the Respondent's Bone Student Center on January 5, 1990 at approximately 5:30 a.m. At that time, the Claimant was employed as the manager of the Dairy Queen at the Bone Student Center. When she fell, the Claimant's left buttock struck a tennis ball-sized metal door stop anchored to the sidewalk outside the One West door. The Claimant

testified that she slipped on water with frost or ice over it which had accumulated outside the One West door. "Well, there was a lot of moisture here [in front of the door], and it was slick. It was really slick. It was like a frost over it or something."

On cross-examination, the Claimant's testimony was as follows:

"Q. Was it more frost than ice on that occasion?

A. I would say it was like it hadn't rained, like it was a moisture that came down there and it froze. It was more like scum over there. It was like a frost.

Q. So there wasn't an identifiable pond of water with a hard coating on it?

A. Yes, there was.

Q. Where was it?

A. It was on this door. When you come up these sidewalks here, it was here and then went clear across here. [Indicating] There is always water there. There was water even there in the sunshine.

Q. Okay. On the morning that you fell, is it your belief that there was frost everywhere on the—

A. Yes.

Q. So there was a general frost condition?

A. Uh-huh.

Q. Not a specific patch of ice that you slipped on?

A. It was frost. Ice, or frost, or whatever you want to call it. It was slick."

Pam Oliver Troxel, a student, who took the Claimant to the hospital, stated she had slipped a number of times where the Claimant fell. Tim Kearney, the facilities manager, testified that no falls had been reported where the Claimant fell.

The Claimant told Manuel Cordero, the Respondent's maintenance man, that she had fallen. He went to the One West door and did see ice outside the door. The Bone Student Center does keep a supply of salt and sand for sidewalks, but there was no salt or sand on the ice outside the One West door.

This Court finds that there was water present which froze into a slick surface which we will call ice.

The Claimant claims that the water forming the ice at this entrance had two sources—the recessed wall corner just to the north of the door in question, and the patio/overhang above the door. The Claimant argues that the ice formed by these two conditions constituted an unnatural accumulation of ice.

The recessed wall corner where the Claimant fell extends all the way to the roof of the Bone Student Center. The Respondent's facilities manager, Tim Kearney, testified that the white cast to the bricks in the recessed wall corner is from water, but that he did not believe the recessed wall corner causes water to run all the way from the top of the Bone Student Center to the One West door. The Claimant's engineer, Morley Brickman, testified that it was his professional opinion that the recessed wall corner is discolored because of running water, and that the recessed wall corner acts as a channel. Then because of the pitch in front of the door the water cannot drain any. In addition, for approximately five years prior to this fall, there had been a water infiltration problem from the patio/overhang above the One West door. Manuel Cordero acknowledged that when it rained, water would come down from the patio above. Engineer Brickman opined that the discoloration of the brick underneath the patio/overhang is indicative of water having come down from the overhang. Tim Kearney stated that the patio/overhang had been caulked at one time.

The Claimant's argument is that the Respondent had a duty to prevent unnatural accumulations of ice created by artificial causes or in an unnatural way by the design defects of its property or lack of maintenance thereof. *McCan v. Bethesda Hospital* (1980), 80 Ill. App. 3d 544; *Lapidus v. Hahn* (1983), 115 Ill. App. 3d 795.

The condition had persisted for some time and both the building's maintenance man, Manuel Cordero, and the facilities manager, Tim Kearney, indicated an awareness of the condition. Therefore, the Respondent had knowledge of the abnormal accumulation of water and ice in front of the door.

The burden of rectifying the situation would not have been great. Sand or salt could have been spread, the patio/overhang could have been caulked, and a drain or downspout could have been used to carry away the water from the recessed wall corner.

Therefore, we find that the Respondent was negligent in knowingly allowing an unnatural accumulation of ice to exist where the burden of rectifying the situation would not have been great.

The Claimant's physician, Dr. Seymour Goldberg, testified that, in his opinion, falling on the doorstep as opposed to a flat surface localized the blow to the Claimant's buttock. The fall caused a severe hematoma which resulted in a permanent eight-inch by ½-inch indentation and scar in the plaintiff's buttock. The Claimant incurred medical expenses of $3,266.39. The Claimant was physically unable to continue her work at the Dairy Queen. She subsequently found other employment, but was off work from the first week of March, 1990, until the first week of October, 1990. Her 1989 earnings were $14,855.76.

The Claimant requests damages for her medical bills, lost wages, permanent disfigurement and disability, and pain and suffering.

The Claimant's medical expenses have been stated above. The Claimant did try to return to work at the Dairy Queen, but her pain was so great that she was hos-

pitalized in early March, 1990. The Claimant did not return to work at the Dairy Queen because she believed that she was physically unable to do the work. After her release from the hospital, and as late as June 1, 1990, the Claimant's doctor gave the Claimant a note saying that she was temporarily disabled as far as work was concerned. She could not work where she had to be on her feet all the time. Finally, on October 5 or 7, the Claimant got a job at Osco Drugs where she was allowed to sit down every 15 or 20 minutes. The Claimant, basing her calculations upon the previous year's wages, requests compensation for lost wages from the date of the accident until early October of the same year in the amount of $8,665.76.

We will make an award including the amount of the medical bills and lost wages as calculated by the Claimant.

Remaining to be determined is our award for disfigurement and disability, and pain and suffering.

The Claimant has sustained permanent, though hidden, disfigurement and during her recovery period had a definite disability, as she could not climb stairs or stand for a period of time. Therefore, for disfigurement and disability we award $5,000.

The Claimant did undergo pain and suffering at the time of the injury and during her period of recovery. The Claimant's physician testified that the pain should subside and eventually disappear. The Claimant and the Claimant's husband testified that the Claimant was unable to sleep at night because of her pain, but the extent to which this pain was due to her injury or other conditions she suffers from, such as arthritis, was not clear from the record. We therefore award the Claimant $7,500 for past and future pain and suffering.

We also note that the Claimant at the time of the hearing was married and is now known as Eileen Bagnell. We therefore award the Claimant Eileen Owens, n/k/a Eileen Bagnell, $24,432.25 in full and complete satisfaction of her present claim.

(No. 91-CC-0981—Claim denied.)

SHARIF RAHEEM, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 26, 1994.

SHARIF RAHEEM, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (CHRISTOPHER K. WELLS, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*failure to exhaust administrative remedies—claim for lost personal property denied.* An inmate's failure to exhaust his administrative remedies by seeking review of his denied grievance with the Administrative Review Board pursuant to section 790.60 of the Court of Claims Regulations resulted in the dismissal of his claim requesting damages for the State's loss of his religious cap.

OPINION

FREDERICK, J.

Claimant, an inmate with the Illinois Department of Corrections, seeks judgment against Respondent, State of Illinois, based on allegations that the State is responsible for Claimant's loss of a religious article of wearing apparel, a religious cap known as a Muslim Kufi. The damages sought are $30.

At the hearing in this cause, Claimant testified that the article of apparel at issue was "religious headgear."

Claimant was wearing the article at the Vienna Correctional Center. Claimant was asked by an officer what the designs on the article of apparel meant and Claimant advised the officer that they didn't mean anything. Claimant was instructed to talk to a lieutenant concerning the matter and Claimant's article of apparel was then confiscated. Claimant received a disciplinary ticket for wearing the article of apparel apparently based on Respondent's agents' belief that the article of apparel was gang related.

Claimant's grievances were denied and his appeal to the Administrative Review Board in Springfield was not heard, apparently on the basis that it had not been timely filed.

Respondent's Exhibit 1 was offered and admitted into evidence as a departmental report. The exhibit was from the claims coordinator for the Illinois Department of Corrections to the Illinois Attorney General's Office noting that Claimant's claim should be denied recovery for the reason that Claimant had not exhausted his administrative remedies. Claimant contends that he was aware of the process for filing grievances with both the institution and the Administrative Review Board. However, Claimant contends that the time the person had to respond from a denied grievance to seek review with the Administrative Review Board was not specified on any of the materials he had received.

The State called no witnesses. Neither party filed a brief.

This case is governed by the rule established in *Terry v. State* (1988), 41 Ill. Ct. Cl. 164. In *Terry*, the record revealed that the claimant had received the decision of the Institutional Inquiry Board. The claimant in *Terry* contended that he "wrote Springfield, the Administrative Review Board." That claimant contended that he

had not heard from the Administrative Review Board. That claimant kept no copy of his correspondence with the Administrative Review Board. Interrogation by the State revealed that the claimant had not had a hearing before the Administrative Review Board. Thus, this Court concluded that the claimant had not exhausted his administrative remedies in accordance with section 790.60 of the Court of Claims Regulations. (74 Ill. Adm. Code 790.60.) In light of the fact that claimant had sought a final adjudication of his claim without exhausting administrative remedies, the claim in *Terry, supra*, was denied.

The present facts are similar to the facts in *Terry, supra.* Claimant failed to timely file for a hearing before the Administrative Review Board. For the foregoing reason that Claimant has failed to exhaust his available remedies, this claim is denied.

(No. 91-CC-1014—Claim denied.)

TIMOTHY HALL, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed June 29, 1994.

TIMOTHY HALL, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (KATHY TWINE and DIANN MARSALEK, Assistant Attorneys General, of counsel), for Respondent.

PRISONERS AND INMATES—*force which may be used on inmate by prison officer.* Where a prison officer is faced with an inmate disturbance, he is afforded a wide range of discretion and the Court will consider the total circumstances in determining whether the officer's conduct constituted negligence, and where an inmate becomes unruly and physically abusive towards officers, the officers may use such force as is reasonably necessary to restrain the inmate.

SAME—*prison disturbance—correctional officer's actions were reasonable—claim denied.* Where there was evidence that an inmate who had previously threatened a correctional officer approached the officer using abusive language, pushed him, and precipitated a prison disturbance involving other inmates, the inmate's claim for damages as a result of injuries sustained when the officer struck him in the face was denied, since the officer's actions were reasonable under the circumstances.

OPINION

PATCHETT, J.

The Claimant is an inmate with the Illinois Department of Corrections. He seeks damages from the Department of Corrections as a result of injuries sustained when correctional officers struck him in the face. At a hearing before a commissioner of this court, the Claimant testified that he was a member of the Black Disciples. He was incarcerated following a murder conviction.

Mr. Hall testified that on August 13, 1990, he was the subject of an adjustment committee hearing regarding a ticket he had received for a previous incident. The previous incident consisted of a threat and intimidation against Corrections Officer McGee. Mr. Hall testified that Officer Sandige had appeared and testified at the hearing. Mr. Hall was found guilty and sentenced to 60 days in the segregation unit as a result of this committee hearing.

Following the hearing, Mr. Hall approached Officer Sandige. Hall pointed his finger at Sandige and questioned why the officer had testified in that matter. Hall testified that he said, "What the fuck you doing, what's up with you?" Hall admitted that he acted in the heat of the moment. He further testified that he intended to get back at Officer Sandige.

Hall testified that Officer Sandige then struck him in the mouth with a radio. This resulted in Mr. Hall's loss of

three teeth. A fight ensued during which Mr. Hall also kicked and hit Officer Sandige in the face and body. After this fight ended, two more fights broke out, and several of the inmates were involved. When Mr. Hall was later returned to his cell, he discovered that his mouth was cut and required stitches.

As a result of the incident on August 13, 1990, Mr. Hall was brought before the adjustment committee for yet another hearing. He was found guilty and sentenced to one year in segregation, one year loss of good time, and reduction in grade.

Mr. Hall testified that he was acting in self defense and alleges that Officer Sandige used excessive force.

Respondent called Officer Brian Givens, who had witnessed the incident. Officer Givens testified that Mr. Hall was angry following the adjustment committee hearing on August 13, 1990. He testified that Mr. Hall said, "I am fucking everybody up and I am starting with you." After saying this, he began pushing Officer Sandige in the face.

According to Officer Givens, Sandige then used his right fist to strike Mr. Hall in the mouth. Givens denied that Sandige used the radio to strike Mr. Hall.

Other inmates and members of the Black Disciples became involved in the fight. The inmates grabbed Officer Sandige and began kicking and beating him. Officer Givens testified that Sandige suffered a bruised kidney and lung, in addition to back and leg injuries. Officer Sandige was on disability for two months following the incident. He ultimately left his employment as a prison officer.

Sergeant Jordan was also called to testify. Jordan testified that he was a correctional sergeant on duty at the time of the incident. Jordan was alerted by inmates running

toward the door. He then observed Officer Sandige "folded up" in the corner and being kicked and hit by several inmates. Jordan and his supervisor were able to stop the fighting, but after a few minutes, the fighting began again. Sandige was grabbed, dragged underneath the tower, and inmates piled on top of him and began beating him. The inmates were using weight belts and sticks as weapons. The fighting was halted a second time, but shortly after that, the fighting began a third time. The captain then gassed the unit with mace.

This Court has held that where a prison officer is faced with an inmate disturbance, he is afforded a wide range of discretion. The Court will consider the total circumstances in determining whether the officer's conduct can constitute negligence. *Hamilton v. State* (1987), 40 Ill. Ct. Cl. 191, 195.

The Court has also held that where an inmate becomes unruly and physically abusive towards officers, the officers may use such force as is reasonably necessary to restrain the inmate. *Simmons v. State* (1991), 44 Ill. Ct. Cl. 304.

We find that the officer did not exceed the limits of his discretion or abuse his discretion. The officer's actions were reasonable and necessary when viewed within the context of this situation. We hereby deny this claim.

(No. 91-CC-1416—Claimant awarded $150.)

WILLIAM HORTON, Claimant, *v.* THE STATE OF ILLINOIS and THE ILLINOIS DEPARTMENT OF CORRECTIONS, Respondents.

Opinion filed May 13, 1994.

WILLIAM HORTON, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (ELIZABETH M. LOOBY, Assistant Attorney General, of counsel), for Respondents.

PRISONERS AND INMATES—*State owes duty to provide inmates with safe working conditions—negligence.* The State owes a duty to provide inmates with safe working conditions under which to perform their assigned work, but to recover against the State in a claim for personal injury, 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 the Claimant's injury.

SAME—*fall from ladder—inmate awarded damages for pain and suffering*. An inmate was entitled to $150 in damages for pain and suffering in a claim for injuries sustained when he slipped on oil and fell from a ladder while performing his assigned job duties, since the inmate had warned his supervisor of the dangerous condition but the State failed to remove the oil and ordered the inmate to continue working.

SAME—*inmate's claim for additional lay-in pay denied*. Where the Claimant inmate received lay-in pay for a one-month period following his fall from a ladder while performing assigned tasks, but the length of his actual lay-in was only three days and he was under investigation during the time in question, the inmate's claim for an award of additional lay-in pay was denied.

OPINION

MITCHELL, J.

This matter comes before the Court on the complaint of William Horton, Claimant, against The State of Illinois, Department of Corrections, seeking an award in damages for personal injury and loss of wages.

Claimant's complaint arose from an incident on June 29, 1993, in which Claimant fell from a ladder while working in his assigned capacity as an asbestos removal worker. Following the incident, Claimant was terminated from his employment as an asbestos removal worker. Claimant seeks damages in the amount of $25,000 for pain and suffering resulting from the alleged personal injury. In addition, Claimant seeks "lay-in pay" in an unstated amount for the period of his injury.

Facts

On June 29, 1990, Claimant was incarcerated at Logan Correctional Center. On that date, Claimant was assigned as an asbestos removal worker which is classified as Worker Apprentice 1 at a pay rate of $1.50 per hour.

Claimant testified that on June 29, 1990 at about 8:20 a.m., pursuant to his supervisor's orders, Claimant was standing on a ladder hanging plastic on the back end of a boiler when the job supervisor told Claimant to come down the ladder. Claimant slipped on some oil on the ladder and fell backwards, striking his back on a steel beam.

Claimant further testified that he had previously warned his supervisor of the presence of oil on the boiler on June 26, 1990, June 27, 1990, and June 28, 1990.

Following the incident, Claimant was examined by a nurse who evaluated the injury as back pain and noted no broken areas of skin. Claimant was referred to Dr. Ulrich.

Dr. Ulrich noted that Claimant had fallen approximately three feet from a ladder. The doctor assessed the injury as a contusion to the back area, ordered an x-ray of the spine and a lay-in for three days. The x-rays showed no evidence of fracture or dislocation. The doctor assessed the condition as a contusion, ordered a muscle relaxant for three days and a low bunk for ten days.

Following his three-day medical lay-in, Claimant was informed that he had been terminated from the asbestos crew. Claimant testified that he had not been involved in any incidents of discipline from the time of his initial assignment on February 22, 1990, to the date of injury on June 29, 1990.

The Respondent introduced the following documents in support of the Claimant's termination from the asbestos unit:

(1) A memorandum dated June 4, 1990, from Lt. Cox, Internal Affairs, evidencing an investigation into Claimant's assertions that people are "out to get him." The memo states that all Claimant's assertions were found to be unsubstantiated. The memo further cites Claimant's inability to accept orders. In conclusion, the memo recommends Claimant's removal from the asbestos unit due to Claimant's inability to accept orders and due to Claimant's irrational behavior.

(2) A memorandum dated June 7, 1990, from Warden Bosse to the asbestos superintendent recommending Claimant's removal from the asbestos unit.

(3) A memorandum dated June 18, 1990, from asbestos supervisor to the asbestos superintendent citing disturbances caused by Claimant and describing Claimant as a slow worker with a poor attitude who questions authority.

(4) A memorandum dated June 20, 1990, from asbestos superintendent Michael Shelton confirming Claimant's removal from the asbestos crew.

Claimant introduced a letter dated January 30, 1991, from Marjorie Donahue, coordinator of inmate issues, which states that Claimant was compensated in full for the month of June, 1990 in the amount of $157.62. In addition, Claimant was compensated $51.67 for lay-in status in July, 1990 and that the full amount was posted to Claimant's trust fund account.

The following evidence of Claimant's back treatment subsequent to the injury on June 29, 1990:

On July 30, 1990, Claimant was seen on the sick call complaining of low back pain after jumping on his bed. Following an examination by a doctor on July 31, 1990,

the doctor noted that Claimant had no restriction of movement and prescribed pain medication for seven days.

On September 15, 1990, Claimant was again examined by a doctor for an evaluation of back pain. The doctor noted tenderness due to back strain.

October 1, 1990, Claimant received an orthopedic consultation with Dr. Bowen. The examination revealed evidence of muscle spasm in the right parascapular area which was injected with lidocaine and aristospan.

Upon subsequent visits with Dr. Bowen on October 15, 1990, and November 12, 1990, Claimant reported a significantly improved condition.

A CT scan performed on November 23, 1990, failed to demonstrate evidence of fracture or dislocation. The doctor reported a normal cervical spine. An examination by Dr. Bowen on December 17, 1990, revealed no abnormalities. Claimant reported no complaints. The doctor declined Claimant's request for physical therapy in light of the fact there were no positive findings or complaints.

On June 11, 1992, Claimant began physical therapy citing the back injury on June 29, 1990. The physical therapy consultant advised exercises. Claimant returned for consultations on June 18, 1992, July 9, 1992, and July 16, 1992. On July 16, 1992, Claimant was discharged from physical therapy.

Claimant has repeatedly stated that he had not suffered any back pain or back injury prior to June 29, 1990. However, Claimant was, in fact, treated by the Inmate Health Service on February 7, 1988 for complaints of back pain.

Claimant seeks damages in the amount of $25,000 for pain and suffering and future complications or suffering as

a result of the Respondent's negligence. Claimant also seeks an unstated amount of back pay for the period of his lay-in.

I. Whether Respondent Is Liable to Claimant for Injuries Claimant Suffered While in the Course of Performing His Assigned Tasks

The law is clear, the State of Illinois owes a duty to inmates to provide them with safe conditions under which to perform their assigned work. To recover in a claim for personal injury against the State, 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. *Reddock v. State* (1978), 32 Ill. Ct. Cl. 611.

The Claimant testified that on June 29, 1990, he was working in his assigned capacity in the asbestos unit. At approximately 8:20 a.m. Claimant was standing on a ladder hanging plastic on the back end of the boiler. Pursuant to his supervisor's orders, Claimant descended the ladder. As he descended the ladder, he slipped on some oil on the ladder and fell backwards, striking his back on a steel beam.

Prior to the occurrence, Claimant had warned his supervisor of the dangerous condition of the presence of the oil on three occasions, yet Respondent failed to remove the oil and ordered Claimant to continue working. Respondent did not deny notice of the dangerous condition nor did Respondent produce any evidence to contradict Claimant's testimony.

Claimant has proved that Respondent failed to provide him with a safe environment in which to perform his assigned task. The breach of the Respondent's duty to Claimant was the direct proximate cause of Claimant's injury. Following the incident the doctors assessed Claimant's

injury as a contusion or bruise to the back area and ordered a lay-in for three days. The subsequent x-rays showed no evidence of fracture or dislocation.

Although Claimant produced evidence of subsequent visits to the doctor, Claimant failed to establish a causal connection between the incident of June 29, 1990, and subsequent treatment. Claimant also failed to establish that he had suffered any permanent injuries as a result of the occurrence of June 29, 1990.

Therefore, in assessing damages, the Court should only consider the injury proven as a direct result of the occurrence.

As to the issue of whether Claimant was contributorily negligent, the Court has recognized that an inmate does not enjoy the same independence as a person outside the penitentiary. To refuse the orders of a supervisor may subject the inmate to disciplinary action. *Davis v. State* (1987), 39 Ill. Ct. Cl. 185.

In this case, Claimant testified that he had warned his supervisor of the dangerous condition of the oil on the boiler on three occasions prior to the resulting injury. It is not unreasonable that Claimant continued to perform his assigned work in spite of the dangerous condition where failure to do so would have resulted in disciplinary action.

The evidence supports an award for Claimant's pain and suffering for back discomfort resulting from his fall for a period of three days. An award of $150 is entered in favor of Claimant.

II. Whether Claimant Is Entitled to Lay-in Pay

The Illinois Department of Corrections procedure manual states that inmates on "lay-in" are to be paid $2.50 per day. The manual further dictates that an "in-

mate receiving lay-in pay must not be under investigation or in segregation."

Claimant contends that he is entitled to lay-in pay for the term of the injury resulting from the Claimant's fall from a ladder on June 29, 1990.

Following Claimant's fall from the ladder on June 29, 1990, Dr. Ulrich examined Claimant and ordered a three-day lay-in. Claimant did not complain of back pain again until July 30, 1990. A doctor's examination of Claimant on July 31, 1990, revealed that Claimant had no restriction of movement and further lay-in was not ordered.

It is clear that if Claimant was entitled to lay-in pay it was only for the period of the actual lay-in, three days following the injury. Yet Claimant was, in fact, compensated for the entire month of July, 1990. Lay-in pay in the amount of $51.67 was posted to Claimant's trust account as compensation for July, 1990.

The Illinois Department of Corrections procedure manual dictates that lay-in pay should be denied when an inmate is under investigation. In this case, Claimant was, in fact, under investigation for his conduct while assigned to the asbestos crew. The investigation into Claimant's behavior and the decision to terminate Claimant were documented prior to Claimant's injury on June 29, 1990. In this factual situation, it was clearly within the discretion of the industry superintendent to deny Claimant's lay-in pay in its entirety.

Claimant was compensated for the entire month of July, 1990. There is no evidence to support the Claimant's contention that he is entitled to additional lay-in pay.

Claimant's request for award of lay-in pay is denied.

(No. 91-CC-1525—Claim denied; motion for reconsideration denied.)

RUDOLPH LUCIEN, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed December 2, 1993.

Order on petition for rehearing filed January 12, 1994.

RUDOLPH LUCIEN, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (CHRISTOPHER K. WELLS, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*bailment—what Claimant must prove*. In a bailment case, a Claimant must prove by a preponderance of the evidence that specific property of the Claimant has come into the exclusive possession of the State and has not been returned before a presumption of negligence is established that the Respondent must rebut.

SAME—*missing personal property—insufficient evidence of bailment—claim denied.* Where an inmate sought damages for personal property allegedly lost by prison officials during his transfer between correctional facilities, the claim was denied notwithstanding the inmate's allegation that discrepancies existed between his bill of particulars listing the missing items, and several personal property inventories prepared by prison officials, since the inmate failed to establish the loss of the items for which he sought recovery, and there was evidence suggesting that those items were in storage awaiting the inmate's release from segregation status.

OPINION

FREDERICK, J.

Claimant, Rudolph Lucien, an inmate with the Illinois Department of Corrections, seeks damages against the Respondent, State of Illinois, in the amount of $558.81 alleged by Claimant to be the value of personal property lost by Claimant through alleged fault or neglect of the Respondent.

Claimant's complaint alleges that on May 4, 1990, a large volume of personal property belonging to Claimant was confiscated by correctional officers. Claimant contends that although some of his property has been returned, a

large amount of the property with an alleged value of $558.81 has not been returned.

The complaint filed December 5, 1990, alleges that the property in question was removed by correctional officers from his cell. The complaint further alleges that three months later Claimant was transferred from Pontiac to Menard where he has been continuously incarcerated in the segregation unit. At the time of the filing of the complaint, Claimant asserts that certain items of his personal property described in the complaint and listed in the bill of particulars were "lost or stolen" while in the possession of the Respondent.

A rather substantial number of documents were submitted by way of a departmental report. The departmental report indicates that Claimant filed grievances with the Administrative Review Board on August 13 and August 22, 1990, with regard to his claims of lost personal property stemming from his transfer to Menard Correctional Center from Pontiac Correctional Center on August 8, 1990. The Administrative Review Board, after a review of information from Pontiac Correctional Center and Menard Correctional Center, concluded that the Claimant's property was appropriately transferred and arrived at Menard Correctional Center with several specific exceptions being: one scarf, two pair of winter gloves, one white gold cross with matching chain, food items, and 20 envelopes. It was noted that the Administrative Review Board was unable to verify the Claimant's possession of the excepted items, and there was no verification of quantity with respect to the food items which were consumable.

Subsequently, in a letter from Howard A. Peters, the Warden of the Pontiac Correctional Center to Rick A. Dunbar, it appears with respect to the "silver tone cross on a chain" that there was no "Jewelry Retention Statement"

on file at Pontiac for Claimant on either a silver chain with cross or a black cross. As to "tapes," Warden Peters reports that only 22 cassette tapes were removed from the possession of Claimant on May 20, 1990, and the 22 tapes were returned to the Claimant on June 20, 1990, and were transferred to Menard on August 8, 1990.

At the hearing in this cause, Claimant elected to make narrative statements regarding his claim. Claimant made reference to the departmental report and offered exhibits which Claimant contended disputed the statements of Warden Peters in his letter to Rick A. Dunbar of January 11, 1991.

First, Claimant submitted Claimant's Exhibit 1 consisting of three pages. The first page was a disciplinary report reflecting that the officer found what he believed to be unauthorized property which he removed from Claimant's cell (#818) consisting of one black pullover sweatshirt, one black zip-up hooded sweatshirt, one black Nike nylon pants, one pair of black gloves, three black stocking caps, one black scarf, and one navy blue pillowcase which he, in turn, turned over to his shift commander. The second page of the exhibit was a memo offered by Claimant to the adjustment committee. The third page was the adjustment committee's summary dated May 9, 1990, reflecting that the institutional adjustment committee read the disciplinary report and Claimant's written statement. The adjustment committee's summary reflects that the Claimant had no receipt for the unauthorized clothing found in his cell, and that Claimant requested that the institution provide him with receipts. The summary disposition reflects that the institutional adjustment committee found that Claimant had unauthorized property in his cell and that the matter was placed under investigation by Internal Affairs. Exhibit 1 in three pages was admitted into

evidence as Claimant's attempt to demonstrate that property, a portion of which was included in the complaint at bar, was in fact, taken from his person by Respondent's agents on May 4, 1990. Claimant contended on the same date (May 4, 1990), an additional item that was seized from his cell (Cell #818) was the silver-tone chain mentioned in Warden Peters' letter of January 11, 1991.

Claimant contended that Warden Peters' letter of January 11, 1991, misstated the facts in relation to the requirement that "Jewelry Retention Statements" were required for jewelry owned by inmates at the Pontiac Correctional facility. Claimant makes reference in his own written statement to the Pontiac disciplinary report as evidence that he did not make the "craft" items which Warden Peters speculated may have been made by him but, in fact, he had obtained those items from "Leisure Time Services" at the Pontiac Correctional Center.

Claimant testified that contrary to the "disciplinary report" of May 4, 1990, there were five stocking caps removed from Claimant's possession instead of three, and that only two were returned.

Again, referring to the letter of Warden Peters dated January 11, 1991, the Claimant's testimony reveals that the Claimant's theory of liability is predicated, at least in part, on the fact that on April 9, 1990, inventory showed certain clothing items (e.g. one pair of gloves) that were not also revealed as being present on the May 20, 1990, inventory. This fact, combined with Claimant's Exhibit 1 (the disciplinary report of May 4, 1990), revealing that one pair of black gloves were removed from Claimant's possession by a correctional officer and "turned over to the Shift Com" helps to establish the State's liability in this case. Again, pointing to the May 4, 1990 disciplinary report, Claimant disputes the content of the report and

states that on May 4, 1990, "all" of his personal property was seized from cell 818 which included items not listed as being removed from the possession of the Claimant on the disciplinary report (Plaintiff's Exhibit 1) including "nylon underwear."

On April 9, 1990, the Claimant was placed in disciplinary segregation at Pontiac Correctional Center. An inmate's access to, or right to, possession of personal property while he is placed in disciplinary segregation is severely limited by the Illinois Department of Corrections. On the date that Claimant was placed in disciplinary segregation at Pontiac Correctional Center, the personal property that he was not entitled to possess while in disciplinary segregation was confiscated. The departmental report, accompanied by the letter of Robert J. Senger to the Honorable Roland W. Burris dated January 22, 1991, contains a "Resident Personal Property Inventory Record" dated 4/9/90 prepared at Pontiac Correctional Center which purports to be a list of the Claimant's resident personal property on the date and time of his placement into disciplinary segregation. In comparing Claimant's "bill of particulars" attached to his complaint to the "resident personal property inventory record" prepared at Pontiac Correctional Center on April 9, 1990, the following is noted:

(1) One silver tone cross on chain is listed in this inventory; Claimant's complaint seeks damages of $300 for one *white gold* cross with matching chain.

(2) The 4/9/90 inventory lists 6 undershorts-briefs and 21 undershorts-boxers. Claimant seeks reimbursement of $64 for eight "nylon underwear."

(3) The inventory lists four sweatshirts and four sweatsuits; Claimant seeks damages of $70 for two zip-up, hooded sweatshirts and two Nike nylon sweatpants.

(4) The 4/9/90 inventory lists 25 audio cassettes; Claimant seeks $30 in damage for the loss of five cassette tapes.

(5) The 4/9/90 inventory lists one pair gloves; Claimant seeks damages of $9 for one pair black gloves.

(6) The 4/9/90 inventory lists no hats or scarves; Claimant seeks $18 in damage for the loss of three black religious caps and one black religious scarf all made of yarn.

(7) The 4/9/90 inventory lists three thermal underwear; Claimant seeks $15 in damage for the loss of two sets of thermal underwear.

(8) The 4/9/90 inventory lists various audio equipment (see third page) but lists no ear plug sets; Claimant seeks damages of $2 for one ear plug set.

(9) The 4/9/90 inventory lists no consumables or food items; Claimant seeks approximately $20 for 10 listed food items on his Bill of Particulars.

(10) The 4/9/90 inventory lists six pillowcases; Claimant seeks indefinite damages for his loss of one navy blue printed pillowcase.

There is no evidence as to which of the items listed in the April 9, 1990 inventory were permitted to remain in the Claimant's possession while in disciplinary segregation status at Pontiac Correctional Center; from the record as a whole, it is reasonable to assume that some, but not all, of Claimant's personal property was permitted to be in his possession while in disciplinary segregation status at Pontiac Correctional Center.

Claimant's Exhibit 1 (disciplinary report of May 4, 1990) reveals that certain items were removed from Claimant's possession as being "unauthorized" at Pontiac Correctional Center. These items consist of the following:

one black pullover sweatshirt
one black zip-up hooded sweatshirt
one black Nike nylon pants
one pair of black gloves
three black stocking caps
one black scarf
one navy blue pillowcase

Of the above-listed items, only the three black stocking caps and the one black scarf can be said to be *not listed* on the April 9, 1990 inventory. As to the remainder of the items removed from Claimant's possession on May 4, 1990, they might very well have been listed on the April 9, 1990 inventory, but with slightly different descriptive adjectives.

Claimant's transfer in disciplinary segregation status to Menard Correctional Center occurred on August 8, 1990. Again, "Resident Personal Property Inventory Records" were prepared at Pontiac Correctional Center (dated August 8, 1990) with subsequent follow-up inventories of personal property being prepared at Pontiac on October 11, 1990, both of which appear as part of the departmental report in this case. Comparing the resident personal property inventories of August 8, 1990 and October 11, 1990 with the personal property inventory of April 9, 1990 and the list of property removed from Claimant's possession on May 4, 1990, certain difficulties arise. For example, as to the property described and itemized in Claimant's bill of particulars, it is noted as follows:

1. The 8/8/90 inventory lists a black cross but not a white gold cross with matching chain.

2. The 8/8/90 inventory lists five undershorts-briefs and four undershorts-boxer, but does not describe "nylon underwear."

3. The 8/8/90 inventory lists two sweatshirts and

again four pairs of sweatshirts but does not describe "zip-up hooded sweatshirts" or "Nike nylon sweatpants."

4. The 8/8/90 inventory lists 22 cassette tapes as opposed to the listing of 25 audio cassette tapes in the 4/9/90 inventory.

5. Due to unclear markings on the 8/8/90 listing, it is uncertain as to whether one pair of gloves is listed or not.

6. The 8/8/90 inventory lists two caps and possibly one hat as compared to no caps or hats listed on the April 9, 1990, inventory.

Again, as at the Pontiac Correctional Center, there is no evidence to establish what personal property of the Claimant, out of the various "transfer" inventories, was allowed to be placed in Claimant's possession while in his disciplinary segregation status while at Menard Correctional Center. Again, it is reasonable to assume that some, but not all, of Claimant's property has been allowed to be in his possession while in disciplinary segregation status. Claimant has not received, and will not receive, unrestricted access to his personal property until he is discharged from disciplinary segregation status. Claimant contends that since there are anomalies between the inventory of April 9, 1990 and the list of unauthorized property removed from his possession on May 4, 1990 at Pontiac Correctional Center as compared to the various "transfer" inventories prepared at the time of and subsequent to his transfer to Menard Correctional Center, then he should be entitled to claim damages for the loss of these items to the extent that it can be argued that certain items do not appear on the transfer inventories which Claimant contends were shown to be in his possession, or among his items of personal property on April 9, 1990.

It is submitted that Claimant's entire case must be

predicated on the assumption that identical, or at least recognizable descriptive adjectives as to miscellaneous items of personal property prepared and written by different correctional officers at different times must exist in the record keeping of the Department of Corrections in order to avoid or defeat the claims of inmates to the loss or destruction of their various miscellaneous items of personal property. For example, Claimant seeks judgment for $300 against Respondent for the loss of "1 silver tone cross on chain" listed in the inventory of 4/9/90. The inventory of 8/8/90 lists "1 black cross." At the hearing, Claimant produced a plastic black cross which Claimant contended could not be the "1 white gold cross with matching chain" for which Claimant seeks damages. Claimant contends that the descriptive adjectives used by the correctional officer preparing the April 9, 1990 inventory (1 silver-tone cross on chain) could not be confused with the black plastic cross demonstrated to the Commissioner at the hearing or the cross described by the correctional officer on August 8, 1990, as "one black cross." Thus, Claimant argues that he should be awarded damages even in the face of the departmental report containing Warden Peters' letter of January 11, 1991, to Rick A. Dunbar which explains in detail that at Pontiac Correctional Center, jewelry is not confiscated when inmates are assigned to segregation units, and further that Pontiac Correctional Center required "Jewelry Retention Statements" for "all jewelry owned by inmates at this facility." Claimant did not tender and Warden Peters explained that Claimant did not have any "Jewelry Retention Statement" for the claimed lost property.

As to the various garments Claimant contends have been lost for which Claimant seeks monetary damages, it is impossible to corroborate Claimant's claims by virtue of the personal property inventory records submitted due to

the probability, and indeed, likelihood, that two separate correctional officers at different times would describe miscellaneous clothing articles using adjectives which could distinguish between phrases such as "black and white pullover sweatshirt" from "2 sweatshirts" or "4-pr. sweatshirts." (See transfer inventory of August 8, 1990.) Further, Claimant seeks to recover damages for black religious caps and scarves made of yarn. Yet, the transfer inventory of August 8, 1990 reflects "2 caps" and "2-pair homemade knits." The officer at Pontiac Correctional Center removing unauthorized property from Claimant's possession on May 4, 1990 described property removed from Claimant's possession including "3 black stocking caps" and "1 black scarf." Claimant wore a black stocking cap to the hearing. There is no evidence in this record to support Claimant's contentions regarding the consumable items listed on his bill of particulars.

Finally, with respect to the navy blue pillowcase, it should be noted that the transfer inventory of August 8, 1990 lists "2 pillowcases." It is impossible to determine that Claimant has been deprived of the navy blue printed pillowcases, or any pillowcase at all.

A complete review of the departmental report and the Claimant's testimony at the hearing reveals that Claimant's case is predicated almost entirely on the assumption that the use of descriptive adjectives by different correctional officers at different times in respect to widely varied miscellaneous personal property, must always be of sufficient similarity or context to enable persons upon third party review to determine the exact identity of such items of personal property. No evidence was adduced by Claimant from which this Court can conclude, that it is either possible, practical, or feasible to require this standard of accuracy from employees of the

Illinois Department of Corrections in preparing resident personal property inventory records.

Indeed, in the final analysis, Claimant has failed to corroborate by any convincing evidence whatsoever, that the items for which he seeks monetary damages are not indeed, in storage awaiting his release from disciplinary segregation status; indeed, there is some indication in the record from an analysis of the various personal property inventory records, that such items are, in fact, in storage awaiting Claimant's change of status. The items were not subpoenaed to the hearing by Claimant for comparison.

In a bailment case, a claimant must prove by a preponderance of the evidence that specific property of claimant has come into the exclusive possession of the State and has not been returned before a presumption of negligence is established that Respondent must rebut. (*Doubling v. State* (1976), 32 Ill. Ct. Cl. 1; *Crossland v. State* (1988), 41 Ill. Ct. Cl. 180.) In this case, that evidence is lacking as the Claimant has failed to meet his burden of proof.

For the foregoing reasons, it is ordered that this claim be and hereby is denied.

ORDER

FREDERICK, J.

This cause coming on Claimant's motion for reconsideration of opinion filed December 2, 1993, and the Court having reviewed the entire case, and the Court being fully advised in the premises, wherefore, it is ordered that the motion for reconsideration is denied.

(No. 91-CC-1557—Claim denied.)

MALCOLM JENNINGS, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 26, 1994.

MALCOLM JENNINGS, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (CHRISTOPHER K. WELLS, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*inmate did not exhaust administrative remedies—missing property claim denied.* Where there was unrebutted *prima facie* evidence that an inmate did not appropriately seek to exhaust his administrative remedies in accordance with section 790.60 of the Court of Claims Regulations, his claim seeking judgment against the State for the cost of a pair of basketball shoes which were allegedly lost upon his admission to a hospital was denied.

OPINION

FREDERICK, J.

Claimant, Malcolm Jennings, an inmate with the Illinois Department of Corrections, seeks judgment against the State of Illinois in the sum of $85 based on allegations that Claimant was deprived of a pair of basketball shoes while they were entrusted to the exclusive care of Respondent. Claimant contends that on December 2, 1989, he was removed from Menard Correctional Center on a medical writ to Chester Memorial Hospital. Upon arriving at the hospital, Claimant was instructed by escorting officers to remove his clothing which was placed in the exclusive possession of the officers. After Claimant was released from Chester Memorial Hospital and returned to Menard Correctional Center a day later, Claimant requested that his clothing be brought to him. Claimant's complaint alleges that his clothing could not be found.

Upon hearing, Claimant testified that when he was taken to the hospital on December 22, 1989, he was

wearing a pair of Nike solo flight basketball shoes, and upon arriving at the hospital, he was asked to remove the clothing so that it could be taken back to the correctional center.

Claimant filed a grievance for the loss of his basketball shoes at the institutional level, but was unable to obtain redress. On February 26, 1990, Claimant sent a grievance to the Administrative Review Board that he had "waited too long to file a grievance."

Claimant contends that the shoes had been brand new in the month before their loss and that he had only worn them three times, namely twice on a visit and once to the hospital. Claimant contends that a pair of shoes of the kind in question would have lasted a year.

Claimant stated that he bought the shoes from the Chernins Shoe Store in Chicago.

Claimant denied any understanding of the time limitations on review to the Administrative Review Board under rule 504-F.

The departmental report was submitted in this case which contained correspondence from the claims coordinator for the Illinois Department of Corrections addressed to the Attorney General dated December 19, 1990, purporting to reflect that Claimant had violated Departmental Rule 504-F in that his grievance had not been submitted in a timely manner. Rule 790.140 of this Court provides that all records and files maintained in the regular course of business by any department, commission, board, agency or authority of the State of Illinois, and all departmental reports made by any officer thereof relating to any matter or case pending before the Court, shall be *prima facie* evidence of the facts set forth therein; provided, a copy thereof shall have been first

duly mailed or delivered by the Attorney General or the legal counsel of the appropriate state agency to the Claimant, or his attorney of record, and five copies filed with the clerk. The departmental report was received by the Commissioner one week before the hearing, having been submitted from the office of the clerk of the Court with correspondence dated eight days before the hearing.

Respondent offered no evidence. Neither party filed a brief.

In *Terry v. State* (1988), 41 Ill. Ct. Cl. 164, this Court denied the claim of a claimant because that claimant had not sought relief from the Administrative Review Board. In the *Terry* case, the claimant contended that he wrote the Administrative Review Board in Springfield and contended that he had not heard from the Board. As in the case at bar, claimant produced no copy of any correspondence with the Administrative Review Board and admitted that he had not had a hearing before the Administrative Review Board. In *Terry, supra*, this Court concluded that the claimant had not exhausted his administrative remedies in accordance with section 790.60 of the Court of Claims Regulations (74 Ill. Adm. Code 790.60) and denied the claim.

There is unrebutted *prima facie* evidence in the record in this case that Claimant did not appropriately seek to exhaust his administrative remedies in accordance with the rules governing grievances before the Administrative Review Board. A failure to exhaust administrative remedies because of a failure to follow the required procedures is no different than making no attempt to exhaust administrative remedies at all. Claimant has sought a final adjudication of his claim without exhausting his administrative remedies.

Based on the foregoing, it is the order of the Court that this claim be and hereby is denied.

(No. 91-CC-2797—Claim denied.)

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

Opinion filed January 21, 1994.

JOHN BUTLER, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (CHRISTOPHER K. WELLS, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*assault on inmate must be foreseeable for liability to attach.* The State is not an insurer of the safety of persons under its control, and unless the State can reasonably foresee an assault on an inmate there can be no liability.

SAME—*negligence—attack on inmate in gym shower room—claim denied.* In a negligence claim arising out of an attack on an inmate by other inmates in a gym shower room, where the Claimant was never directly threatened by his assailants prior to the attack, did not name the individuals he suspected were going to attack him, and was placed in temporary protective custody after advising prison officials of his concerns, the State was not liable to the inmate and the claim was denied.

OPINION

PATCHETT, J.

This claim arises from a disturbance in the Department of Corrections. The Claimant, while an inmate with the Illinois Department of Corrections, was attacked by other inmates on January 19, 1991, in the gym shower room at Menard Correctional Center. He was cut by a steel shank over his right eye, and a small scar was created by the attack.

The Claimant testified that he had problems with another inmate. He told a correctional officer about the incident and was placed on temporary deadlock. After he was released from deadlock, he was attacked by another inmate during the next gym period.

The Claimant testified that there was no officer in the shower room and that officers normally do not go into the shower room while inmates are taking showers. He did report the injury in question to correctional officers and filed a grievance.

The Claimant suggests that liability arises because the officer should have seen the possibility of disturbance and protected him. He testified that it was the responsibility of the correctional officer to provide an environment where an attack could not happen. On cross-examination, he admitted that after he advised correctional officers of his concerns, he was put in lockdown, or temporary protective custody, for three days.

The Claimant also admitted on cross-examination that he was never directly threatened with bodily harm by the inmate who ultimately attacked him before the actual attack. He also did not give to the guards the names of inmates he suspected were going to attack him. He never sued the inmate who attacked him, but as mentioned earlier, he did file a grievance report.

On cross-examination, the Claimant further admitted that when filing an inmate injury report dated January 19, 1991, he stated that he was struck over the right eye by another player's elbow during a basketball game. He admitted that the inmate injury report was incorrect and stated that he lied because he fears for his safety. The Claimant had no complaints about the medical care received, and he has no other complications from the injury other than the slight scar.

The leading case in the Court of Claims on inmate attack cases is *Dorsey v. State* (1977), 32 Ill. Ct. Cl. 449. There the court held that the State was not negligent, "* * * because the record is devoid of anything that would have put the State on notice that the attack, which did occur, might have occurred." *Dorsey* at 451. The State is not an insurer of the safety of persons under its control. *Dorsey* at 453. The *Dorsey* case was cited with approval in the recent case of *Bock v. State* (1991), 43 Ill. Ct. Cl. 299, 305. There the court reaffirmed that unless the State could reasonably foresee an assault, there could be no liability.

The Claimant testified that he warned the officers of a possible attack and was placed on protective status for three days. He also acknowledged that he did not specifically identify the persons who he considered a threat to him. The Respondent's agents obviously took steps to protect the Claimant from immediate harm after the report of the potential attack. It is difficult to imagine how the officers could do more based on the information they had in their possession. Clearly, they were not negligent. Therefore, this claim is denied.

(No. 91-CC-2932—Claimant awarded $505.45.)

RONALD SEATS, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 6, 1994.

RONALD SEATS, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (WENDALL HAYES and VERNE DENTINO, Assistant Attorneys General, of counsel), for Respondent.

PRISONERS AND INMATES—*State liable in claim for lost personal property—no excessive depreciation allowed in determining damages.* Although the State, after admitting liability in an inmate's claim for lost personal property, argued that the inmate was only entitled to the value of the property at the time of loss rather than the replacement cost, and that the items had minimal or no value, the Court did not allow excessive depreciation in valuing the property for purposes of awarding damages, since to do so would have effectively denied the inmate of his property.

OPINION

SOMMER, C.J.

This is a prisoner's claim for lost property. The parties agree that the property was lost while in the exclusive possession of the State. When the Claimant was transferred from one institution to another, an inventoried box of his property was missing and never found. The State admits liability under the doctrine of *Doubling v. State* (1976), 32 Ill. Ct. Cl. 1.

The only dispute is over the value of the property that was lost. Items lost included a color television set, court transcripts, pencils (15), law books (3), eyeglasses, books (6), playing cards (2), briefcases (2), a magazine, cigarettes (23 packs), photographs of family (8), frames (2).

The State's position is that the loss is the value at the time of loss, not the replacement cost. The State argues that the value of the present lost items was minimal. For example, the State contends that the television, which was two years old, was worth nothing due to depreciation. The State also assigned a flea market value to the books and assigned minimal or no value to the other items.

This Court has ruled in *Hamilton v. State* (1992), 45 Ill. Ct. Cl. 324, that a prisoner's situation is somewhat different than a civilian. When a prisoner loses an item, he must generally go to the commissary to purchase a replacement at the commissary's prices, and due to a prisoner's generally

impoverished condition he often has to do without the lost item if not reimbursed adequately. An excessive assignment of depreciation effectively deprives the prisoner of his property. If the prisoner had a working television set when he was transferred, he should be entitled to a working television set when he arrives. If it does not work or is missing, he has nothing. *Hamilton, supra*.

Due to the prisoner's situation, his testimony as to the commissary cost or original cost is good practical evidence of the value of an item, though certainly some depreciation may be allowed when warranted. *Hamilton, supra*. The values as established by the prisoner's own testimony are not speculative, but are to be weighed by the Commissioner in conjunction with all the evidence before him including the credibility and demeanor of the parties.

The Commissioner found at the hearing that the value of the lost items were $505.45. We will adopt the Commissioner's finding.

It is therefore ordered that the Claimant be paid $505.45 in full and complete satisfaction of this claim.

(No. 92-CC-0323—Claim dismissed;
motion to vacate order of dismissal denied.)

DIANE WELSH, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed June 25, 1993.

Order filed June 29, 1994.

SCHAFFNER, RAVINOWITZ, & FEINARTZ, P.C., for Claimant.

ROLAND W. BURRIS, Attorney General (BARRINGTON D. BAKER, Assistant Attorney General, of counsel), for Respondent.

EXHAUSTION OF REMEDIES—*Claimant must exhaust all other sources of recovery*. Pursuant to section 25 of the Court of Claims Act and section 790.60 of the Court of Claims Regulations, a person who files a claim before the Court of Claims shall exhaust all other remedies and sources of recovery whether administrative, legal or equitable, and the exhaustion requirement is mandatory rather than optional.

SAME—*personal injuries—claim dismissed for failure to exhaust remedies—motion to vacate order of dismissal denied*. A claim brought by a woman who allegedly suffered personal injuries while visiting a patient at a State mental health facility was dismissed based on her failure to exhaust all remedies available to her against a known tortfeasor before seeking damages in the Court of Claims, and the woman's motion to vacate the order of dismissal was denied.

ORDER

FREDERICK, J.

This cause coming on to be heard on the motion of Respondent to dismiss the claims herein, due notice having been given the parties hereto, and the Court being fully advised in the premises:

The Court finds that the claim herein seeks damages for personal injuries allegedly sustained by Claimant during an incident which occurred while she was visiting a patient at Madden Mental Health Center in Hines, Illinois. Based upon this incident, the Claimant alleges serious personal injuries. According to the Claimant's complaint, it was the negligence of the Department of Mental Health & Developmental Disabilities which caused the plaintiff these alleged injuries. We note that section 25 of the Court of Claims Act (Ill. Rev. Stat. (1989), ch. 37, par. 439.24—5) and section 790.60 of the Court of Claims Regulations (74 Ill. Adm. Code 790.60) require that any person who files a claim before the Court of Claims shall exhaust all other remedies and sources of recovery whether administrative, legal or equitable.

The leading case regarding the Court of Claims exhaustion of remedies requirement is *Doe v. State* (1991), 43 Ill. Ct. Cl. 172, which is dispositive of the case at bar. In *Doe*, claimant, a patient at John J. Madden Health Center, brought suit against the State after she had been sexually assaulted by another Madden patient. The claimant sued the State but did not file an action against her assailant. Accordingly, respondent moved to dismiss for failure to exhaust remedies pursuant to section 25 of the Court of Claims Act and section 790.60 of the Court of Claims Regulations. This court, in *Doe*, followed the reasoning set forth in *Boe v. State* (1984), 37 Ill. Ct. Cl. 72, 75, where we held that claimants "must exhaust *all* possible causes of action before seeking final disposition of a case filed in the Court of Claims." (Emphasis in original.) The language of section 25 of the Court of Claims Act and section 790.60 of the Court of Claims Regulations clearly makes the exhaustion of remedies mandatory rather than optional. To quote our prior watershed exhaustion of remedies case (*Lyons v. State* (1981), 34 Ill. Ct. Cl. 268), we stated:

"The requirement that claimant exhaust all available remedies prior to seeking a determination in this Court is clear and definite in its terms. It is apparent to the Court that claimant had sufficient time to both become aware of his other remedies and to pursue them accordingly. The fact that claimant can no longer pursue those remedies cannot be a defense to the exhaustion requirement. If the Court were to waive the exhaustion of remedies requirement merely because claimant waited until it was too late to avail himself of the other remedies, the requirement would be transformed into an option, to be accepted or ignored according to the whim of all claimants. We believe that the language of Section 25 of the Court of Claims Act [citation omitted] and Rule 6 of the Rules of the Court of Claims quite clearly makes the exhaustion of remedies mandatory rather than optional."

These principles were most recently used in our dismissal of the case of an inmate who had allegedly been attacked by his cellmate. We held that claimant failed to exhaust his remedies by not pursuing a civil action for damages against a known tortfeasor. (*Lutz v. State* (1989), 42 Ill. Ct. Cl. 124.) The appropriate procedure would be

to sue the known tortfeasor in state court, file against the State of Illinois in the Court of Claims, and have the Court of Claims case placed on general continuance.

We find that as in *Doe* and *Lutz*, the instant Claimant had an affirmative duty to exhaust all remedies available against a known tortfeasor before seeking final damages in the Court of Claims. Thus the Claimant has failed to comply with section 25 of the Court of Claims Act, *supra*, and section 790.60 of the Court of Claims Regulations. Section 790.90 of the Court of Claims Regulations provides that failure to comply with the provisions of section 790.60 shall be grounds for dismissal.

It is therefore ordered that the motion of Respondent be, and the same is hereby granted, and the claim herein is dismissed with prejudice.

ORDER

FREDERICK, J.

This cause coming on for hearing on Claimant's motion to vacate order of dismissal entered June 25, 1993, and the Court having reviewed the file, heard oral arguments, and the Court being fully advised in the premises,

Wherefore, it is ordered that the motion to vacate the order of dismissal entered June 25, 1993, is denied.

(No. 92-CC-0447—Claimant awarded $3,500.)

JOHNNY C. ROSS, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 25, 1994.

JOHNNY C. ROSS, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (WENDELL DEREK HAYES, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*inmate burned—State failed to provide safe working procedures—award granted.* An inmate was awarded $3,500 in damages in his claim for burn injuries sustained on his hand when he emptied hot oil into a grease vat pursuant to a prison supervisor's orders, since the supervisor was told that the task required of the inmate would be dangerous but ordered that it be completed in any event, and the State thereby breached its duty to provide the inmate with safe working procedures.

OPINION

SOMMER, C.J.

The Claimant, Johnny Ross, who is an inmate, seeks damages for personal injury from the State of Illinois. At the hearing on April 30, 1993, the State admitted that it was liable "for some amount."

The Claimant seeks damages in excess of $100,000 as compensation for injuries which occurred on August 7, 1991. At the time of his injury he was employed at the Danville Correctional Center as head cook on the night shift. It was his duty to prepare an evening meal to feed officers and late night crews. The Respondent's supervisor ordered the Claimant and another inmate to empty hot cooking oil from a recently-used deep fat fryer into a grease vat that was in back of the dining hall. The Claimant feared that the procedure would be dangerous, and advised both the Respondent's supervisor and the other inmate that this was dangerous and not necessary. As a prisoner, the Claimant had no choice but to obey orders. In performing the task, the Claimant sustained burns to his left hand through no fault of his own.

The State through its supervisor was made aware that the task required of the Claimant would be dangerous, and, yet, continued to order the work done. Therefore,

the State breached its duty to provide safe working procedures. (*Lee v. State* (1992), 44 Ill. Ct. Cl. 246.) The State is, thus, liable for the Claimant's injuries.

An examination of the Claimant's left hand by the Commissioner revealed that the skin color between the ring finger and the little finger on his left hand was splotchy. There were several small discolored areas on the outside of the top of his left hand, the largest of which appeared to be approximately a quarter of an inch to a half an inch in length and three-sixteenths of an inch in width. There were four or five other very small areas of discoloration on the lateral aspect to the back of the left hand. Neither the fingers or the hand appeared to be distorted or scarred in such a way as to change the configuration of the fingers.

The Claimant contended that the injury continued to cause him functional problems with the hand. He testified that he suffers from "slight arthritis occasionally" in his hand. The Claimant also stated that he had been treated for arthritis, and had, at one time, been given a ball to squeeze. He testified that occasionally his hand is a little numb or tingling "basically when the weather gets kind of really bad." At the time of the hearing, his assignment was as a porter who mops and sweeps the floors and empties wastebaskets, which required the repetitive use of his hands. He testified that this work sometimes causes him problems, and when he types the fingers are numb.

The Claimant was treated for his injury from August 8, 1991, through September 16, 1991. At the hearing, he contended that his hand "jingles" and contended that it was hard for him to hold the hand straight, although that condition was not observable by the Commissioner at the hearing. At the hearing, the Claimant complained that there was a difference between his left hand and his right hand which could not be observed by the Commissioner.

The Claimant testified that at the time of the hearing he was experiencing "little neurological feelings" described as "occasional jitters" which could not be observed by the Commissioner at the hearing. He also testified that he had complained that his left hand fell asleep. The Claimant testified that doctors prescribed Naprosyn for the hand, but that had since been discontinued. The Claimant fears that he will not be returned to society as a cook or later promoted to a chef because his left hand falls asleep occasionally and his hands would go numb while "working basically with icing sculptures."

Upon cross examination, it was determined that the Claimant could flex his hand, make a fist and move his wrist up and down and from left to right. He could move one finger at a time and hold on to a ball. He was a right-handed person.

At the conclusion of the hearing, the Claimant commented that it was not his position that he could no longer fully use his left hand. Yet, the Claimant contends that he has sustained a light case of arthritis and fatigue.

The Claimant incurred no medical expense. Other than discoloration of his left hand, there is no evidence of any permanent injury or disability other than the Claimant's own description of the problems he has with the hand.

Although the admission by the assistant Attorney General at the hearing that the State agreed that it was liable for some amount was an unusual action, the Claimant's testimony as to the facts and circumstances of the accident strongly support a finding of liability without regard to the State's admission.

We find that the Claimant is entitled to an award for pain and suffering, discoloration of his hand, and a very

slight disability of his left hand, all of which we will value at $3,500. We find the Claimant's contention that he would not be able to work as a chef because he could not do food decorating to be speculative, therefore we will make no award for future loss of income. It is therefore ordered that the Claimant is awarded $3,500 in full and complete satisfaction of this claim.

(No. 92-CC-1122—Claim denied.)

CONSOLIDATED STEEL & SUPPLY CO., Claimant, *v.*
THE STATE OF ILLINOIS, Respondent.

Order filed December 18, 1992.

CONSOLIDATED STEEL & SUPPLY CO., *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (CYNTHIA WOOD, Assistant Attorney General, of counsel), for Respondent.

STIPULATIONS—*Court is not bound by parties' stipulations*. The Court of Claims is not bound by the parties' stipulations.

SAME—*materials sold to State—stipulation to entry of award not approved because transaction was void—claim denied*. In a lapsed appropriations claim, the Court refused to approve the State's stipulation to the entry of an award to the Claimant for the cost of steel plates sold to the Department of Transportation and the claim was denied, since the transaction in question was void under the State Purchasing Act, but the Court made additional findings for possible consideration of the matter by the General Assembly, noting that the law violation appeared to be inadvertent and that the Claimant did, in fact, suffer a loss in the amount sought.

ORDER

JANN, J.

Claimant Consolidated Steel & Supply Company filed this claim seeking payment in the amount of

$4,415.70 for steel plates sold to the Respondent's Department of Transportation (IDOT). In its standard lapsed appropriation form complaint, Claimant alleged that it made demand for payment to IDOT but the demand was refused on the grounds that the funds appropriated for such payments had lapsed. The Respondent filed a stipulation agreeing to the Court entering an award in the full amount claimed. The case is now before the Court for approval of the stipulation.

The Court of Claims is not bound by such stipulations and it cannot approve the one at bar for the following reason.

The Respondent's stipulation was based on a report compiled by IDOT which report was offered as *prima facie* evidence of the facts contained therein pursuant to section 790.140 of the Court of Claims Regulations (74 Ill. Adm. Code 790.140.) The report indicates that the reason this claim was not paid previously was not because of the lapsing of the appropriation as claimant alleged but because of a violation of the bidding and contract requirements in the Illinois Purchasing Act. (Ill. Rev. Stat. (1991), ch. 127, par. 132.1 *et seq*.) Several purchases were made which, when strung together, exceeded the no-bid purchase limits. Pursuant to §10 of the State Purchasing Act, the transaction is void. Therefore we are constrained by operation of law to deny the claim.

However, for the purpose of possible consideration of this matter by the General Assembly and in fulfillment of our duties as an advisory body to the General Assembly we will make additional findings.

The IDOT report explains that during the winter and spring of 1991 IDOT had a shortage of steel plates such as those which are the subject of this claim. Workers

on the Stevenson Expressway had to borrow steel plates to cover holes appearing on bridge decks. Lanes of Interstate 290 had to be closed during rush hour because full-depth hot patch would not cool and stabilize and no plates were available to "bridge" the patches overnight. In order to rectify the situation and have plates available for future needs, a series of purchases were made.

The purchases were apparently made in good faith; the violation of the Illinois Purchase Act appears to have been inadvertent. The report adds that those responsible for the purchases have been chastised. The steel plates have presumably been used and are not a commodity that can be returned, *i.e.* the transaction cannot be "undone." The Claimant has suffered a loss. The IDOT report is in agreement with Claimant that the amount of the loss is $4,415.70.

Wherefore, it is hereby ordered that this claim be, and hereby is denied.

(No. 92-CC-1262—Claim dismissed.)

THE VILLAGE OF LANSING, Third-Party Claimant, *v.* THE STATE OF ILLINOIS and THE ILLINOIS DEPARTMENT OF TRANSPORTATION, Respondents.

Opinion filed April 11, 1994.

ANCEL, GLINK, DIAMOND, COPE & BUSH, P.C. (THOMAS A. DICIANNI, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (ROBERT J. SKLAMBERG, Assistant Attorney General, of counsel), for Respondents.

NEGLIGENCE—*contribution action against State barred by statute—claim dismissed.* In a third-party contribution action brought by a village

against the State, stemming from a highway auomobile accident caused by a break in the village's water main and a subsequent ice buildup on the highway, the claim was dismissed since it was barred by section 9—113 of the Illinois Highway Code which makes it the sole responsibility of an entity operating a pipeline across a highway to maintain and repair the pipeline, and the Highway Code specifically exempts the State from liability for damages of any kind whatsoever incurred by the entity with respect to its pipeline.

OPINION

SOMMER, C.J.

This claim involves a third-party claim for contribution brought by the Village of Lansing, hereinafter the Village, against the State as a result of an underlying personal injury complaint which is pending against the Village and other defendants in Cook County Circuit Court. (No. 90 L 2235.) None of the other defendants has sought contribution from the State. In the underlying civil litigation, the plaintiff has alleged that her injuries resulted from an automobile accident caused by a break in the Village's water main and subsequent ice buildup on the highway:

"At the time and place aforesaid an open water main operated, managed, maintained and controlled by defendant, VILLAGE OF LANSING, caused an accumulation of ice on Interstate Route 80 in the area of the Burnham Avenue overpass." Complaint, Count II, Paragraph 10.

Among the numerous allegations of negligence against the Village, the plaintiff has claimed that the Village failed to clear the ice from the roadway and failed to warn both motorists and the State of the ice. (Complaint, Count II, Paragraph 11 (e)-(g).) In the contribution claim, the Village has admitted that its water main break was the sole source of the ice, but then the Village has in turn claimed that the Department of Transportation negligently failed to address the ice buildup. The State has moved to dismiss the contribution claim based on section 9—113(g) of the Illinois Highway Code:

"It shall be the sole responsibility of the entity [operating a pipeline across any highway], without expense to the State highway authority, to maintain and repair its * * * pipe line * * * and in no case shall the State

highway authority thereafter be liable or responsible to the entity for any damages or liability of any kind whatsoever incurred by the entity * * *." 605 ILCS 5/9—113(g).

In its objection and response to the motion, the Village has claimed that the aforementioned statute only applies to liability for damage done to the Village's pipeline and related equipment, that the State has an independent duty to the plaintiff to address the ice build-up, and that that duty supports a contribution claim.

The express language contained in this subsection of the statute states, "in *no* case shall the State highway authority * * * be liable or responsible to the [Village] for *any* damages or liability of *any kind whatsoever* incurred by the [Village] * * *." (Emphasis added.) The statute clearly encompasses more than liability for simple damages to the Village's pipeline and related equipment. The statute attaches to any and every form of liability and damages. Thus, the Village's contribution action is barred, for contribution would be for liability incurred by the Village.

A reading of other portions of section 9—113 of the Highway Code supports this result, for the statute has been carefully drawn to shift the burden of all sorts of expenses away from the State and onto the particular utility or other entity. In subsection (e), for instance, the entity is obligated to reimburse the State for all engineering fees, legal fees, and other expenses which the State incurs. Similarly, subsection (f) allows the State to remove, relocate, or modify the entity's equipment at the entity's expense. Accordingly, reading the provisions of section 9—113 as a whole, it is apparent that the drafters intended that the entity alone, and not the State, is to bear any and all liability or other expense which results from its equipment.

Finally, there is case law which supports this reading of the statute. Although not directly on point, the Appellate Court decision in *Reith v. General Telephone Co.* (1974), 22 Ill. App. 3d 337, 317 N.E.2d 369, makes it clear that, as a licensee from the State to use the right-of-way, the entity has assumed the exclusive duty to keep the public right-of-way safe for passers-by:

"The [entity] had an affirmative, non-delegable duty to take precautions against * * * possible and probable injuries around [equipment] constructed through its franchise or permission obtained from the state * * *. [It is] the duty of a licensee to keep [its equipment] along a public right-of-way safe for passers-by * * *. The duty or responsibility to keep the public ways safe was nondelegable * * *. The plaintiff who was injured while using the public way should therefore look to the [entity] held responsible for the [equipment] * * *." 22 Ill. App. 3d 340-43, 317 N.E.2d 373-74.

It is therefore ordered that the Respondent's motion to dismiss is granted, and the Claimant's third party complaint for contribution is hereby dismissed.

(No. 92-CC-2109—Claim dismissed.)

MARY LOUISE FULLER, Claimant, *v.* SOUTHERN ILLINOIS UNIVERSITY and THE BOARD OF TRUSTEES OF SOUTHERN ILLINOIS UNIVERSITY, Respondents.

Order filed January 6, 1994.

MCCANN & FOLEY (BRUCE W. BOOKER, of counsel), for Claimant.

SHARI RHODE, for Respondents.

WORKERS' COMPENSATION—*Claimant awarded damages in workers' compensation claim—exclusivity provision barred further recovery—negligence claim dismissed.* A Claimant who received an award in her workers' compensation action for injuries arising out of, and in the course of, her State employment could not recover in her negligence claim against the State and the claim was dismissed, since the Workers' Compensation Act, where applicable, is an exclusive remedy to recover for personal injuries from an employer.

ORDER

SOMMER, C.J.

This cause coming to be heard on the Respondent's renewed motion to dismiss, due notice having been given, and this Court being fully informed finds:

(1) That a claim for damages for personal injury arising from the same accident was filed both in the Court of Claims and the Industrial Commission by the Claimant.

(2) That on March 26, 1993, an Industrial Commission arbitrator held that the Claimant's injuries arose out of and in the course of the Claimant's State employment, and an award was made.

(3) That no petition for review was filed, and the time for filing such has now passed.

(4) That the Workers' Compensation Act, where it applies, is an exclusive remedy to recover damages for personal injury from an employer. 820 ILCS 305/5(a).

(5) That since the Claimant's injuries have been finally determined by the Industrial Commission without objection to arise out of an accident which occurred in the course of her State employment, a negligence action for these same injuries against the State is barred. *Wills v. State* (1982), 35 Ill. Ct. Cl. 381.

It is therefore ordered that the Respondent's motion to dismiss is granted and this claim is dismissed.

(No. 93-CC-0849—Claim denied.)

ORAL F. GOWER, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed April 12, 1994.

ORAL F. GOWER, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (LAWRENCE C. RIPPE, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*duty owed by State to users of park facilities.* Although the State is not an insurer of the safety of those who make use of its park facilities, the State must exercise reasonable care in the maintenance of its parks and in supervising the use thereof by the public but, before the State can be liable for a Claimant's injury, it must be shown by a preponderance of the evidence that a dangerous or defective condition existed and that the State had actual or constructive notice of the condition.

SAME—*invitees assume normal risks attendant to use of premises.* Invitees to State parks assume normal and obvious risks attendant to the use of the premises.

STATE PARKS AND RECREATION AREAS—*damage to vehicle caused by falling tree limb—no notice to State—claim denied.* A claim against the State for property damage to the Claimant's pickup truck caused by a falling tree limb in a State park was denied, where there was no evidence that a visual examination of trees by park employees imparted to them actual or constructive knowledge of a hazard created thereby, and Claimant, by camping in the vicinity of trees, assumed some risk created by their obvious proximity to the campsite.

OPINION

FREDERICK, J.

Claimant, Oral F. Gower, seeks judgment against Respondent, State of Illinois, in the sum of $1,100 for damages done to Claimant's Ford F-150 pickup truck when a limb fell from a tree and struck his truck at Ft. Massac State Park on October 4, 1992. Claimant's complaint alleges that the limb from the tree fell on his pickup truck "purely and totally" as a result of negligence on the part of Respondent. Claimant contends that many

trees in the park had been chosen to be cut for many months and had been marked with red paint on the trunks. Claimant alleged that dead limbs had been falling from the trees without wind blowing or any other such circumstances. Claimant's complaint is informal and raises many issues regarding allegations of improper care or maintenance at Illinois State parks experienced by Claimant.

At the hearing, Claimant testified that on the date in question, he and his wife pulled into the park, camped and that it was almost dark. There was no wind. Claimant testified that the next thing Claimant knew was that he "heard a boom" and a big tree limb fell down and hit the hood of his truck bending it and bending the cab and the "knickknack" on the side of the door and on the windshield visor. A dent was left in the hood.

Claimant described the facility as a government campground operated by Respondent, State of Illinois. People are invited to bring their vehicles and trailers to the campground and make use of it and a fee is charged. Claimant and his wife had paid the fee.

Claimant testified that a State employee, being the hostess of the campground, was present when the accident happened. Claimant testified that the tree in question had been "bad for a long time." After the accident happened, State employees cut the tree down.

Claimant testified that he was aware of the condition of the trees generally at the campground before the incident happened. Claimant stated that there were limbs falling down out of the trees all the time. Claimant testified that prior to the incident in question, oak limbs on the back side of the campground were falling all the time. Claimant indicated he was aware of that fact before the

incident and never camped on that side. Claimant stated that he became aware of the condition on the other side because he walked around the campground all the time.

Prior to the accident, Claimant had not noticed this particular tree which caused the damage to his truck.

After the limb fell, he observed the limb and the tree it fell from. Claimant stated that the limb that hit his truck was about five inches in diameter and about five feet long. After the incident, Claimant observed the condition of the tree as being bad and that the tree had dead limbs on it.

Claimant's truck was parked in an area that was reserved for parking vehicles that are attached to trailers and that use the facility.

Claimant's position is that because the trees were obviously holding dead limbs that might cause damage as they fell, that the Respondent was negligent in the maintenance of those trees and in the maintenance of the camping facility because they were allowed to create a hazardous condition in their uncorrected state. Claimant reiterated that on the day of this occurrence, the sun was shining, it was warm, and there was no wind. The limb apparently broke off of the tree because of its own weight and there was nothing to cause the limb to break.

Claimant did not have his truck repaired. However, the repair estimates were admitted without objection by the attorney for Respondent. Neither estimate was totaled, but it appears that the estimate from Marion Ford-Mercury was in the amount of $1,086.20 and from Hopes Auto Body Repair in the sum of $1,109.73.

On cross-examination, Claimant testified that he had camped at Ft. Massac quite often. When Claimant arrived

at the campground on October 4, 1992, he believed he was camping in an area of the park that was safe. Claimant had not inspected the area where he was camping to see if there was anything that appeared to be dangerous or a problem. Claimant testified that the tree that was involved in this case was "marked" with a red dot about three or four feet from the ground on the trunk.

Claimant testified that prior to this incident, he had talked to park rangers about trees in the vicinity being a danger.

Ronald Coram was called as a witness for Respondent. Mr. Coram is employed by the Illinois Department of Conservation at Ft. Massac State Park where he had worked for approximately four years. Mr. Coram is a site technician who was working at the park on October 4, 1992, in site security. He made regular rounds on an hourly basis and he testified that in the camping area where the incident occurred there were only a few small trees. There were not many big trees left in that campground because the area had been replanted. Mr. Coram was advised of the damage to Claimant's truck and he observed the damage. Mr. Coram described the dead limb he observed as being five or six inches in diameter and eight to ten feet long. The tree branch which struck Claimant's vehicle came from a persimmon tree. The persimmon tree had dead limbs at the top but was mostly a live tree.

Mr. Coram also testified that he had seen Claimant's truck prior to this incident and the truck was in good repair. Mr. Coram confirmed that on the evening of this incident, conditions of weather were clear, dark and there was no noticeable wind that he knew of. The tree in question had been removed since the incident.

Mr. Coram testified that although he was through that area frequently in trips around the campground, he was not aware that there was a problem with falling limbs from trees at the time of the incident.

Terry Johnson was also called by Respondent as a witness. Johnson was an employee of the Department of Conservation at Ft. Massac State Park as the site superintendent. Mr. Johnson testified that the Department of Conservation had a program at Ft. Massac of identifying and removing dead trees that were located in the park. Such a program existed at the time of this incident. Mr. Johnson described the program as policy and procedure of the Illinois Department of Conservation consisting of marking trees, getting appropriate sign-offs, and then cutting the trees. There is no particular time when trees are marked or cut, but at Ft. Massac an attempt was made to mark the trees in August, September and October while the leaves were on. Normally after encampment in October, the staff had the time to cut the trees down. Johnson testified that much depends on when they can get appropriate "sign-offs." The "sign-offs" are sent to every biologist in the region, the regional office for regional review, and then sent to Springfield for review. Mr. Johnson testified that the paperwork is back in a relatively short period of time on most occasions. Mr. Johnson said they could not cut down an individual tree any time they felt like it because they have to obtain appropriate permission to take that action except on occasions where there is a storm or other unusual circumstances that allow park employees more options than what they have in normal circumstances.

Mr. Johnson testified that when trees are marked for identification, they are marked with an orange dot and they are also numbered. Different colors are used for different

years. Johnson examined the tree involved in the incident in question and found that the tree had not been marked in any way. If the tree had been marked, it would have had an orange dot and a number. Mr. Johnson further testified that there had been no complaints about limbs falling from trees in the area where this incident occurred.

The tree at issue in this case was removed after the incident because Johnson found that it was obviously a dying tree and was too close to the pad for safety's sake. The tree was marked and placed on the list at the last minute and subsequently removed.

On cross-examination by Claimant, Mr. Johnson explained that the tree in question was marked after the incident. Other specialists come and actually look at the tree prior to the time that it can be removed, which was probably mid to late November. The trees may be examined by biologists, natural heritage, wild life biologists, and foresters, all of whom have to sign off. Appropriate sign-offs were obtained with respect to the tree in question and it was removed.

The State of Illinois owes a duty to the public to exercise reasonable care in establishing, maintaining and supervising its parks. (*Kamin v. State* (1953), 21 Ill. Ct. Cl. 467.) In *Kamin, supra*, the Court recognized this rule, but denied the claim of a person using a hiking trail who fell from the trail into a canyon when it was conceded that the canyon was plainly visible, and that Claimant had assumed the risks inherent in the sport of hiking, particularly where the risks were obvious and the absence of guardrails in proximity to a dangerous portion of the path could be seen.

In *Damermuth v. State* (1966), 25 Ill. Ct. Cl. 353, this Court again recognized the duty of the State to members

of the general public to exercise ordinary care to protect them from harm in a State park. In *Damermuth* the Claimant fell into a concrete drainage culvert that was not protected and was in an area people were known to frequent after dark. The Court stated as follows:

> "* * * although the State is not an insurer of the safety of those who make use of the park facilities, the State must exercise reasonable care in the maintenance of its parks, and in supervising the use thereof by the public."

In *Wightman v. State* (1978), 32 Ill. Ct. Cl. 546, this Court held that visitors to State parks are invitees to whom the State owes a duty of reasonable care in maintaining the premises. Once again, this was a walkway accident where the claimant had tripped over a metal divider supporting two paved areas. The Court stated, "this Court has held that the State of Illinois is not an insurer of safety of persons who visit its parks and recreation areas." (32 Ill. Ct. Cl. 546, 547.) In *Pearlman v. State* (1979), 33 Ill. Ct. Cl. 28, 31, this Court again reiterated that,

> "The State of Illinois is not an insurer and before the Respondent can be liable for Claimant's injury it must be shown by the preponderance or the greater weight of the evidence that a dangerous and defective condition existed * * * and that the Respondent knew or should have known of said defective and dangerous condition."

Notice to Respondent can be either actual or constructive. (*Weygandt v. State*, 22 Ill. Ct. Cl. 478; *Hansen v. State* (1981), 24 Ill. Ct. Cl. 103; *Baker v. State* (1981), 35 Ill. Ct. Cl. 104.) In *Noonen v. State* (1983), 36 Ill. Ct. Cl. 200, a visitor to a State park was bitten by a dog chained to a tree. This Court denied recovery because it was not shown that Respondent had either actual or constructive knowledge of a dangerous condition created by the dog chained to the tree.

Recovery was allowed in *Stewart v. State* (1985), 38 Ill. Ct. Cl. 200 when a State park visitor was injured by a defective sliding board. This Court restated the principal

that a governmental entity which extends an invitation to the public to make use of its facilities for educational or recreational purposes, owed a duty of reasonable and ordinary care against known or foreseeable danger. This Court held that the Claimant had been injured by a defect which was open to discovery upon casual inspection. Accordingly, Claimant's claim was allowed.

In *Lyons v. State* (1987), 39 Ill. Ct. Cl. 192, a park visitor was injured when her foot became caught in a hole on a platform near a wooden stairway at Blackhawk State Park in Rock Island. Recovery was disallowed, this Court referred to the following:

(a) The defect complained of was minor and would not have been such as to impart constructive notice.

(b) "The Respondent is not an insurer against accidents occurring to visitors to park facilities."

(c) Park employees made routine inspections prior to the incident.

(d) Invitees, such as the Claimant, assume normal or obvious risks attendant to the use of the premises, citing *Lindberg v. State* (1954), 22 Ill. Ct. Cl. 29.

(e) The State cannot be expected to remove all risks of accidents which may occur in the absence of negligence. There are some risks inherent in hiking.

In this case, the tree from which the dead limb fell was located near an area where users of Ft. Massac Park camping ground were invited to park their vehicles and trailers. Some of the limbs on the tree were dead and most were alive. Respondent's agents had no actual notice of a dangerous condition other than may have been imparted by observing that some of the limbs in the tree were dead.

The evidence shows that there was security on this site that made regular patrols for the purpose of protecting invitees making use of the park premises. The evidence clearly demonstrates that it was the policy of Respondent to remove trees that were dead or dying after receiving "sign-off" permission from a variety of state agencies and authorities.

Claimant does not contend that the condition of the tree was any less apparent to Claimant than it would have been to any park employee. Also, it seems reasonable to conclude that the presence of trees adjoining and in the area of camping locations was a desirable and expected condition which campers seek out for the purpose of adding to the recreational pleasure to be enjoyed by users of the facility. Indeed, Claimant readily acknowledges that Claimant was aware that limbs can fall from trees. Claimant testified that in another area of this particular camping ground, the falling of limbs from trees was a problem of which the Claimant was aware.

Does Respondent, State of Illinois, have an obligation to remove all trees from the immediate vicinity of camping locations where the trees evidence any dead limbs or branches which could constitute a hazard to those using the camping sites if they should happen to fall from the tree at the wrong time? The answer to this question is difficult and important. The practical ramifications of defining the duty of Respondent State to include this responsibility could be said to have far-reaching effects on the maintenance of state camping facilities.

There was no evidence introduced into the record whether there were camping sites available to the Claimant that were not closely proximate to trees.

This Court is of the opinion that campers using

camping sites adjacent to trees must be said to assume some risk associated with placing their property and their persons beneath the limbs of trees. At least some risk could be said to be incurred by placing one's property or person beneath any tree for the reason that some material or branches could fall spontaneously or be caused to fall by an unexpected change in weather or even through the activities of wild animals known to frequent trees for habitat or forage. There is some risk associated with standing under a tree and, likewise, there is risk associated with parking one's vehicle or camper beneath any tree.

There is no evidence in the record from which the Court can determine that merely viewing a tree or group of trees can impart actual or constructive knowledge to the agents of Respondent that a limb or limbs or debris of any kind could or might fall from the tree injuring persons or property beneath. In order to allow Claimant an award in this case, this Court must assume that Respondent's agents can reasonably predict from a visual examination of the trees in and around the camping areas that a particular tree or group of trees constitute a hazard to those using the area. Both from the record in this case, and from the common experience of mankind, the inclusion of such a duty within the parameters of the State's duty to use reasonable care to protect the persons and property of members of the public making use of State recreational camping facilities would surely place a heavy burden on the State. Campers using camping pads or areas in the vicinity of trees must be said to assume some risk created by the obvious proximity of trees to the campsite. The ways of Mother Nature are diverse and unpredictable. The State cannot be made an insurer against damage caused when a single limb from a single tree happens, through the process of decay or natural pruning, to have chosen to fall to the ground. While this

was an unfortunate incident and we are not unsympathetic toward the Claimant, based on the evidence we are constrained to deny this claim.

For the foregoing reasons, it is hereby ordered that the Claimant's claim is denied.

(Nos. 93-CC-1302, 93-CC-1303—Claims dismissed.)

ANGLO AMERICAN AUTO AUCTIONS, INC., d/b/a ARENA AUTO AUCTION, INC., Claimant, *v.* THE STATE OF ILLINOIS and ILLINOIS SECRETARY OF STATE, Respondents.

Opinion filed May 10, 1994.

BIXBY, LECHNER & POTRATZ, P.C. (GARY P. HOLLANDER and WILLIAM J. TURNER, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (TERRANCE MCWHORTER, Assistant Attorney General, of counsel), for Respondents.

COMMERCIAL CODE—*inquiries made to Secretary of State regarding prior security interests—duty of officials.* Pursuant to section 9—407(2) of the Commercial Code, upon request of any person, the filing officer with the Secretary of State's office shall issue his certificate showing whether there is on file on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment thereof and if there is, giving the date and hour of each such statement and the names and addresses of each secured party therein.

SAME—*erroneous information contained in Claimant's inquiries to Secretary of State regarding debtor—claims dismissed.* Where the Claimant sought damages against the Secretary of State due to the State's alleged failure to properly report the existence of a financing statement on a debtor who was misidentified by the Claimant in its inquiries to the Secretary of State, the claims were dismissed, since the State's duty under the plain language of the Commercial Code was limited to a search of its records for the particular debtor named, and there was no evidence to indicate that the prior security interest would have been revealed to a reasonable researcher under the Claimant's incorrect search requests.

OPINION

SOMMER, C.J.

These claims arise from two separate inquiries which the Claimant made to the Uniform Commercial Code Division of the Secretary of State concerning any and all U.C.C. financing statements on file related to a particular entity, "Mecum's Countryside Motors, Inc." Both inquiries were made via form U.C.C. 11.7, the first occurring on or about December 6, 1990, and the second slightly over seven weeks later on or about January 25, 1991. In responding to the first inquiry, the U.C.C. Division reported that there was "nothing on file" as of December 7, 1990. Before the U.C.C. Division responded to the second inquiry, the Claimant itself had already recorded a U.C.C. financing statement against "Mecum's Countryside Motors, Inc." with the Secretary of State on January 28, 1991. The U.C.C. Division identified that financing statement and no others in responding to the Claimant's second inquiry.

As it turned out, both in making its inquiries and in filing its own financing statement, the Claimant had supplied the U.C.C. Division with an erroneous name for the entity. Instead of being "Mecum's Countryside Motors, Inc.," the actual name of the entity at all times was "Mecum's Countryside Motor Companies, Inc." A subsequent search of the U.C.C. records under the correct name revealed that another creditor, Amcore Bank, N.A., Rockford, had a properly-filed financing statement which was of record prior to the date of the Claimant's initial inquiry to the U.C.C. Division, and that bank has now been adjudicated as having a superior lien on vehicles which the Claimant actually provided to the misidentified entity. See *Arena Auto Auction v. Mecum's* (1993), 251 Ill. App. 3d 96, 621 N.E.2d 254.

In the instant Court of Claims proceedings, the Claimant essentially alleges:

(1) That it was "unaware" of the correct name of the entity at the time of its requests.

(2) That the Secretary of State owed it a duty to respond to its inquiries by reporting not only information about the requested entity but also "information on all debtors whose names are substantially similar to that of the (requested) debtor," and

(3) That as a result of the Secretary of State's breach of that duty, it was damaged.

The State has filed a motion to dismiss in which it contends that the Claimant has misidentified the duty of care. According to the State, the Secretary of State's U.C.C. Division was only legally required to search its records for the particular entity which the Claimant had requested and nothing more. In support of its argument, the State has submitted an affidavit from the administrator of the U.C.C. Division which states that, from its inception, the division has limited its searches to "the particular debtor name and address as requested by the searching party." The Claimant has not tendered any counteraffidavits or other evidence on that point but has instead filed a motion for summary judgment in which it contends that it has properly stated the duty of care.

As a matter of law, the duty of care is not as the Claimant wishes it were. The operative statute is section 9—407(2) of Illinois' version of the Uniform Commercial Code which provides in pertinent part:

"Upon request of any person, the filing officer shall issue his certificate showing whether there is on file on the date and hour stated therein, any presently effective financing statement naming a *particular debtor* and any statement of assignment thereof and if there is, giving the date and hour of filing of each such statement and the names and addresses of each secured party therein." (Emphasis added.) 810 ILCS 5/9—407.

While there are no reported Illinois decisions on point, the official commentary to this provision (which can be found in the Smith-Hurd annotated version of the statute) indicates that the plain language of the statute means what it says:

"Subsection (2) requires the filing officer on request to issue to any person who has tendered the proper fee his certificate as to what filings have been made against *any particular debtor* * * *." (Emphasis added.)

Cases from other U.C.C. jurisdictions construing their versions of Article 9 support such a reading of the statute. However, the bulk of the reported litigation over the particularity of debtors' names has occurred under a different portion of Article 9, namely section 9—402, which sets forth the formal prerequisites of financing statements. Two subsections of 9—402 are routinely examined:

"(7) A financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor * * *." and

"(8) A financing statement substantially complying with the requirements of this Section is effective even though it contains minor errors which are not seriously misleading." 810 ILCS 5/9—402(7), (8).

Interestingly (but perhaps not surprisingly) this litigation occurs most frequently in the nation's bankruptcy courts, and a significant body of case law has developed there. All of these decisions have a common legal principle as their point of origin: the creditor filing the financing statement has the duty to be diligent in ensuring that the entity's name he places on the financing statement is correct. See, e.g., *In re Marta Group, Inc.* (1983), 33 B.R. 634, 639 (E.D. Pa.). From there, the cases decided under section 9—402 go on to arrive at widely divergent results as to whether a particular misnomer is or is not sufficiently erroneous to be "seriously misleading." As a matter of law, the determination is not based on a comparison of the wrong name to the correct name but rather on

whether a reasonable searcher would find the financing statement or would be put on notice to inquire elsewhere about it. See, e.g., *In re McGovern Auto Specialty, Inc.* (1985), 51 B.R. 511, 513 (E.D. Pa.):

"The resolution of the question cannot be made simply by comparing two names, but must be settled with an eye toward the intended operation of the UCC indexing system in which the errors are manifest. A reasonable searcher properly using the index is looking for the name of the debtor amid a host of similar names. The system may contain hundreds or millions of names, depending on the size of the index. The extent to which a reasonable searcher may correctly identify an erroneous listing as that of the debtor is dependent, of course, on the size of the index. Analogizing the UCC index to a telephone book is apt. Searching under an erroneous name would be much more difficult with the Manhattan phone book than with an eight page phone book for some rural county.

Furthermore, the type of index in use is a pertinent concern. The 'file box' method, the standard bearer of indexing for generations, with drawers full of cards that allowed a searcher to riffle through myriad cards, is becoming outmoded. The vanguard, of course, is the computer retrieval system, which in its simplest form would allow for no 'riffling' through related names. The entry of a single name into the system may well cause the computer to cite only those financing statements on which the name is identical to the name entered. No similar names would surface." *Id.*, 51 B.R. at 514.

While the Claimant argues in its brief that the advent of computer indexing in itself should broaden the scope of the search to be undertaken by the U.C.C. Division, Courts considering that scenario (such as *McGovern* above) disagree, viewing computers as making it even more difficult for a reasonable searcher to find a substantially similar match, and put the burden back on the party making the request:

"A computer search may require more precision in request-a name search." *In re Waters*, 90 B.R. 946, 960 (N.D. Iowa 1988.)

Courts have warned that "the *only* certainty is that a party will get filings under the *exact* name and spelling given, assuming no error by the clerk." (*In re Wardcorp Inc.*, 133 B.R. 210, 212 (S.D. Ind. 1990.) (Emphasis added.) Hence, a caveat to the requesting party has developed in the law:

"There can be less tolerance of errors in a debtor's name, since such errors may prevent a searcher from discovering the financing statement. If a searcher cannot find it, the searcher cannot be burdened with the duty of further inquiry.

The debtor's name is the primary indexing tool and inaccuracies may compromise the validity of a filing * * *. Any rule that would burden a searcher with guessing misspellings and misconfigurations of a legal name or that would make a searcher dependent on the discretion of the clerk conducting the search would not provide creditors with the certainty that is essential in these commercial transactions." *Id.*, 133 B.R. at 215.

To get an understanding of how this section 9—402 body of case law translates when applied instead to section 9—407(2), one need look no further than the very case which the Claimant has cited as the linchpin of its arguments. (*Borg Warner Acceptance Corp. v. Secretary of State* (1987), 731 P.2d 301 (Kan.).) Like the instant proceedings, *Borg Warner* was an action brought by a disgruntled requesting party against a Secretary of State for the alleged negligence of his employees in failing to report the existence of a particular prior security interest in response to a request for a U.C.C. record search. The operative portion of Kansas' version of section 9—407(2) was identical to that at issue in the instant Illinois cases. 731 P.2d at 303.

In 1977, a bank had filed a financing statement under the correct names of two individuals and under the slightly misspelled name of the entity which those individuals operated. In 1978, Borg Warner submitted a U.C.C. search request to the Kansas Secretary of State under the names of both individuals as well as under the *correctly*-spelled name of the entity. The Secretary of State did not disclose the bank's 1977 financing statement in his response. In 1980, Borg Warner submitted a second U.C.C. search request listing one of the individuals as well as the correct entity name. Again the Secretary of State did not identify the bank's 1977 financing statement

in the response. In 1983 a third search request was submitted by Borg Warner listing the correct names of both individuals and the correct name of the entity with similar results. It was not until Borg Warner made a fourth request of the Kansas Secretary of State in 1984 that the bank's 1977 financing statement was disclosed. By that point, of course, the entity was not only heavily in debt to Borg Warner but also bankrupt.

The determinative factor in establishing liability against the Kansas Secretary of State was *not* the similarity of the entity's correctly and incorrectly spelled names. Rather, that case turned on the fact that the Kansas Secretary of State cross-indexed all financing statements; in other words, the searches under the correct names of the individuals should have automatically revealed the financing statement which had been filed under the slightly misspelled name of the entity. (731 P.2d at 305.) Thus, liability was predicated on the Kansas Secretary of State having failed to disclose what would have been revealed to a reasonable searcher by the specific requests that had been made. No such allegation is raised in the instant proceedings against the Illinois Secretary of State. Further, there is no evidence to indicate that the Amcore Bank financing statement at issue here would have been revealed under either U.C.C. search request which the Claimant made.

One final note. Throughout these proceedings, the Claimant has consistently professed that it was "unaware" of the correct entity name at the time of its U.C.C. requests. However, the Appellate Court opinion indicates otherwise. Based on the evidence in the record from the underlying Circuit Court litigation over the Amcore Bank lien, the Appellate Court commented on a letter dated December 21, 1990 from the Claimant's treasurer addressed to the *correct* name of the entity:

"Obviously, Arena was aware of Mecum's actual corporate name prior to its submission of requests for information to the Secretary of State's office in January 1991. Its failure to turn up Amcore's security interest in the subject vehicles was the result of [its own] lax investigation, not misinformation." 251 Ill. App. 3d 101, 621 N.E.2d 258.

Accordingly, based on both the facts and the law, the Claimant's claims against the Secretary of State should be dismissed. The Secretary of State did not breach the duty of care owed to the Claimant.

It is therefore ordered that the Claimant's motion for summary judgment is denied and the State's motion to dismiss is granted, and the present claims are hereby dismissed.

(No. 93-CC-2498—Claim payment ordered; claim for interest denied.)

G.S. ROBINS & CO., Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed August 18, 1993.

Order filed June 29, 1994.

G.S. ROBINS & CO., *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (LAWRENCE C. RIPPE, Assistant Attorney General, of counsel), for Respondent.

LAPSED APPROPRIATIONS—*claim for raw materials—award entered—motion for accrued interest denied.* In a lapsed appropriations claim requesting payment for raw materials sold by the Claimant to a State agency, where an award was entered pursuant to the parties' stipulation but had yet to be paid via the appropriations process, the Claimant's motion for accrued interest on the award was denied, since the invoice for the materials was not received by the agency before the end of the lapse period and therefore the Court could not award interest when the agency would not have been liable therefor, and post-judgment interest was not recoverable since it does not accrue pending legislative approval of awards.

ORDER

JANN, J.

The record in this cause indicates that this is a standard lapsed appropriation claim which should be paid in accordance with the above stipulation. This payment is made in full and final satisfaction of this claim. It is so ordered.

ORDER

JANN, J.

This cause comes on to be heard on the Claimant's motion for accrued interest, due notice having been given, and the Court being advised.

The Claimant filed this claim on March 26, 1993, seeking payment for raw materials sold to the Respondent's Correctional Industries. Prior demand for payment had been denied due to the lapsing of the appropriation or expenditure authority. On September 20, 1993, an award in the amount of $3,976 was entered. Because the bill was payable out of the 301 fund, the Court could not voucher payment of the award at that time. Funding for the award would have to come with legislative approval via the appropriations process in what is commonly referred to as the Court of Claims Special Awards Bill. The award has yet to be paid. In its motion Claimant seeks interest from July 16, 1992, until the date of eventual payment.

The record in this case includes a departmental report which was compiled by Correctional Industries and offered as *prima facie* evidence of the facts contained therein pursuant to 74 Ill. Adm. Code 790.140. One of the facts contained in the report is that the invoice for the materials was not received prior to the end of the lapse

period. Correctional Industries could not pay the invoice if it did not have it and it could not pay the invoice after the lapse period. This Court will not make an award for interest when the agency would not have been liable therefor. (*Airwork v. State* (1990), 43 Ill. Ct. Cl. 353; *Arthur Anderson & Co. v. State* (1987), 40 Ill. Ct. Cl. 195.) As for post-judgment interest, we have consistently held that such does not accrue pending legislative approval of awards. See *Centola v. State* (1988), 41 Ill. Ct. Cl. 119, and the cases cited therein.

Accordingly, it is hereby ordered that the Claimant's motion be, and hereby is, denied.

Where person is victim of violent crime as defined in the Act; has suffered pecuniary loss of $200 or more; notified and cooperated fully with law enforcement officials immediately after the crime; the victim and the assailant were not related and sharing the same household; 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.

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(No. 83-CV-0457—Claimant awarded $15,000 and attorney's fees of $5,000.)

In re APPLICATION OF KARL J. KEMPF

Order filed September 22, 1987.

Opinion filed May 1, 1992.

Order filed July 26, 1993.

RICHARD P. EICHOFF & ASSOC. and MARSHALL KAPLAN, for Claimant.

NEIL F. HARTIGAN and ROLAND W. BURRIS, Attorneys General (JAMES MAHER, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*victim of violent crime awarded lost earnings, medical expenses and attorney's fees.* Where the Claimant brought an action for compensation after he was shot during the course of a robbery at an apartment building which he owned and managed, the Claimant was entitled to an award for lost earnings and expenses incurred as a result of his inability to perform his managerial duties, which in turn required his hiring of a management company to assume those duties, and an order was entered granting $5,000 in attorney's fees to the Claimant's attorney.

ORDER

BURKE, J.

This cause coming to be heard on the motion of State to dismiss, due notice having been given, and the Court being fully advised in the premises, the Court hereby finds:

(1) That section 790.260 of the Court of Claims Regulations provides that a case may be dismissed for want of prosecution where the Court determines that the Claimant has made no attempt in good faith to proceed.

(2) That the applicant has made no attempt in good faith to proceed.

(3) That the applicant was notified of the failure to submit substantiating materials by having been sent a certified letter by U.S. Mail. That the letter was returned to the Attorney General's Office because the applicant has failed to claim the letter.

(4) That the Attorney General is unable to contact the Claimant for substantiating documentation, and therefore is unable to perform his statutory duty to investigate this claim.

It is hereby ordered that this claim be, and the same hereby is dismissed with prejudice for want of prosecution.

OPINION

BURKE, J.

The Claimant brings this action pursuant to the Illinois Crime Victims Compensation Act (Ill. Rev. Stat. 1989, ch. 70, par. 71 *et seq.*), for the lost earnings and medical expenses not covered by his health carrier.

On May 1, 1981, the Claimant, Karl Kempf, was shot during the course of a robbery at an apartment building which he owned and managed in Chicago, Illinois.

The evidence established that for some time the Claimant had made his living from various real estate investments. In 1980 he entered into a partnership agreement with another individual which resulted in an 80% ownership to Claimant of the 98-unit apartment building at 5411 North Winthrop. In addition to being the majority owner of the premises Claimant assumed the responsibilities of managing this building.

The issue in this matter is whether Claimant, who is self-employed, can recover for expenses he paid out as a result of his being unable to perform his duties in managing the real estate for the partnership which in turn affected his income.

Crime victim compensation cases wherein the victim is a salaried employee are more easily resolved than matters of this nature. Claimant in the instant case is hard pressed to prove an average net monthly earning because of the nature of his income. Prior to the time of the shooting, he and his partner did not employ a management company; therefore, they did not pay management expenses for the service he rendered to the partnership. Initially, the State denied his claim for lost income because Claimant was unable to substantiate his earnings prior to the shooting to prove his reduced income. However, simple mathematics correlating the 80% ownership of the partnership which Claimant proved and the amount of expenses the partnership incurred established that, but for the shooting, the partnership would have accumulated substantially more income which would have been distributed to the partners. Therefore, Claimant would have shared in the increased income.

Claimant established by testimony and various exhibits that showed prior to the shooting the partnership incurred no expenses for management and after Claimant's

injury, the partnership was forced to pay a substantial management fee. The amount of the management fee appeared reasonable considering the building housed 98 units.

Wherefore, it is hereby ordered:

(1) That the Claimant be awarded fifteen thousand ($15,000) dollars in full and complete satisfaction of this claim.

ORDER

BURKE, J.

This cause coming on before this Court on the motion for approval of attorney's fees by Marshall Kaplan, attorney for the Claimant, Karl Kempf, due and proper notice having been given to the said Claimant, it is hereby ordered as follows:

That attorney's fees for Marshall Kaplan, attorney for Karl Kempf, the above-captioned Claimant, be and hereby are approved in the amount of $5,000.

(No. 86-CV-1310—Claim dismissed.)

In re APPLICATION OF NELDA M. COLE

Order filed February 25, 1987.

Opinion and order filed March 17, 1989.

Order filed October 17, 1991.

Order filed December 9, 1993.

NELDA M. COLE, *pro se*, for Claimant.

NEIL F. HARTIGAN, Attorney General (SALLIE MANLEY and SUZANNE J. SCHMITZ, Assistant Attorneys General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*condition precedent to recovery—victim killed or injured as result of crime of violence.* Section 2(d)(1) of the Crime Victims Compensation Act requires that the victim be killed or injured "as a result of" a crime of violence, and this requirement is satisfied if the conduct of the perpetrator has a measurable connection with the victim's injuries or death.

SAME—*victim of assault and battery drowned in drainage ditch—Claimant failed to cooperate in investigation as to appropriate compensation—claim dismissed.* Although the Court of Claims found that a victim of assault and battery who stumbled into a drainage ditch and drowned after the attack was a victim of violent crime who died as a result of a crime of violence, the Court determined that any award to the victim's spouse was to be reduced to reflect the victim's voluntary intoxication which contributed to his death, and upon the spouse's failure to cooperate in an investigation regarding the amount of compensation to which she was entitled, the claim was dismissed.

ORDER

POCH, J.

This claim arises out of an incident that occurred on February 5, 1986. Nelda M. Cole seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. Ill. Rev. Stat (1985), ch. 70, par. 71, *et seq*.

This Court has carefully considered the application for benefits submitted on June 6, 1986, on the form prescribed by the Attorney General, and an investigatory report of the Attorney General of Illinois which substantiates matters set forth in the application. Based upon these documents and other evidence submitted to the Court, the Court finds:

(1) That on February 5, 1986, the body of the victim was found in a drainage ditch located at county roads 1400 N and 1700 E, near Irving, Illinois. Police investigation revealed that the incident occurred following a robbery by two offenders. Prior to the robbery, the victim met the offenders in a tavern and asked them for a ride. After searching for a house that the victim wanted to visit,

the offenders stopped their automobile and exited from it. When the victim exited the car, one of the offenders knocked him to the ground and took his wallet. Both offenders then fled. The victim, who was highly intoxicated, then stumbled into the drainage ditch which was full of water and drowned. The Montgomery County Coroner's Office determined that the cause of death was an accidental drowning.

(2) That in order for a Claimant to be eligible for compensation under the Act, there must be evidence of one of the violent crimes specifically set forth under section 2(c) of the Act.

(3) That an accidental drowning is not one of the violent crimes specifically set forth under section 2(c) of the Act.

(4) That the Claimant has not met a required condition precedent for compensation under the Act.

It is hereby ordered, that this claim be, and is hereby denied.

OPINION AND ORDER

DILLARD, J.

This claim is brought by Nelda Cole for compensation under the Crime Victims Compensation Act (Ill. Rev. Stat. (1987), ch. 70, par. 71 *et seq*.) following the death of her husband on February 4, 1986. Claimant makes application for compensation as a "person who was dependent upon the deceased victim of a crime of violence for [her] support at the time of the death of that victim." Ill. Rev. Stat. (1987), ch. 70, par. 72(a).

Facts

Decedent's body was found on February 5, 1986, in a six-foot drainage ditch with mud banks in rural Mont-

gomery County. It was determined death was caused by drowning and testing revealed a blood alcohol level of .36.

The sheriff's investigation resulted in the arrest of two Montgomery County men—Michael Daniels and Danny Sanford. Daniels gave a statement to police that he and Sanford were at a local tavern with Cole at 9:00 p.m. on February 4, 1986, when Cole asked them for a ride to someone's home. After driving around the rural areas for 15-30 minutes, Daniels asked the driver Sanford to stop because he needed to urinate. After Daniels exited the car he heard a "thump" and turned around. He stated that Sanford had thrown Cole down onto the ground, knocking off the victim's glasses, took his wallet and went through the victim's pockets. Sanford and Daniels then got back into their car, after they kept Cole's wallet and $60. They then drove away, leaving Cole lying conscious on the edge of the roadway. Both men were charged with robbery under section 18—1 of the Criminal Code, Ill. Rev. Stat. (1987), ch. 38, par. 18—1.

The Attorney General submitted an investigatory report that concluded that the victim died as a result of accidental drowning and that, since accidental drowning was not one of the crimes of violence defined in section 2(c) of the Crime Victims Compensation Act (Ill. Rev. Stat. (1987), ch. 70, par. 72), the Claimant was not entitled to compensation. This court entered an order adopting the findings and conclusions of the investigatory report and denying the claim. Claimant appealed pursuant to section 13.1(a)(3) of the Act. (Ill. Rev. Stat. (1987), ch. 70, par. 83.1(a)(3).) A hearing was subsequently held before a commissioner.

The Commissioner's Hearing

At the hearing, the investigation reports of the Montgomery County Sheriff and the transcript and records of

the coroner's inquest were admitted into evidence (Ill. Rev. Stat. (1987), ch. 70, par. 83.1(b).) Also, the investigator for the Montgomery County Sheriff testified describing the condition of the victim when the body was found. There were cuts and bruises on Cole's face and the investigator concluded these were a result of the victim being thrown onto the gravel roadway. Also, he opined that after the two assailants departed, the victim—who was virtually blind without his glasses—stumbled into the drainage ditch. Because the sides of the ditch were wet mud, he was unable to crawl out (marks on the sides were found where he apparently tried to do so), and drowned in the water, which was high because of recent rains. In response to hypothetical questions, the sheriff's investigator said that: (1) given the level of intoxication, that condition alone would have prevented Cole from escaping the ditch; (2) even if Cole had not been intoxicated, without his glasses he could not have escaped the ditch; and (3) the injuries themselves were not severe enough alone to prevent Cole from escaping the ditch but contributed to preventing him from escape.

Issues

The initial issue is whether Arnold Cole was killed due to a crime of violence perpetrated or attempted against him. (Ill. Rev. Stat. (1987), ch. 70, par. 72(d)(1).) A crime of violence means and includes offenses defined in specified sections of the Criminal Code. (Ill. Rev. Stat. (1987), ch. 70, par. 72(c).) Robbery, the offense with which Sanford and Daniels were charged, is not included in such statutory list. However, both assault under section 12—1 and battery under section 12—3 of the Criminal Code are included. (Ill. Rev. Stat. (1987), ch. 38, pars. 12—1, 12—3.) The actions of Sanford satisfy the elements of either offense, as those actions were described by Daniels. There

is no requirement in the Act that the perpetrator be charged or convicted of the crime of violence. We therefore find that Cole was a victim of a crime of violence.

The second element of section 2(d)(1) of the Crime Victims Compensation Act requires that the victim be "killed or injured * * * as a result of" the crime of violence. Since the claim is made for the death of Cole, the injuries he received from the assault are not at issue. Rather, the issue is whether Cole was killed "as a result of" the assault.

There is no requirement in section 2(d) that the death be a *direct and proximate* result of the crime. Rather, the legislature limited the wording to the less stringent requirement of simply "a result of." This reading of section 2(d) is consistent with the provisions of section 10.1 of the Act relating to compensation (Ill. Rev. Stat. (1987), ch. 70, par. 80.1). Section 10.1(d) provides:

> "[A]n 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 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." (Emphasis added.)

The language allows reductions based upon the conduct of the victim but does not require a "direct and proximate" measure. Reading sections 2(d) and 10.1(d) in concert, it is most reasonable to conclude that the legislature intended that the conduct of the victim—as well as the conduct of the perpetrator—of the crime be judged as to whether it had any measurable connection with the injuries or death. If such measurable connection is found, then the evidence satisfies the "result of" requirement of section 2(d)(1) of the Act.

The evidence in this case is that Arnold Cole was thrown to the ground and had eyeglasses knocked off. As

a result he suffered bodily injuries, sufficient to at least limit his ability to escape from the drainage ditch. Left in that condition by his assailants, Cole stumbled into the ditch. Unable to escape the high water, he drowned. Therefore, we find that the death can be attributed to a measurable degree to the assault because of the injuries. Also, we find that Claimant is entitled to compensation as a dependent of the victim.

The evidence is that the victim's funeral expense was $3,002.18 and his burial expenses were $100. Of this, $255 was paid by Social Security and $645 by the Illinois Department of Public Aid. The balance was paid by Lyle Cole, the victim's brother. There were no medical and hospital expenses.

The victim was 48 years old at the time of his death. He had been a construction worker but had suffered several heart attacks. As a result, he had been disabled for about one year. His only source of income was $455 monthly from Social Security disability benefits. The record does not contain evidence as to whether Claimant was receiving any widow's portion of the victim's Social Security benefits or any other public assistance income, nor is there adequate evidence as to other potential deductions under section 10.1(e) and 10.1(g) of the Act.

Having reviewed the evidence as to the cause of death, however, we were able to make findings under section 10.1(d) of the Act. Based upon the testimony and record evidence, we find that the victim's conduct of voluntary intoxication contributed to his death to the extent of 50%. Therefore, it is hereby ordered that any award should be reduced by 50% under section 10.1(d).

It is further ordered that this claim be returned to the Attorney General for investigation as to the amount of

loss of support and the amount of any deductions under section 10.1(e) and 10.1(g), and whether any award for funeral and burial expenses should be made to Claimant or to Lyle Cole, victim's brother, who actually paid the unpaid portion of those expenses.

ORDER

BURKE, J.

This cause coming to be heard upon the Respondent's motion to dismiss, all parties having notice and the Court being fully advised in the premises, the Court finds:

(1) That the instant case was heard and an order entered on March 13, 1989, directing the matter to Attorney General for investigation.

(2) That the Attorney General followed the above order and made reasonable attempts to investigate.

(3) That Claimant failed to cooperate with the investigation.

(4) That Respondent filed a motion to dismiss and Claimant was given time to respond.

(5) That Claimant continues to be uncooperative.

It is hereby ordered that Respondent's motion to dismiss is granted and the instant case is dismissed with prejudice.

ORDER

BURKE, J.

This cause coming to be heard upon the Court's motion, and the Court being fully advised in the premises, the Court finds: That the Claimant died on January 23, 1992.

It is hereby ordered that the instant case is dismissed.

(No. 87-CV-0997—Claimant awarded $25,000; lien on portion of civil suit judgment waived.)

In re APPLICATION OF NASEEM ABUSHARIF

Opinion filed May 23, 1988.

Order filed October 18, 1991.

Opinion filed August 30, 1993.

NASEEM ABUSHARIF, *pro se*, for Claimant.

NEIL F. HARTIGAN and ROLAND W. BURRIS, Attorneys General (JAMES A. TYSON, JR. and CHARLES DAVIS, JR., Assistant Attorneys General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*crime victim awarded statutory maximum—lien on civil settlement proceeds partially waived—attorney's fees denied.* The Court of Claims awarded an aggravated battery victim the statutory maximum of $25,000 and prorated the award in order to partially reimburse several providers of medical services related to the battery, and on the Claimant's request for a waiver or reduction of a State lien on the proceeds of the Claimant's civil settlement, the Court waived the lien to the extent of the Claimant's unreimbursed medical expenses, but denied his motion for attorney's fees because there was no statutory provision for the State's payment of fees.

OPINION

POCH, J.

This claim arises out of an incident that occurred on October 25, 1986. Naseem Abusharif, Claimant, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. Ill. Rev. Stat. (1985), ch. 70, par. 71, *et seq*.

This Court has carefully considered the application for benefits submitted on March 18, 1987, on the form prescribed by the Attorney General, and an investigatory report of the Attorney General of Illinois which substantiates matters set forth in the application. Based upon these documents and other evidence submitted to the Court, the Court finds:

(1) That the Claimant, Naseem Abusharif, age 58, was a victim of a violent crime as defined in §72(c) of the Act, to wit: aggravated battery. Ill. Rev. Stat. (1985), ch. 38, par. 12—1.

(2) That on October 25, 1986, the Claimant was shot by an unknown offender who was burglarizing his grocery store. The incident occurred at Route 171 and Smith Road, Lockport, Illinois. Police investigation revealed that the Claimant went to the store to investigate an activated burglar alarm. The offender, who had gained entry into the store, approached the Claimant with a gun, demanded his money and shot him. The Claimant was initially transported to Silver Cross Hospital and was later transferred to Christ Hospital for treatment of his injuries.

(3) That the Claimant seeks compensation for loss of earnings and medical/hospital expenses.

(4) That section 2(h) of the Act states that loss of earnings shall be determined on the basis of the victim's average net monthly earnings for the six months immediately preceding the date of the injury or on $750 per month, whichever is less.

(5) That the Claimant was self-employed as owner/operator of Hollywood Towers Food and Liquor Store at the time of the incident. The Claimant has indicated that his business is operating at a loss. Therefore, the Claimant

has no net earnings upon which to base his claim for loss of earnings.

(6) That the Claimant has submitted and verified medical/hospital expenses in the amount of $29,832.70, none of which was paid by insurance, leaving a balance of $29,832.70. To date, the Claimant has paid $135 towards this balance.

(7) That the Claimant has complied with all pertinent provisions of the Act and qualifies for compensation thereunder.

(8) That pursuant to section 10.1 of the Act, this Court must deduct from all claims the amount of benefits, payments or awards payable under the Workers Compensation Act, Dram Shop Act, Federal Medicare, State Public Aid, Federal Social Security Administration burial benefits, Veterans Administration burial benefits, health insurance, or from any other source, except annuities, pension plans, Federal Social Security payments payable to dependents of the victim and the net proceeds of the first $25,000 (twenty-five thousand dollars) of life insurance that would inure to the benefit of the applicant.

(9) That the Claimant has received no reimbursements that can be counted as applicable deductions.

(10) That after making all the applicable deductions under the Act, the pecuniary loss resulting from the Claimant's injuries is in excess of $25,000, the maximum amount allowed in section 10.1(f) of the Act.

(11) That pursuant to section 18(c) of the Act, the Court may order that all or a portion of an award be paid jointly to the applicant and provider of services. In the instant case, the Court finds this section applicable and orders that joint payment be made.

(12) That the Claimant is entitled to an award of $25,000, which may be prorated as follows:

	Compensable Amount	% of Loss	Total Award
Christ Hospital	$21,734.10	72.9%	$18,225.00
Parkview Orthopedic Group, S.C.	6,555.00	22.0%	5,500.00
Silver Cross Hospital	509.60	1.7%	425.00
Fisher Mangold/Joliet	263.00	.9%	225.00
Norval T. Cocadis, M.D.	250.00	.8%	200.00
Para-Care Inc. Ambulance Service	191.00	.6%	150.00
Lawn Medical Center, S.C.	164.00	.5%	125.00
Associated Radiologist of Joliet, S.C.	31.00	.1%	25.00
Paid Medical Expenses	135.00	.5%	125.00
Total	$29,832.70	100.0%	$25,000.00

It is hereby ordered that the sum of $125 (one hundred twenty-five dollars) be and is hereby awarded to Naseem Abusharif, an innocent victim of a violent crime.

It is further ordered that the sum of $18,225 (eighteen thousand two hundred twenty-five dollars) be and is hereby awarded to Naseem Abusharif and Christ Hospital.

It is further ordered that the sum of $5,500 (five thousand five hundred dollars) be and is hereby awarded to Naseem Abusharif and Parkview Orthopedic Group, S.C.

It is further ordered that the sum of $425 (four hundred twenty-five dollars) be and is hereby awarded to Naseem Abusharif and Silver Cross Hospital.

It is further ordered that the sum of $225 (two hundred twenty-five dollars) be and is hereby awarded to Naseem Abusharif and Fisher Mangold/Joliet.

It is further ordered that the sum of $200 (two hundred dollars) be and is hereby awarded to Naseem Abusharif and Norval T. Cocadiz, M.D.

It is further ordered that the sum of $150 (one hundred fifty dollars) be and is hereby awarded to Naseem Abusharif and Para-Care Inc., Ambulance Service.

It is further ordered that the sum of $125 (one hundred twenty-five dollars) be and is hereby awarded to Naseem Abusharif and Lawn Medical Center, S.C.

It is further ordered that the sum of $25 (twenty-five dollars) be and is hereby awarded to Naseem Abusharif and Associated Radiologists of Joliet, S.C.

ORDER

MONTANA, C.J.

This cause comes on to be heard on the applicant's request to reopen and "lift the lien" on the expected proceeds of a civil case arising out of the same incident as gave rise to the case at bar, due notice having been given, and the Court being advised.

In the request at bar, applicant has alleged that he has incurred medical expenses of $37,000 as a result of the crime which gave rise to this claim. He has been previously awarded and paid a maximum benefit of $25,000 under the Crime Victims Compensation Act, leaving alleged unreimbursed expenses of $12,000. He stated that he has a collateral civil action wherein a $10,000 settlement has been reached and against which a $25,000 lien has been placed pursuant to the Act.

It is hereby ordered that this matter is reopened and referred to the Office of the Attorney General for: (1) verification that unreimbursed expenses have been

incurred as a result of the crime and the amount of any such expenses and (2) report as to its position on whether the lien should be lifted in view of the additional expenses and amount of the settlement.

OPINION

SOMMER, C.J.

This cause coming on to be heard on the Claimant's request for the waiver or reduction of the lien maintained by the State for monies it has paid under the Crime Victims Compensation Act (Ill. Rev. Stat. (1985), ch. 70, par. 71 *et seq.*

The Claimant went to the grocery store owned by him, at 5:00 a.m. in the morning on October 25, 1986, to investigate an activated burglar alarm signal and was confronted and shot at his store by a burglar.

The Claimant filed a claim under the provisions of the Crime Victims Compensation Act (Ill. Rev. Stat. (1985), ch. 70, par. 71 *et seq.*), hereafter referred to as the Act. The Claimant had medical bills and expenses resulting from the incident totalling $29,832.70, which was prorated and paid by Respondent to the Claimant's creditors.

The Claimant thereupon filed a civil action in the circuit court of Cook County, 88-L-18007, against the Forest Alarm Service, Inc., the company furnishing the alarm service in the Claimant's store, alleging negligence on the part of the defendant for failure to properly service the alarm system as well as its failure to notify the police of the alarm system being activated.

An examination of a pre-trial memorandum in the Cook County case disclosed that a notice of lien had been filed in favor of the State of Illinois in the amount of its

award paid on behalf of the Claimant of $25,000. The Claimant, in the belief that his suit against the Forest Alarm Service, Inc. may be settled in his favor, for an amount less than the Respondent's lien of $25,000, seeks a waiver or reduction of the lien of $4,832.70, his unreimbursed medical expenses.

This Court in *In Re Application of Setuko M. Cobb* (1992), 44 Ill. Ct. Cl. 438, has held that where the Claimant recovers in the circuit court and where the circuit court award plus the crime victims compensation award does not fully compensate the victim as measured by the Act, the lien might be waived. In the present claim, if the lien were to work so that the circuit court award were to be totally paid to the State, then the Claimant would not be fully compensated for his expenses compensable under the Act. If, however, the lien is waived in the amount of $4,832.70, the Claimant would be fully compensated. To do otherwise would remove the incentive for injured parties to seek redress against their assailants and to pursue repayments for the State in such cases.

The Claimant also asks for attorney's fees. The counsel for the Claimant, Stephen Block, ably argued on behalf of his client, but there is no provision in the Act for the State's paying attorney's fees, so we must deny this claim for attorney's fees.

It is therefore ordered that the State's lien is waived in the amount of $4,832.70 but remains in effect for monies recovered over and above that amount.

(No. 88-CV-0894—Claimant awarded $4,443.05.)

In re APPLICATION OF DAVID P. NORBY

Order filed November 6, 1989.

Opinion filed October 24, 1991.

Order filed December 9, 1993.

CHRIS CUETO and GREGORY M. SKINNER, for Claimant.

NEIL F. HARTIGAN and ROLAND W. BURRIS, Attorneys General (JAMES MAHER, AGATHER MCKEEL, and PAUL H. CHO, Assistant Attorneys General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*eligibility requirement—cooperation with law enforcement officials*. Pursuant to section 6.1(c) of the Crime Victims Compensation Act, a person is entitled to compensation under the Act if he or she has cooperated fully with law enforcement officials in the apprehension and prosecution of the assailant.

SAME—*violent crime—stipulation—award granted.* While the Claimant was initially denied recovery for medical expenses and lost earnings based upon a finding that he failed to fully cooperate with law enforcement officials in the apprehension and prosecution of his assailant who assaulted the Claimant after the Claimant struck a parked car, the Court subsequently determined that compensation had wrongfully been denied, and an award was entered pursuant to the parties' stipulation.

ORDER

POCH, J.

This claim arises out of an incident that occurred on May 17, 1987. David P. Norby, Claimant, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. Ill. Rev. Stat. (1985), ch. 70, par. 71, *et seq*.

This Court has carefully considered the application for benefits submitted on April 22, 1988, on the form prescribed by the Attorney General, and an investigatory report of the Attorney General of Illinois which substantiates

matters set forth in the application. Based upon these documents and other evidence submitted to the Court, the Court finds:

(1) That on May 17, 1987, the Claimant was beaten during the course of a traffic dispute with the alleged offender. The incident occurred in Granite City, Illinois. The alleged offender was apprehended and charged with battery. This charge was later dismissed however, when the Claimant failed to appear in court and testify against him.

(2) That section 6.1(c) of the Act states that a person is entitled to compensation under the Act if the applicant has cooperated fully with law enforcement officials in the apprehension and prosecution of the assailant.

(3) That an investigation by Illinois Attorney General's Office shows that the Claimant declined to fully cooperate with law enforcement officials in the apprehension and prosecution of the assailant, in that he failed to appear in court and testify against him. As a result, the charge against the assailant was dismissed.

(4) That by reason of the Claimant's refusal to fully cooperate with law enforcement officials in the apprehension and prosecution of the assailant as required by the Act, he is not eligible for compensation thereunder.

It is hereby ordered that this claim be, and is hereby denied.

OPINION

MONTANA, C.J.

Chief Justice Montana delivered the opinion for the Court.

This is a claim for compensation filed pursuant to

the Crime Victims Compensation Act, Ill. Rev. Stat. (1989), ch. 70, par. 71, *et seq*. (hereinafter referred to as the Act). This Court has exclusive jurisdiction to hear and determine this matter pursuant to section 8 of the Court of Claims Act. Ill. Rev. Stat. 1989, ch. 37, par. 439.8(g).

For all practicable purposes, this case is undisputed. The facts show that the applicant, David B. Norby, on May 17, 1987, while driving home from a friend's house, struck a parked Toyota automobile. The Toyota thereupon rolled backwards striking a 1984 Porsche sportscar. Norby testified that his car strayed when he took his eyes off the road to adjust a radio, thereby causing said accident.

Although the owner of the Porsche was not present, a Mr. Miles, charged with taking care of said car, appeared immediately after the accident. Norby testified that he apologized for hitting the car and assured Mr. Miles that his insurance would cover the cost of repair. This apparently did not satisfy Mr. Miles as he struck Norby several times in the face. The applicant at no time made any threatening gestures towards Mr. Miles, nor did he say anything to provoke such actions. As a result of Mr. Miles beating him, Norby received facial injuries resulting in some $12,652.17 worth of medical bills.

The police arrived shortly after the "fight" and issued claimant a ticket for illegal lane usage. Although not charged immediately, a warrant was finally issued for Mr. Miles' arrest (after applicant secured a witness to the event and formally filed a complaint).

Norby filed his request for compensation (under the Crime Victims Compensation Act, hereinafter referred to as the Act) on April 22, 1988. An investigatory report was subsequently submitted by the Attorney General suggesting the application be denied. The reason submitted for

this refusal was that the applicant failed to fully cooperate with the law enforcement officials as required by section 6.1 of the Act. This Court thereafter ordered, without a hearing, that Norby's application be denied based upon said Attorney General's report. Norby thereupon timely filed a request for a hearing to review said order pursuant to section 13.1(a)(3) of the Act.

After receiving additional evidence and reviewing the record in its entirety, it is determined that Norby's application was wrongfully denied. Although the Attorney General is correct when it says a victim should not be granted compensation if he fails to cooperate with law enforcement officials (see *In re Application of Gary C. Ford* (1985), 37 Ill. Ct. Cl. 443), there is just no evidence of such a failure in this case. Applicant testified that on no less than five occasions he contacted the Circuit Clerk's office to try and find out when he was needed to testify against Mr. Miles. Each time he was told that Mr. Miles' hearing had not yet been set. At no time was applicant contacted in follow-up of this case. Apparently, the charges against Mr. Miles were finally dismissed, most probably due to failure to prosecute. This does not, however, appear to be the applicant's fault as the evidence indicates he was ready, willing, and able to cooperate with the law enforcement officials at all times. The State of Illinois has not disputed any of these facts.

All that remains, therefore, is to determine the compensable losses. The record is inconclusive on this issue. Norby testified to having incurred approximately $12,000 in medical bills and to having paid a portion of those bills. It is the Court's policy to award reimbursement to applicants directly for compensable expenses which they have paid and to make awards co-payable to applicants and medical providers for outstanding bills. We cannot make

such a determination based on the record before us. Applicant also seeks compensation for lost earnings. The record is insufficient for us to make a determination on that issue too.

It is hereby ordered that this matter is referred to the Office of the Attorney General for investigation and report on the compensation due the applicant as a result of the crime.

ORDER

BURKE, J.

This cause being heard upon the Court's own motion, it is hereby found that:

The parties have entered into a stipulation whereby the Attorney General's Office recommends that the sum of $4,443.05 be paid to Claimant, David P. Norby, the innocent victim of a violent crime.

Wherefore, it is hereby ordered that the sum of $4,443.05 be paid to David P. Norby, for paid medical/hospital expenses and lost earnings suffered as a result of the incident.

This case is hereby closed.

(No. 89-CV-0607—Claim denied.)

In re APPLICATION OF LAURA DEMBY

Order filed May 18, 1990.

Opinion filed August 25, 1993.

LAURA DEMBY, *pro se*, for Claimant.

NEIL F. HARTIGAN, Attorney General (JAMES MAHER, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*claim for loss of support for murder victim's children denied—no proof of net income or amount of support*. A claim filed by the ex-wife of a murder victim, seeking compensation for loss of support for the victim's four minor children, was denied because the Claimant failed to prove either the victim's net income or the amount of support, if any, provided by the victim to his children in the six months preceding his death.

ORDER

SOMMER, J.

This claim arises out of an incident that occurred on September 8, 1988. Laura Demby, ex-wife of the deceased victim, James Demby, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. Ill. Rev. Stat. (1987), ch. 70, par. 71, *et seq*.

This Court has carefully considered the application for benefits submitted on December 16, 1988, on the form prescribed by the Attorney General, and an investigatory report of the Attorney General of Illinois which substantiates matters set forth in the application. Based upon these documents and other evidence submitted to the Court, the Court finds:

(1) That the Claimant's ex-husband, James Demby, age 38, was a victim of a violent crime as defined in section 2(c) of the Act, to wit: first degree murder. Ill. Rev. Stat. (1987), ch. 38, par. 9—1.

(2) That the crime occurred in Chicago, Illinois and all of the eligibility requirements of section 6.1 of the Act have been met.

(3) That the Claimant seeks compensation for loss of support for the victim's minor children, Sherita Demby, Darno Demby, Devin Demby and Joscar Demby.

(4) That pursuant to section 2(h) of the Act, if a divorced or legally separated applicant is claiming loss of support for a minor child of the deceased, the amount of support for each child shall be based either on the amount of support the minor child received pursuant to the decree for the six months prior to the date of deceased victim's injury or death, or if the subject of pending litigation filed by or on behalf of the divorced or legally separated applicant prior to the injury or death, on the result of that litigation.

(5) That pursuant to the judgment for dissolution of marriage entered on January 25, 1979, *In Re the Marriage of Laura Demby v. James Demby*, No. 78 D 11842, filed in the Circuit Court of Cook County, Illinois, the victim was ordered to pay $35 per week as child support for Sherita Demby and Darno Demby. However, the Claimant has not submitted documentation to substantiate that the victim was meeting his child support obligation.

(6) That following the dissolution of the marriage of the victim and the Claimant, the victim fathered two other children by the Claimant, Devin Demby and Joscar Demby. However, the Claimant has not submitted documentation to substantiate that the victim was supporting these two children.

(7) That the Claimant has not met required conditions precedent for compensation under the Act.

It is hereby ordered that this claim be, and is hereby denied.

OPINION

SOMMER, C.J.

This claim for compensation by the Claimant, Laura Demby, pursuant to the Crime Victims Compensation

Act (hereinafter the "Act"), arises out of an incident that occurred on September 8, 1988, resulting in the death of the victim, James Demby. The Claimant seeks compensation for loss of support for the deceased victim's four minor children, Sherita (born: 8/29/71), Darno (born: 3/24/73), Devin (born: 8/2/87) and Joscar (born: 8/5/88).

On May 18, 1990, this Court entered an order denying this claim. This Court in paragraph 5 of its order, found that pursuant to a judgment for dissolution of marriage, the victim was subject to a requirement to pay $35 per week as child support for Sherita and Darno. Paragraph 6 of the order included a finding that after the dissolution of the marriage the victim and the Claimant produced two children, Devin and Joscar. This Court concluded that the Claimant had not submitted documentation to substantiate that the victim had met his child support obligation in regards to Sherita and Darno, for the six months preceding his death, or had supported Devin and Joscar preceding his death.

On June 4, 1990, the Claimant requested a review of the order of denial. This matter was set for a hearing on February 5, 1991, September 20, 1991, and June 10, 1992. The Claimant was present at all three hearings and submitted documentation in an effort to substantiate her claim.

The Claimant testified that, contrary to the Court's finding, which was based upon the Attorney General's investigatory report, the deceased victim was subject to an order requiring him to pay $85 a week as child support for Sherita and Darno, not $35 as previously determined.

The Claimant further testified that since the dissolution, the Claimant and victim bought a house. The Claimant apparently had her own income. The victim was self-

employed as owner and automobile mechanic at Express Auto Repair Shop in Chicago, Illinois. The Claimant and the children were living with the victim for the six months preceding his death.

The Claimant and victim shared a joint checking account. In addition to the joint account, the Claimant testified on February 5, 1991, that the Claimant and victim each kept their own checking account. The Claimant stated the victim dealt in cash also. For that reason, there would not be copies of checks showing that he wrote checks for clothing, medical or educational expenses for the children. No tax return was filed on behalf of the victim for 1988. The Claimant did produce a copy of the victim's 1987 individual tax return, which indicates one dependent—Devin. The youngest child was born in 1988. The hearing of February 5, 1991, was continued to allow the Claimant an opportunity to provide evidence that the victim was supporting the four children.

At the September 20, 1991, hearing, the Claimant produced a certified copy of the judgment for dissolution which clearly demonstrated that the victim was obligated to pay $85 per week for child support for Sherita and Darno.

The Claimant presented two letters to support the position that victim was making the required child support payments. The letter from Leonard Parker, a friend of the deceased victim, indicates that on "many Friday nights" he would be present when the victim would give the Claimant $200 and $500 upon several different occasions.

A second letter from Barbar Harvey, the sister of the deceased victim, indicates that she lived with the victim and the Claimant from June, 1987 through May, 1988. Harvey also states in the letter that she saw the victim give the Claimant "$100 a week and sometimes more."

The victim's 1987 U.S. individual income tax return showed an adjusted gross income of $8,566.53 for 1987.

The Claimant testified that the victim would deposit cash into their joint account. She provided a series of original deposit slips in the name of James Demby for a checking account at Heritage Pullman Bank. All deposit slips were for dates in 1987, with one exception that being a slip dated February 6, 1988. No slips were produced bearing a date within the six months preceding the date of the victim's death, September 8, 1988.

On June 10, 1992, an additional hearing was conducted in an effort to provide the Claimant an opportunity to demonstrate that the deceased victim was supporting the minor children. The Claimant provided a packet of documents that purport to be photocopies of invoices prepared by the deceased victim for work performed in relation to his business. All of the invoices were dated within the six-month period of time preceding the date of the incident. The invoices totaled approximately $12,325, indicating gross revenues for the business, and including charges for labor, parts and supplies. The invoices provided for a subtotal for labor of approximately $3,172.42.

It is our finding that James Demby was living with Laura Demby and four children at 12748 S. Bishop, Chicago, Illinois, and working at Express Auto Repair at 2158 W. Van Buren.

Additionally, we find that the deceased victim was obligated to pay $85 per week for two children, Sherita and Darno. The two children Devin and Joscar, born after the divorce are eligible for compensation for loss of support if it can be shown that they were a dependent of the deceased victim. (740 ILCS 45/2(h) (1992).) Loss of earnings are 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.

The Claimant has had difficulty in proving that the $85 payments were being made, and the victim was supporting the two younger children because the victim operated on a cash basis. No copies of checks were presented that showed that the victim made the required $85 payments, or that any money was being expended for food, clothing, education, medical or shelter expenses for any of the four children. The only evidence in addition to the testimony of the Claimant that the above payments were being made were the two letters. Although the two letters tend to show that the victim paid money to the Claimant, they are insufficient to prove that the victim was meeting his child support obligations of $85 per week during the six-month period preceding the incident or to otherwise prove that the victim was supporting the two younger children.

Although the invoices do tend to indicate the victim's business received money within six months of the incident, approximately $3,172.42 of such revenue was for labor, it does not prove the net income of the victim nor does it prove that the victim was providing support, and the extent of the support, to any of the children. Because the amount of support provided by the victim is uncertain, this Court has no way of establishing an award which would be based on the amount of support.

The finding of this Court that the Claimant has failed to substantiate her claim is affirmed and this Court's order of May 18, 1990, is affirmed.

Claim denied.

(No. 89-CV-0812—Claimant awarded $3,000.)

In re APPLICATION OF TED S. CHARLTON

Order filed March 5, 1990.

Opinion filed December 3, 1993.

TED S. CHARLTON, *pro se*, for Claimant.

NEIL F. HARTIGAN and ROLAND W. BURRIS, Attorneys General (JAMES MAHER, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*death as result of violent crime—victim's father awarded funeral and burial expenses.* Although the Court of Claims initially denied a father's claim seeking payment for his daughter's funeral and burial expenses because the crimes of involuntary manslaughter and reckless conduct, of which the offender was convicted, were not among the specifically enumerated crimes under section 2(c) of the Crime Victims Compensation Act, upon review the Court awarded the father the maximum amount allowable for such expenses, since reckless conduct is in fact a crime for which compensation is available.

ORDER

POCH, J.

This claim arises out of an incident that occurred on April 30, 1988. Ted S. Charlton, father of the deceased victim, Angela Charlton, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. Ill. Rev. Stat. (1987), ch. 70, par. 71, *et seq.*

This Court has carefully considered the application for benefits submitted on February 14, 1989, on the form prescribed by the Attorney General, and an investigatory report of the Attorney General of Illinois which substantiates matters set forth in the application. Based upon these documents and other evidence submitted to the Court, the Court finds:

1. That on April 30, 1988, the victim was accidentally shot by an offender who was known to her. The inci-

dent occurred in an apartment located at 515 South Pearl, Salem, Illinois. Police investigation revealed that prior to the incident, the offender was assembling the components of a shotgun, when the weapon discharged and struck the victim in the chest. The Marion County Coroner's Office ruled the death of the victim to be an accident. The offender was apprehended, prosecuted and convicted of involuntary manslaughter and reckless conduct.

2. That in order for a Claimant to be eligible for compensation under the Act, there must be evidence that one of the violent crimes specifically set forth under section 2(c) of the Act occurred.

3. That involuntary manslaughter is not one of the violent crimes specifically set forth under section 2(c) of the Act.

4. That the Claimant has not met a required condition precedent for compensation under the Act.

It is hereby ordered that this claim be, and is hereby denied.

OPINION

FREDERICK, J.

This claim arises out of an incident that occurred on April 30, 1988. Claimant, Ted S. Charlton, father of the deceased victim, Angela Charlton, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the "Act." Ill. Rev. Stat. (1987), ch. 70, par. 71, *et seq.*

The Court file reflects that on February 14, 1989, a "Notice of Intent to File a Claim" was filed herein on behalf of applicant, Ted S. Charlton, arising from the death of alleged victim, Angela Charlton, on April 30, 1988.

The notice reflected that Angela Charlton was killed by a shotgun blast at close range. It was alleged that the assailant was loading a shotgun in preparation for the return of individuals with whom the assailant had had an argument during a drinking party.

The investigatory report of the Attorney General's Office noticed that the offender, James Renfro, was apprehended, prosecuted and convicted of involuntary manslaughter and reckless conduct. The investigatory report concluded that involuntary manslaughter was not one of the violent crimes specifically set forth under section 2(c) of the Act, and that therefore, the Claimant had not met a required condition precedent for compensation under the Act.

This Court followed the recommendation of the investigatory report and ruled that the Claimant had not met a required condition precedent for compensation under the Act and denied the claim on March 5, 1990.

A review of this Court's decision was sought by Claimant, Ted S. Charlton. At the hearing conducted by Commissioner Rath, the facts in evidence mirrored those facts set forth in the investigatory report of the Attorney General and in this Court's prior order. However, since the entry of the order denying the claim, this Court in *In re Application of Catherine Smith* (1992), 45 Ill. Ct. Cl. 520 (unreported opinion entered on October 30, 1992, 90 CV 977), held that circumstances similar to those extant in the case at bar "met the criteria for reckless conduct" which was found to be a crime specifically included in the Crime Victims Compensation Act.

In the case at bar, the assailant was convicted of both involuntary manslaughter and reckless conduct arising from the death of Angela M. Charlton on April 30, 1988.

We therefore find:

(1) That on April 30, 1988, the victim was accidentally shot by an offender who was known to her. The incident occurred in an apartment located at 515 S. Pearl, Salem, Illinois. Police investigation revealed that prior to the incident, the offender was assembling the components of a shotgun, when the weapon discharged and struck the victim in the chest. The Marion County Coroner's Office ruled the death of the victim to be an accident. The offender was apprehended, prosecuted and convicted of involuntary manslaughter and reckless conduct.

(2) That reckless conduct is one of the violent crimes specifically set forth under Section 2(c) of the Act.

(3) That the Claimant has met the required conditions precedent for compensation under the Act.

(4) That the burial expenses of Angela Charlton were in the sum of $4,478.62. These expenses were paid in full by Angela's parents.

(5) That the Claimant seeks only the funeral expenses incurred by the family in the sum of $4,478.62 paid by Claimant, Ted Charlton, to the Rogers-Atkins Funeral Home in Salem, Illinois.

(6) That no loss of support is claimed. The victim was not employed during the six months prior to the injury.

(7) That no civil suit was filed or intended against the assailant or any third party arising from the death of Angela Charlton.

(8) That section 2(h) of the Act states that a maximum of $3,000 may be awarded, in the case of death, for funeral and burial expenses.

It is therefore ordered that Claimant, Ted S. Charlton, is awarded the sum of $3,000 for funeral expenses for the deceased victim pursuant to the Illinois Crime Victims Compensation Act.

(No. 90-CV-0570—Claimant awarded $25,000; lien on civil suit settlement waived.)

In re APPLICATION OF MARY JOANNE URBAN

Opinion filed July 23, 1992.

Order filed July 23, 1993.

GARY L. PETERLIN, for Claimant.

ROLAND W. BURRIS, Attorney General (JAMES MAHER, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*requirement for compensation—violent crime must be proximate cause of death.* In order to be eligible for compensation under the Crime Victims Compensation Act, a Claimant must prove that a statutorily specified violent crime was the proximate cause of the victim's death.

SAME—*heart attack victim died as result of violent crime—award granted—lien on civil suit settlement waived.* The Court of Claims determined that the Claimant's deceased husband was a victim of violent crime and that his death was proximately caused by a violent crime, where the victim suffered a fatal heart attack immediately after an assailant forced his way into his home and assaulted him, and the Court awarded the Claimant compensation for her husband's medical, hospital and funeral expenses and granted attorney's fees in connection with a hearing, and the State's lien against the Claimant's civil settlement was waived.

OPINION

POCH, J.

This claim arises out of an incident that occurred on April 2, 1989, at 1423 Prospect Avenue, Peru, Illinois. The Claimant, Mary Joanne Urban, wife of the deceased vic-

tim, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the "Act." Ill. Rev. Stat. (1989), ch. 70, par. 71, *et seq.*

The Court had considered the application for benefits and the investigatory report of the Attorney General and had denied the claim on the grounds that the Claimant had not offered documentation to substantiate her claim and that the assailant had been acquitted of the murder of the deceased victim.

The Claimant, through counsel, requested consideration of the denial of her claim and this cause was assigned to a commissioner of this Court for a hearing.

The evidence is undisputed that on April 2, 1989, the decedent and his wife resided in Peru, Illinois. Their daughter had been married to Michael Carter and had divorced. The daughter had custody of the couple's children. Michael Carter came to the Urban residence. The Claimant described how Carter came to her home in an intoxicated condition. The decedent told Carter he could not see the children because of his intoxicated state and asked Carter to leave the premises. Carter left after numerous requests to do so but came back one hour later.

When Carter returned, he was armed with a revolver. The victim asked him to leave a number of times. The victim called the police. The victim attempted to take the gun from Carter and was able to take the gun away from Carter. The victim and Carter continued to struggle which continued from the house onto the porch. The victim was able to throw the gun onto the roof of the garage. The victim was able to get back into his home and lock the door.

The victim suffered a fatal heart attack. He had a history of cardiac problems including a prior heart attack.

The struggle with Carter was very vigorous. It is uncontradicted that the assailant had forced his way into the victim's home. The victim was in fear for his safety and that of his wife. The victim's death resulted from the assault which caused the fatal heart attack according to the medical report of the decedent's physician.

The Claimant's deceased husband, Richard P. Urban, was a victim of a violent crime as defined in Section 72(c) of the Act. The Claimant has met the burden of proving the death was the result of a violent crime. *In Re Application of Michael DeBartolo* (1982), 36 Ill. Ct. Cl. 442.

The Claimant has met all the eligibility requirements of section 76.1 of the Act and is entitled to compensation because the assault was the proximate cause of the victim's death. (*In Re Application of Hamit Jusufi* (1976), 31 Ill. Ct. Cl. 631.) The Claimant has met the burden of proving that the cause of death was the proximate result of a violent crime and is, therefore, entitled to compensation pursuant to the Act. *In Re Application of Jean Rosenbaum* (1979), 32 Ill. Ct. Cl. 1086.

The Claimant has complied with all pertinent provisions of the Act and qualifies for compensation thereunder.

The Claimant seeks compensation for medical expense, hospital expense and funeral expense associated with the death of her husband. The victim was retired at the time of his death and was receiving pension benefits of $729.06 per month. The decedent was 56 years of age at the time of his death. Based upon life expectancy tables, the decedent if he had lived would have continued to receive his pension benefits for 20 years. The loss of support to the Claimant of the decedent's pension benefits exceeds the maximum amount recoverable under the Act.

The Claimant is entitled to the maximum amount that can be awarded under the Act which is $25,000. The Claimant's attorney seeks award of attorney fees and reimbursement of costs advanced to be paid out of the award made to the Claimant. Pursuant to section 82 of the Act, an attorney may not receive payment for services in preparing the application or presenting the application to this Court. Fees may be charged only for representing the applicant at a hearing with such amount approved by the Court as reasonable.

The Claimant's attorney has filed an itemized petition for fees and for costs advanced on behalf of the Claimant. This Court finds that of the time spent by Claimant's counsel, 15 hours relate directly to the representation of the Claimant at the hearing. The Claimant's attorney is authorized to receive payment of the sum of $1,500 for representation of Claimant at the hearing and be reimbursed for costs advanced of $562.90.

It is hereby ordered that the Claimant Mary Joanne Urban be awarded the sum of $25,000 to be paid in one lump sum.

The Claimant's attorney may receive attorney fees from the Claimant's award in the sum of $1,500 and he is also to be reimbursed the sum of $562.90 in costs and expenses advanced on behalf of Claimant.

ORDER

SOMMER, C.J.

It is ordered that the motion to waive/discharge the lien the State of Illinois may have pursuant to the Crime Victims Compensation Act in the settlement of cause 90-L-84 filed in La Salle County, Thirteenth Judicial Circuit Court of the State of Illinois against the settlement amount

of $60,000 is hereby granted and it is further hereby ordered that any said lien is waived/discharged.

(No. 90-CV-0954—Claimant awarded $2,000.)

In re APPLICATION OF JOSE L. GARCIA

Order filed April 3, 1990.

Order filed April 6, 1993.

Order filed July 27, 1993.

GLENN CHERTOKOW, for Claimant.

NEIL F. HARTIGAN and ROLAND W. BURRIS, Attorneys General (PAUL H. CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*when claim must be filed*. Pursuant to section 6.1 of the Crime Victims Compensation Act, a notice of intent to file a claim must be filed with the Attorney General within six months of the occurrence of the crime upon which the claim is based, and the application for compensation must be filed within one year of the crime's occurrence, but upon good cause shown, the Court of Claims may extend the time for filing for a period not to exceed one year.

SAME—*violent crime—Court recognized constructive filing exception limited to case at bar—funeral expenses allowed*. In the Claimant's action seeking reimbursement for his brother-in-law's burial expenses, the Court of Claims found that, although the Claimant did not technically comply with the statutory filing requirements by returning his application for benefits to the Attorney General within six months of the commission of the crime, his claim was constructively filed within the limitations period because he acted with deliberate speed and in good faith, but in granting the Claimant's request for compensation, the Court noted that the constructive filing exception was limited to the case at bar.

ORDER

DILLARD, J.

This cause coming on to be heard on the petition of Jose Garcia for an extension of time to file documents to

claim benefits under the Crime Victims Compensation Act, Ill. Rev. Stat., ch. 70, par. 71, *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 November 29, 1987;

(3) The notice of intent was never filed;

(4) The application was tendered on January 11, 1990;

(5) The petition at bar was filed on January 11, 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.

On April 3, 1990, the Court dismissed this claim on the grounds that Claimant had failed to file his notice of intent to file a claim and his application within the statutory time periods to claim benefits under the Crime Victims Compensation Act. Ill. Rev. Stat., ch. 70, par. 71 *et seq*., hereinafter referred to as the Act.

Section 6.1 of the Act at that time provided 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 of time not exceeding one year."

This Court has consistently given a strict interpretation to the statutes prescribing and limiting our jurisdiction. (*Beene v. State* (1984), 36 Ill. Ct. Cl. 431; *Schenk v. State* (1990), 43 Ill. Ct. Cl. 437.) In *Schenk, supra*, this Court denied a claim where the intent to file claim was filed more than two years after the claim. The Court held that the maximum time to file notice of intent is 18 months which includes any extensions. The statute does not grant an exception to the limitations period for an excuse of lack of information regarding the program.

After the original denial of the claim, the Claimant requested a hearing. The cause was duly tried by Commissioner Michael Kane who adduced the following evidence. Enrique Garcia, age 15, was shot on November 29, 1987, and died as a result of those gunshot wounds. He was the victim of a violent crime. The Claimant, Jose Garcia, is the brother-in-law of the decedent and he paid for the burial of Enrique Garcia. According to the testimony of both the Claimant and his wife, Yolanda Garcia, the funeral director who handled the arrangements informed Jose and Yolanda Garcia that there was compensation available through the State if they would make application through the Attorney General's Office. The Claimant went to the Attorney General's Office, received forms from the Attorney General's Office which he and his wife filled out. On December 22, 1987, Jose Garcia signed the forms and returned them to

the Attorney General's Office. The document he signed is entitled "Crime Victim Compensation Application." At the top of the first page of this document, it states as follows: "Return to: Illinois Attorney General's Office, Crime Victim Compensation Program, 174 West Randolph Street-Third Floor, Chicago, Illinois, 60601." On the last page of this four-page document, the following language is contained: "You have only one year from date of the criminal incident in which to file this application with the Attorney General." Pursuant to the information and the instructions the Garcias received, they returned the form to the Attorney General's Office where they were told that the processing of this document would take approximately one year. In January of 1989, slightly longer than a year after the filing, the Garcias became concerned about their application and sought information from the Attorney General's Office about the application. At that point they were told that there was no record of their ever having filed an application. They continued to seek information from the Attorney General's Office with no success. In January of 1990, they filed a petition to extend the time with which to file and this petition resulted in the order dated April 3, 1990.

At the hearing, Mr. Mohr, the assistant Attorney General, acknowledged that in his file he had the application which was signed and dated on December 22, 1987, which is within the year permitted by the Act and also within the six-month period required by the notice requirements. The Attorney General acknowledged that the Claimant filed the application within two months of the commission of the crime. He further acknowledged that the Attorney General's forms indicated to Claimant that the forms should be completed and returned to the Attorney General. Mr. Mohr stated, "The problem is that the people * * * the individuals come to our office and we give them

the forms and I think it's our responsibility to file them because I think in a lot of cases they don't know that they do have a duty on their own part to file the application."

The law specifically requires a notice of intent to file a claim be filed with the Attorney General within six months of the occurrence of the crime and then an application must be filed within one year of the occurrence with the Court of Claims. Unfortunately, the very documents which the Claimant received from the Attorney General's Office specifically stated that the documents are to be returned to the Attorney General's Office and give the impression that by doing so, the Claimant has complied with the law. There is nothing in the instructions or the application which indicates that the documents must be filed with the Court of Claims or that anything else has to be done in regards to a crime victim application. The State has acknowledged a responsibility to file the claims. It is clear from these facts that the Garcias acted with deliberate speed and in good faith.

This is an unusual and difficult case. It is also true that difficult cases make for bad law. We are determined not to make bad law. However, because we believe this situation will not be repeated and is limited to the facts of this case, we believe we can reverse our prior ruling and be consistent with our prior rulings on jurisdiction. The Attorney General originally indicated there was no record of the Garcia's application. However, at trial, the Attorney General acknowledged that an application had been found in their files with indications showing such documents were filed with the Attorney General within two months of the date of the crime. The Attorney General did not file the claim. Because the documents were actually filed with the Attorney General and do actually exist, we believe this is a case where there is a constructive fil-

ing of the claim and by allowing this claim, we are not extending the statute of limitations. However, in the future and hereinafter, the public is put on notice that notwithstanding the language on forms, it is the law that the application must be filed by the claimant with the Court of Claims no later than 18 months from the date of the occurrence, such 18 months including any extensions.

We will not in the future consider constructive filings but will make all rulings strictly on the statute of limitations and the only determination will be whether or not the notice of intent was filed within the statutory time limit with the Attorney General and whether the application was filed with the Court of Claims within the statutory time limit.

Wherefore, it is ordered:

(A) That the Attorney General shall file an investigatory report indicating the amount of the benefits which the Court should award to Claimant.

(B) That the Attorney General shall purge the forms indicating applications shall be returned to the Attorney General if such forms are still in use.

OPINION

FREDERICK, J.

This claim arises out of an incident that occurred on November 29, 1987. Jose L. Garcia, brother-in-law of the deceased victim, Enrique Garcia, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. Ill. Rev. Stat. (1985), ch. 70, par. 71, *et seq*.

This Court has carefully considered the application for benefits submitted on January 11, 1990, on the form

prescribed by the Attorney General, and an investigatory report of the Attorney General of Illinois which substantiates matters set forth in the application. Based upon these documents and other evidence submitted to the Court, the Court finds:

(1) That on November 29, 1987, the Claimant's deceased brother-in-law, Enrique Garcia, age 16, was a victim of a violent crime as defined in section 2(c) of the Act, to wit: murder. Ill. Rev. Stat. (1985), ch. 38, par. 9—1.

(2) That the crime occurred in Chicago, Illinois and all of the eligibility requirements of section 6.1 of the Act have been met.

(3) That the Claimant seeks compensation for funeral and burial expenses.

(4) That the Claimant incurred funeral and burial expenses in the amount of $3,743.56, all of which has been paid. Pursuant to section 2(h) of the Act, funeral and burial expenses are compensable to a maximum amount of $2,000.

(5) That the Claimant has received no reimbursements that can be counted as an applicable deduction under section 10.1(e) of the Act.

(6) That the Claimant has complied with all pertinent provisions of the Act and qualifies for compensation thereunder.

It is hereby ordered that the sum of $2,000 (two thousand dollars) be and is hereby awarded to Jose L. Garcia, brother-in-law of Enrique Garcia, an innocent victim of a violent crime.

(No. 91-CV-0354—Claimant Crystal Y. Patton awarded $24,375; Claimant Virginia J. Patton awarded $625.)

In re APPLICATION OF CRYSTAL Y. and VIRGINIA J. PATTON

Opinion filed November 6, 1991.

Order filed December 3, 1993.

CRYSTAL Y. PATTON and VIRGINIA J. PATTON, *pro se*, for Claimants.

ROLAND W. BURRIS, Attorney General (JAMES MAHER and CHARLES DAVIS, JR., Assistant Attorneys General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*claims for compensation filed by both crime victim's wife and ex-wife—award prorated.* Where the wife of a deceased violent crime victim sought compensation for herself and the victim's minor child, and the victim's ex-wife requested compensation on behalf of another of the victim's minor children for whom the victim had been paying child support pursuant to a divorce decree, the Claimants' combined pecuniary loss exceeded the maximum allowable recovery, and the Court therefore divided the maximum award in proportion to the amount of compensable loss sustained by each Claimant.

OPINION

MONTANA, C.J.

This claim arises out of an incident that occurred on July 7, 1990. Crystal Y. Patton, wife of the deceased victim, Charlie Lee Patton, and Virginia J. Patton, mother of the victim's minor child, Charles Lemont Patton, seek compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. Ill. Rev. Stat. (1989), ch. 70, par. 71, *et seq.*

This Court has carefully considered the applications for benefits submitted on August 10, 1990, and August 17, 1990, respectively, on the form prescribed by the Attorney General, and an investigatory report of the Attorney General of Illinois which substantiates matters set forth in the applications. Based upon these documents

and other evidence submitted to the Court, the Court finds:

(1) That on July 7, 1990, Charlie Lee Patton, age 39, was a victim of a violent crime as defined in section 2(c) of the Act, to wit: first degree murder. Ill. Rev. Stat. (1989), ch. 38, par. 9—1.

(2) That the crime occurred in Chicago, Illinois, and all of the eligibility requirements of section 6.1 of the Act have been met.

(3) That the Claimant, Crystal Y. Patton, seeks compensation for funeral expenses and for loss of support for herself and the victim's minor son, Isaac Lee Patton. The Claimant, Virginia J. Patton, seeks compensation for loss of support on behalf of the victim's minor child, Charles Lemont Patton.

(4) That the Claimant, Crystal Y. Patton, incurred funeral and burial expenses in the amount of $4,967.23, all of which had been paid. Pursuant to section 2(h) of the Act, funeral and burial expenses are compensable to a maximum amount of $3,000.

(5) That section 2(h) of the Act states that loss of support shall be determined on the basis of the victim's average net monthly earnings for the six months immediately preceding the date of the injury or on $1,000 per month, whichever is less.

(6) That the victim's average net monthly earnings were $1,312.53. The victim was 39 years of age at the time of the crime. According to *Vital Statistics of the United States*, Life Tables, volume II (U.S. Department of Health, Education and Human Services 1984), his life expectancy would have been 74.2 years. The projected loss of support for 35.2 years is $422,400, which is in

excess of $25,000 which is the maximum amount compensable under section 10.1(f) of the Act.

(7) That section 2(h) of the Act further states that if a divorced applicant is claiming loss of support for a minor child of the deceased, the amount of support for each child shall be based on the amount of support the minor child received pursuant to the degree for the six months prior to the date of the deceased victim's death.

(8) That under the divorce decree in *Charlie Patton v. Virginia Patton,* No. 84 D 0024999, filed in the circuit court of Cook County, Illinois, the victim was ordered to pay child support for his minor child, Charles Lemont Patton. Available evidence indicates that the victim met his child support obligations at an average of $90 per month.

(9) That the victim's minor child, Charles Lemont Patton, born March 30, 1982, was eight years, three months of age at the time of the incident. Charles Lemont Patton will attain the age of majority on March 30, 2000, which is 117 months after the incident.

(10) That based upon support payments of $90 per month, the projected loss of support for 117 months, the maximum period for loss of support for the victim's child, is $10,530.

(11) That pursuant to section 10.1(e) of the Act, this Court must deduct from all claims, the amount of benefits, payments or awards payable under the Workers' Compensation Act, Dram Shop Act, Federal Medicare, State Public Aid, Federal Social Security Administration burial benefits, Veterans Administration burial benefits, health insurance, or from any other source, except annuities, pension plans, Federal Social Security payments payable to dependents of the victim and the net proceeds

of the first $25,000 (twenty-five thousand dollars) of life insurance that would inure to the benefit of the applicant.

(12) That the Claimant, Crystal Y. Patton, has received $43,000 from a life insurance policy as a result of the victim's death, $18,000 of which can be counted as an applicable deduction under section 10.1(e) of the Act.

(13) The Claimant, Virginia J. Patton, has received no reimbursements that can be counted as an applicable deduction under section 10.1(e) of the Act.

(14) The Claimant, Crystal Y. Patton, net loss can be based upon the following:

Projected loss of support	$422,400.00
Maximum Funeral Expenses	3,000.00
Subtotal	$425,400.00
Less Applicable Life Insurance	-18,000.00
Total	$407,400.00

(15) That after making all of the applicable deductions under the Act, the net loss of the Claimant, Crystal Y. Patton, is in excess of the $25,000 maximum award allowed in section 10.1(f) of the Act.

(16) The Claimant, Virginia J. Patton, net loss can be based upon the following:

Projected Loss of Child Support	$10,530

(17) That section 10.1(f) of the Act states that if the pecuniary loss is in excess of $25,000, the maximum amount allowed, the award shall be divided in proportion to the amount of actual loss among the claimants entitled to compensation.

(18) The Claimants' net loss should be prorated respectively in accordance with the percentage of the compensable net loss. The Claimants' net compensable loss is based upon the following:

	Total Net Loss	% of Loss	Compensable Amount
Crystal Y. Patton	$407,400.00	97.5	$24,375.00
Virginia J. Patton	10,530.00	2.5	625.00
Total	$417,930.00	100.0	$25,000.00

(19) That the Claimant Crystal Y. Patton, has complied with all pertinent provisions of the Act and qualifies for compensation thereunder.

(20) That the Claimant Virginia J. Patton, has complied with all pertinent provisions of the Act and qualifies for compensation thereunder.

(21) That the interest of the Claimant, Crystal Y. Patton, would be best served if the award hereunder would be paid pursuant to the installment provision of section 10.1 of the Act.

It is hereby ordered that the sum of $625 (six hundred twenty-five dollars) be and is hereby awarded to Virginia J. Patton, on behalf of Charles Lemont Patton, minor child of the deceased victim, Charlie Lee Patton, an innocent victim of a violent crime.

It is further ordered that the sum of $24,375 (twenty-four thousand three hundred seventy-five dollars) be and is hereby awarded to Crystal Y. Patton, wife of the deceased victim, Charlie Lee Patton, an innocent victim of a violent crime, to be paid and disbursed to her as follows:

(a) $3,000 (three thousand dollars) to be paid to Crystal Y. Patton in a lump sum;

(b) $12,375 (twelve thousand three hundred seventy-five dollars) to be paid to Crystal Y. Patton for herself and for the use and benefit of the victim's minor child, Isaac Lee Patton in a lump sum;

(c) 9 (nine) equal monthly payments of $1,000 (one thousand dollars) each to be paid to Crystal Y. Patton for the use and benefit of the victim's minor child, Isaac Lee Patton;

(d) In the event of the death or marriage of the victim's minor children, it is the duty of the personal representative of the Claimant to inform this Court in writing of such death or marriage for the purpose of the possible modification of the award.

ORDER

JANN, J.

This claim for compensation pursuant to the Crime Victims Compensation Act (740 ILCS 45/1 *et seq.*) (hereinafter the "Act") arises out of an incident that caused the death of Charlie Lee Patton on July 7, 1990. Claimant, Crystal Y. Patton, wife of the deceased victim, seeks compensation for funeral expenses, loss of support and loss of support for Isaac Lee Patton, a minor son of the deceased victim. Claimant Virginia J. Patton seeks compensation for loss of support for Charles Lemont Patton, a minor son of the deceased victim.

On November 6, 1991, the Court entered an opinion awarding a total of $25,000. The Court awarded $24,375 to Crystal Y. Patton and Isaac Lee Patton for loss of support and funeral expenses, and $625 to Virginia J. Patton on behalf of Charles Lemont Patton (hereinafter "Charles"). The award for Charles was based upon a child support order requiring the victim to pay child support in the sum of $90 per month. The total net loss was found to be $407,400, of which the loss attributable to the support obligation of Charles was $10,530 or 2.5% of the total loss. The Court divided the maximum award of $25,000 in proportion to the actual loss. On November 13, 1991,

Virginia Patton requested a hearing on this claim, specifically on the issue of whether Charles should receive an award higher than $625. Crystal Patton did not seek review of the opinion.

A hearing was conducted on June 10, 1992, at which Virginia Patton appeared. Crystal Patton did not appear. Virginia Patton testified that the deceased victim was giving Charles $50 per week after the divorce between the victim and Virginia. She stated that she did not need to go back to court to have the child support obligation of $90 per month increased because the deceased victim was giving her $300 to $400 a month for Charles. The victim was paying the costs of Charles' schooling, clothing, sports and health care. The payments by the victim to Virginia on behalf of Charles were made in cash. According to Virginia, the child support order did not specify that the victim was required to provide health insurance or pay health care costs. Neither Claimant nor the Attorney General provided a copy of the child support order and it is not part of the record. Virginia stated that she could document that the victim was paying the cost of health insurance for Charles.

The hearing was continued and Claimant Virginia Patton was given an opportunity to obtain proof, via witnesses or documents, that the deceased victim was providing health insurance to Charles and that the victim was providing additional money or benefits to him.

The continued hearing was held on May 11, 1993. Claimant Virginia Patton appeared, but Claimant Crystal Patton did not appear. Virginia Patton presented three documents for consideration by the Court. No witnesses appeared and Virginia Patton's testimony was consistent with her prior statements.

Claimant's Exhibit No. 1 is a written statement by

Constance Jackson and her signature is notarized. Jackson indicates that she recalls, "times when Charles Patton gave his ex-wife $200 to $300 dollars at a time." Jackson remembers that the victim provided for his son (Charles) in every way possible. Claimant's Exhibit No. 2 is a written statement by Amy G. Hernandez, a teacher of Charles Lemont Patton. The statement does not provide any information on financial support of the victim's son.

Claimant's Exhibit No. 3 is a letter from C. A. Anderson, manager of benefits services for the Chicago Transit Authority (CTA). The letter indicates that Charles would be covered by health benefits (COBRA benefits) for a period of 90 days after the death of his father. The letter implies that Charles was covered by his father's health plan at the CTA. The letter does not indicate whether the deceased victim paid for the coverage and at what cost.

Section 2(h) of the Act defines pecuniary loss for which the applicant may seek compensation. The section specifies:

> "If a divorced or legally separated applicant is claiming loss of support for a minor child of the deceased, the amount of support for each child shall be based either on *the amount of support the minor child received pursuant to the judgment* for the 6 months prior to the date of the deceased victim's death * * *." 740 ILCS 45/2(h). (Emphasis added.)

Although the divorce decree is not part of the record, Claimant and the Attorney General's office agree that a divorce decree imposed an obligation on the deceased victim to pay $90 in child support for Charles. Regardless of whether the victim voluntarily provided additional financial support to Charles, the victim was not under a legal obligation to do so for the six months prior to the date of his death. Had the deceased victim survived, his legal obligation for support would have been for only $90 per month. The Court need not address the

issue of whether Claimant Virginia Patton can receive a higher award on behalf of Charles if the victim was providing financial support in excess of a court child support order because the exhibits and the testimony do not prove that the victim provided the additional support in any specific amount within six months of victim's death.

We hereby deny Claimant Virginia Patton's petition for additional compensation to the deceased's son, Charles Lemont Patton for the foregoing reasons. The Court's opinion of November 6, 1991, shall stand as entered and this cause is hereby dismissed with prejudice.

(No. 92-CV-0728—Claim denied.)

In re APPLICATION OF LEONARD THOMAS CASEY

Order filed March 24, 1992.

Opinion filed October 19, 1993.

LEONARD THOMAS CASEY, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (CHARLES A. DAVIS, JR., Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*basis for denial or reduction of claim—victim provokes or contributes to injury or death*. Pursuant to section 10.1(d) of the Crime Victims Compensation Act, an award shall be reduced or denied according to the extent to which the victim's conduct provoked or contributed to his injury or death.

SAME—*violent crime—victim's conduct contributed to his death—claim denied.* The son of a deceased murder victim was not entitled to compensation under the Crime Victims Compensation Act, where the victim's conduct in supplying illegal narcotics to the offender in exchange for a sexual act contributed to his death to such an extent as to warrant the denial of the Claimant's request for compensation.

ORDER

MONTANA, C.J.

This claim arises out of an incident that occurred on August 31, 1991. Leonard Thomas Casey, son of the deceased victim, Leonard Casey, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. Ill. Rev. Stat. (1989), ch. 70, par. 71, *et seq.*

This Court has carefully considered the application for benefits submitted on October 17, 1991, on the form prescribed by the Attorney General, and an investigatory report of the Attorney General of Illinois which substantiates matters set forth in the application. Based upon these documents and other evidence submitted to the Court, the Court finds:

(1) That on August 31, 1991, the victim was stabbed, allegedly by an offender who was known to him. The incident occurred at 3852 South Calumet, Chicago, Illinois. Police investigation revealed that the victim had supplied the alleged offender with illegal narcotics in exchange for a sexual act. Upon completion of the act, the alleged offender requested additional narcotics from the victim. The victim refused to provide the alleged offender with any additional narcotics. As a result, the offender obtained a knife and fatally stabbed the victim. The alleged offender has been apprehended and charged with first degree murder. That criminal proceedings against her are currently pending.

(2) That section 10.1 of the Act indicates factors used to determine entitlement to compensation. Specifically, section 10.1(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.

(3) That it appears from the investigatory report and the police report that the victim supplied illegal narcotics to the alleged offender in exchange for a sexual act. Upon completion of that act, the alleged offender requested additional illegal narcotics. When the victim refused this request, the alleged offender obtained a knife and fatally stabbed the victim.

(4) That the victim's conduct contributed to his death to such an extent as to warrant that the Claimant be denied entitlement to compensation.

(5) That this claim does not meet a required condition precedent for compensation under the Act.

It is hereby ordered that this claim be, and is hereby denied.

OPINION

FREDERICK, J.

This claim arises out of an incident that occurred on August 31, 1991. Leonard Thomas Casey, son of the deceased victim, Leonard Casey, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. Ill. Rev. Stat. (1989), ch. 70, section 71, *et seq*.

On March 24, 1992, this Court denied the claim pursuant to section 80.1(a) of the Act based upon the victim's contribution to his own injury.

Claimant made a timely request for a hearing and a hearing was subsequently held before the Commissioner assigned to the case.

On August 31, 1991, Leonard Casey was stabbed by an offender who was known to him. The incident occurred at Mr. Casey's home at 3852 S. Calumet, Chicago, Illinois. The offender told the police investigators that Mr. Casey had supplied her with illegal narcotics in exchange for a sexual act. The offender stated that at the completion of the act, Mr. Casey refused to provide any additional narcotics. The offender obtained a knife and fatally stabbed Mr. Casey. The offender was apprehended and charged with first degree murder.

At the hearing, Claimant, Leonard Thomas Casey, son of the deceased victim, testified. Claimant disputed the findings of the Court because the statements of the offender constituted the only evidence of Mr. Casey's contributory misconduct. Claimant testified that the offender's statements were not credible and should not be considered by the Court.

The only other evidence presented at the hearing in support of Mr. Casey's alleged drug involvement was a scale of the kind often used for weighing narcotics which was found in Mr. Casey's apartment.

The Commissioner suggested to the parties that the medical examiner's postmortem examination report of Mr. Casey might provide evidence and gave the parties ample opportunity to supplement the file. However, neither party obtained nor produced a copy of the medical examiner's report. The Commissioner then requested a copy of the report and the toxicology analysis of the victim's blood revealed the presence of benzoylecgonine, a cocaine metabolite.

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. *In Re Application of Fort* (1990), 42 Ill. Ct. Cl. 392.

In this case, the Respondent relies on statements made by the offender to support the claim that the victim was engaged in criminal activity at the time of the murder, and that the Claimant is, therefore, ineligible for compensation. Claimant disputes the credibility of the offender's statements.

The statements made by the offender do not mitigate her guilt and are therefore not self-serving. This Court can therefore conclude that the statements are more probably true than not true. The physical evidence of the scale found at the scene and the toxicology report provide circumstantial evidence which further bolsters the credibility of the offender's statements.

Claimant also questions the Court's finding because there were no narcotics found at the scene of the incident. Since the offender admitted that she stabbed Mr. Casey because he refused to provide any more narcotics for her use, the Court can assume that the offender would have taken any narcotics when she fled the scene of the incident.

In addition, the fact that Mr. Casey had by-products of cocaine metabolism in his blood at the time of his death further supports the Respondent's position that Mr. Casey was engaged in contributory misconduct.

We therefore find that Mr. Casey's conduct contributed to his death to such an extent as to warrant that the Claimant be denied entitlement to compensation. The claim does not meet a required condition precedent for compensation under the Act.

It is hereby ordered that this claim be and hereby is denied.

(No. 93-CV-0257—Claimant awarded $5,475.46;
motion to waive lien on civil recovery denied.)

In re APPLICATION OF PEGGY A. CHERRINGTON

Opinion filed May 6, 1993.

Opinion filed May 31, 1994.

WEINER & MCAULIFFE, LTD. (THOMAS W. WEBER, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (CHARLES A. DAVIS, JR., and PAUL H. CHO, Assistant Attorneys General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*DUI victim awarded compensation—motion to waive lien on civil recovery denied.* A DUI victim was awarded compensation for medical and hospital expenses and lost earnings, but her motion to re-open and adjudicate the victim's assistance lien retained by the State against the proceeds of her subsequent civil recoveries arising from the incident was denied, since the Crime Victims Compensation Act is a secondary source of recovery and compensation, which would have been deducted at the time the original award was made, must be refunded to the State.

OPINION

MITCHELL, J.

This claim arises out of an incident that occurred on April 25, 1992. The Claimant, Peggy A. Cherrington, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. Ill. Rev. Stat. (1991), ch. 70, par. 71, *et seq*.

This Court has carefully considered the application for benefits submitted on July 29, 1992, on the form prescribed by the Attorney General, and an investigatory report of the Attorney General of Illinois which substantiates matters set forth in the application. Based upon these documents and other evidence submitted to the Court, the Court finds:

(1) That on April 25, 1992, Peggy A. Cherrington,

age 34, was a victim of a violent crime as defined in section 2(c) of the Act, to wit: driving under the influence of intoxicating liquor or narcotic drugs. Ill. Rev. Stat. (1991), ch. 95½, par. 11—501.

(2) That the crime occurred in Crete, Illinois, and all of the eligibility requirements of section 6.1 of the Act have been met.

(3) That the Claimant seeks compensation for medical/hospital expenses and for loss of earnings.

(4) That after considering insurance and other sources of recovery, the Claimant's net compensable loss for medical/hospital expenses is $3,020.96. To date, the Claimant has paid $127.25 towards this amount.

(5) That section 2(h) of the Act states that loss of earnings shall be determined on the basis of the victim's average net monthly earnings for the six months immediately preceding the date of the injury or on $1,000 per month, whichever is less.

(6) That the Claimant's average net monthly earnings for the six months prior to the incident were $1,887. Claimant was disabled and unable to work for a period of 2 months and 10 working days. Based upon $1,000 per month, the maximum compensation for loss of earnings is $2,454.50.

(7) That the Claimant has received no reimbursements that can be counted as an applicable deduction under §80.1(e) of the Act.

(8) That the Claimant's net compensable loss is based on the following:

	Compensable Amount
Medical Practice Plan	$2,893.21
Paid Medical Expenses/Compensable Loss of Earnings	2,582.25
Total	$5,475.46

(9) That the Claimant has complied with all pertinent provisions of the Act and qualifies for compensation thereunder.

(10) That the Claimant, Peggy A. Cherrington, has filed a civil action, *Peggy A. Cherrington v. Michael P. Matthews, et al.*, No. 92-L-15668 in the circuit court of Will County, Illinois, as a result of the incident. The Claimant, by informing the Attorney General's office of her pending civil suit, has acknowledged her responsibility to further notify the Attorney General's office of the final disposition of the civil action, pursuant to section 17 of the Act.

(11) That on December 7, 1992, Medical Practice Plan filed a physician's lien with the Court of Claims concerning the Claimant's outstanding medical expenses. The Court hereby orders direct payment to the provider in this instant case.

It is hereby ordered that the sum of $2,582.25 (two thousand five hundred eighty-two dollars and twenty-five cents) be and is hereby awarded to Peggy A. Cherrington, an innocent victim of a violent crime.

It is further ordered that the sum of $2,893.21 (two thousand eight hundred ninety-three dollars and twenty-one cents) be and is hereby awarded to Medical Practice Plan for the medical expenses of Peggy A. Cherrington.

OPINION

SOMMER, C.J.

This matter arises on the Claimant's motion to reopen and adjudicate the victim's assistance lien.

On May 6, 1993, this Court awarded $5,475.46 to the Claimant under the provisions of the Crime Victims Compensation Act. (740 ILCS 45/1 *et seq.*) The State retained a lien against any proceeds of recoveries by the victim against the perpetrators or other parties involved in the crime. 740 ILCS 45/17(c).

The Claimant has recovered $27,000 from the dram shop insurer, and proposes to pro-rate that amount among the insurance companies that have paid the victim for various damages and the Crime Victim's fund. The Attorney General has refused to agree to the pro-ration.

The Crime Victims Compensation 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 Victims' 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 Crime Victims Compensation 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). [Emphasis added.]

Under the law, as cited above, crime victims 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 victims 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.

In the present claim, had the dram shop recovery occurred before the crime victims compensation had been paid, the Claimant would have had $5,475.46 deducted from her potential award and would have received nothing.

Therefore, the position of the Attorney General in refusing to compromise the crime victims compensation lien is correct. It is therefore ordered that the Claimant's motion to re-open case and adjudicate victim's assistance lien is denied.

(No. 93-CV-2086—Claimant awarded $681.30;
net recovery in civil action ordered returned to State.)

In re APPLICATION OF FOREST L. SHOOK

Opinion filed December 30, 1993.

Opinion filed March 31, 1994.

KEEHNER, CANNADAY & KATZ, P.C. (JIM D. KEEHNER, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (PAUL H. CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*what necessary for Court of Claims to waive lien on civil recovery*. The Court of Claims may waive the State's lien on a victim's recovery in a civil action where the amount of the victim's loss, as measured by the Crime Victims Compensation Act, is high and not fully compensated.

SAME—*violent crime—Claimant awarded compensation—subsequent dram shop recovery ordered returned to State.* The Claimant was awarded compensation for his lost earnings and medical and hospital expenses related to an aggravated battery of which he was the victim, but the Court of Claims did not grant a request by the Claimant's attorney for a waiver of the State's lien on a subsequent dram shop settlement, where the victim had already been fully compensated for his loss, and therefore the Claimant's net dram shop recovery was ordered to be returned to the State.

OPINION

SOMMER, C.J.

This claim arises out of an incident that occurred on November 26, 1992. The Claimant, Forest L. Shook, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. Ill. Rev. Stat. (1991), ch. 70, par. 71, *et seq*.

This Court has carefully considered the application for benefits submitted on February 10, 1993, on the form prescribed by the Attorney General, and an investigatory report of the Attorney General of Illinois which substantiates matters set forth in the application. Based upon these documents and other evidence submitted to the Court, the Court finds:

(1) That on November 26, 1992, Forest L. Shook, age 30, was a victim of a violent crime as defined in section 2(c) of the Act, to wit: aggravated battery. Ill. Rev. Stat. (1991), ch. 38, par. 12—4.

(2) That the crime occurred in Swansea, Illinois, and all of the eligibility requirements of section 6.1 of the Act have been met.

(3) That the Claimant seeks compensation for medical/hospital expenses and for loss of earnings.

(4) That after considering insurance and other sources of recovery, the Claimant's net compensable loss

for medical/hospital expenses is $3,323.05. To date, the Claimant has paid $45 towards this amount.

(5) That section 2(h) of the Act states that loss of earnings shall be determined on the basis of the victim's average net monthly earnings for the six months immediately preceding the date of the injury or on $1,000 per month, whichever is less.

(6) That the Claimant's average net monthly earnings for the six months prior to the incident were $1,078.22. Claimant was disabled and unable to work for a period of 14 working days. Based upon $1,000 per month, the maximum compensation for loss of earnings is $636.30.

(7) That the Claimant has received no reimbursements that can be counted as an applicable deduction under section 10.1(e) of the Act.

(8) That the Claimant's net compensable loss is based on the following:

	Compensable Amount
St. Elizabeth Hospital	$2,536.30
Belleville Radiologists, Ltd.	278.75
Medstar Ambulance, Inc.	253.00
Neurological Service-Belleville	210.00
Paid Medical Expenses/Compensable Loss of Earnings	681.30
Total	$3,959.35

(9) That the Claimant has complied with all pertinent provisions of the Act and qualifies for compensation thereunder.

(10) That pursuant to section 18(c) of the Act, the Court may order that all or a portion of an award be paid jointly to an applicant and the provider of services. In the

instant case, the Court finds this section applicable and orders that co-payment be made.

It is hereby ordered that the sum of $681.30 (six hundred eighty-one dollars and thirty cents) be and is hereby awarded to Forest L. Shook, an innocent victim of a violent crime.

It is further ordered that the sum of $2,536.30 (two thousand five hundred thirty-six dollars and thirty cents) be and is hereby awarded to St. Elizabeth's Hospital and Forest L. Shook.

It is further ordered that the sum of $278.75 (two hundred seventy-eight dollars and seventy-five cents) be and is hereby awarded to Belleville Radiologists, Ltd. and Forest L. Shook.

It is further ordered that the sum of $253 (two hundred fifty-three dollars) be and is hereby awarded to Medstar Ambulance, Inc. and Forest L. Shook.

It is further ordered that the sum of $210 (two hundred ten dollars) be and is hereby awarded to Neurological Service-Belleville and Forest L. Shook.

OPINION

SOMMER, C.J.

On December 30, 1993, this Court issued an opinion granting compensation to the Claimant pursuant to the provisions of the Crime Victims Compensation Act. 740 ILCS 45/1 *et seq*.

On January 10, 1994, this Court received a letter from the Claimant's attorney indicating that a settlement of a dram shop action in the amount of $4,500 might be available to the Claimant. The letter asks that the Court waive the lien created by section 17 of the Act, so as to

allow the attorney and the Claimant to keep part or all of the dram shop award.

When this Court has been asked to waive the lien after an award has been made, a distinction has been made between those claims which were fully compensated by the State as measured by the terms of the Act and those which were not. *In re Application of John Lavorini* (1989), 42 Ill. Ct. Cl. 390; *In re Application of Setuko M. Cobb* (1992), 44 Ill. Ct. Cl. 438.

This distinction reflects the situation which would occur if the dram shop award or other award were to be made before the crime victims award was made. In some situations the amount of the loss as measured by the Act is high and not fully compensated, usually due to the $25,000 limit on any award. In other situations, the amount of loss is fully compensated under the terms of the Act. Where the amount of loss is fully compensated, the lien for any recovery from a dram shop action remains in effect.

In the present claim the victim was fully compensated for his loss as measured by the Act, therefore, under the ruling of *Lavorini, supra*, this Court is unable to waive the lien.

The issue remaining is whether the gross amount of the dram shop recovery must be returned to the State, or whether any expenses of obtaining the recovery be retained. 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. It is therefore ordered that the net amount of the dram

shop recovery after expenses be returned to the State as per section 17 of the Act.