REPORTS

OF

Cases Argued and Determined

IN THE

COURT of CLAIMS

OF THE

STATE OF ILLINOIS

VOLUME 47

Containing cases in which opinions were filed and
orders of dismissal entered, without opinion
for: Fiscal Year 1995—July 1, 1994-June 30, 1995

SPRINGFIELD, ILLINOIS
1996

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PREFACE

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

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

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

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Judge - February 26, 1987—January 15, 1993

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Marion, Illinois
March 26, 1985—

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

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

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

RICHARD MITCHELL, Judge
Jacksonville, Illinois
February 24, 1993—

ANDREW M. RAUCCI, Judge
Chicago, Illinois
November 9, 1994—
February 28, 1984—June 1, 1992

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Springfield, Illinois
March 1, 1995—

CHLOANNE GREATHOUSE
Deputy Clerk and Director
Springfield, Illinois
January 1, 1984—February 28, 1995

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

REPORTED OPINIONS

FISCAL YEAR 1995

(July 1, 1994 through June 30, 1995)

(No. 77-CC-2021—Claim denied; petition for rehearing denied.)

SHIRLEY MAE MCCLELLAN, Administrator of the Estate of CHARLES EDWARD MCCLELLAN, Deceased, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed August 30, 1988.

Order on petition for rehearing filed June 27, 1994.

SPOMER & SPOMER (W. C. SPOMER, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (CLAIRE GIBSON TAYLOR, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*State not insurer of inmates' safety.* The State is not an insurer of the safety of persons imprisoned by the Department of Corrections.

SAME—*inmate killed in tractor accident—no evidence of negligence or defective equipment—claim denied.* A wrongful death claim brought by the estate of an inmate who was killed in a tractor accident while working at a correctional facility was denied, based upon lack of evidence in support of al-

legations that the inmate had been forced off the road by the operator of a State-owned vehicle, or that the tractor was defective, unusually dangerous, or in violation of applicable State or Federal regulations.

OPINION

BURKE, J.

This cause coming to be heard upon the report of the Commissioner, after hearing before said Commissioner, and this Court being fully advised in the premises, finds that the Claimant is the widow and administrator of the decedent's estate. The decedent was killed on September 10, 1977, as a result of a tractor accident at the Menard Correctional Center. Claimant brings this action for wrongful death pursuant to section 22—1 of the Court of Claims Act. 705 ILCS 505/22—1.

Claimant alleges that at the time of decedent's death he was exercising due care and caution for the safety of his person. Claimant further alleges that the tractor furnished to decedent was dangerously defective because the brakes were inoperable and it was not equipped with a roll bar and that the Respondent knew or should have known of the tractor's defective condition.

Claimant and the decedent were married December 27, 1976, and no children were born of the marriage. The decedent had five adult children by a previous marriage. Claimant testified that prior to the decedent's incarceration at Menard Correctional Center on January 10, 1977, the decedent did farm work, construction work and was a minister. Decedent graduated high school and completed two years of college. Decedent earned approximately six thousand dollars ($6,000) in the year preceding his death. Claimant further testified that decedent provided his children with advice, communication, and financial support. Decedent was a good husband who took care of his home

and did repairs. Claimant stated decedent was careful in his habits and had been observed operating tractors in a careful manner in the performance of agricultural pursuits.

Claimant called Chesley W. Stevens as a witness to testify as to the condition of the tractor operated by the decedent at the time of his death. Mr. Stevens operated a welding and fabrication shop in the city of Cairo, Illinois. He had installed roll-over protective devices on tractors, jeeps, and pick-up trucks. Mr. Stevens was familiar with the type of tractor operated by the decedent at the time of his death. The tractor did not have a roll bar. A roll bar protective system could have been affixed or attached to the tractor, and such a system would have cost approximately $300 in labor and materials in 1977. A seat belt could have also been installed on the tractor according to the witness. The witness had attached seat belts and three roll bars on tractors manufactured prior to 1976.

The parties stipulated to the admission of certain documents and things in evidence including the departmental report identified as Respondent's exhibit "1." The scene of the accident could have been viewed from the Menard Psychiatric Unit. Resident David Carlson of that unit claimed to have seen the accident which resulted in McClellan's death. Carlson did not testify at the hearing in this case. The investigation report reveals that Carlson claimed that a red pick-up truck with a spotlight on top of the cab forced McClellan's tractor from the road into a deep ditch where it overturned. The internal investigation conducted by the Department of Corrections authorities revealed that the pick-up truck described by Carlson was not used on the day of McClellan's death. Indeed, there was no institutional vehicle being driven on the farm when McClellan's death occurred.

The Claimant argued in the alternative that liability on the part of the Respondent is established on two additional grounds. The first is that the State did not furnish the decedent a safe place to work and safe equipment. Secondly, the decedent was forced off the farm road by a vehicle owned and operated by the Respondent.

As to the Respondent's second point, *prima facie* evidence of the statement of Carlson is included in the departmental report which was admitted as set forth above. The result of the internal investigation with respect to the statement of Carlson was offered and received by this Court in accordance with that stipulation. Accordingly, there is no preponderance of evidence to establish the validity of the statement by resident Carlson that decedent's tractor was run off the road by an institutional pick-up truck. Claimant has failed to meet her burden of proof that decedent's death was caused by the operation of an institutional pick-up truck.

As to the alternative claim that the death was due to the failure of the Respondent to provide a safety belt and roll bar on the farm tractor, we do not agree. The departmental report previously referred to revealed that the tractor being operated by the decedent at the time of his death was in good condition mechanically and had good brakes. The road upon which the tractor was being operated was in good condition and not in need of repairs. Claimant offered no evidence concerning the condition of the tractor being operated by the decedent except to point out that it was not equipped with a roll bar or seat belt. Claimant places great reliance on the case of *Camenzind v. Freeland Furniture Company* (1918), 89 Oregon 158, 174 Pac. 139. We find that this case is not helpful in deciding the issues in this case. Claimant in this case simply produced no evidence that the tractor in question was de-

fective, unusually dangerous, or violated any applicable State or Federal regulations. No evidence was presented which would indicate that the tractor being operated by the decedent at the time of his death presented any peculiar or unusual risk to the operator.

The Respondent is not an insurer of the safety of persons imprisoned by the Department of Corrections. There is nothing in the record to indicate that the tractor was defective or that the condition of the tractors being used generally in the agricultural industry would have given rise to an extraordinary duty on the part of the Respondent to provide protective security devices referred to by the Claimant.

Accordingly, we find in favor of the Respondent and against the Claimant on the issue of liability in this case.

ORDER

FREDERICK, J.

This cause comes on the Claimant's petition for rehearing, and the Court having reviewed the court file and opinion, and the Court being fully advised in the premises, therefore, it is ordered that the petition for rehearing is denied.

(No. 81-CC-1473—Claimant Rita Gordon awarded $45,000; Claimant Vincent Gordon awarded $2,500.)

RITA GORDON and VINCENT GORDON, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed Jan. 31, 1995.

GOLDBERG & GOLDBERG (BARRY DAVID GOLDBERG, of counsel) for Claimants.

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

NEGLIGENCE—*duty owed by State-employed physicians—elements of medical malpractice claim.* The State, by its physician employees, owes a duty to patients to possess and apply the knowledge, skill and care that is ordinarily used by reasonably well-qualified doctors in similar circumstances, and to prove medical malpractice a claimant must show that the State breached its duty, and that the breach was a proximate cause of injury.

SAME—*medical malpractice—failure to diagnose viral encephalitis—State liable for wife's injuries and husband's loss of consortium.* The Claimant, an employee of the Department of Public Aid, established a *prima facie* case of medical malpractice and was awarded damages as a result of the Illinois State Psychiatric Institute's misdiagnosis of her viral encephalitis as acute schizophrenia, where the State presented no expert witness to refute testimony by the Claimants' expert showing that physicians deviated from the required standard of care in failing to perform a blood test, spinal tap, and neurologic evaluation of the wife, or to re-evaluate her when she developed symptoms consistent with encephalitis.

DAMAGES—*medical malpractice at State Psychiatric Institute warranted award, including that for loss of consortium, for damages resulting from misdiagnosis.* Where there was uncontested medical testimony that the State Psychiatric Institute's misdiagnosis of Claimant's viral encephalitis as acute schizophrenia permitted the disease to progress to a more severe state and made it more likely that she would require a tracheostomy and renal dialysis and experience a longer period of recovery, Claimant was awarded over half of her total medical expenses and her husband was awarded $2,500 for loss of consortium.

OPINION

FREDERICK, J.

Claimants, Rita and Vincent Gordon, filed their complaint in the Court of Claims pursuant to section 8 of the Court of Claims Act seeking recovery for personal injuries. (705 ILCS 505/8(d).) The claim by Claimant, Rita Gordon, against Respondent is a medical negligence claim arising out of acts, or omissions, alleged to have been performed by the Illinois State Psychiatric Institute, which caused her to incur personal injuries. The claim by Claimant, Vincent Gordon, is for loss of consortium.

Facts

The Claimants, Rita and Vincent Gordon, are wife and husband. They have been married since October 9, 1976. In 1979, Mr. and Mrs. Gordon were both employed. Mr. Gordon was a janitor for the Chicago Housing Authority and Rita Gordon was a case worker I for the Illinois Department of Public Aid. The Claimants enjoyed a normal, healthy marital relationship. Their four children lived with the Gordons in 1979 and Rita had the primary responsibility for maintaining the household.

Prior to January 1979 Rita Gordon had enjoyed good health. She had never suffered from any significant illness, and she had never been treated for a psychiatric condition.

In January of 1979 Mrs. Gordon began exhibiting bizarre behavior. She would talk incoherently and emotionally. One night she obtained a knife because she thought someone was out to get her. After demonstrating bizarre behavior at home, including hearing voices, Rita Gordon was admitted to Respondent's Illinois State Psychiatric Institute on January 14, 1979. After being involuntarily admitted, she laid lifeless and made no utterances or responses. She was diagnosed as an acute schizophrenic. During this hospitalization, Rita Gordon became stuporous, failed to recognize people, developed a fever and progressed to a coma. Mrs. Gordon did not undergo any laboratory studies to work up the cause of her illness. More specifically, she never had a white blood cell count nor a spinal tap. It appears a white blood count was ordered but no result appeared in her medical chart.

On January 20, 1979, Mrs. Gordon was transferred to Rush Presbyterian St. Luke's Medical Center. At that time she came under the care of Dr. Harold Klawans. Dr. Klawans diagnosed Rita Gordon as suffering from viral

encephalitis. The diagnosis was confirmed by a spinal tap. During this hospitalization, Mrs. Gordon was treated with Arabinoside-A for the viral encephalitis. She also underwent paraperitoneal dialysis for altered kidney function and had a tracheostomy to provide support. Dilantin and Phenobarbital were prescribed to treat seizures.

The only medical witness to testify was Dr. Harold Klawans. Dr. Klawans is a board certified neurologist. Dr. Klawans testified that viral encephalitis is an inflammation of the brain caused by a virus. The signs and symptoms of viral encephalitis include fever, apparent psychiatric manifestations, followed by a depressed level of consciousness, lethargy, stupor, coma and seizure. Dr. Klawans further testified that the diagnostic modalities used to rule viral encephalitis in or out in 1979 included temperature, white blood cell count, and a spinal tap. He also testified that viral encephalitis was treated with the drug Arabinoside-A.

Dr. Klawans reviewed the Illinois State Psychiatric Institute records pertaining to Rita Gordon. It was the opinion of Dr. Klawans that the physicians at the Illinois State Psychiatric Institute deviated from the standard of care in treating Rita Gordon in the following respects:

(a) By failing to obtain a white blood cell count for Rita Gordon;

(b) By failing to re-evaluate Mrs. Gordon several days after her admission when she developed a stiff neck and became lethargic;

(c) By failing to perform a neurologic evaluation; and

(d) By failing to perform a spinal tap.

Dr. Klawans also testified that the standard of care required that the foregoing be performed by the physicians at Illinois State Psychiatric Institute.

Finally, Dr. Klawans testified that the deviations from the standard of care caused injury to Rita Gordon. Dr. Klawans testified that Mrs. Gordon's disease was allowed to progress to a much more severe state prior to its diagnosis and it made her medical course more complicated. She required renal dialysis and a tracheostomy for respiratory care and she sustained short-term memory loss. Dr. Klawans testified that earlier treatment would have spared Mrs. Gordon a coma and that earlier treatment could have prevented Mrs. Gordon's anterior compartment syndrome.

After the hospitalization, Mrs. Gordon continued to receive outpatient physical occupational therapy for six to eight months. She has permanent scars from the tracheostomy and treatment for the anterior compartment syndrome. She did not return to work until March 17, 1980. The Claimant's medical bills amount to $70,589.95.

Mrs. Gordon has no memory of her treatment at the Illinois State Psychiatric Institute. She does not engage in strenuous work at home. She has lost the desire for sex and her frequency of intercourse has diminished from three to four times a week to once or twice a month.

The only evidence presented by the Respondent was the introduction of Mrs. Gordon's Illinois State Psychiatric Institute record. The Respondent called no physicians to dispute the standard of care, whether Respondent deviated from the standard of care, or whether the deviations were a proximate cause of Claimant's injuries.

Immediately prior to the commencement of the hearing and before any evidence, the Respondent moved orally and inartfully for a directed verdict stating that the case was barred by the doctrine of *res judicata*. Claimants had previously filed a medical malpractice complaint in the circuit court of Cook County in *Gordon v. Nasr*

(1989), 182 Ill. App. 3d 964, 538 N.E.2d 483. The circuit court ultimately granted summary judgment in favor of defendants. Claimants sued 32 defendants in the circuit court action. The Claimants appealed the decision to the first district appellate court. The appellate court affirmed the circuit court's decision. *Gordon v. Nasr* (1989), 182 Ill. App. 3d 964, 538 N.E.2d 483.

Claimants objected to Respondent's motion for directed verdict based upon timeliness. Claimants also objected because the motion was not stated in writing and thus did not provide them with a fair opportunity to respond. Claimants argue that the circuit court never obtained jurisdiction over Dr. Nasr, therefore the summary judgment could not have been a decision on the merits as it relates to his conduct.

Respondent's position is that Dr. Sudahyl Nasr and 31 other individuals were named defendants in the circuit court case. Respondent argues that the State, as a principal, acts as an indemnor of its agents. Respondent argues that the disposition of summary judgment is a disposition on the merits of the case.

Respondent may be correct that if the circuit court found Respondent's agents to be without fault, then Respondent would escape liability, but in this instance, it appears that the circuit court did not have jurisdiction over all of the alleged agents of the State, including Dr. Sudahyl Nasr. The appellate decision indicates that, "only 16 defendants were remaining at the time the orders appealed from were entered." (538 N.E.2d 484.) The appellate decision does not state whether Dr. Nasr was one of the remaining defendants, therefore it cannot be determined whether summary judgment was entered in favor of Dr. Nasr. Claimants' reply brief names Dr. Nasr and 11 other individuals which were not subject to the summary judgment order.

Respondent has not disputed the assertion that Dr. Nasr was not a subject of the summary judgment order. Additionally, the affidavits relied upon by the circuit and appellate courts are not offered into this record and there is no indication what the exact statements of those affiants may contain. The Respondent failed to present enough evidence to the court to determine if the motion should have been granted.

It may be that the State should have argued that the cause should have been dismissed for failure of the Claimants to exhaust their other remedies. (Court of Claims Regulations, 74 Ill. Adm. Code, 790.60, 790.90.) This Court could find that the Claimants' failure to follow Supreme Court Rule 220 against some of the defendants in the State court proceeding is a breach of Claimants' duty to properly exhaust their remedy.

The Court's problem is trying to determine the status of those defendants for which the circuit court did not have jurisdiction. If the 32 defendants were State employees, acting within the scope of their employment, then the State does not have an exhaustion of remedies defense. (See 24—5 Court of Claims Act, 740 ILCS 45/1, *et seq.*). However, if Dr. Nasr and the 11 others not subject to the summary judgment order were not State employees then there would be a defense for failure to exhaust other remedies for recovery.

There is no evidence that the Court can point to before the Court from which this Court can determine the employment status of those 12 State court defendants by a preponderance of the evidence. Therefore, the *res judicata* defense and the potential exhaustion of remedies defense must be denied.

Claimants have presented a *prima facie* case of medical negligence and the Respondent failed to rebut any of

that evidence. Respondent did not present any witnesses. Respondent only offered into evidence the records from the Illinois State Psychiatric Institute.

The Respondent, by its physician employees, owed a duty to Claimant, Rita Gordon, to possess and apply the knowledge, skill and care that is ordinarily used by reasonably well-qualified doctors in similar circumstances. In order to prove medical malpractice, the Claimants had to prove that Respondent breached its duty and the breach was a proximate cause of injury. *Borowski v. Von Sobbrig* (1973), 14 Ill. App. 3d 672, 303 N.E.2d 146, 150.

Claimants presented Dr. Harold Klawans, a treating physician of Rita Gordon and a board certified neurologist. Dr. Klawans testified that he cared for Rita Gordon while she was a patient at Rush Presbyterian St. Luke's in 1979. He played a role in the diagnosis of Mrs. Gordon and the determination of her treatment. He diagnosed her, based upon clinical features and spinal fluid, as having viral encephalitis. Dr. Klawans stated that the condition could cause loss of memory and it is common for such patients to go into a coma. Dr. Klawans testified that the physicians and attendants to Rita Gordon at the Illinois State Psychiatric Institute deviated from the required standard of care. His interpretation of the medical records is that no white blood count was conducted, and if it was conducted, there is no mention of the results. He opined that several days after admission, when she developed a stiff neck, which is often a suggestion of inflammation going on within the central nervous system and was lethargic, she should have been completely re-evaluated.

Respondent cites *Ondes v. State* (1991), 43 Ill. Ct. Cl. 272 in support of the proposition that Claimant must show by a preponderance of the evidence that the injury was reasonably foreseeable, the likelihood of injury, the

magnitude of the burden of guarding against it, and the burden on the State to guard against the injury. *Ondes* is not a medical malpractice case.

Respondent argues that after tests were run, physical exams given and notes made, Mrs. Gordon was diagnosed as suffering from acute schizophrenia. Further tests were to be conducted during her stay between January 17 and January 20, 1979, but Mrs. Gordon was recalcitrant and uncooperative. Respondent also states that her illness did not appear to be life-threatening.

All of the above circumstances, according to Respondent, would make it extremely difficult for anyone to reasonably foresee the likelihood of injury. Respondent notes that, "as soon as it was determined that Rita Gordon spiked a high fever of 104 degrees, she was immediately transferred to Rush Presbyterian St. Luke's Hospital after consultation with her family." Respondent concludes that an injury was not foreseeable since a creation of a legal duty to a claimant requires more than a mere possibility of an occurrence. *Cunis v. Brennan* (1974), 56 Ill. 2d 372.

The problem with all of the State's arguments is that the State presented no expert witnesses to support its arguments. All the State presents are arguments unsupported by testimony. As the Claimant presented a *prima facia* of medical negligence which Respondent failed to rebut with expert testimony, we must find that the Respondent owed a duty of care to care and treat Claimant within the standard of care of reasonably well-trained medical providers in similar circumstances in similar localities; that the Respondent breached that standard of care by failing to diagnose the viral encephalitis through appropriate diagnostic modalities; and that this breach was a proximate cause of Claimant's injuries.

Claimant's Exhibit No. 1 is a statement of account indicating that $63,745.75 in medical costs had been charged by Presbyterian St. Luke's Hospital as of April 24, 1979. Claimant's Exhibit No. 2 indicates that a total of $70,589.95 in medical expenses were incurred. Mrs. Gordon did not return to her job at the Illinois Department of Public Aid until March 17, 1980. Claimant testified that she was earning approximately $800 per month. Unfortunately, Claimant's Exhibit No. 3, an employment record which was used to refresh the witnesses' recollection, was not offered into evidence. Therefore, there is no verification of earnings. However, Mrs. Gordon did miss nearly 14 months of work.

The issue of damages is a difficult one because there is no allegation or proof that Respondent was in any way responsible for Mrs. Gordon's viral encephalitis. Instead, it is alleged that the misdiagnosis caused her condition to become more extreme and complicated. It is not absolutely clear whether Mrs. Gordon would have experienced the renal dialysis and a tracheostomy for her respiratory care had the viral encephalitis been diagnosed and treated any time prior to January 20, 1979. Dr. Klawans testified that Respondent deviated from the standard of care which allowed Mrs. Gordon's disease to progress to a much more severe state. This made it more likely that she would require a tracheostomy and renal dialysis. It was more likely it would take her longer to recover. She experienced six or seven months of therapy. She also has scars from the tracheostomy.

The Court finds that the total value of Claimant Rita Gordon's claim is forty-five thousand dollars ($45,000). The Court finds that the total value of Claimant Vincent Gordon's claim for loss of consortium is two thousand five hundred dollars ($2,500). No specific sum was requested

by Mr. Gordon and although there is some testimony to loss of consortium, the loss appears to have been temporary.

Wherefore, it is ordered that the Claimant, Rita Gordon, be and hereby is awarded the sum of forty-five thousand dollars ($45,000) and Claimant, Vincent Gordon, be and is hereby awarded the sum of two thousand five hundred dollars ($2,500).

(Nos. 82-CC-0565, 84-CC-0375 cons.—
Claimant McCarthy Brothers Co. awarded $6,003.96.)

McCarthy Brothers Co. and The Waldinger Co.,
Claimants, *v.* The State of Illinois, Respondent.

Opinion filed Feb. 21, 1995.

Amendment to opinion filed April 28, 1995.

Greensfelder Hemker Weise Gale & Chappelow and Thomas R. Lamont and Churchill, Nester & McDonnell, for Claimant McCarthy Brothers.

Sorling, Northrup, Hanna, Cullen & Cochran, Ltd. and William R. King and John A. Templer, Jr., for Claimant Waldinger Corp.

Jim Ryan, Attorney General (Tom Gray, Assistant Attorney General, of counsel), for Respondent.

Practice and Procedure—*admissions by State in pleadings were binding.* Once a statement of fact has been admitted in the pleadings, it constitutes a judicial admission, it is binding on the parties making it, and it is unnecessary for the opposing party to introduce evidence in support thereof, and in a claim by contractors against the Capital Development Board, the State was bound by its admission in a motion for summary judgment that project delays were due to a contractor's compliance with the project architect's faulty design specifications.

Contracts—*when owner warrants to contractor adequacy of plans and specifications.* When an owner, through its agent or architect, directs a

contractor to perform work in accordance with plans or specifications, the owner warrants the adequacy of those plans or specifications, and the contractor who is obliged to follow them is not liable for errors or defects resulting from the plans or specifications.

SAME—*construction delays—State's architect submitted faulty design specifications—contractors entitled to compensation.* Where two contractors who performed construction work on a university building sought damages against the Capital Development Board for breach of contract, the contractors were entitled to compensation for amounts which the State wrongfully refused to pay, improperly deducted from the contract price, or which were incurred due to unreasonable delays in the project, because the record showed that the delays resulted from the contractor's required compliance with the State architect's faulty design specifications and the State's refusal to alter those specifications.

SAME—*lapsed appropriations—insufficient funds available to pay contractors' claims.* The Court of Claims cannot enter an award unless sufficient funds remain released and unexpended in the appropriation made to fund the project, and although the Claimant contractors established their entitlement to awards for breach of contract, the Court of Claims was constrained to limit one contractor's award to the remaining lapsed funds available, and to deny payment to the other contractor since no funds remained to pay the damages suffered.

OPINION

FREDERICK, J.

These two cases arose from the construction of the Basic Science Building for the University of Illinois College of Veterinary Medicine in Urbana, Illinois. The claims were consolidated into one claim from two original claims filed respectively by McCarthy Brothers Company in 1981 and the Waldinger Company in 1983. McCarthy Brothers Company (hereinafter referred to as "McCarthy") filed its complaint with the Court of Claims on October 13, 1981, seeking $97,633.95 in damages from the State of Illinois, through its agency, capital development board (hereinafter referred to as "CDB"), for damages it incurred as a result of the Respondent's alleged breach of contract. The Waldinger Company (hereinafter referred to as "TWC") filed its complaint in the Court of Claims on September 1, 1983. TWC then amended its

complaint on September 24, 1983, seeking $709,929.03 in damages from the State for damages incurred as a result of the breach of contract by the Respondent. The Court consolidated the two claims on May 11, 1984.

A trial was held before the Commissioner assigned to the case on the following dates: July 13 through 14, 1992, and July 20, 1992. The evidence in this case is voluminous and consists of hundreds of pages of contract documents, award letters, construction plans and designs, correspondence among the parties and other contractors, engineers and architects, photographs of the construction site, depositions, joint stipulations to uncontested facts, and the report of the proceedings.

The Facts

The construction project which is the subject of this litigation is the Basic Science Building of the College of Veterinary Medicine at the University of Illinois in Urbana, Illinois. In 1979, the Capital Development Board issued a series of contracts to the significant contractors as required under Illinois law. Construction was to proceed under two distinct phases, being Phase I and Phase II. Phase I involved site preparation and the erection of structural steel and concrete frame. Phase II principally involved the exterior and interior finishing of the structure.

McCarthy was awarded the contract to perform Phase I structural work and entered into a contract dated July 27, 1979, with CDB. In addition to erecting the structural frame for the building, McCarthy was to provide the Phase I "Temporary Utilities." The CDB set forth all requirements in the project manual. Howard Peters was in charge of the field work for McCarthy. TWC entered prime contracts under both phases of the construction. Under Phase I, TWC entered a contract with the CDB for

the construction of underground utilities. Under Phase II of the project, TWC entered contracts with CDB for heating and ventilation. Richard Wyninger was in charge of the field work for TWC. The work began in the early fall of 1979.

CDB's senior project manager for the project was Eugene Barish. As the senior project manager, he was the employee of CDB. Mr. Barish was responsible for monitoring the progress of the work. He was also acting as liaison between the architect-engineer, the prime contractors, the using agency, CDB and each of them for acting on any changes and work orders.

The architect-engineer for the project was Lester B. Knight & Associates, Inc. (hereinafter referred to as "Knight"). As architect-engineer, Knight was CDB's representative for the purpose of observing the work for conformance with the plans and specifications. Knight was also responsible for processing and approving all change orders issued in connection with the work on the project. Knight's contract provided that the "Architect-Engineer shall prepare when authorized by CDB, minor modifications and applications for change orders * * * and shall review and make recommendations on contractor's proposals." John Larson was the on-site representative for Knight. Scott Lawson was the designated Knight project architect.

In performance of its Phase I contract, TWC interfaced with McCarthy's work and certain of TWC's work was dependent upon the prior completion by McCarthy of its work. The same was true with respect to the Phase II contracts of TWC. McCarthy was responsible for constructing the basement foundation walls, the basement floor slab, driving certain pilings immediately adjacent to the basement walls, and backfilling the walls. A third contractor, C.

Iber and Sons, was responsible for the placement of the first floor concrete slab.

McCarthy commenced work on the project on October 1, 1979. During the performance of its Phase I work, McCarthy failed to maintain its scheduled performance, due to a problem in the driving sequence of certain piles causing movement of the adjacent walls. This delayed the performance of other Phase I and Phase II contractors, such as TWC. The problem with the driving sequence is at the heart of this litigation. The construction plan contained a Drawing S-1 which set the special pile driving sequence McCarthy was instructed to follow. Drawing S-1 specified that McCarthy would not drive the pilings immediately adjacent to the foundation walls until after the walls were poured and backfilling was complete.

As work proceeded through 1979, McCarthy informed CDB that the special driving sequence posed serious problems and should be changed. McCarthy specifically noted the sequence would cause delays in the completion of work and that if the walls were backfilled prior to driving the piles, the walls would move during the pile-driving sequence. Beginning in November 1979, McCarthy requested CDB and Knight to change the sequence; however, the requests were denied.

Pursuant to Drawing S-1, Foundations, section 2, McCarthy was contractually required to brace the basement walls "* * * to resist soil pressure until floor systems are completely poured." Included in its bid price was the only bracing system and materials described in the contract documents and actually provided to the project, to wit: a conventional lumber bracing system typically used on similar type projects with shoring on the top walls. On January 15, 1980, McCarthy advised CDB and Knight that the pressure exerted on the basement walls as a result of

the pile-driving operation would greatly exceed the pressure of the soil. McCarthy restated that they were only required to provide bracing sufficient to resist soil pressure, not to resist the force resulting from the pile driving. At this time, McCarthy requested Knight and CDB to provide it with direction for bracing the basement walls to resist the force of the pile-driving sequence.

On January 16, 1980, Knight advised McCarthy that it would provide McCarthy with direction respecting the bracing needed to resist the force of the pile driving. Two days later, Knight changed its mind and informed McCarthy it would not give any direction on bracing. McCarthy repeatedly through February 13, 1980, to July 1980 requested that it be permitted to drive the pile before the basement walls were poured and backfilled in order to avoid the problem. C. Iber and Sons, Inc. joined McCarthy in these requests. Knight refused all requests to change the pile driving sequence.

Mr. Scott Lawson, the Knight project architect, testified that it was his belief that Knight, at the time the bracing questions were being raised, made an assessment as to whether any type of temporary bracing could be effective to maintain the integrity of the walls and that the assessment was in written form. Mr. Lawson further believed that Knight assessed what loads would be put against the wall under the existing conditions. Mr. Lawson acknowledged that he felt that McCarthy's requests to Knight to provide direction as to what loads would be applied on the walls (the design parameters) was a reasonable request. McCarthy could reasonably request that Knight provide McCarthy with engineering criteria which would then be utilized by McCarthy to determine the construction materials that would be required.

In adherence with Knight's and CDB's refusal to change the sequence, McCarthy performed the work in strict accordance with the special driving sequence contained in Drawing S-1. The basement walls were erected from April through June 1980 and immediately braced to resist soil pressure. On July 22, 1980, McCarthy commenced driving the last row of pile, the one closest to the walls. At no time did CDB or Knight object to McCarthy's bracing system even though each clearly observed the system on site. Shortly after resuming pile driving, the walls moved. On July 22, 1980, Knight informed C. Iber and Sons, Inc. that the wall moved because "* * * the amount of bracing provided to keep the foundation walls in line is inadequate * * *."

On July 23, 1980, McCarthy advised Knight and CDB that the bottom of the foundation walls had now moved, that the pile driving sequence should have been changed, and that an extremely large and sophisticated bracing system would have been needed to protect against the pile driving sequence. Knight took the position on July 23, 1980, that the McCarthy bracing system should have been sufficient to resist soil pressure and vibration from pile driving. As a result of the wall movement, CDB directed Knight to conduct an investigation of the movement and directed McCarthy to cease further work in the area of the wall movement and to remove the backfill from around the basement walls. The CDB took the position on July 30, 1980, that McCarthy was responsible for the wall movement. CDB refused to pay McCarthy any additional compensation for removing the backfill. CDB takes the position that section 02350 of the Project Manual required McCarthy to protect other construction from pile driving operations.

McCarthy did not believe the wall movement and associated costs was its responsibility, because the work had

been performed in accordance with the construction documents; the walls were poured in correct location and braced to resist soil pressure and no movement occurred until after backfilling. Further, McCarthy believed it was free from responsibility because it had warned CDB, Knight and others as early as January 1980 that problems would occur as a result of the special drilling sequence.

On August 5, 1980, Knight, pursuant to CDB's direction to investigate the wall movement, engaged Danner & Associates, Inc. to perform surveying work on the basement walls and columns, George A. Kennedy and Associates, Inc. to perform structural engineering services, and A & H Engineering Corporation to investigate the existing condition of the pile caps adjacent to the basement excavation. On August 28, 1980, A & H informed Knight that the vertical load bearing capacity of the pile groups was not adversely affected, and structural steel could be erected upon them. McCarthy had expressed that same opinion as early as October 1979 that a change in the sequence would not adversely affect the vertical load bearing capacity of the pile groups. McCarthy had maintained from the date the walls moved that the structural steel could be erected because the bearing capacity had not been affected.

Knight had maintained from the outset that the piles could not be driven before erection of the walls because the piles relied on friction for their structural integrity which would be compromised if the special driving sequence was not followed. A & H's report concluded that Knight's concerns were not well based, lacked substance, and that there was no basis for the special driving sequence, compliance with which resulted in movement of the wall as predicted by McCarthy. A & H also made a recommendation that prior to starting any backfill around

the basement wall, the first floor framing be placed and, if possible, the first floor slab installed before backfill was placed. The George A. Kennedy and Associates, Inc. report found that the walls were not poured as shown in the contract drawings. On September 16, 1980, Knight accepted the conclusions and recommendations of its consultants, including the revised procedure for installing the first floor structural slab and basement slab to provide lateral stability for the basement walls before starting any backfilling.

The contract documents required that builder's risk insurance be purchased and maintained until substantial completion of the project. McCarthy obtained such an insurance policy. McCarthy took the position that all costs resulting from the wall movement were covered by, and reimbursable under, the builder's risk insurance policy. As early as August 28, 1980, CDB was aware of the possibility that said expenses would be covered by the builder's risk insurance. On October 2, 1981, McCarthy filed a claim for reimbursement of costs, losses, expenses and damages incurred by McCarthy in connection with the wall movement. McCarthy recovered $70,000 of its $71,792.67 claim from the policy. CDB made no claim on the builder's risk claim.

CDB claims it incurred $33,642.99 in added costs, losses or expenses as a result of the wall movement. CDB's project manager, Eugene Barish, could not, however, state why all expenses had been incurred or why they should be charged to McCarthy. The claim arose out of the same incident or occurrence which gave rise to the claim which McCarthy submitted on the builder's risk insurance policy. McCarthy requested CDB to file a claim under the policy. CDB refused to file a claim and assessed the expense to McCarthy. The contract documents provided that CDB

waives all rights against McCarthy for damages caused by any peril to the extent the loss or claim is covered by builder's risk insurance. McCarthy again informed CDB the deduction was incorrect and that CDB should look to the insurance policy for reimbursement.

McCarthy also has a claim against the CDB for an outstanding contract balance amount due. As set forth in its final pay request dated January 31, 1984, McCarthy's adjusted contract amount totalled $2,941,068.50. CDB total payments to McCarthy account for $2,935,064.54, leaving a balance due McCarthy in the sum of $6,003.96.

McCarthy also has made a claim against the CDB in relation to the temporary electrical power system McCarthy installed during Phase I of the project. McCarthy contracted to provide Phase I "Temporary Utilities." McCarthy was to provide and maintain specified temporary utilities for specified times during the construction period. Electricity was one of the utilities to be provided. The project manual described the electric system to be followed, which was not the one originally described in the bid documents. The power level of the electricity was to be sufficient to meet Phase I construction needs. No individual contractor performing Phase I work requested electrical power in excess of that provided by McCarthy.

After completion of Phase I, McCarthy was to turn over to the Phase II general contractor responsibility for providing and maintaining temporary utilities. The project manual set forth the same terms regarding the Phase II temporary electrical services for the general electrical contractor, Commonwealth Electric Company as the Phase I terms applicable to McCarthy except for an increased number of journal boxes.

McCarthy brought electrical power to the construction site through the University of Illinois. An agreement to use the university's electrical lines for power was reached. McCarthy then subcontracted with Aladdin Electric to install a system to supply and distribute temporary electric power for Phase I construction needs. The total cost incurred by McCarthy in supply and maintaining Phase I temporary electric service was $5,222. The Phase I temporary utilities were turned over to C. Iber & Sons, Inc. on November 9, 1979, at which point the Phase II Electrical Contractor took over responsibility for providing temporary electric service. C. Iber & Sons, Inc. wrote to McCarthy on February 28th asking McCarthy to install the temporary electrical system described in the project manual. McCarthy replied that the temporary electrical system it had installed had been approved by Knight and CDB in accordance with the contract documents.

Knight responded to McCarthy by stating that McCarthy was obligated to supply the specified minimum electrical system set out in the Phase I project manual regardless of construction needs. CDB concurred with Knight's assessment. CDB gave McCarthy notice that if it did not begin to install the specified minimum electrical system, a deduction would be made in the amount due McCarthy equal to the cost of hiring another contractor to install the electrical system. McCarthy did not respond and CDB hired Commonwealth Electric Company to finish installing a temporary electrical system at a cost of $47,000. The system installed by Commonwealth was materially different from the system described by the project manual for either Phase I or Phase II. CDB issued a deduction from the amount due to McCarthy in the sum of $47,000. CDB also issued a deduction in the amount due McCarthy in the sum of $10,987 for the cost of contracting with Illinois

Power Company to bring electricity to the construction site.

TWC was a contractor on both Phase I and Phase II of the project. When the walls moved as a result of the driving sequence, the schedule for work performance was affected for all prime contractors, including TWC. By reason of the failure of the basement walls, the remaining performance of the Phase I construction, already delayed by reason of McCarthy's delayed performance, and the construction of the Phase II work were significantly impacted. Extended delay to the project occurred during assessment and correction of the wall failure, changes in sequencing of the work occurred which essentially eliminated a normal construction schedule, and extensive work on the project was required to be performed during exposure to winter conditions. Under the original project schedule, all of such work would have been performed within a structure closed to the weather.

Scott Lawson of Knight acknowledged that a substantial reason the project was not on schedule at the end of 1980 was due to the problems encountered with McCarthy's work in Phase I. He further acknowledged that work on the project was then accelerated with the architect and CDB still trying to meet a completion date from the original schedule and looking at ways to compress that schedule because of the project delay which had occurred. All of the major prime contractors on Phase II work notified CDB that they would seek reimbursement for their added costs attributable to the project delay, resequencing and acceleration. CDB was timely and properly advised by TWC as to the fact that TWC sought time extensions and would seek reimbursement for costs. Claims subsequently filed by TWC in connection with the three contracts it held were timely and properly filed.

No time extensions for the contract time associated with the wall failure or other delayed performance by McCarthy were ever granted by CDB. CDB elected to accelerate the contractor's performance of the project following the wall failure in order to reduce the amount of project delay which would otherwise occur. The accelerated work, together with the project delay and the work having to be performed out of sequence, resulted in substantial impacts on major portions of the labor work of TWC. Under the contract documents, CDB was obligated to grant time extensions to TWC for unreasonable delays in time of performance of the project. The backfilling was 7½ months delayed. The pouring of the grade beams and walls were five months delayed and the pouring of the slab on grade in the basement was 5½ months delayed. The completion of the structural steel was six months delayed.

Wagner, Hohns, Inglis, Inc., a nationally-known consulting firm which provides CPM scheduling, project management and consulting work in claims analysis throughout the United States, was employed to develop the Critical Path Method scheduling for the project. William Wagner is one of the principles hired by C. Iber and Sons, Inc. Mr. Wagner testified about the scheduling problems associated with the wall movement delay. He periodically gave updates on the scheduling project. In the third update report, he concluded that the final completion date was 162 days later than the revised contractual completion date of April 6, 1982, and stated: "All Phase II contractors should be granted an extension of time in the above amount to compensate for delays due entirely to lack of progress by the Phase I contractor." Mr. Wagner showed charts demonstrating the numerous scheduling changes disrupting the normal construction sequence for TWC on both of its Phase II contracts requir-

ing work to be performed out of sequence and on different floors, contrary to normal construction practice. He explained the inefficiencies connected with the performance of the work in that respect and how manpower productivity particularly would be adversely affected. TWC's Phase II ventilation contract was adversely affected by moving the completion date by 9½ months. Mr. Wagner testified that the six-month delay in Phase I work of McCarthy resulted in a ten-month delay to the Phase II contractors.

The project manual and the standard documents for construction contain provisions that a contract time is of the essence. Article 4, section 4.10D states that,

"* * * extensions of the contract time will be made for delays which affect critical items on the construction schedule arising from unforeseeable causes beyond the control and without the fault or negligence of the contractor or of his subcontractors or suppliers, including, but not restricted to: Acts of CDB, the Architect-Engineer or * * *. Acts of other contractors in the performance of a contract with CDB * * *."

Under the contract documents, CDB was obligated to grant extensions of time to TWC to which it was entitled for the three contracts it held on the project. CDB was also obligated to contractors for added costs associated with the acceleration of its work by the CDB. Each of the three contracts contained a time-is-of-the-essence clause. Guy Gast, vice president of operations for TWC, testified regarding the claims of TWC. Mr. Gast, in detailed testimony, explained each element of the claim and the manner in which it had been calculated, the business records of TWC which had been utilized in obtaining the data, and also the analysis of the data. Most of the damage items related simply to the extended contract time attributable to the delay caused by the untimely performance by McCarthy of its Phase I contract and the resulting unavailability of the site for performance of work by TWC in performing its contracts.

Mr. Gast explained in detail the various ways in

which the labor of TWC was adversely affected during performance of its Phase I contract for site utilities and then addressed the manner in which that adverse impact on labor productivity was determined. He discussed the use of what is called bulletin 58, "Factors Affecting Productivity," a publication developed by the Mechanical Contractors Association of the United States. Similar testimony was received relating to the Phase II contracts.

TWC seeks to recover from the CDB damages and compensation under its site utilities contracts the sum of $91,795; TWC seeks to recover from the CDB damages and compensation under its heating contract the sum of $399,988.03; and TWC also seeks to recover from the CDB damages and compensation under its ventilation contract the sum of $218,146. The total amount being sought by TWC is $709,929.03 as a result of the CDB denying any extensions of time and subsequent acceleration of the project impacting on TWC's labor efficiency, expenses and costs.

The Law

The Claimant, TWC, points out in its brief that the CDB had, through its counsel on May 11, 1990, filed a motion for summary judgment. TWC argues that the law on admissions by a party in a pleading is applicable in this case and sets forth the admissions of the CDB which it argues are binding upon the Respondent. (*Chimerofsky v. School District No. 63* (1970), 121 Ill. App. 2d 371, 374.) In the motion for summary judgment, the Respondent stated as follows:

"The evidence supports the facts that McCarthy Brothers did in fact follow the design specifications of the A/E on the project. The walls, which were the true cause of the delay on the project, were due to faulty design administration by Knight."

The Motion goes on to state:

"There can be no doubt then, that the delay claim which claimant (TWC)

pursues against the CDB, has as its root, the unfortunate compliance with the A/E's design specifications by McCarthy Brothers. Under the cases cited above, The Waldinger Company had a valid claim against Lester B. Knight & Associates for design negligence."

The project manual and contract documents expressly provide that a contractor will be entitled to damages or compensation from CDB through an adjustment of its contract sum for unreasonable delays caused by CDB or the architect-engineer. The statements set out in the motion for summary judgment are binding admissions by the Respondent. In *State Security Insurance Co. v. Linton* (1978), 67 Ill. App. 3d 480, 384 N.E.2d 718, 721, the court stated: "* * * that once a statement of fact has been admitted in the pleadings, it constitutes a judicial admission, it is binding on the party making it, and it makes it unnecessary for the opposing party to introduce evidence in support thereof * * *." These admissions have not been withdrawn by the Respondent and are not alternative theories. They therefore became judicial admissions for purposes of this action and are conclusive as to the matters admitted. *Beccue v. Rockford District* (1968), 94 Ill. App. 2d 179.

Pursuant to the contract between McCarthy and CDB, McCarthy owed CDB the duties to (a) perform its scope of work in a reasonable workmanlike manner and (b) follow the plans and specifications issued to it by CDB. (*Economy Fire and Manufacturing Co. v. Raymond Concrete Pile Co.* (1940), 111 F.2d 875, 878 (7th Cir.).) McCarthy has presented substantial and persuasive evidence respecting its reasonable workmanlike manner. McCarthy made attempts to convince the CDB and Knight that the pile-driving sequence would cause a problem in shifting the walls. McCarthy was denied in its efforts to change the sequence. McCarthy followed the pile-driving construction plans despite its concerns, because Mc-

Carthy was not allowed to change the sequence by the CDB and Knight. McCarthy supported the wall with a bracing system of the type customarily used in performing work of the nature being performed by McCarthy on the project. Moreover, the bracing did, in fact, hold the walls in place and "resist soil pressure" as required by the contract documents.

> "Contractors have no right to depart from working plans made part of the contract. If they do so, it is at their peril, and they become guarantors as to the strength and safety of the structures * * *. An express contract admits of no departure from its terms, and the subcontractors could discharge themselves from liability only by constructing the buildings in accordance with the plans and specifications, unless a deviation was mutually agreed upon." *Robert G. Regan Co. v. Fiocchi* (1963), 44 Ill. App. 2d 336, 194 N.E.2d 665, 668.

McCarthy was obliged to construct the piling and foundation walls in the manner and sequence specified in the contract documents. As long as McCarthy complied with the contract requirements, it was not responsible for the movement of the wall.

Claimant, McCarthy, relies heavily on the case of *St. Joseph Hospital v. Corbetta Construction Co.* (1974), 21 Ill. App. 3d 925, 316 N.E.2d 51. In *St. Joseph, supra*, the contractor provided the exact paneling specified by the architect only to subsequently learn that the specified material did not comply with applicable building codes. At issue was: "when an owner through its agent architect directs the contractor to install certain material does not the owner impliedly warrant to the contractor that the material is suitable?" The analogy is drawn that similarly when an owner, through its agent or architect, directs the contractor to perform its work in a specific and mandatory sequence, does not the owner impliedly warrant to the contractor that the sequence is suitable? The case sites to 6th Williston on Contracts, "* * * though the builder may be liable if he fails, by reason of defective plans furnished him, to com-

plete work which he has undertaken, yet if he can and does complete it according to the plans he is not liable for subsequent inferiority, injury, or destruction of the work, due to the defective character of the plans." The Court determined that "* * * the defective plans and specifications causing the difficulty were issued by the owner's architect, not the owner, and yet the court in such cases held that the owner was bound and that the contractor who followed them was not liable to the owner." 316 N.E.2d at 65.

McCarthy was required to follow the plans provided by CDB and, therefore, is not liable for errors or defects in the plans and specifications. CDB, as owner, warrants the adequacy and accuracy of the plans and specifications. (*United States v. Spearin* (1918), 248 U.S. 132.) The plans and specifications issued to McCarthy by CDB were defective in that McCarthy's compliance with the Special Driving Sequence set forth on Contract Drawing S-1 resulted in the movement of the foundation walls. CDB admitted this in its motion for summary judgment and the evidence presented supports this conclusion.

Upon discovery of this defect during Phase I, McCarthy reasonably notified CDB and its architect of the defect, warned of the damage that would result, and requested that the sequence be changed. CDB refused McCarthy's requests as a result of which McCarthy strictly complied with the sequence and, predictably, the walls moved. Respondent has argued that McCarthy failed to protect other construction from pile-driving operations, failed to present a change order, and did not pour the walls as shown in the contract drawings. McCarthy is not fully at fault for the movement of the foundation walls and is not fully responsible for the cost incurred by CDB as a result of the wall movement.

CDB's costs incurred as a result of the wall move-

ment were covered by the builder's risk insurance policy. Whatever the reason for CDB's unwillingness to submit a claim, its refusal to do so resulted in a waiver of its right to assess its costs against McCarthy by virtue of General Condition 5.006.H of the contract documents. CDB's deduction of $33,642.99 from McCarthy's contract to reimburse CDB for the costs incurred as a result of the movement of the foundation constituted a breach of the contract.

McCarthy also has a claim for payment of the contract balance alleging CDB has failed to pay the balance of $6,003.96. CDB presented no defense respecting its failure to pay. CDB's failure to so pay McCarthy constitutes a breach of contract.

The final claim McCarthy has made against CDB is regarding the temporary electrical system that CDB billed McCarthy for when CDB determined that the system McCarthy installed was not sufficient nor within the contract requirements. Phase I bidders were advised that "the designated contractor shall pay all costs of installation, operation and maintenance, restoration and warranty extension of temporary utilities" until "assignment to the General Contractor for Bid Package II occurs" at which time "all temporary materials and equipment shall be turned over to the General Contractor for Bid Package II." The Bid II documents were not issued at the time of the Phase I bid. The contract document set forth an addendum stating the deletion of instructions to install the system "* * * where shown on the drawings." This addendum served to confirm to McCarthy that the temporary electric specification was a performance specification related to Phase I construction needs rather than a detailed design specification which located the system throughout the project for service to both Phase I and II contractors.

Knight originally agreed with McCarthy's position that Bid Package I only required McCarthy to provide temporary electric for the reasonable needs of the Bid Package I bidders for work to be performed during the Phase I construction. It was the Phase II electrical contractor who urged CDB to find McCarthy was required to provide a more expansive electrical system whether or not needed by the Phase I contractor. CDB thereafter demanded that McCarthy install a much more comprehensive system. When McCarthy failed to do so, CDB had the Phase II electrical contractor install an adequate system for the Phase II construction needs. The system was not the one described in the specifications because all parties agreed that such a system was too elaborate, expensive and far beyond the construction needs of the project.

McCarthy's understanding of its requirement for an electrical system was that if the needs of the Phase I contractors exceeded what McCarthy installed, then those portions of the specifications containing details of temporary electrical system would come into play, then and only then. The specification left it to the skill, experience and risk of the bidder to evaluate the construction needs accurately. If the estimate proved too low in relation to actual needs, McCarthy would be obligated to supply, at no cost to CDB, a system within the parameters detailed to meet the needs of Phase I of the project.

The specification is ambiguous in that McCarthy interpreted the specification as a performance specification requiring McCarthy to provide an electrical system sufficient to meet Phase I construction needs rather than CDB's subsequent interpretation that the Temporary Utilities specifications were design specifications instructing McCarthy as to each and every component of the system to be provided. The Claimant argues that the rule of *contra*

proferentum is applicable. The contract must be construed most strongly against the drafter. Under the rule of risk of ambiguity, lack of clarity and absence of proper warning is on the drafting party which could have forestalled the controversy. The rules pushes the drafters toward improving contractual forms, and it saves contractors from hidden traps not of their own making. *Sturm v. United States* (1970), 421 F.2d 723 at 727.

Under McCarthy's interpretation, there is no duplication of facilities, or duplication of payment or windfall benefit to either side. The temporary electric needed and necessary for Phase I was provided by the structural contractor, and the temporary electric needed and necessary for Phase II was provided by the electrical contractor. This result is reasonable, conforms with trade usage, and is consistent with the public building policy and elimination of contingencies, duplication and waste in the construction of public works. It would be unfair to allow CDB to reap the benefit of McCarthy's decision to undertake that risk in the form of a reduced bid while at the same time requiring that it provide a temporary electric power system far in excess of the construction needs. CDB's deduction of $57,987 from McCarthy's contract to reimburse CDB for the costs incurred to provide more elaborate temporary electrical power than needed for Phase II construction needs was wrongful. McCarthy argues that its claim for the electrical system should be granted for $57,987.

In regard to TWC's three claims, the Court's attention is directed to the Standard Documents for Construction, where it is provided in article IV, section 4.10(B) that,

"Extensions of the contract time will be for delays which affect critical items on the construction schedule arising from unforeseeable causes beyond the control and without the fault or negligence of the contractor * * * including

acts of CDB, the architect-engineer * * * or * * * acts of other contractors in the performance of a contract with CDB * * *."

The record clearly indicates that the delays experienced by TWC under its three contracts and for which the claim is made in these proceedings, result mainly from actions or failure to act on the part of CDB, Knight or a contractor under direct contract with CDB. The CDB clearly recognizes this in its own admissions that the delays were caused by the inaccuracy of the driving sequence set by Knight. Control over this sequence was clearly out of the hands of the Claimant, TWC.

The purpose of the obligatory extension of contract provision is to relieve the contractor affected from its scheduled time of performance thereby avoiding acceleration of its contracts with all of the attendant labor and inefficiencies described in the trial proceedings. The timely granting of an extension of time also provides to a contractor such as TWC the ability to schedule its work in accordance with a planned schedule rather than incurring delays, as in the present case, because of a total project being performed out of sequence.

The CDB, having chosen not to perform its obligations to grant time extensions under the contract with TWC, now cannot claim that TWC cannot recover against the CDB for damages. Under Illinois law, a party who materially breaches a contract cannot take advantage of the terms of a contract which are to its benefit. *Goldstein v. Lustig* (1987), 154 Ill. App. 3d 595.

The Claimant, TWC, comments on the State's failure to produce several key witnesses, including Gene Barish, the CDB's project manager for the site. Gene Barish made admissions in the deposition that there were in fact project impacts and they were of serious extent, resulting to TWC from McCarthy's delayed performance and the

wall failure. The case of *Tepper v. Camp* (1949), 76 N.E.2d 490 established the "missing witness rule." The principle of the rule is that failure of a party to produce evidence available to that party and which testimony could have been produced if that party's position was true, would give rise to a presumption against the party.

The missing witnesses in this case are pointed out by Claimant as Gene Barish, John Larson and Scott Lawson. Howard Peters, the McCarthy project manager, had several conversations between himself and these three persons during which he told them that McCarthy was not going to provide bracing beyond that necessary to resist lateral soil pressure, that the bracing which McCarthy would be using would not be adequate to withstand the resumption of pile driving, and that the walls would fail when pile driving resumed. All three of these individuals were within the control of the Respondent to produce at trial. The Claimant argues and reasonably so that the presumption must be recognized that if any of the three individuals had been called, their testimony would have been unfavorable to the Respondent. They would have had to acknowledge that the subject conversations did, in fact, occur.

The Claimant, TWC, has clearly established a basis for damages on its three contracts. Mr. Gast explained how the figures were calculated. The method follows the procedures set out in the industry by Bulletin 58. The law states that where there is a lack of certainty or precision as to the amount it is not fatal to the recovery, providing there is a reasonable basis for computation of the damages. *Jackson v. United States* (1987), 12 Ct. Cl. 36; *Bockman Printing & Services, Inc. v. Baldwin-Gregg, Inc.* (1991), 213 Ill. App. 3d 516.

The Claimant, TWC, has argued that it should re-

ceive $91,795 for damages on the site utilities contract, $399,988 on the heating contract, and $218,146 on the ventilation contract. Most, if not all, construction projects will have some delays. Projects with multiple contractors requiring coordinated efforts are more likely to have delays. In this case, the majority of the delays are attributable to the architect-engineer and CDB. Much less delay is attributable to the contractors. For a delay to be tolerated, it must be reasonable under the circumstances. Much of the delay on this project was beyond reasonable. (*K & S Associates, Inc. v. State* (1991), 43 Ill. Ct. Cl. 117.) As this Court found in *K & S Associates, Inc., supra*, we do not believe that the damages are computable to the penny as Claimants have tried to show. With the fact that some delay is reasonable and inevitable and the inherent speculative nature of computing losses in construction cases, we must try to find a fair figure for damages after weighing the evidence as is the Court's responsibility. *Neylon v. State* (1985), 39 Ill. Ct. Cl. 65.

We are also confronted with the fact there was no proof from the insurance company that the builder's risk claim would have been allowed for CDB and what part of the electric system construction could reasonably be charged to McCarthy. Admittedly the figure of damages may appear arbitrary but the damage figure we find is the result of the Court's extensive review of all the evidence and taking into account the aforesaid variables peculiar to construction project cases. We believe our findings of damages are fair under the peculiar circumstances of this case.

For the foregoing reasons, we find that Claimant, McCarthy Brothers Company should be compensated in the sum of $76,154.88 and that Claimant, the Waldinger Company should be compensated in the sum of $582,141.80.

Finally, as is often the case, the question of entering an award remains before the Court. This Court cannot enter an award unless sufficient funds remain released and unexpended in the appropriation made to fund the project. (*Lowenburg/Fitch Partnership v. State* (1986), 38 Ill. Ct. Cl. 227; *Ude, Inc. v. State* (1982), 35 Ill. Ct. Cl. 384.) There is no evidence before the Court from which the Court can determine if appropriated funds remain from which to make an award. We are also concerned that the case was on general continuance and there is no evidence from which the Court can determine if the Claimants or either of them had successful claims against other entities which would reduce the awards. Therefore, before entering an award for the Claimants or making a recommendation to the General Assembly, we need additional information. Respondent is ordered to file the fiscal data on this project, including the balance of released funds which lapsed at the conclusion of this project so that the Court can determine what amount of award can be made, if any. Respondent shall file this information with the Clerk of Court within 21 days. The Claimants shall each file with the Court within 21 days a statement regarding claims made against other entities for these same damages and the results of those claims.

AMENDMENT TO OPINION

FREDERICK, J.

This claim is before the Court following the entry of the opinion hereon of February 21, 1995, and following the parties' compliance with the instructions issued at the conclusion of that opinion. The Court finds:

(1) That the Claimants have received no funds from collateral litigation which can be used to offset the damages.

(2) A total of $1,003.96 of 141 CDB bond fund money lapsed on the McCarthy Brothers Company contract and $5,000 was held in its retention trust account. The CDB has agreed to release the money in the retention trust account.

(3) No funds lapsed or are otherwise available to pay the damages suffered by the Waldinger Corporation.

(4) The Court is restrained to limit the awards in these claims to $6,003.96 for McCarthy Brothers Company and to $0 for the Waldinger Corporation.

(5) For purposes of potential future consideration of these claims by the General Assembly we reiterate our findings on page 21 of the February 21, 1995, opinion and hereby advise that McCarthy Brothers Company should be compensated $76,154.88 less the $6,003.96 which will be awarded and the Waldinger Corporation should be compensated $582,141.80.

Wherefore, it is hereby ordered that McCarthy Brothers Company is awarded $6,003.96, $5,000 of which is to be paid through the actions of the CDB with respect to the retention trust fund and $1,003.96 is to be paid with 141 bond fund money; the Court is constrained to, and hereby does, deny an award for all other damages heretofore found to be suffered by both parties.

(No. 82-CC-1139—Claimant awarded $30,886.83.)

MEDISCREEN CORP., Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed May 10, 1995.

KOVITZ, SIFRIN & WAITZMAN (RICHARD W. HILLSBERG, of counsel), for Claimant.

JIM RYAN, Attorney General (STEVEN SCHMALL, Assistant Attorney General, of counsel), for Respondent.

PUBLIC AID CODE—*nonpayment for medical services constituted breach of contract—award entered.* The Department of Public Aid, by issuing warrants in payment for certain services rendered by a medical provider, admitted that the services were performed satisfactorily and that the Department owed the money, and since the five-year statute of limitations on the Claimant's breach of contract claim had not expired, the Claimant was entitled to an award in the amount of the unpaid balance of the contract.

ORDER

PATCHETT, J.

Claimant Mediscreen Corporation brought this claim on December 3, 1981, seeking payment of $78,400.93 for services rendered on behalf of the Respondent's Department of Public Aid (hereinafter referred to as DPA). In February of 1986 the Claimant filed a motion for summary judgment, essentially seeking to have the Court enter a default judgment in the case. The Respondent had filed no responsive pleading other than the general denial by rule up to that time. The case had been set for hearing and continued on 15 separate occasions. On April 7, 1986, an order was entered which gave the Respondent 45 days to file a response to the merits of the claim and denied, with leave to renew, the motion for summary judgment, should the Respondent fail to comply with the order.

Although the Claimant's motion had been denied, the Respondent filed a response to Claimant's motion for

summary judgment. Therein the Respondent stated that State of Illinois warrants were issued pursuant to vouchers which comprise the attachments to Claimant's complaint. The Respondent attached certified copies of paid warrants totalling $47,514.10. The unpaid warrants were said to have escheated or been vouchered and the time allowed for seeking replacement thereof had expired. Thus Respondent concluded its response by arguing that the statute of limitations had run on the unpaid portion of this claim and asking for summary judgment in its favor.

No reply to the Respondent's pleading was filed. We will construe that pleading to be a cross-motion for summary judgment.

Although warrants were issued in payment for the services giving rise to the claim at bar, it is clear to us that the Respondent has not actually paid for all of the services. The fact that warrants were issued is an admission that the services were satisfactorily performed and that the Respondent owed the money. Not paying for services is a breach of contract. Such causes of action are governed by a five-year statute of limitations. Judgment will be entered in favor of the Claimant for the unpaid balance of the claim.

Wherefore, it is hereby ordered that the Claimant be, and hereby is, awarded $30,886.83, payable with general revenue fund money.

(No. 82-CC-1497—Claim dismissed.)

THE ILLINOIS MUNICIPAL LEAGUE and THE ILLINOIS ASSOCIATION OF COUNTIES, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed December 22, 1994.

BETH ANNE JANICKI, for Claimant.

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

REMEDIES—*interest was not recoverable against State absent statute.* Interest is not recoverable against the State absent a statute providing for such, nor may it be imposed on equitable grounds, and therefore the Claimants, on behalf of member municipalities and counties, could not recoup interest on the amount of a 2% fee which was overwithheld by the State where there was no statute providing for interest liability.

SAME—*claim for payment of past interest on tax proceeds denied.* In a claim brought on behalf of municipalities and counties seeking past interest on retailer's occupation tax proceeds which were held by the State prior to distribution to local governments, the Court of Claims denied relief, since the withholding practice in question was long-standing and done under a claim of right, retroactively requiring the State's payment of such amounts would result in hardship to the State, and there was no applicable statute requiring an award of past interest.

OPINION

SOMMER, C.J.

This claim can be characterized as having two different aspects as stated by count I and count II of the amended complaint.

In count I, the Claimants are requesting interest on an administrative fee withheld by the State on collection of the county retailer's occupation tax (CROT) and the municipal retailer's occupation tax (MROT). The supreme court had previously ruled that the effective date of legislation reducing the 4% administrative fee to 2% was December 5, 1974. The State contending that the ef-

fective date was at the beginning of the fiscal year, charged the full 4% fee until June 30, 1975. The State was ordered to pay back the 2% overwithheld for the period December 5, 1974, to June 30, 1975.

The municipalities and counties then brought an action for interest on the amount of the 2% fee overwithheld. (*City of Springfield v. Allphin* (1984), 82 Ill. 2d 571.) After stating the general principal that interest is not recoverable absent a statute providing for it, the supreme court entered into a detailed discussion of the application of various possible interest statutes. The Court concluded that interest statutes are to be strictly construed and that the possible statutes did not apply, nor could interest be imposed on equitable grounds, as such would be "contravention of sovereign immunity." The Court then ruled that "There being no method in law or equity by which interest can be awarded to the plaintiffs, the orders of the circuit court of Sangamon County awarding interest to the plaintiffs in these consolidated cases are hereby reversed." *City of Springfield, supra*, at 581.

The Claimants contend that the supreme court's ruling in *City of Springfield* is correct insofar as the circuit courts and supreme court go, as these courts generally cannot make awards against the State; however, the Court of Claims can make awards against the State.

The rule in this Court is the same as stated in *City of Springfield*. Interest is not recoverable, particularly against the State, absent a statute imposing such. *T & D Pharmacy, Inc. v. State* (1984), 37 Ill. Ct. Cl. 37. *Centola v. State* (1988), 41 Ill. Ct. Cl. 119, 121.

The Claimants argue that the Public Funds Investment Act (30 ILCS 235/0.01 *et seq.*), imposes liability for interest. This Act states that to the extent that the State

has custody of funds belonging to another public agency, it may invest such and the earnings would belong to the other public agency. The Public Funds Investment Act is addressed to the situation in which the State knowingly holds money belonging to another government agency, and acts as custodian of such money. The State was not required to invest such money in any event, as the Public Deposits Act (30 ILCS 225/0.01 *et seq.*), which requires investment of funds held by the treasurer became effective on July 1, 1980. (*Town of the City of Peoria v. O'Connor* (1981), 85 Ill. 2d 195; *Village of Pawnee v. Johnson* (1984), 103 Ill. 2d 411.) In this claim the 2% fee overwithheld for December 5, 1974, to June 30, 1975, was claimed by the State to be its own money, duly earned. The State was not in a custodial relationship to the funds, nor was the State required to invest the funds. Therefore, we hold that the Public Funds Investment Act does not impose liability for interest in this situation.

Adopting the same reasoning as in *City of Springfield* we find no other statute imposes interest liability for the 2% fee withheld; and as this Court may not order equitable remedies, we are unable to award interest in the form of an equitable remedy. (*National Railroad Passenger Corp. v. State* (1982), 36 Ill. Ct. Cl. 265, 266.) Therefore, we deny count I of the complaint.

In count II, the Claimants are requesting interest on MROT and CROT tax proceeds that were held by the State prior to distribution to local governments. This very issue has been before the Illinois Supreme Court in the case of the *Village of Pawnee v. Johnson* (1984), 103 Ill. 2d 411. In *Village of Pawnee* the supreme court ruled that the State is required to pay interest to the local governments on the MROT tax proceeds held by the State prior to distribution after November 3, 1983. In this claim, the

claimants are seeking interest for the period from July 5, 1977, to November 3, 1983.

In *Village of Pawnee*, the court stated that interest on proceeds collected prior to November 3, 1983, could not be ordered reimbursed, as "* * * any recovery by the municipalities would then have to be derived from the General Revenue Fund of the State. Such relief would clearly amount to an impermissible money judgment against the State." 103 Ill. 2d 411, 422.

The Claimants argue that the above language implies that the Court of Claims would have jurisdiction, as it can order money judgments against the State. The Claimants further argue that the Public Deposits Act (30 ILCS 225/1), which requires investment of tax receipts coupled with the Public Funds Act, *supra*, which permits investment of custodially-held funds, require interest to be paid by the State.

In the case of *Board of Commissioners of the Wood Dale Public Library District v. County of Du Page* (1984), 103 Ill. 2d 422 (hereinafter referred to as *Wood Dale*) the supreme court ruled that interest on proceeds retained by the county treasurer need not be returned to local governments even though the county treasurer was ordered to pay interest on such proceeds in the future. In *Wood Dale*, the supreme court clearly had the power to order past interest to be paid but declined to do so. When speaking of payment of restitutional relief, the court stated that "* * * such relief is not required in every case * * *." (103 Ill. 2d 422, 431). Therefore, we find that *Wood Dale* stands for the proposition that payment of past interest is not necessarily required.

The Claimants argue that in the *Wood Dale* case, the supreme court balanced "equities," but the Court of Claims may not act as a Court of equity; and therefore, this

Court cannot apply the methodology or the rule in *Wood Dale*. We disagree. We are a creature of the General Assembly created to weigh thousands of claims yearly that otherwise could be presented to the General Assembly. We are told to find the facts and apply the law. We are not given equitable remedy powers. We cannot divorce people, or issue injunctions, or make awards in *quantum meruit*; but we can balance factors called equitable to arrive at a decision following the precedents of the supreme court.

In *Wood Dale*, the Illinois Supreme Court used the tests set out in the U.S. Supreme Court case of *Chevron Oil v. Huson* (1971), 404 U.S. 97, 92 S. Ct. 349, to determine whether it should award interest retroactively. First, the decision must establish a new principle of law or be an issue of first impression. In this claim, the practice in question was unchallenged since 1943, and may have been unchallengeable until 1980 when the Public Investment Act, *supra*, placed a mandatory duty on the treasurer to invest. Even then the Public Investment Act was not applied against the State until the decision *Village of Pawnee, supra*, in 1984. Thus, the issue was one of first impression.

Second, the Court must look at the prior history, which we have done, and find whether retroactivity will further or retard operation of the new rule. We find that retroactivity would neither further nor retard operation of the new rule.

Finally, the Court must weigh the inequity or "injustice or hardship" of applying the rule retroactively. In this regard, we find that the decision in *Village of Pawnee, supra*, hinged on provisions of a statute, the Public Investment Act, that was not effective until 1980 and had not previously been applied to the State; therefore, the most equitable solution is to maintain the long-standing

practices that existed prior to 1984 and the *Village of Pawnee* decision. We find that to do otherwise would be a hardship to the State, but less of a hardship to the municipalities, as the monies involved would not have been anticipated or budgeted by the municipalities; whereas, the State would have to appropriate a substantial sum from current revenues to make a retroactive payment.

The present claim and *Wood Dale* are analogous. In both cases, a broader level of government was collecting taxes for other governmental units and withholding interest. Both withholdings were long-standing and were done under a claim of right. The situation in the present count has persisted since at least 1943. Therefore, absent a statutory requirement, strictly construed, and balancing the factors as in *Wood Dale*, we cannot order interest to be paid for the period July 5, 1977, to November 3, 1983. Therefore, we deny count II of the complaint.

The *City of Springfield* and *Village of Pawnee* cases were brought as class actions. We do not know the reason that the present claim was not brought as a class action. This Court's uneasiness with the Municipal League and the Illinois Association of Counties as the Claimants is that the parties are not directly interested or aggrieved parties and do not have as members all of the potential claimants, some of whom may now be foreclosed by the statute of limitations. However, we find that it is not necessary to decide the issue of standing to reach a conclusion as no award is made.

It is therefore ordered that this claim is dismissed.

(No. 83-CC-1438—Claim dismissed.)

THOMAS C. WOODARD and CHERRILYN K. WOODARD, minors, by their Mother & Next Friend PATRICIA A. WOODARD, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed January 21, 1987.

Order filed May 15, 1995.

JEROME MIRZA & ASSOC., LTD. (DAVID V. DORRIS, of counsel), for Claimants.

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

PRACTICE AND PROCEDURE—*tort claim brought by parent on behalf of minor children dismissed—statute of limitations.* In response to the State's motion to dismiss a tort claim brought by a parent on behalf of his minor children, one of the Claimants was dismissed from the action with prejudice based upon the statute of limitations, since she was not a minor or under any legal disability which would excuse her late filing of notice or the complaint and, although the two minor Claimants were given 90 days to remedy deficiencies in their complaint, their claims were later dismissed as well.

ORDER

PATCHETT, J.

This cause comes on for hearing upon the motion to dismiss filed herein by the Respondent; and the Court having reviewed the documents filed in connection with the motion to dismiss, having heard arguments on the motion to dismiss, and having considered the memorandum of law filed herein by the Claimant and the Respondent, the Court makes the following findings:

(1) That this Court can find no basis for the Claimant, Patricia A. Woodard, being allowed to maintain her claim, in that it is apparent that her claim was filed well after the statute of limitations and the notice requirement had run. In addition, it does not appear of record that she is under any legal disability, under age, or under any other

factual situation which would excuse the late filing of notice or the late filing of the complaint.

(2) That the Court has considered the arguments as to the lack of notice filed herein by Thomas C. Woodard, II, and Cherrilyn K. Woodard, both minors. The Court has considered the arguments of counsel and has reviewed the cases applicable to this instance. The Court has specifically taken into consideration sections 101 and 103 of the Tort Immunity Act. (745 ILCS 10/8—101, 10/8—103.) These are the tort immunity statutes which apply to other governments in the State of Illinois not covered by the Court of Claims Act. The Court has considered prior Court of Claims cases on point, *Roberts v. Illinois*, 24 Ill. Ct. Cl. 120, *Gossar v. Illinois*, 24 Ill. Ct. Cl. 183. From reviewing these prior cases, other legislation which is similar, and Illinois Appellate Court cases construing the other statutes previously cited, it is apparent to this Court that the notice provision should not be applied to minors.

For the foregoing reasons, it is ordered:

(1) That the claim of Patricia A. Woodard be and hereby is dismissed, with prejudice.

(2) That the claims of the minor Claimants are not dismissed, and this case shall be set for further consideration consistent with the claim.

(3) That this order does not affect the Respondent's other grounds for dismissal. Therefore, the motion to dismiss, in terms of the requirement that the complaint be verified, is well taken. In addition, the Claimant's complaint should state a cause of action, including a bill of particulars with specific information as to damages, medical treatment, and employment. Therefore, that part of the motion to dismiss which alleges the complaint is not

verified and does not contain a bill of particulars is well stated. Wherefore, the motion to dismiss is granted on those grounds, and the two minor Claimants remaining in the case are given 90 days from the effective date of this order to comply with those requirements.

ORDER

PATCHETT, J.

The Court being fully advised of the issues involved in the case, does hereby dismiss this cause of action.

(No. 84-CC-0270—Claim denied.)

MEL DUNCAN, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed April 14, 1995.

MURPHY, PETERS, & DAVIS (THOMAS PETERS, of counsel), for Claimant.

JIM RYAN, Attorney General (BRIAN FARLEY, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*what Claimant must prove.* In order for a Claimant to recover against the State in a negligence claim, he must prove by a preponderance of the evidence that the State owed him a duty, that the duty was breached by a negligent act or omission, and that such negligence was the proximate cause of the injuries complained of.

SAME—*State's duty to maintain premises and warn of defects.* The State has a duty to maintain its premises in a reasonably safe condition, and if it knows of any defects, it has a duty to take steps to bring such defects to the attention of the public.

SAME—*wrongful death claim—drowning in park—no breach of duty—claim denied.* A wrongful death claim brought by the father of a drowning victim who was swept into the river bordering a State park was denied, where the State had previously erected numerous and adequate signs throughout the area warning of a dangerous undertow and directing people

to avoid the water, there had been no similar incidents in the same location, and it would have been unduly burdensome to fence the 4½ mile stretch of park land bordering the river.

OPINION

SOMMER, C.J.

On July 5, 1982, the Claimant, Mel Duncan, along with his daughter, Gayle Duncan, other relatives, neighbors, and friends went to Starved Rock State Park. They paid no admission fee. While at Starved Rock State Park, Gayle Duncan drowned in the Illinois River which borders the park for 4½ miles. Gayle was 25 years old at the time, and was gainfully employed.

The Claimant has filed this wrongful death claim arising from his daughter's drowning. In this claim, the complaint alleges that the Respondent was negligent for failing to warn of dangerous currents in the river; for failing to adequately supervise the park; for failing to make available adequate life saving equipment and personnel; and for unreasonably allowing an attractive nuisance to continue to exist without taking steps to prevent swimming in the park.

At the time of the drowning, Gayle Duncan was in the Illinois River off of Lover's Leap Cove along with a number of other people from her group. Gayle was sitting on a rock and was fully clothed. She decided to get off the rock, but the water was deeper than she anticipated; and she was pulled into the river by the current. Gayle could not swim. Immediate attempts to rescue her were made by those nearby; and some park employees tried to revive her, but she died of drowning. Park employees did rescue two other persons who had gone to Gayle's aid and were swept into the river by the strong currents and undertows.

Contrary to the assertions of the Respondent, the Recreational Use of Land and Waters Act (45 ILCS 65/1 *et seq*., formerly Ill. Rev. Stat., Ch. 70, par. 31), was not applicable to the Starved Rock State Park in 1982. (*Miller v. United States* (1979), 597 F.2d 614 (7th Cir.); *Sherman v. State* (1994), 93-CC-2240.) The Standard to be applied would be one of negligence, not willful and wanton conduct. The Recreational Use of Land and Waters Act was amended in 1987. This amendment had the effect of changing the standard to willful and wanton conduct.

In order for the Claimant to recover against the State, he must prove by a preponderance of the evidence that the State owed the injured party a duty, and that duty was breached by a negligent act or omission, and that such negligence was the proximate cause of the injuries complained of. *McCoy v. State* (1975), 37 Ill. Ct. Cl. 182.

The State has a duty to maintain its premises in reasonably safe condition; and if it knows of any defects, it has a duty to take steps to bring such defects to the attention of the public. *Harder v. State* (1991), 44 Ill. Ct. Cl. 235, 237. *Walter v. State* (1989), 42 Ill. Ct. Cl. 1, 5.

In this claim, the State knew of the dangerous undertows in the Illinois River. The State erected six warning signs on trees along the 400 feet of the perimeter of Lover's Leap Cove. The majority of the signs were near the trail leading to the cove. The trail was necessary to use to get to the cove due to the surrounding high bluffs. The signs were metal, 18 by 18 inches, and had written on them: DANGEROUS UNDERTOW STAY CLEAR OF WATER. Other warnings against swimming in the river were in the park brochures, on the park maps posted on the grounds, and on other signs posted on the grounds. The State could not put signs in or near the river on the beach because the periodic rises and falls in

the river of 28 feet would cover or destroy the signs. Putting signs on the beach had been tried, but the signs had been destroyed by rising water.

It was suggested by the Claimant that the State fence off Lover's Leap Cove to prevent swimming. The State contended that to do so would destroy the beauty and naturalness of the park; and would be subject to the previously-cited rises and falls in the river; and would not prevent swimming in any event. In addition, the boundary along the river was 4½ miles. In order to be effective, the fence would have to cover the entire distance. To fence off such a distance would be a great burden and again would destroy the naturalness of the Park; while the rise and fall of the river would destroy the fence.

The State testified that there had been two drownings somewhat before the present incident, but they occurred under different circumstances. No one drowned by entering the water at the beach of Lover's Leap Cove.

Thus, we find that a reasonably alert person would have seen the warning signs; and that the warning signs were adequate and were the best the State could do in light of having to warn along a stretch of 4½ miles of river. The State is not required to take unduly burdensome steps to warn. For example, it would be unduly burdensome to require the State to station an employee at Lover's Leap Cove all day to warn persons away. Persons intent on swimming could enter the river elsewhere. The State cannot be expected to station employees along the whole 4½ mile stretch of river all day to prevent swimming. *Dunbar v. State* (1992), 45 Ill. Ct. Cl. 175, 179.

It is also noted that park employees were on hand by boat in time to rescue two of the swimmers caught in the current.

Therefore, we find that the State did not breach its duty to warn or maintain the premises in reasonably safe condition; and, therefore, is not liable to the Claimant for damages resulting from the drowning death of Gayle Duncan. Therefore, it is ordered that this claim is denied.

(No. 84-CC-0952—Claim denied.)

ARTIS TOLIVER and DOROTHY TOLIVER, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed August 25, 1994.

MARTIN E. KLEIN LAW OFFICES, for Claimants.

ROLAND W. BURRIS, Attorney General (IAIN D. JOHNSTON, Assistant Attorney General of counsel), for Respondent.

HIGHWAYS—*State not insurer of persons using highways—notice of defective condition required.* The State is not an insurer of all persons traveling on its highways, but where a dangerous condition exists and a person using the highway is injured, the Claimant must prove by a preponderance of the evidence that the dangerous condition existed and that the State had actual or constructive notice of it.

SAME—*when State may be charged with constructive notice*. Constructive notice of an unsafe condition in a roadway exists if the condition existed for such a length of time that public authorities, by exercise of reasonable care and diligence, should have known of the condition, and had the opportunity to make the roadway safe.

SAME—*motorcycle accident—State did not have notice of defect—claim denied.* Where the Claimants sought damages for injuries sustained when their motorcycles allegedly struck a highway defect and collided, the claim was denied based upon the testimony of road workers and supervisors indicating that the location in question was in good repair and had not been the subject of prior complaints, and because even assuming the existence of an unsafe condition, the State had no actual or constructive notice thereof.

OPINION

SOMMER, C.J.

The Claimants filed a complaint in the Illinois Court of Claims on October 24, 1983, seeking damages "in excess of the jurisdictional amount" of $100,000 for each Claimant, for injuries sustained by them, arising from an accident that occurred on October 3, 1982, while riding on their individual motorcycles on a State highway. The accident occurred about 5:00 p.m.

Artis Toliver and his wife, Dorothy, motorcyclists with 30 years and 8 years experience, were riding their separate vehicles on Illinois Route 1, north of its intersection with Sollitt Road, in the City of Momence, in Kankakee County, Illinois, at a speed of about 50 m.p.h.

Artis Toliver was traveling 10 to 20 feet behind his wife. Both testified that there was a dark spot in the road ahead of them. Artis was 50 to 75 feet from this dark spot when he first saw it. Dorothy applied her brakes 30 feet from the spot, which was a rough portion of the roadway, while Artis did not brake at that time. Dorothy, upon reaching the rough spot, lost control of her vehicle. When both cyclists reached a second bump on the roadway, Artis also lost control of his vehicle and collided with his wife's vehicle, resulting in injuries to both Claimants. Both testified that there was a hole or dip three inches deep and three feet wide followed by a three-inch raised crack on the roadway, with loose material in the hole.

The Claimants' photographic exhibits nos. 1 to 5, purported to be of the location of the accident. These exhibits showed the location of the "dip" and the "crack" in the road that caused the accident. The exhibits were objected to by the Respondent on the grounds that the road had been filled in and fixed; and, therefore, did not rep-

resent the condition of the area at the time before the accident, as testified to by the claimants. We find that said exhibits should be admitted as they indicated the general size and location of the rough portions of the road.

A Respondent's witness, Raymond Mulholland, an employee of IDOT for 27 years as a design project engineer, and a member of the maintenance department and design department testified. He stated that in 1982, at the time of the accident, he was the area field engineer of the maintenance department of IDOT and his duties were to supervise the road conditions, repair and maintenance of all State roads within Kankakee and Iroquois counties. In response to questions as to whether he was familiar with the subject area, he indicated that he was. He drove all the roads in Kankakee County every other month. In reply to the question "were you aware of any prior complaints of a road defect in that portion of the roadway just prior to this accident," he stated "I do not remember any other complaints in that area at all."

Further, Mr. Mulholland stated that he did not recall ever receiving any complaints from any individual as to the area of the accident site. He was then shown the Claimants' photographic exhibits. He was asked if, in his opinion as a field engineer, whether the location there shown was in a safe condition. He responded that it was safe.

Testimony for the Respondent also was given by Mark Berger, the lead worker or foreman over the area in question. He testified that a few days after October 3, 1982, he went to the site of the accident. He found a concrete pavement with some asphalt patches on it. Mr. Berger agreed that the photographic exhibits reflected the condition of the site that he saw. He further testified that he had no crew in the area between the time of the

accident and his visit a few days later; and that the asphalt patches were not new and had been made prior to the accident and were safe. He further stated that pothole crews travelled the road at least once a month looking for problems, which they then repaired.

During the hearing the Claimants' attorney requested a ruling similar to the effect of an I.P.I. 5-01 instruction. The gist of such an instruction is that the Respondent has withheld evidence in its possession, thereby warranting an inference that had such evidence been produced it would have been unfavorable to the Respondent.

In December of 1991 the Claimants had requested a copy of the 1981 road condition report for the district and the work sheets for the work crews. Mr. Mulholland testified that the 1981 road condition report was an aggregate report naming the materials, etc., necessary for an entire county in the next fiscal year. It was not site specific. It was destroyed three years later due to its no longer being current. This report would not be helpful to the Claimants. The work sheets for the work crews were destroyed after one year, due to the volume of paper that would accumulate. The Claimants argued that these reports should have been saved after the notice of filing suit was filed. The State argued that such a requirement would mean that the State could never dispose of any reports, because a claim might be pending somewhere. Insomuch as these reports were requested in December of 1991 and had been destroyed years before due to policy of the State, this Court will not make a finding similar to an I.P.I. 5-01 instruction in this case, as the reports were not deliberately withheld.

At the hearing, Mr. Mulholland testified that a Mr. Wiese, a State employee, had made a report at the time of the accident. After this testimony, the Claimant made a

request for an I.P.I. 5-01 instruction finding in regard to the Wiese report. The Respondent's counsel stated that the day of the trial, Mr. Mulholland requested from the district headquarters all additional reports concerning the accident and was told there were none. In the files delivered to the Claimant was a 1978 computerized collision information document with the name of Wiese at the bottom. Similar reports for other years, including 1982, had the name Ed Jermenc on them. In any event, the Court will not make a finding similar to an I.P.I. 5-01 instruction for the Wiese Report, as the report was not more specifically identified. Whether it was a detailed accident report or a report similar to the Wiese-Jermenc documents was not established by the Claimant. In any event, there is no evidence that it had been deliberately withheld.

This Court has consistently held that the State is not an insurer of all persons travelling on its highways. (*Edwards v. State* (1984), 36 Ill. Ct. Cl. 10, 15.) However, where a dangerous condition on a State highway exists, and a person using said highway becomes involved in an accident involving the condition, that person must prove, by a preponderance of the evidence, that such dangerous condition existed and that the State had actual or constructive notice of it. See *Scroggins v. State* (1991), 43 Ill. Ct. Cl. 225.

The testimony of the Respondent's witness, Mr. Mulholland, indicates that during the period involved and prior, he did not recall ever receiving any complaints from any individual as to the unsafe condition of the accident site. Additionally, Mr. Berger testified that he knew of no such complaints. This testimony must lead to the conclusion that if, *arguendo*, the area was unsafe, the Respondent had no actual notice of such unsafe condition so as to be charged with negligence in not maintaining same

in a reasonably safe condition. See *Scroggins, supra*.

The testimony of the Respondent's witnesses contradicts any claim that an unsafe condition existed for such a length of time as to reasonably conclude that the State was on or had constructive notice. Constructive notice would exist if a dangerous condition existed for such a length of time, that public authorities, by exercise of reasonable care and diligence, should have known of the condition and had the opportunity to make the roadway safe. (*Crile v. State* (1984), 36 Ill. Ct. Cl. 176, 178.) In the absence of such proof, the State cannot be charged with constructive notice of an unsafe condition. (*Baker v. State* (1989), 42 Ill. Ct. Cl. 110, 115.) The State regularly patrolled the area and found nothing. Indeed, the testimony of Mr. Berger contradicts the Claimant's assertion that there was the dangerous condition as described by them.

In the claim of *Allen v. State* (1984), 36 Ill. Ct. Cl. 242, a motorcyclist lost control of his vehicle when it went over a patched area, similar to the one in the present Claim. The Court found that the patched area was not unreasonably dangerous, and stated that "the Court has never held that all State roads must be bump free." *Allen* at 247.

It is the finding of this Court that the State had no actual or constructive notice of the defect alleged by the Claimants, and therefore was not negligent.

It is therefore ordered that this Claim is denied and dismissed.

(No. 84-CC-0961—Claim denied.)

ROBERT M. NEBGEN, JAMES F. NEBGEN, L. E. YEAGER, and CARL H. TEMPEL, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed May 12, 1994.

Order on petition for rehearing filed August 8, 1994.

PESSIN, BAIRD & WELLS (SAM S. PESSIN, of Counsel) for Claimants.

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

FRAUD—*party must exercise diligence in seeking truth of representations.* Parties are not justified in relying on representations made when they have ample opportunity to ascertain the truth of such representations before they act, and a Claimant relying on fraud must show that he acted reasonably under the circumstances respecting the degree of diligence and prudence that a normal person would employ in protecting their own interests.

SAME—*actual and constructive fraud—intent or tendency to deceive.* An essential element of actual fraud is the intent to deceive, whereas constructive fraud, although not requiring actual dishonesty, involves a breach of legal or equitable duty which is legally fraudulent because of its tendency to deceive.

SAME—*misrepresentations by State employee regarding financing for project—no reasonable reliance—claim denied.* The Claimants could not recover in their action alleging that the Respondent's agent falsely represented to them that he had obtained financing for their project and that the Claimants were damaged when they relied on the misrepresentation and canceled alternative financing arrangements, since there was insufficient proof of any agreement purporting to bind the Respondent, and the Claimants failed to show that the statements made were in fact false, or that their reliance on the statements, without attempting to verify the funding source, was reasonable.

OPINION

JANN, J.

Claimants seek judgment against Respondent for damages claimed to have been sustained by Claimants through the fraud of a representative of Respondent's Department of Commerce and Community Affairs.

Claimants contend that they sought funding for a

new industry to be located in East St. Louis. Claimants allege that they had arranged financing to commence the project through the officials and representatives of East St. Louis. Claimants assert that John Smith, an agent, employee or servant of Respondent's Department of Commerce and Community Affairs fraudulently represented to Claimants that he had obtained "private" funding for their project through a Florida trust, and through his contacts Claimants could avoid bonding costs. Claimants contend that in reliance on Respondent's agent, Claimants cancelled arrangements for an industrial revenue bond issue that had been approved by representatives of the City of East St. Louis. Further, in reliance on Respondent's agent, Claimants borrowed $50,000 to meet initial expenses. After having borrowed the $50,000 and having paid initial expenses, Claimants claim never to have heard from Respondent's agent again. Claimants advised representatives of Respondent's department of the failure of Respondent's agent to follow through on the financing arrangements. Apparently after having played a taped telephone conversation for the director of the department, Respondent's agent was interviewed by department officials and resigned on the spot.

Claimants seek damages against Respondent in the amount of $71,375.05, being the amount of principal and interest on a $50,375 loan obtained by Claimants for payment of initial expenses in reliance on the alleged fraudulent representations of Respondent's agent.

Respondent contends that their agent was far outside the scope of his employment and authority if, indeed, the representations made by Respondent's representative were as alleged by the Claimants.

Claimants contend that after contacting Respondent's Department of Commerce and Community Affairs, they were referred to John Smith. The City of East St. Louis was committed to giving Claimants a 26.5 acre tract of land for $1 for an industrial site at a location which had 2.6 million dollars of funds dedicated to it for development of streets, sewers and lighting. East St. Louis had also offered Claimants a 10-year tax abatement for up to a million dollars, and the city was willing to issue industrial revenue bonds in the amount of approximately six million dollars to help fund the project. The project could have been funded with the industrial bond issue. Appropriate resolutions were passed by the East St. Louis City Council.

Claimants contend that Respondent's representative John Smith caused Claimants to back out of the arrangements with East St. Louis and "shut that all down." Claimants had been referred to John Smith by a representative of Respondent's Department of Commerce and Community Affairs. Smith was introduced as a colleague in the Respondent's Department of Commerce and Community Affairs, and that Smith "may be able to assist" the Claimants. Claimant Robert M. Nebgen testified that Smith advised Nebgen that Smith had knowledge of people who could provide financial assistance to Claimants. Smith stated to Nebgen in the presence of Don Falls of Respondent's department (Department of Commerce and Community Affairs) that it was Smith's job to assist people like the Claimants in developing industries within the State of Illinois, and that he met "all kinds of people that had funding available." According to Claimant Nebgen, Smith advised Nebgen that by using his sources of funding, Claimants could avoid the cost of bonding and the costs of people who do all the bonding work. Smith

represented to Claimants that Smith was contacting the "Ulena Trust," and that those people could possibly fund Claimants' project, thereby avoiding a revenue bond issue. The initial meeting between Claimant Robert M. Nebgen and John Smith was in July of 1982 at the office of Don Falls of Respondent's department in Springfield. Nebgen testified this was the only time that Claimants met face to face with John Smith, and that further communications were by phone conversation. Claimants contend that they sought from Smith, and were granted, authority to tape telephone conversations between Smith and Robert M. Nebgen so that other investors in the project could hear the conversations if they were unavailable to hear them first hand. Thereafter, some of the conversations between Robert M. Nebgen and John Smith were taped but later erased and not preserved. One conversation was preserved which occurred in July 1982 toward the end of the month. The transcript of the conversation was marked as Claimant's Exhibit #3. In the conversation marked and identified as Claimant's Exhibit #3, Smith represented to Claimants that he had tentative approval from the Ulena trust for the funding of the project. Claimants contend that a week later Smith called back and said that he had obtained "final approval" and that everything "was okay." Claimants contend that Smith advised Claimants that the funding through the industrial bond issue of the City of East St. Louis would no longer be required.

In reliance on Smith's representations, Claimants contacted the people with whom they had been dealing in East St. Louis and advised them that their funding was no longer necessary. Further, in reliance on Smith's representation, Claimants borrowed $50,000 to pay expenses. A local bank loaned Claimants $50,000 and required individual guarantees by the Claimants to secure the debt. The

loan was at 15.5% interest (prime + 2). Claimants used the $50,000 to pay expenses incurred by Claimants in developing the project to that point, and paid off the CPA firm to whom they had been referred by Respondent's department at the outset.

Claimants never heard from John Smith again after the July phone call. When Claimants were unable to reach John Smith or Don Falls, a representative of Respondent's department with whom they had conferred, and the person who had introduced them to Smith, Claimants became suspicious and made contact with an FBI agent with whom Claimants were acquainted to check on the "Ulena Trust," purportedly located in Miami, Florida. Claimants were unable to learn anything about the "Ulena Trust." Claimants contacted the assistant to the director of Respondent's department who claimed to be ignorant of the situation. Claimants were invited to come to Springfield with the taped telephone conversation. Claimants drove to Springfield and met with Respondent's assistant director Woelfer. The taped telephone conversation was played and Respondent's agents made a tape recording of the taped conversation. Woelfer advised Claimant Robert Nebgen that the department had suspected that John Smith "had been doing this kind of thing for quite awhile" and that Claimant's tape recording was "the first piece of hard evidence" that Smith was "engaged" in this kind of activity. Woelfer advised Robert Nebgen that the director of the department called John Smith in and played the tape for him and Smith resigned on the spot.

In a later conversation between Claimant Robert Nebgen and Peter Fox, the director of the Department of Commerce and Community Affairs that occurred in May or June of 1983 at Claimant's home in Belleville, Fox asked Claimant what Claimant "thought the State of Illinois was

responsible for." Nebgen testified that the director of the department told Claimants that he (the director) agreed with Claimants as to what had happened, and that their project had been destroyed by John Smith's activities, and that he (the director) felt the same way as Claimants and that he (the director) was going back to Springfield and arrange "to set things straight." Fox told Claimants that "they" had a fund available "like a contingency fund" for things like this, and that he (Fox) would go back to Springfield and "take care of it." Claimants did not receive any funds.

Neither Claimants nor Respondent offered the testimony of John Smith and there is no evidence in the record from which it can be determined that the "Trust" to which John Smith apparently made reference in his telephone conversations with Claimants ever did or did not exist. Neither Claimants nor the Respondent presented Mr. Fox as a witness or representatives from the City of East St. Louis.

Claimants seek to impose liability on the State of Illinois because they claim they relied on telephone conversation representations of a State employee that certain private funding sources had agreed to loan money to the Claimants. Predicated on these representations, Claimants abandoned a plan to finance their venture through industrial revenue bonds authorized by the city officials of East St. Louis, Illinois. In further reliance on the representations of John Smith, Claimants contend that they borrowed money to pay expenses Claimants had incurred on the proposed project including bills of accountants for "feasibility studies" obtained by Claimants without regard to the alleged faults or misleading representations of John Smith. Implicit in the theory of detrimental reliance and fraud advanced by Claimants for recovery in this case, is the propo-

sition that Claimants placed total trust and confidence in the representations of John Smith pertaining to his success in arranging private financing for Claimants, which was supposed to be on better terms than Claimants could obtain under the plan to which the City of East St. Louis, Illinois, was apparently committed. Claimants do not contend that any representative of Claimants ever had direct contact with the "Ulena Trust," or any agent, servant or representative thereof. The record is sparse as to what information concerning Claimants' project had been furnished to the "Trust" by John Smith. Since John Smith did not testify and no information was apparently obtainable from the "Trust," the record is barren as to whether the purported "Trust" was a figment of Smith's imagination, or, instead, if the trust actually existed and had actually made commitments to Smith which Smith passed on to the Claimants. This Court is left to speculate as to much of the hard information which predicates the "facts" and circumstances of Claimants' claim against Respondent.

Claimants' essential contentions in support of their claim against Respondent are as follows:

(a) Claimants' "project" would have been funded and the expenses of Claimants duly paid from the industrial revenue bond issue authorized by the City of East St. Louis but for the verbal representations made by Respondent's agent that he had secured "private" funding for Claimants' project through the "Trust."

(b) Claimants' action in withdrawing from the proposed financing arrangement to which the City of East St. Louis had committed itself was reasonable, and was predicated entirely on the representations of Respondent's agent to Claimant that Respondent's agent had secured "private" funding on more favorable terms for the Claimants' project.

(c) That the private funding obtained by Respondent's agent for Claimant's project would have paid Claimant's project expenses, and that but for John Smith's representations to Claimants, they would not have borrowed $50,000 to cover those project expenses, and would not have become liable for the repayment thereof.

(d) Claimants' reliance on Smith's representations without first making any direct contact between Smith's alleged funding source and Claimants or their representatives, was reasonable.

(e) When a hopeful entrepreneur is told by Respondent's agent that private funding for the entrepreneur's project can be obtained through contacts made by representatives of State economic development agencies, any undertakings or financial commitments made by such entrepreneur on the strength of verbal representations by such agents of Respondent, may be "insured" by Respondent on the basis of claims by such entrepreneur that if these commitments are not kept by private entities, then the State may be liable to reimburse such entrepreneurs for their losses sustained.

Respondent contends that the agent of the State, John Smith, worked a fraud upon the Claimants. In essence, Smith misinformed Claimants or failed to "follow through" on obtaining financing for Claimants from some private source known only to Smith, and which Smith had represented had been both tentatively and finally approved by the unknown private funding source. Claimant argues had it not been for Smith, Claimants would have completed the industrial revenue bond funding. Claimant asserts Respondent's liability under the theory of *respondeat superior*, and that, in any event, when the department director, Peter Fox, indicated to Claimants that he would seek reimbursement to Claimants

from department contingency funds that this verbal undertaking by Fox at a meeting with Claimants was binding upon Respondent.

Claimant argues that Respondent may not successfully defend on the basis that their employee, John Smith, acted contrary to Respondent's policies and procedures, and that "under common law principles of *respondeat superior*, a principal is liable for the deceit of its agent, if committed in the very business the agent was appointed to carry out." Respondent makes no such argument. Instead, Respondent argues that when a representative of State government asserts that he has found private financing for a hopeful entrepreneur, these representations do not bind the Respondent and are not intended by either the State or its representative to bind the Respondent, State of Illinois. It is not suggested in the transcript or depositions that John Smith ever purported to bind the State of Illinois to any agreement with Claimants or their representatives. A suggestion by the director of the Department of Commerce and Community Affairs that he would look into the question of reimbursing Claimants from the department's contingency funds does not represent any admission or commitment on the part of Respondent to reimburse Claimants for the funds spent by Claimants as project expenses prior to the time that it was determined that Smith's assertions regarding his contact with private funding sources, and the availability of private funding sources had either proved false, or had not been pursued and brought to fruition by Smith on behalf of the Claimants.

The record as a whole in this case, demonstrates that Smith apparently either lied to the Claimants about having secured private funding, or simply failed to follow through on funding arrangements with private sources ac-

tually committed to the Claimants' project. It may be that if Smith had followed through with the contacts he said that he had made with private funding sources, Claimants' project may, indeed, have been benefited by those sources. Although it is not clear from the record, it appears that Smith's employment by the State was terminated when the department director heard the tape of the conversation between Smith and Robert Nebgen transcribed and admitted into evidence as Claimant's Exhibit #3. From a review of the transcript of the telephone conversation, it is just as believable that Smith's sudden resignation upon being confronted with the tape of the conversation, was predicated upon Smith's own statements of intent to become personally involved in the investment as it would be to assume that Smith's sudden resignation was predicated upon the fear that he had been found to be making fraudulent statements to the Claimants about his efforts in obtaining private funding for their project. Implicit in the Claimant's argument is that when Smith was confronted with the taped conversation, his resignation was predicated upon some belief that he had made misleading or fraudulent statements to Claimants concerning his activities on behalf of arranging private financing. Since there is no evidence in the record from Smith or from any persons purporting to represent the mysterious "trust" entity with whom Smith was allegedly dealing, it is impossible for this Court to make any determination as to the cause or reasons for Smith's actions; or, indeed, whether the representations made by Smith to the Claimants were, in fact, misleading or fraudulent.

Respondent's argument is persuasive that there is no evidence from which it can be concluded that Smith purported to bind Respondent to any financial obligation to the Claimants. Claimants' own evidence through Claimants' witness Nebgen demonstrates that Nebgen was not

relying on any agreement with Respondent, but instead, was relying on the fact that Smith was an agent of Respondent, and was making representations concerning his activity on Claimants' behalf not in striking agreements with a private funding source located in Miami, Florida which would benefit Claimants.

The best that can be said for the actions of Claimants in this case in placing such total and irrevocable reliance on the verbal representations of John Smith, would be that their actions in reliance on Smith's statements were precipitous and unwise. At worst, Claimants' contention that they may seek indemnity from the State of Illinois for undertakings that they voluntarily entered into on the sole basis of telephone conversations with John Smith concerning the availability of private funding and without any contact with the funding entity or any agent, servant or employee thereof, was ill-advised, premature and self-destructive. It is unreasonable in the extreme for this Court to be asked to assess Respondent with the responsibility of indemnification to plaintiffs for their preliminary project expenses because of the verbal representation made by a State employee as to what arrangements he had been able to make with private funding sources for hopeful entrepreneurs. The actions of Claimants in apparent reliance on Smith's representations were naive and premature, and losses resulting therefrom should not be the responsibility of the State. Indeed, the bulk of the expenses covered by Claimants' loan were expenses which would have been repaid by Claimants or by their new commercial entity in any event whether they had obtained private funding for their proposed enterprise, or whether they had continued to pursue the previously approved funding package offered by the City of East St. Louis.

The record is barren of any evidence that the representations of Smith to the Claimants were false. From the record, it is impossible to determine what steps, if any, were taken by representatives of the Respondent toward following through with the proposed private financing plan which may have been discovered by Smith. Smith resigned from the agency, and since Claimant's attempts through a contact with the FBI had failed to turn up the identity or location of the private funding source with whom Smith was allegedly dealing, efforts to complete that arrangement were apparently abandoned, not only by Respondent and its department, but also by the Claimants.

Claimants' tort claim against Respondent is predicated upon a fraud. This Court is asked to assume that the entity known as "Ulena Trust" was fictional. Claimant contends "all the investigation into the Ulena Trust, even by having an FBI man in Miami try to check it out, showed it was clearly false and known by Smith to be false, as evidenced by his superior." The only reference to attempts on the part of Claimants or Respondent's agents at locating the "Ulena Trust" are reflected in the transcript. Nebgen stated that he called a friend of his who was with the FBI in Miami "and asked him if he would please check and see if this Ulena Trust was registered in Florida or registered in the United States or if, in fact, it existed because we didn't know where we were going at that point." There is no evidence as to what the inquiry to the FBI agent produced by way of information but, when asked if Nebgen was able to learn anything at all as to the existence or location of the "Ulena Trust," his sole reply was "No." Respondent's agent, Biderbecke testified that the department made no investigation as to the existence of the Miami, Florida trust.

Parties are not justified in relying on representations made, when they have ample opportunity to ascertain the truth of such representations before they act. A claimant relying on fraud must be prepared to demonstrate that he acted reasonably under the circumstances respecting the degree of diligence and prudence that a normal person would employ in protecting their own interests. In the case at bar, despite the passage of two months between the end of July 1982 and the month when Claimants first became alarmed and made inquiry of Respondent's department, Claimants made no contact with Smith in an effort to be put in direct communication with those representing the "Ulena Trust," and apparently relied entirely on Smith to make *all* of the arrangements for the private funding program which involved many millions of dollars. These are not the actions of reasonably prudent businessmen seeking to finance a multi-million-dollar venture. There is no evidence in the record from which it can be concluded that John Smith ever made any misstatement directly or by omission to the Claimants, or any of them. An essential element of actual fraud is the intent to deceive. Even constructive fraud, although not requiring actual dishonesty or intent to deceive, involves a breach of legal or equitable duty which irrespective of moral guilt, is legally fraudulent because of its tendency to deceive. In any event, on the record in this case, there is no proof of deception in either a constructive or actual sense. The Court is asked to "imply" that Smith had deceived the Claimants and that damages done by the Claimants to themselves in apparent reliance on Smith's statements, however imprudent, may be asserted as a ground of liability against Respondent.

Conclusion

There is no evidence in the record in support of essential elements of proof required to support Claimants'

action predicated upon the theory of fraud. Even if the record could be said to support the conclusion that Smith's statements made to the Claimants were false, it is doubtful that Claimants could maintain Claimants' burden of showing their reliance over a two-month period on these assertions with no attempt on their part to make direct contact with the supposed private funding source was reasonable or in accord with any reasonably-prudent standards of inquiry that might be expected of hopeful entrepreneurs finding themselves in the position of the Claimants in this case. Claimants speculate that Smith's employment termination with the Respondent's department was predicated solely on the representations made by Smith to the Claimants as revealed in the taped telephone conversation. This speculation cannot support the Claimants' case. It is just as reasonable to speculate that Smith's rapid departure from the department was brought about by the disclosure that he was endeavoring to provide himself with some financial gain or investment opportunity, in a situation in which he clearly had a conflict of interest, than to suppose otherwise.

Claimants do not assert that Respondent's agency was negligent in failing to follow Smith's attempt to arrange private financing for the Claimants; further, Claimants suggest that their own failures, beyond the meager inquiry that they apparently made of a friend who was in the FBI, should not adversely affect their claim. It is not possible on the basis of the record in this case, for this Court to conclude that Smith's statements to the Claimants were in the least bit deceptive, misleading or false. The most that can be said, is that Smith left the Respondent's department, and that nobody in the department or among the Claimants made any reasonable effort to follow through and to determine if Smith's representations were, indeed,

false or whether, instead, there was a private trust who had, through Smith's efforts, committed to privately funding the Claimants' venture.

This claim is hereby denied.

ORDER

JANN, J.

This cause coming on to be heard on Claimants' petition for rehearing, the Court having reviewed the evidence and arguments herein finds:

Claimants' petition is hereby denied. Claimants' petition seeks a decision based upon speculation and conclusions drawn from facts not in evidence.

(No. 84-CC-2613—Claim dismissed.)

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

Opinion filed May 23, 1995.

WISEMAN, SHAIKEWITZ, MCGIVERN, WAHL, FLAVIN & HESI, P.C. (EARL W. HUBBS, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (TERENCE J. CORRIGAN, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*State is not insurer of inmates' safety—foreseeability of harm.* The State is not an insurer as to the safety of inmates, and in a claim for injuries inflicted by a fellow inmate, foreseeability of the potential for harm is a necessary element which must be proved by a preponderance of the evidence, and foreseeability must be judged by the facts in each case and by taking judicial notice of the prison environment.

SAME—*inmate stabbed—failure to identify potential attackers—claim dismissed.* An inmate's claim for injuries received in a stabbing outside his

prison cell was dismissed since, although the inmate had allegedly alerted prison officials that he was in danger, he declined an offer to be placed in protective custody, failed to identify specific individuals of whom he was afraid, and there was no evidence that he suffered injuries from known enemies or their agents.

OPINION

RAUCCI, J.

Claimant seeks judgment in the sum of $100,000 as a result of physical injuries sustained by him while a resident of the Illinois Department of Corrections. He contends that the department negligently failed to protect him, and that as a proximate result thereof, he was injured.

He testified that he had been housed at the Menard penitentiary for a couple of months before he was injured. On October 18, 1983, he was going to breakfast and stepped out of his cell. Other prisoners were coming down the gallery because the doors were open. He took a couple of steps from his cell and was struck and stabbed. He was escorted to the hospital. He was stabbed twice behind his left shoulder, under the eye, and on the forehead. He also contends that he was hit over the head with a bar and that his head was split. He crushed his finger in defending himself.

The gravamen of the claim is that the Claimant tried to alert prison officials to the fact that he feared for his life and that he was in danger because he was going to testify against certain other individuals who had "connections" in the prison. Claimant was offered placement in the protective custody unit which he refused.

No evidence in the record identifies the Claimant's attackers although one name is contained in a collection of inmate statements. No evidence was offered that

Claimant had identified that individual as someone he feared.

The State is not an insurer as to the safety of inmates. Foreseeability of the potential for harm is a necessary element which must be proved by a preponderance of the evidence. What is foreseeable necessarily must be judged by the facts in each case, and by taking judicial notice of the prison environment. *Petrusak v. State* (1987), 39 Ill. Ct. Cl. 113, 114.

Claimant argues that the Respondent had knowledge because he had told prison officials that he feared for his safety. His fears pertained to individuals who might in the future be potential enemies being housed at Menard. However, he declined protective custody which was offered.

His generalized fears, however, are not a basis for recovery. His claims to the contrary, he never identified specific individuals to prison officials. Claimant had sought to be transferred to a Federal institution or to another State. Such options were not available. Respondent could easily construe Claimant's declination of protective custody as an indication that Claimant did not seriously fear danger to his person.

Finally, there is no evidence that Claimant suffered injuries from known enemies or their agents.

The claim should be denied.

It is therefore ordered, adjudged and decreed that this claim be, and it is hereby, dismissed with prejudice.

(Nos. 84-CC-2692, 84-CC-2693 cons.—Claimant Bongi Cartage awarded $13,501.03; Claimant William Immordino awarded $31,534.)

WILLIAM IMMORDINO and BONGI CARTAGE, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed March 23, 1995.

MICHAEL R. PANTER, for Claimants.

JIM RYAN, Attorney General (COLLEEN MCCLOSKY VON OHLEN, Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*road defect case—what Claimant must show.* In order to recover for injuries received as a result of a road defect, it must be shown that the defect was substantial enough and must have existed for such a length of time that reasonable persons would conclude that immediate repairs should be made or, in the alternative, that warning signs should be posted.

SAME—*defect in highway caused accident—State had constructive notice—awards granted.* In a claim by a truck driver and his employer stemming from injuries received by the driver when his truck hit a large pothole on an expressway and overturned, the State had constructive notice of the defect and was negligent in maintaining repairs to it, where the pothole had been temporarily patched prior to the accident but the State offered no proof as to when the repairs were made, and awards were granted to the employee for personal injuries and to the employer for property damage.

STIPULATIONS—*agreement of parties—lien held by workers' compensation carrier.* Pursuant to the parties' stipulation, an order was entered in the Claimants' highway defect claim against the State acknowledging a lien held by an intervening workers' compensation carrier for 75% of the amount previously paid by the carrier to the Claimant employee.

OPINION

MITCHELL, J.

These claims were brought by William Immordino and his employer, Bongi Cartage Company, as a result of an incident which took place on April 4, 1983. In addition, a petition to intervene has been filed on behalf of the Bituminous Casualty Corporation, the workers' compensation carrier for Bongi Cartage.

On April 4, 1983, the Claimant was employed as a truck driver for Bongi Cartage Company. On that date it

was Mr. Immordino's responsibility to take loads from a construction site located at Addison and Rockwell, Chicago, to a location in Elk Grove Village. At approximately 10:30 a.m., he left the Chicago site with his second load of the day, entering the Kennedy Expressway at Belmont. In order to stay on the Kennedy, he was required to move into the left lanes. As he crossed from the second lane into the third lane, his vehicle struck a pothole and he lost control of the truck. The tractor-trailer rolled on its side and slid down the Kennedy Expressway causing injuries to Mr. Immordino and damage to the vehicle.

The State of Illinois contends that it lacked notice of the pothole and, therefore, is not responsible for the accident. Additionally, the State believes that the Claimants were not injured to the extent claimed.

There is little dispute that a pothole was a cause of this mishap. Not only did Mr. Immordino testify that he observed the pothole as he attempted to change lanes, but the Claimants' evidence also included the testimony of the driver of the vehicle immediately behind Mr. Immordino. Mr. Alan Underwood of Gurnee, Illinois, was driving northbound on the expressway behind Mr. Immordino's vehicle. He testified that he saw the truck's cab swerve to the left and then go to the right and that the back tire of the trailer went way up in the air on one side and he observed a big chuck hole which he had to straddle as he drove further north. He observed the truck start to fishtail, go out of control and turn over on its side. He describes the chuck hole as being "damn big." He further identified Claimants' Exhibit No. 1 for identification as an accurate depiction of the hole he saw on the day of the accident. Plaintiff also called a Mr. Flipello who testified that his examination of the truck revealed a crack in the left rear spring. The function of the rear spring is to hold

the axle in place and a crack would create an impossible situation for the driver to control the tractor-trailer. Mr. Dennis Mahoney, an employee of the Illinois Department of Transportation, testified that the chuck hole in question appeared to have been patched at some earlier point and that the cold patch did not stick but he had no idea when the cold patch material had been placed in this particular pothole. He also testified as to the frequency and routine with which the department inspects the Kennedy between O'Hare and the Eisenhower and the number of crews involved in such inspections. He further testified that before this incident occurred, no one had called the department's attention to the particular hole in question. Further, during winter months temporary cold patch was placed in these types of holes until the weather changed. Permanent repairs could only be made in warmer weather.

This Court has consistently held that for recovery as a result of an injury suffered in a road defect case, it must be shown that the defect was substantial enough and must have existed for such a length of time that reasonable persons would conclude that immediate repairs should be made or, in the alternative, that warning signs should be posted. (*Stege v. State* (1971), 27 Ill. Ct. Cl. 399.) Careful examination of this record reveals that the pothole which caused this accident had previously been patched by the State in an attempt to avoid this type of incident. There is unfortunately no evidence to indicate when, who or how this patching had been done, but there is evidence that these patch jobs were only temporary and their duration would be effected by weather, traffic conditions, snow plow operations, location and durability.

The State must have either actual or constructive notice of the defect. (*Aetna Casualty and Surety Co. v.*

State (1984), 37 Ill. Ct. Cl. 179, 181.) The Court believes that the State of Illinois did have constructive notice of the existence of a pothole and was negligent in maintaining the repairs to that pothole.

The Court believes that fair and reasonable repairs to the truck was the amount of $13,501.03. Mr. Immordino had medical expenses of $8,273.99 and lost wages of $8,260. The evidence as to any permanency was minimal; however, the Court does believe that obviously there was some pain and suffering of which some compensation can be entered.

Therefore, the Court awards $13,501.03 to Bongi Cartage for property damage and awards $31,534 to William Immordino for personal injuries. Pursuant to the stipulation of the parties, the Court enters an order acknowledging a lien of Bituminous Casualty Corporation in the amount of $13,298.35, which represents 75% of the $17,731.14 which Bituminous had previously paid to Claimant, William Immordino.

(Nos. 84-CC-3194, 86-CC-1254 cons.—Claims dismissed.)

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

Opinion filed October 19, 1993.
Order filed February 8, 1995.

RICHARD BLACK, *pro se*, for Claimant.

JIM RYAN, Attorney General (PHILLIP J. ROBERTSON, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*furlough expenses are chargeable to inmates.* Pursuant to 730 ILCS 5/3—11—1(a), the Department of Corrections may

make an appropriate charge for the necessary expenses of accompanying an inmate on furlough.

SAME—*inmates' claims relating to furlough denied.* A claim filed by two inmates who alleged they were wrongfully refused a furlough to attend their brother's wake, improperly charged for travel expenses, and suffered mental distress by being unnecessarily shackled, was denied since the inmates did in fact attend the service, there was statutory authority for the travel expense charge and for keeping the inmates restrained, and the mental distress claim lacked necessary allegations of physical symptoms or impact.

SAME—*inmate failed to proceed with case after Court vacated denial of claim—claim dismissed.* Although the denial of an inmate's claim relating to a furlough was vacated because the inmate had been unable to attend the hearing and present testimony on his own behalf, the claim was subsequently dismissed for want of prosecution, based upon the inmate's failure to make a good faith attempt to proceed.

OPINION

PATCHETT, J.

This claim seeks recovery against the Department of Corrections for the State's alleged violations of section 3—11—1(a) of the Unified Code of Corrections (730 ILCS 5/3—11—1(a)), which provides for furloughs for people who are committed to the Department of Corrections.

At the time of occurrence complained of herein, both Claimants were inmates at Stateville Correction Center, Joliet, Illinois. They made requests for furloughs pursuant to the statute cited above, for the purpose of attending their brother's wake. The furlough was granted, and the inmates were advised of the conditions of that furlough before their departure. Those conditions included a charge of $74 to cover the necessary expenses for correctional officers to accompany the inmates on the furlough, and the fact that the inmates were to have close supervision and constant restraints.

The inmates left the institution for the funeral furlough on May 17, 1982. On May 16, 1984, the Claimants filed a complaint against the Department of Corrections

seeking $20,150 in total damages. A hearing was held June 7, 1988, before a Commissioner of this Court at which only Claimant Holice Black appeared. He offered no additional testimony, but simply reasserted the allegations stated in the complaint.

Those allegations set forth in the complaint are as follows:

Count One

Claimants contend they were wrongfully denied furlough and seek $10,000 compensation.

Count Two

Claimants contend they were improperly charged $74 in travel expenses.

Count Three

Claimants allege they were unnecessarily shackled and accompanied by guards.

The evidence is clear and undisputed regarding this claim. Claimants were granted resident furloughs, and left Stateville for the purpose of the wake on May 17, 1982. The allegations as to the denial of the furlough are without basis and are therefore denied.

The Statute cited above provides in part as follows:

"* * * The Department may make an appropriate charge for the necessary expenses of accompanying a person on furlough * * *." 730 ILCS 5/3—11—1(a).

Charges in this case were based on the need for two officers to accompany the Claimants for one-half day each at $55 per day plus 100 miles at 19 ($.19) cents per mile. The charges assessed were appropriate and reasonable. Therefore, the claim for reimbursement of the furlough expense is denied.

The Department of Corrections determined that the Claimants could have a furlough, but they should be under close supervision and in constant restraints. This decision is clearly within the authority of the department, and reasonable in light of the fact that Claimants were convicted of murder and armed robbery.

The complaint alleged mental distress; however, it failed to allege any physical impact or symptom as a result thereof. This Court has ruled previously that there will not be recovery for mental distress without physical manifestation. (*Macon v. State* (1986), 37 Ill. Ct. Cl. 326, 327.) Therefore, the claim as a result of being shackled, is denied, as well as recovery for alleged mental distress.

For reasons stated above this claim is denied.

ORDER

PATCHETT, J.

Claim 84-CC-3194 sought recovery against the Department of Corrections and the State of Illinois for alleged violations of section 3—11—1(a) of the Unified Code of Corrections (730 ILCS 5/3—11—1(a)), which provided for furloughs for people who are committed to the Department of Corrections.

Originally this claim was filed by two brothers, Richard Black and Holice Black. A hearing was held, and Holice Black testified. Based on that testimony, this Court entered an order on October 19, 1993, denying recovery as to both Claimants.

In April 1994 this Court granted Claimant Richard Black's motion to vacate. This was granted because his claim had been denied without Mr. Black being able to appear and present testimony on his own behalf. The

Court remanded the case to a Commissioner of this Court to conduct a hearing for Mr. Black.

On October 12, 1994, a Commissioner of this Court appeared at the Pontiac Correctional Center, Pontiac, Illinois, to conduct a hearing. Proper notice had been sent to Mr. Black. An employee of the Department of Corrections indicated to the Commissioner that Mr. Black refused to appear. The State then called Sgt. Reider who testified that she was an employee of the Department of Corrections. She further testified that on October 12, 1994, she was assigned to the visiting room. All inmates receiving visitors or court appearances had to proceed through her security "shake down" room.

Sgt. Reider testified that Richard Black, despite having been given several opportunities, refused to proceed through the security channels. Sgt. Reider further testified that officer Gerber advised Mr. Black that if he refused to proceed through security and appear in court, his claim might be jeopardized. The Claimant persisted in his refusal to go through the security check.

Illinois Court of Claims Regulations state as follows:

> "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." (74 Ill. Adm. Code 790.260)

Because the Claimant has not made a good faith attempt to proceed, we are hereby dismissing case No. 84-CC-3194 for want of prosecution.

Mr. Black also had a claim for alleged property loss in case No. 86-CC-1254. This claim was also set for trial on October 12, 1994. As previously indicated, Mr. Black refused to appear before the Commissioner of this Court. This case is consolidated with No. 84-CC-3194 for the

purposes of issuing this order. Case No. 84-CC-3194 is also dismissed for want of prosecution.

(No. 85-CC-0323—Claim denied.)

TOM A. EUDALEY and TIM W. EUDALEY, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed March 10, 1995.

HEILIGENSTEIN & BADGLEY (THOMAS HEILIGENSTEIN, of counsel), for Claimants.

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

HIGHWAYS—*negligence—State's duty to maintain highways—notice.* The State owes a duty to all users of the highways to maintain them in a reasonably safe condition, and in order to recover on a negligent highway maintenance claim, the Claimant must show that the State had actual or constructive notice of a defect.

SAME—*negligence—when State may be charged with constructive notice.* The State may be charged with constructive notice of a dangerous condition when, through the exercise of due diligence, the condition should have been discovered.

SAME—*motorcycle hit pothole—no notice of defect—claim denied.* Where a motorcycle driver and his passenger filed a negligence claim as a result of injuries sustained when their motorcycle struck a pothole, the claim was denied based upon the State's lack of notice concerning the defect, since testimony by Department of Transportation employees indicated that the hole had been caused by a sudden buckling of the highway which had not been seen by, or reported to, the State prior to the accident.

OPINION

MITCHELL, J.

Claimants, Tom A. Eudaley and Tim W. Eudaley, seek damages from Respondent, State of Illinois, for personal injuries sustained by each in a motorcycle accident

which occurred on May 16, 1984, in the eastbound lane of Interstate 70 at the 16.5 mile marker.

Tom Eudaley was operating his motorcycle in an easterly direction on I-70 with his brother, Tim, as a passenger. He was traveling in the median lane. The motorcycle struck a hole, and went out of control, causing the Claimants to be thrown to the pavement. Claimants were injured and received medical treatment. The motorcycle was destroyed.

Tom Eudaley contended that on the date in question, he and his brother had been visiting his sister in St. Louis and were returning home. Traffic was heavy and the motorcycle was being operated in the passing or median lane. Tom was operating the motorcycle at 55 m.p.h. Tom noticed that the truck ahead of him had picked up dust and Tom noticed the flash of the truck's brake lights. Tom thought the truck had a blowout because he saw the smoke and "stuff." The motorcycle struck a hole in the pavement with a lot of chunks of concrete laying around.

Claimant, Tim Eudaley, contended that he saw the truck and white smoke. Tim thought a tire had blown and "didn't know what it was." Tim claimed that when the motorcycle hit the hole, he was thrown off the bike. After the accident, Tim looked back at the hole and was shocked to see how deep "one part of it was." He testified that a big chunk of concrete was gone, and that the hole was a good eight inches deep all the way down to the iron bar. Tim saw the iron bar. He also stated that he had operated a car eastbound on I-70 a week earlier and had not seen the hole.

Trooper Ellis investigated the accident. He observed the hole in the pavement being approximately 5 feet by 5 feet and 10 inches deep. The motorcycle received exten-

sive damage. Ellis saw rocks, pebbles and asphalt lying around the hole, but not large chunks of concrete. Ellis reported the pavement damage to the Department of Transportation. Ellis stated that the hole was located in the passing lane. The motorcycle was 450 feet away from the hole.

Phillip Schneider, a Department of Transportation employee with the bureau of maintenance, maintained that he acquired knowledge of this accident on the following day or the day after in the course of his discussion with his immediate supervisor, field engineer Ponce. Ponce told Schneider that there was a pavement blow-up. Emergency repairs had been made on the evening of the 16th and permanent repair of the site was made a couple of weeks later. Schneider recounted that work crews are sent to that stretch of Interstate 70 "one or two times in the year, if then," but there had been ongoing repairs done on that stretch of Interstate 70 during the spring of the year when the accident occurred. At the time of the accident, routine repairs were going on in the general vicinity of this accident "a couple of miles east in that area." Schneider traveled this portion of I-70 during the times that repairs were being made. He related that based upon the description of the hole, he would have noticed it. If he had heard of such a hole, an immediate response to repair it would have been made. Schneider traveled I-70 in that area two or three times a week during the spring of the year.

J. Robert Ponce, a maintenance field engineer with the Department of Transportation, recounted that he was working on the day of the accident. He was called at home by a Department of Transportation radio dispatcher who advised him of the pavement problem at mile marker 16 that needed attention. Ponce called a

foreman to go and make whatever repairs were necessary. A "blow up" is a buckling or a traumatic occurrence of the pavement which usually happens in the warm time of the year, summer or spring months. This condition occurs from heat and moisture causing stress on the pavement which causes it to raise up or blow out. Ponce stated that the Department of Transportation can, in some seasons or some summers, "account for maybe 20 of these." A need study is the only formal procedure for inspecting the roadways other than normal traveling to and from different locations for road business. Ponce's opinion that this was a "blow up" was based on what the repair crew told him and his observations of the area where he observed a "slight hump" and "the heavy part of it." The hump referred to by Ponce was approximately 2-3 inches higher than the normal elevation of the pavement and spread out over an area of 3-4 feet wide. Ponce reported that there is no way to predict where a concrete blow up will occur. Blow ups have occurred at temperatures around 70 degrees. The concrete at the location in question was of a type known as continuously reinforced concrete pavement that has heavy reinforcing steel through the center of it which takes up expansion and contraction. Ponce stated that it was his experience that there are fewer blow ups on this type of pavement than on the type of pavement with expansion joints.

Harry E. O'Connell stated that he was an eyewitness to the accident in question. In his travels to and from work, Mr. O'Connell travels Interstate 70 at the location of the accident returning from work each day, and was traveling that same route on the day of the occurrence. O'Connell was in the driving lane and there was an 18-wheeler and two or three cars behind it, and then the two boys on the motorcycle. O'Connell guessed he was about

a quarter of a mile behind the truck. He guessed that the truck hit the bad spot in the pavement and threw up a white powder or dust. O'Connell thought he had dropped a sack of flour. O'Connell then saw a concrete piece rolling under the truck's wheels, and that the pavement had been torn up. O'Connell stated that he knew that the boys on the motorcycle could not see that because their vision was restricted by the truck and by the two cars following the truck. O'Connell saw the accident coming and knew what was going to happen. When the boys on the motorcycle hit the spot in the road, they started fish-tailing on the road and lost control. The truck had caused pieces of concrete to roll under its wheels. O'Connell described the hole as being half the size of a table to a full-size table. He stated that the chunks of concrete may have rolled off to the shoulder, but he could not remember. O'Connell believed that particular stretch of I-70 was "terrible" and that it seemed like the area was always subject to potholes and busted up pavement, but on his previous trips he did not recall seeing anything in the same area where the accident occurred that would appear to be similar to what he saw the evening after the accident.

The issue is whether or not Respondent, State of Illinois, had actual or constructive notice that a hazardous condition existed in the median lane eastbound I-70 at the 16.5 mile marker. The State owes a duty to all users of the highways to maintain them in a reasonably safe condition. (*Berry v. State* (1968), 26 Ill. Ct. Cl. 377.) Claimants must show that the State had actual or constructive notice of a defect in order to recover on a negligent highway maintenance claim. *Piggott v. State* (1968), 26 Ill. Ct. Cl. 262.

Respondent contests the existence of either actual or constructive notice. This Court has consistently held that each case involving constructive notice must be decided on its own particular facts. (*Bugle v. State* (1967), 26 Ill. Ct. Cl. 173.) In *Wagner v. Illinois* (1978), 32 Ill. Ct. Cl. 50, this Court denied recovery where the decedent lost control of his motorcycle on account of loose gravel on an interstate highway ramp. This Court found no evidence of actual notice in the testimony. Knowing that the State may be charged with constructive notice where, through the exercise of due diligence, a condition should have been discovered, this Court found that there was no evidence on how long the gravel had been lying on the pavement, and thus, no constructive notice. In the instant case, there was no testimony that the hole or the buckling of the highway was seen at any time before the day of the accident. State employees had routinely observed the section of highway in question. No hole or buckling was seen. After receiving actual notice of the condition as a result of the accident, the State made temporary repairs to the highway immediately.

There is no evidence in this record to indicate that the Respondent, in the exercise of reasonable care and diligence, should have known of the condition which caused the accident. This Court cannot conclude that the defect in this case existed for a sufficient period of time to be discovered by the State.

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

(Nos. 84-CC-3228, 84-CC-3398, 84-CC-3565, 84-CC-3602, 85-CC-0001, 85-CC-0137, 85-CC-0197, 85-CC-0208 & 85-CC-0355 cons.—
Motion to reconsider denied.)

THE COUNTIES OF MCLEAN, LIVINGSTON, TAZEWELL, KANE, WOODFORD, STEPHENSON, DEWITT, LAKE, and DEKALB, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed December 23, 1994.

RONALD C. DOZIER, for Claimant McLean County; RONALD BERNARDI, for Claimant Livingston County; BRUCE W. BLACK, for Claimant Tazewell County; J. PATRICK JAEGER, for Claimant Kane County; G. PATRICK RILEY, for Claimant Woodford County; CHARLES R. HARTMAN, for Claimant Stephenson County; STEPHEN H. PETERS, for Claimant DeWitt County; FRED L. FOREMAN, for Claimant Lake County; T. JORDAN GALLAGHER, for Claimant DeKalb County.

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

CONSTITUTIONAL LAW—*only legislature can make deficiency appropriations—Fergus doctrine abolished.* The Illinois Constitution unilaterally gives the General Assembly the authority to make deficiency appropriations, and therefore the Court of Claims determined that the Court's practice of making deficiency appropriations in certain cases based upon the principles set forth in *Fergus v. Brady* (1917), 277 Ill. 272 was unconstitutional.

LAPSED APPROPRIATIONS—*counties challenged pro-rated awards—Court lacked jurisdiction to make deficiency appropriation—motion to reconsider denied.* Where nine counties who expended funds pursuant to the Juvenile Court Act on behalf of children in shelter care sought reconsideration of a Court of Claims order which pro-rated the funds remaining in the relevant appropriation and denied the balance of their claims for lack of appropriated funds, the Court denied the motion to reconsider, since it was without subject matter jurisdiction to award any sums beyond the pro-rations previously made, and any deficiency appropriation would have to be made by the legislature.

OPINION

SOMMER, C.J.

These nine counties have requested reconsideration of an order[1] in which this Court pro-rated to them the amount of money remaining in the relevant appropriation and denied the balance of their claims for lack of appropriated funds. Because the legal issues in all nine claims are identical, we will select the first such claim, *McLean County v. State* (84-CC-3228), as an example of the factual scenario typical to these claims.

McLean County seeks an award for one hundred two thousand eighty-eight dollars and thirty-two cents ($102,088.32) as reimbursement pursuant to former section 7—5 of the Juvenile Court Act of August 5, 1965, now codified at 705 ILCS 405/6—10 (formerly Ill. Rev. Stat. ch. 37, par. 707—5), for sums which it expended for the care and support of juveniles ordered to be placed in shelter care by the judges of its circuit court.

After the Department of Children and Family Services (hereafter "DCFS") audited McLean County's claim, it determined that the proper dollar amount was slightly less than that sought:

FISCAL YEAR	AUDITED AMOUNT
1982	$ 5,025.39
1983	44,739.86
1984	47,149.71
TOTAL	$96,914.96

Nonetheless, DCFS was unable to pay these audited sums because it had expended more than the appropriations made to it by the General Assembly and only had a total of $13,670.69 in funds remaining to apply to McLean County's claim as well as to the aggregate $344,194.72 in similar audited claims made by the eight

[1] Entered in *Woodford County v. State*, 85-CC-0001 (Cons.).

other counties.[2] Accordingly, this Court pro rated the total $13,670.09 in available DCFS funds to each of the nine counties. McLean County's share was $2,762.80, slightly less than 3% of its audited total claim.

Thereafter, all nine of the counties asked this Court to reconsider its decision, arguing that some language taken from a 1917 Illinois Supreme Court decision authorized this Court to award the full amount of their claims. The case which the counties cited is *Fergus v. Brady* (1917), 277 Ill. 272, 115 N.E. 393. Because a thorough understanding of the *Fergus* opinion is crucial to its application in these proceedings, we will begin our analysis with a review of the record from the *Fergus* litigation.

I. Background drawn from the supreme court record in *Fergus v. Brady*, No. 11147.

This case originated in Sangamon County Circuit Court (general no. 31721) on July 9, 1915, when the complainant (Fergus), a taxpayer, sought an injunction against the state treasurer (Russel) which was later amended to include the state auditor (Brady) as an additional party defendant.

In pertinent part, Fergus objected to $408,823.87 in so-called "deficiency bills" passed by the 49th General Assembly which made additional appropriations to various state offices for the amounts by which they had ex-

[2] The other counties' claims are:

County	Case No.	DCFS' Audited Amount of Claim
DeKalb	85-CC-0355	$44,064.72
DeWitt	85-CC-0197	3,867.09
Kane	84-CC-3602	90,423.23
Lake	85-CC-0208	37,542.83
Livingston	84-CC-3398	27,625.07
Stephenson	85-CC-0137	21,688.26
Tazewell	84-CC-3565	47,791.95
Woodford	85-CC-0001	71,191.57
	Total	$344,194.72

ceeded or otherwise spent above and beyond the funds previously appropriated to them by the 48th General Assembly.[3] There were 14 such deficiency appropriations which were the subject of Fergus' suit:

Bill	Amount	Page of Sess. Laws 1915
S.B. 159 (Canady)—Deficiency, of Pub. Util. Com.	$35,000.00	105
S.B. 316 (Barr)—Deficiency, Joliet Pen.	125,000.00	104
S.B. 464 (Curtis)—Deficiency, Live Stock Comm'rs	3,000.00	17
H.B. 79 (Merritt)—Deficiency, Insurance Supt.	26,000.00	79
H.B 102 (Shepard)—Deficiency, Industrial Board	29,965.00	78
H.B. 209 (Bruce)—Deficiency, Auditor of Pub. Accts.	4,500.00	16
H.B. 256 (Smejkal)—Deficiency, Secretary of State	12,823.12	199
H.B. 340 (Igoe)—Deficiency, Auditor of Public Accounts	20,000.00	63
H.B. 528 (Com. on App.)—Deficiency, Comm'rs State Contracts	85,000.00	17
S.B. 495 (Smith)—Deficiency for Vredenburgh, *et al.*	25,104.25	196
H.B. 541 (Gorman)—Deficiency, Chief Insp. Priv. Emp. Ag'cy	5,000.00	43
H.B. 574 (Smejkal)—Deficiency, Leg. Ref. Bureau	15,000.00	70
H.B. 586 (Morris)—Deficiency, Southern Ill. Pen.	19,056.50	103
H.B. 730 (Com. on App.)—Deficiency, Clerk of Supreme Court	3,375.00	43

[3] Fergus separately objected to other appropriations which were part of an Omnibus Bill. Since the Omnibus Bill was not related to the 14 deficiency appropriations, it will not be examined in this discussion of Fergus' litigation.

Fergus maintained that these deficiency appropriations were unconstitutional for numerous reasons, including: (1) they exceeded the revenue of the State authorized to be raised by taxation during the period ending September 30, 1915; (2) the appropriations attempted to grant additional and extra compensation, fee, and allowance, without express authority of law, and after service had been rendered and after contract had been made; and (3) because the various offices of the State government had exceeded their authority in purchasing supplies and employing personnel and otherwise becoming obligated, the heads of such departments as public officers thereby then and there became personally responsible for the sums, and the deficiency appropriations by the State to pay these bills was an attempt upon the part of the State to assume the now personal debts and liabilities of such public officials.

The trial court rejected Fergus' arguments and held: (1) that the term "revenue" included all revenue from any source; and (2) that the deficiency appropriations were constitutional and legal.[4]

II. Synopsis of the supreme court's opinion in *Fergus v. Brady* as correlated to the trial court record.

The supreme court affirmed the trial court's construction of the term "revenue" and held that deficiency appropriations are constitutionally permissible for State expenditures which were within the direct, definite, and explicit scope of the "particular and specific" mission of the State officer or department involved. (277 Ill. at 278-280, 115 N.E. at 396.) As an example of an expenditure

[4] However, the trial court did sustain Fergus' objections to the appropriations made in the Omnibus Bill and enjoined their payment. The appeal to the supreme court was filed by the auditor and treasurer as to those items, and Fergus took a cross-appeal on the 14 deficiency appropriations which the trial court had upheld.

deemed constitutionally worthy of a deficiency appropriation, the supreme court cited in dicta one of the appropriations which the 49th General Assembly had made to the Southern Illinois Penitentiary:

> "The authorities in control of the penitentiary are required by law to receive, feed, clothe, and guard prisoners convicted of crime and placed in their care, involving the expenditure of money, which may vary on account of the cost of clothing, food, and labor beyond the control of the authorities, and which could not be accurately estimated in advance for that reason or by determining the exact number of inmates." 277 Ill. at 279; 115 N.E. at 396.

Because the penitentiary dicta was selected by the supreme court as its benchmark for a constitutionally permissible deficiency appropriation and was later looked to by the Court of Claims to develop its own *Fergus* doctrine, some additional scrutiny of that appropriation is warranted. The Southern Illinois Penitentiary's deficiency appropriation amounted to $19,035.50. Of that sum, a total of $13,750.72 had been granted by the auditor and paid by the treasurer prior to the initiation of Fergus' suit, and there remained $3,783.37 in unpaid and outstanding warrants drawn against the deficiency appropriation, detailed in part as follows:

Warrant No.	On Account of	Amount
73038	Telegrams	$2.85
77419	Eyelets, top dressing, repairing dashboard	4.70
77431	Onions, meal, eggs	54.45
77442	Lawn mower repairs	2.95
77443	Wells-Fargo express	3.52
77446	Postage stamps	97.00
77457	Freight	182.29
78676	Warden's salary	416.66
78677	Commissioner's salary	125.00
78680	Chaplain's salary	125.00
78681	Guard	43.33
78682	Guard	60.67
78684	Guard	75.00
78686	Guard	51.34

78687	Guard	52.00
78689	Guard	50.00
78690	Guard	65.00
78691	Assistant Deputy Warden	125.00
78692	Guard	65.34
78693	Guard	33.33
78695	Guard	53.17
78696	Guard	75.00
78697	Guard	60.00
78698	Guard	65.00
78699	Pharmacist	60.00
78700	Housekeeper	50.00
78702	Guard	55.00
78704	Stenographer	67.50
78705	Guard	65.00
78707	Guard	40.00
78708	Guard	60.00
78710	Carpenter	35.00
78711	Guard	48.00
78712	Guard	60.00
78713	Carpenter	58.50
78715	Florist	75.00
78718	Deputy Warden	134.44
78719	Guard	55.00
78720	Guard	55.00
78721	Guard	70.00
78722	Guard	62.84
78723	Guard	35.00
78724	Guard	60.67
78727	Guard	50.00
78728	Guard	50.00
78729	Guard	50.00
78730	Bookkeeper	70.00
78732	Cook	40.00
78735	Guard	55.00
78736	Guard	45.50
78738	Guard	49.83
78739	Gardener	79.34
78740	Guard	75.00
78741	Guard	75.00
78742	Steward	100.00

The record does not provide an itemization of the $13,750.72 previously paid, but recites that it was for generally similar expenses:

- "to engage and employ a large number of clerks, assistant wardens, keepers, engineers and other servants"; and
- "to contract with various persons and for numerous articles and supplies and to obtain services from various corporations and individuals, including contracts for office supplies, printing, stenographic services, express and other matters."

Thus, these are the sort of expenditures which the supreme court considered to be within the direct, definite, and explicit scope of the "particular and specific" mission of the Southern Illinois Penitentiary.

III. The *Fergus* doctrine as articulated in the Court of Claims.

Although the supreme court's opinion in *Fergus v. Brady* clearly stated that it was the *legislature* which possessed the constitutional authority to make deficiency appropriations, our predecessors on the Court of Claims used the supreme court dicta concerning the Southern Illinois Penitentiary's deficiency appropriation to evolve a doctrine through which the Court of Claims either awarded or denied claims stemming from deficiency expenditures of various state agencies. All of these "pseudo-Fergus" claims, it must be emphasized, related to expenditures not addressed by deficiency appropriations from the General Assembly; rather, the "pseudo-Fergus" claimants bypassed the legislature and came directly to the Court of Claims. The Court, in turn, then compared each claim against the prison dicta in *Fergus* to reach conflicting, seemingly irreconcilable results. Examples abound, but four cases from the Court of

Claims are noteworthy for the problems caused by this doctrine of the Court's own creation:

(1) *Beane v. State* (1976), 31 Ill. Ct. Cl. 155: After the Fair Employment Practices Commission had exhausted both an original appropriation as well as a deficiency appropriation, its hearing officers and court reporters brought claims for the remaining $13,737.19 not covered by the two appropriations. Following five pages of discussion of the Court of Claims' prior applications of *Fergus*, this decision turned on a single inquiry which was summarily answered in the affirmative:

"Was the obligation under * * * the Fair Employment Practices Act analogous to the situation where the prison officials had no choice but to feed, clothe, and house the prisoners assigned to their care?" We believe that they were. 33 Ill. Ct. Cl. at 161.

Awards were made.

(2) *Kankakee County Sheriff's Police Department v. State* (1979), 33 Ill. Ct. Cl. 276: These claims were for expenditures which the sheriff had made for travel to other jurisdictions to return fugitives for prosecution. As with all "pseudo-Fergus" claims, there were insufficient funds remaining in the appropriation to reimburse the sheriff. In an opinion reciting *verbatim* much of *Beane's* discussion of the *Fergus* doctrine and its progeny, the Court's analysis again was based on a summary comparison to the prison dicta:

"* * * This Court is of the opinion that the decision to incur the [extradition] expense for which claim is here made is discretionary and not analogous to the situation where the prison officials had no choice but to feed, clothe and house the prisoners assigned to their care. It would therefore follow that the claims should be denied." 33 Ill. Ct. Cl. 281.

(3) *Clifton F. Hall, M.D. v. State* (1979), 35 Ill. Ct. Cl. 1: This claim was initially reported at 33 Ill. Ct. Cl. 364 as an unpublished opinion but then was later published in volume 35. The doctor had rendered $314 in medical services to inmates at the Stateville prison.

The Court repeated large portions of its *Fergus* discussion from *Beane* and summarily commented that the doctor's services were "in line with the example set out by the Illinois Supreme Court in *Fergus v. Brady*." (35 Ill. Ct. Cl. 9.) However, in reaching its decision, the Court carefully avoided *Fergus* and went on to rely on the State Finance Act. The Court found that the particular appropriation at issue had not been exhausted and held that sufficient funds actually remained available to pay the doctor's claim.

(4) *Eastern Cyclone Industries, Inc. v. State* (1984), 37 Ill. Ct. Cl. 197: This claim related to laundry equipment installed at a State hospital for which, as always, insufficient funds were appropriated. The Court reiterated portions of its *Fergus* doctrine discussion as originally set forth in *Beane* but began to realize the constitutional infirmities inherent in the *Fergus* doctrine:

"* * * For us to make an award * * * could only be described as making a deficiency appropriation and a usurpation of the legislative prerogative.

* * * [The *Fergus*] exception * * * is extremely narrow and must be cautiously applied." 37 Ill. Ct. Cl. at 204.

However, in resolving the *Fergus* issues against the claimant, the Court chose to attempt to articulate clearer standards for the doctrine instead of invalidating it altogether:

"Authorization for virtually every expenditure of State funds can be traced to a statute or an inference to be drawn from [a] statute. The question is often one of degree. The situation here * * * we do not feel, rises to the level described in *Fergus, supra*. The obligation should contain the same element of need and exigent circumstances or at the very least be a clear and unequivocal directive to pay or incur an obligation. * * *

We cannot make an award * * * despite the obvious equities in favor of the Claimant under the facts of this case. To do so would be to condone irresponsible overspending by State agencies." 37 Ill. Ct. Cl. at 205-206.

The Court dealt a glancing blow to the *Fergus* doctrine which for a decade now has begged the constitutional question.

IV. Is the *Fergus* doctrine, as utilized by the Court of Claims, a constitutionally invalid usurpation of the General Assembly's prerogative to make deficiency appropriations?

The following colloquy between the Court and counsel for one of the other counties having a similar claim for partially-unfunded DCFS shelter care expenses frames the issue:

"Judge Poch: The legislature appropriates the money.

[Tazewell County attorney]: That's correct, Judge.

Judge Poch: And you are now asking the Court to set an amount for the legislature to pay?

{Tazewell County attorney]: That is pursuant [to *Fergus v. Brady*]

Judge Poch: They first have to legislate. They have to appropriate * * *.

Judge Patchett: How is it any different [from] a child [who] is a ward of the State [and receives] Public Aid, for instance? [We] have thousands of claims that come in for public aid where a child is taken to a hospital or somebody is given medical treatment, and the claim comes through here, and we order it paid out of appropriated funds or funds that have funds. But what if the Public Aid Department didn't have any money appropriated sufficient to handle that medical claim? We would have to deny the claim, I think * * *.

* * *

Do you follow me? We can really run into a hundred million dollars. If the State runs out of money, and they only appropriate so much, [and] the Public Aid Department places $100 million [more] for medical care than the legislators appropriate, how would this Court order the State to pay that? It can be projected well beyond this one little problem [of your county] * * *.

* * *

I don't see how we can continually tell [the General Assembly that] they have to pay money after they refuse to appropriate sufficient funds.

* * *

[Tazewell County attorney]: I believe the legislature [put sufficient safeguards in the shelter care statute to avoid 'rampant overspending'] because they recognized that they are dealing with an area that cannot be accurately forecast as far as expenditures. They know they can't predict how many minors are going to be detained and placed [in shelter care] during any given year.

Judge Patchett: The legislature did a good job in doing all that. But the legislature consistently refuses to [properly fund] their own statute[s]. And, you know, maybe that is a political decision. They made a political decision when

they passed the statute and they make a political decision each and every time they don't appropriate sufficient money [to fund it]."

Indeed, as Judges Poch and Patchett correctly inferred, the Constitution of 1970 unilaterally gives the General Assembly the authority to make deficiency appropriations. Two portions of Article VIII, read in conjunction with section 30 of the State Finance Act, mandate such a result:

- "The General Assembly by law shall make appropriations for all expenditures of public funds by the State. * * *" Constitution of 1970, Article VIII, section 2(b).
- "The State * * * shall * * * make payments from public funds only as authorized by law * * *." Constitution of 1970, Article VIII, Section 1(b).
- "No officer, institution, department, board or commission shall * * * assume to bind the State in an amount in excess of the money appropriated * * *." 30 ILCS 105/30.

Thus, the Court of Claims Act cannot confer jurisdiction to make deficiency appropriations, for that is a function which is exclusively within the legislature's domain. See also, *Illinois Education Association v. State* (1973), 28 Ill. Ct. Cl. 379, 386.

Interestingly, in Mr. Fergus' arguments to the Illinois Supreme Court back in 1916, he warned of the fiscal evils which could result from a failure to properly construe the Constitution:

"[Opposing] Counsel in their brief have laid much stress upon an inevitable calamity which would befall the State if the prison officials were not allowed to go in debt for supplies. [T]hey draw a terrible picture of murderers, robbers, and thieves who are turned loose to prey upon the public. This is the old argument so often made—the hard case which would make bad law. The court is asked to legislate to change the Constitution to meet a contingency."

In *Chicago v. McDonald,* 176 Ill. [404,] 409, [52 N.E. 982, 983 (1898)] the court said:

"The question has frequently arisen whether a municipal corporation can incur an indebtedness in excess of 5 percent of its taxable property for necessary supplies, such as light and water."

The argument there presented was that the city could not exist without light and water, but the court said:

> "To so construe the Constitution would be to add a provision in the nature of an exception to the Constitution, which the framers of that instrument did not see proper to insert."

We note that little is said in the argument concerning the appropriations to the [thirteen] other departments of the state government. Counsel do not find a great calamity if the insurance superintendent, or other officers, are not allowed to incur debts. We do not believe it is possible to draw a distinction between one class of over-buying and another class. Under the Constitution, they are all right or all wrong. If they are all right, then every public official has a legal right to secure as much credit as he desires, and the legislature has full power to make [deficiency] appropriations for any of these debts, and the State of Illinois will never at any time know the nature or extent of its outstanding obligations.

Similarly phrased in terms of the *Fergus* doctrine which has evolved in the Court of Claims, one would logically conclude that, if the doctrine were constitutionally sound, no proper distinction could be drawn between one class of deficiency expenditure and another class. In other words, if it could have been permissible under *Fergus* for the Court of Claims to award a deficiency appropriation to a penitentiary for such sundry items as lawn mower repairs, postage stamps, a florist, and a gardener (see pages 7-8 above), how then could this Court possibly deny reimbursement of a county sheriff's expenses in returning fugitives for prosecution or deny a State hospital's laundry equipment expenses? Or, to use the better hypothetical posed by Judge Patchett, how could this Court differentiate the $100 million medical expense deficiency from McLean County's $96,914.96 shelter care expenses? The obvious answer is that if any one such deficiency expenditure were

proper, all would have to be proper, and no restraint could be imposed by this Court on a department or agency's disregard of its budgeted appropriation.

The law, thankfully, is otherwise. The Constitution gives the General Assembly—not the agencies, not the departments, and not even the Court of Claims—the exclusive authority to exercise its discretion in determining whether to make deficiency appropriations and, if so, in what amounts. True, those who deal with State offices which exceed appropriated expenditures may find themselves becoming involuntary, unpaid creditors of those agencies. But that is what the Constitution allows. That is the very protection which the Constitution provides to control against overspending, and it is not for this Court to re-draft the Constitution.

V. Conclusion.

The Court of Claims' *Fergus* doctrine is a constitutionally infirm principle which had its origin in nothing more than dicta taken out of proper context. As such, the *Fergus* doctrine never should have been adopted, and it is hereby abolished. This Court's practice of referring deficiency appropriation claims to the General Assembly is the only constitutionally-proper procedure.

Accordingly, the Court finds that it does not have subject matter jurisdiction to award any sums beyond the $13,670.69 in pro-rations[5] previously made to these nine counties. It is ordered that the motion to reconsider is denied. Should these nine counties choose to approach the General Assembly for a deficiency appropriation, we find

[5] It should be noted that these pro-rations were made prior to this Court's adoption of the first-in/first-out ("FIFO") policy set forth in *Aurora College v. State* (1985), 37 Ill. Ct. Cl. 321, 323 and that lapsed balances are no longer pro-rated among all claimants. In denying the instant motion to reconsider, the Court is not in any manner reversing its policy as articulated in *Aurora College*.

the net dollar amount of their deficiency to be $427,438.99 ($441,109.68 DCFS' aggregate audited total less the $13,670.69 awarded by this Court's previous order).

(No. 85-CC-0001—Motion for reconsideration granted.)

THE COUNTIES OF DE KALB, DE WITT, LAKE, LIVINGSTON, MCLEAN, STEPHENSON, TAZEWELL, KANE and WOODFORD, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed February 15, 1985.

Order filed June 17, 1985.

NEIL F. HARTIGAN, Attorney General (SUE MUELLER, Assistant Attorney General, of counsel), for Respondent.

LAPSED APPROPRIATIONS—*insufficient funds appropriated to pay counties' claims in full—awards pro-rated—motion to reconsider and vacate dismissal order granted.* After it was determined that insufficient funds lapsed to pay nine counties' aggregated $441,109.68 claim for sums expended under the Juvenile Court Act on behalf of children in shelter care, the $13,670.66 remaining in the relevant appropriation was awarded to the counties on a pro-rated basis, and thereafter the Court granted the counties' motion to reconsider and vacate a dismissal order previously entered.

OPINION

PER CURIAM.

The record in this cause indicates that this is a lapsed appropriation claim. The Attorney General has submitted a Respondent's stipulation based upon a report of the Department of Children and Family Services.

The purpose of the expenditure was for amounts due the respective counties pursuant to section 5—5 of the Juvenile Court Act, providing for State reimbursement of funds (Ill. Rev. Stat. 1985, ch. 37, par. 705—5), regarding

care and support of dependent children placed in shelter care by the county courts. These were properly authorized expenditures.

Unfortunately, the departmental report indicates that there were insufficient funds remaining in each fiscal year appropriation to pay these claims. There are nine counties claiming $441,109.68 against $13,670.66 remaining in the appropriation. There were no funds remaining for fiscal year 1984.

The Department of Children and Family Services has audited and pro rated these claims, and their results are attached to this order, along with the appropriation numbers. Precedent for pro rating funds in this manner is found in the case of *Board of School Inspector for the County of Peoria v. State*, 12 Ill. Ct. Cl. 17. This Court agrees that this is the proper manner for payment of these claims, as to pay the entire amount requested by each county would be deficiency appropriation which is the realm of the Legislature and is both constitutionally and statutorily prohibited for this Court.

It is hereby ordered that Claimants be hereby awarded, in full accord and satisfaction of these claims as follows:

85-CC-0355	De Kalb	$1401.39
85-CC-0197	De Witt	137.70
85-CC-0208	Lake	2053.63
84-CC-3398	Livingston	988.15
84-CC-3228	McLean	2762.80
85-CC-0137	Stephenson	1395.94
84-CC-3565	Tazewell	1338.70
84-CC-3602	Kane	1760.54
85-CC-0001	Woodford	1831.72
	Total	$13,670.66

ORDER

HOLDERMAN, J.

This matter comes before the Court upon Claimants' motions to reconsider and vacate the dismissal order heretofore entered by this Court and Respondent's motion in opposition to Claimants' motion for reconsideration.

The Court hereby grants Claimants' motions for reconsideration and vacates the order heretofore entered by this Court. These cases are ordered set for hearing before a Commissioner.

(No. 85-CC-0626—Claimant Cynthia Blair awarded $20,000; Claimant Michael Blair awarded $71,668.65.)

MICHAEL BLAIR and CYNTHIA BLAIR, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed September 30, 1994.

MICHAEL F. BONAMARTE III, for Claimants.

ROLAND W. BURRIS, Attorney General (CARA LEFEVOUR SMITH, Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*duty of State to maintain highways—reasonable care.* The State owes a duty to persons using its streets and roads to exercise reasonable care and to maintain its streets and highways in reasonably safe condition for the purposes for which they are intended.

SAME—*injuries sustained in motorcycle accident—State had constructive notice of highway defect—damages awarded.* Uncontradicted evidence produced in a highway defect case showing that a three-foot pothole which the Claimant husband struck while riding his motorcycle had existed for at least two months prior to the accident, established the State's constructive notice of the defect and, since the State failed to warn of the condition which proximately caused the husband's injuries, damages were awarded to the husband, with the State entitled to a set-off for medical expenses previously paid by the Department of Public Aid, and the Claimant wife was granted compensation for loss of consortium.

OPINION

PATCHETT, J.

This is a claim which arose from a motorcycle accident which occurred on October 18, 1983, at the intersection of Route 43 and Route 41 in Park City, Illinois. The Claimant, Michael Blair, was driving a 1976 Honda 750 cc motorcycle north on Route 43 near the point of merger with Route 41. Randy Vogel had been driving behind Blair for over a mile in his 1979 Camaro. He testified that Blair was not speeding, weaving, or driving erratically. When both drivers started to merge onto Route 41, Vogel looked over his right shoulder to check for traffic. He looked forward again and did not see the motorcycle. He realized that it must be down. He then saw Blair on the road.

An ambulance subsequently took Blair to St. Therese Hospital where he underwent extensive medical treatment, including a frontoparietal craniotomy. Blair's injuries included bruises, contusions, abrasions, epidural hematoma, subdural hematoma, gastrointestinal bleeding, and a fractured skull. Blair was discharged from the hospital on November 8, 1983, and continued to treat with Dr. Gamez. On February 14, 1984, he underwent cranioplasty surgery to install an acrylic plate in his skull. His medical bells totaled $30,031.35. He incurred at least $6,960 in lost wages. His wife and children had to miss work and school on various occasions in order to help him. The motorcycle which Blair was riding was a total loss. The motorcycle had a value of approximately $800.

It was stipulated that the place of the accident was owned and controlled by the State of Illinois and under its maintenance jurisdiction. There were numerous potholes and seams in the road at the point of the accident.

One of the potholes was approximately three feet by two feet in size and between eight and fifteen inches deep. The pothole existed for at least two months prior to the date of the accident, and possibly as long as two years. This was established by the eyewitnesses' testimony. There were no signs posted warning of its existence.

There is no dispute that the State has a duty to maintain its streets and highways in reasonably safe condition for the purposes for which they are intended. (*Robertson v. State* (1983), 35 Ill. Ct. Cl. 643. Further, the State has a duty to persons using its streets and roads to exercise reasonable care. *Baren v. State* (1974), 30 Ill. Ct. Cl. 162.

Vogel, the occurrence witness, testified that he was familiar with the roadway and location of the accident because he drove through that area fives times a week for almost two years. He testified that on the date of the accident, the roadway where the accident occurred was in poor condition. He further testified that the pothole which he believes Blair struck was at least three feet in size.

Michael Luff, the lieutenant of police for City Park, Illinois, at the time of the occurrence, also testified. He testified that he was familiar with the condition of the road at the accident location and the pothole in question. He testified that the condition of the pothole on October 18, 1983, had existed unchanged for at least two months prior thereto. He further stated that the pothole was eight to fifteen inches deep and approximately three feet in size. He indicated that it was located about 110 feet from the place where the pavements of Route 43 and Route 41 merge.

We find the evidence more than sufficient to establish constructive notice of a defective condition on the part of the State.

The Claimants called an expert witness, Robert Lippman. He testified that based upon review of the photographs, police reports, and depositions, the pothole was of sufficient size and depth to cause a motorcycle to lose control. He testified that its location in the middle of the lane made it very hazardous to motorcycles as opposed to automobiles.

Blair, who was seriously injured in the accident, could not remember anything about the accident. Vogel did not actually see the accident because he was looking for traffic on Route 41. The expert testified that the final resting point of the body and the motorcycle were entirely consistent of a motorcycle striking a pothole. His opinions are based upon and unequivocally consistent with the depositions, police reports, and photographs of the scene. He stated that based upon a reasonable degree of engineering and accident reconstruction certainty, the pothole was the proximate cause of Blair's accident. The Respondent produced no expert testimony to contradict Lippman's testimony. We therefore find that the pothole in question was the proximate cause of Blair's accident.

Blair's wife, Cynthia Blair, has a claim for loss of her husband's consortium, companionship, and society. She and her husband testified that she had to feed him, help him walk, bathe him, clean his open and exposed head wound, care for the children, and continue to work to support their family as a result of the accident. We award Cynthia Blair the sum of twenty thousand dollars ($20,000) for loss of consortium.

As previously stated, Michael Blair incurred medical expenses in the amount of $30,031.35 and lost wages of $6,960. We will award the Claimant, Michael Blair, the sum of one hundred thousand dollars ($100,000). However, there was testimony before the court that part of the

medical bills had been paid for by the State of Illinois. Therefore, the State is entitled to a set-off as to the amount of the medical bills. The Illinois Department of Public Aid paid for all medical expenses except for $1,700. Therefore, we deduct the amount of $1,700 from $30,031.35, which leaves a balance of $28,331.35. When this amount is deducted from the award of $100,000, it leaves a balance of $71,668.65.

We therefore award Michael Blair the sum of seventy-one thousand six hundred sixty-eight dollars and sixty-five cents ($71,668.65). We make a specific finding that by deducting the sum of $28,331.35 from the $100,000, we have satisfied the State's lien. The State should have no further liens against the proceeds of the award.

(No. 86-CC-0255—Claim dismissed.)

BRIAN C. BURKE, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed September 30, 1994.

HARVEY L. WALNER & ASSOC. (DEBRA I. MILLMAN, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (LINO MENCONI, Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*negligence—what Claimant must prove.* In order to prevail in a negligence action, the Claimant must prove by a preponderance of the evidence that the State had a duty to maintain the roadway, a breach of that duty, the State's actual or constructive notice of the dangerous condition, and that the State's negligence was the proximate cause of the Claimant's injuries.

SAME—*duty owed by State—delegation of duty to maintain.* While the State is not an insurer of the safety of the users of its highways, it owes a duty

to exercise reasonable care in maintaining its roads and highways in a reasonably safe condition in order that dangerous and defective conditions likely to injure persons lawfully on the highway shall not exist, but the State can delegate its duty to maintain by written agreement with any other highway authority and relieve itself of liability.

SAME—*motorcycle accident—State did not have duty to maintain area where defect was located—claim dismissed.* In a motorcyclist's claim seeking redress for injuries and property damage sustained when his motorcycle hit a pothole in an intersection, although there was contradictory testimony offered by the Claimant's expert regarding the location of the accident, the preponderance of the evidence established that the pothole and location where the Claimant was injured were in an area which the city had previously agreed to maintain, and therefore the claim against the State was dismissed.

OPINION

FREDERICK, J.

Claimant, Brian C. Burke, filed his cause of action in the Court of Claims alleging a tort claim on August 8, 1985. Claimant alleged he was injured through the negligence of Respondent on Greenbay Road at or near its intersection with Ridge Avenue in Evanston, Illinois, when he struck a large pothole while traveling north on his motorcycle.

The evidence at trial indicated the collision occurred on August 13, 1984, at 5:10 p.m. Claimant was traveling northbound on Ridge Avenue on his motorcycle. The Claimant was stopped for a red light behind another vehicle prior to the occurrence. When the light changed, the Claimant proceeded northbound behind the other vehicle until Claimant hit a hole or bump in the roadway. Claimant could not see the hole or bump because he was behind the other vehicle and because the defective area was on a downhill curve which curved to the left and then straightened out. When Claimant hit the hole, he lost control and his vehicle jumped the median. The hole that Claimant believed caused the accident was measured at

15 inches long, 13 inches wide, and over 3 inches deep. Willard Alroth, a traffic engineer and Claimant's expert, determined the hole had to be in existence for several weeks. Mr. Alroth opined the hole was dangerous to motorcyclists likely to use the road. It appeared that the hole was caused by asphalt material wearing away and causing a depression. City of Evanston police officer Lenart testified the accident occurred from northbound Ridge Avenue unto northbound Greenbay Road. He believed the bumps in the roadway had been there for at least four years.

Claimant sustained a broken right leg which required four surgeries. The first surgery was an internal fixation, requiring eight pins. Claimant also had plastic surgery. Claimant indicated he could not work for a year and still had pain and scars from the accident at the time of trial. He still cannot run. The Claimant was off work for 10 months due to the injury. He was earning $300 per week. The medical bills were in excess of $8,000. These bills were paid by Respondent through the Illinois Department of Public Aid. Damage to the motorcycle was approximately $1,200. Claimant sold the motorcycle for $200.

In order for the Claimant to prevail, he must prove by a preponderance of the evidence that the State had a duty to maintain the roadway, a breach of that duty, that the State had actual or constructive notice of the dangerous or defective condition, and the negligence of the State was the proximate cause of the Claimant's injuries. (*West v. State* (1987), 40 Ill. Ct. Cl. 3.) The State of Illinois is only required to maintain its roads and highways in a reasonably safe condition, since the State is not an insurer of the safety of the user of the highways and the burden is on the Claimant to show the State had actual or

constructive notice of the defect as a condition of the State being held liable. *Cotner v. State* (1987), 40 Ill. Ct. Cl. 70.

It is the duty of the State to exercise reasonable care in the maintenance and care of its highways in order that defective and dangerous conditions likely to injure persons lawfully on the highway shall not exist. The exercise of reasonable care requires the State to keep its highways reasonably safe. (*Kraemer v. State* (1990), 42 Ill. Ct. Cl. 236.) The State can delegate its duty to maintain by written agreement with any other highway authority and relieve itself of liability. *Henderson v. State* (1991), 44 Ill. Ct. Cl. 180.

The first issue in the case to be considered is whether the State had a duty to maintain the road where the alleged defective condition existed. If this is not the State's highway, the Claimant cannot recover. The Court has scrupulously examined the record and listened very closely to the oral arguments in an effort to fairly determine this issue. It is apparent that the intersection of Greenbay, Ridge, Emerson and the Metro Railroad tracks is a very difficult intersection to describe. After reviewing all of the testimony, maps, photographs, and other documentation, we find that if the hole or bump was not on Greenbay Road, north of Emerson Street, then the State did not have a duty to maintain that portion of the road, but if the hole or bump was on Greenbay Road, north of Emerson Street, then the State did have a duty to maintain that roadway. The evidence appears clear that the City of Evanston either owned or had previously agreed to maintain all of Ridge Avenue at the time of Claimant's accident. The parties were in substantial disagreement as to whether the hole was on Greenbay Road or Ridge Avenue.

Ronald Levine, a highway systems manager with the Illinois Department of Transportation, testified that Greenbay Road north of Emerson Street was State-owned property. He further testified that the roadway south of the north edge of Emerson Street was within the jurisdiction of the City of Evanston. Mr. Levine testified that the whole intersection of Emerson Street and roadways south were the responsibility of the City of Evanston. He also testified that Greenbay Road ends at Emerson Street. Willard Alroth, Claimant's expert witness, testified that the accident occurred south of Emerson Street. The picture taken by Alroth, Exhibit No. 3, with the hole circled appears to be a picture of a hole south of Emerson Street. James Tonkinson, the City Engineer of the City of Evanston, testified that Greenbay Road and Ridge Avenue do not intersect. He agreed that Greenbay Road terminates at the northern property line of Emerson Street. Mr. Tonkinson also testified that Ridge Avenue in the area of the accident was under the jurisdiction of the City of Evanston.

To establish the State's maintenance jurisdiction, the Claimant points to his testimony that he thought he was on Greenbay Road, that Mr. Levine testified the accident occurred north of Emerson, that the city map squeezes the word "bay" after "green" at or near the disputed area, and the police report says the accident occurred on Greenbay Road at the intersection with Ridge Avenue.

Whether the State owned or had a duty to maintain a particular highway is a question of fact. We find that the proofs show that it is more probable than not that the City of Evanston had a duty to maintain the roadway in question south of the north edge of Emerson Street where it meets Greenbay Road. We also find it is more probable than not that the accident occurred south of the

north edge of Emerson Street. Brian Burke, who infrequently traveled this roadway, would hardly be able to give competent evidence as to this issue. He even understood the intersection was confusing. Mr. Levine's testimony about where the accident occurred came during a confusing line of questioning and was based on a one-time reading of the traffic report. Mr. Levine also corrected that testimony saying, "It was right at the intersection if I remember right." Mr. Levine also later in his testimony noted that the accident happened on Ridge Avenue. The demonstrative map and the police report are also entitled to little weight. The officials of the City of Evanston, Mr. Alroth and Mr. Levine's testimony concerning jurisdiction are relied on by this Court to establish jurisdiction. Mr. Levine indicated that there is a connector to Ridge Avenue that goes left from Ridge Avenue and that the City held maintenance responsibility for this connector. It is most likely the accident occurred on the connector.

Mr. Alroth, the Claimant's expert, did not view the scene until January 29, 1985. He took a copy of the police report and went to the area of Ridge Avenue and Greenbay Road. He found a hole that appeared several weeks to a month old. He had some photographs provided to him and he found what he believed to be the area of the accident. All of the pictures to which this witness referred appear to show the hole and expansion joint to be south of Emerson Street. In fact, Mr. Alroth specifically testified that Emerson Street was north of the pothole in question.

Claimant himself pointed to the circled area on Exhibit 3 as the place where the accident occurred. This places the Claimant south of Emerson Street at the time of the accident. The Claimant also specifically stated the

pothole he hit was south of Emerson Street. The police officer indicated that the accident occurred under the viaduct which is south of Emerson Street. We, therefore, find that the Claimant has failed to prove by a preponderance of the evidence that the State had a duty to maintain the area of roadway wherein Claimant struck a bump or hole.

Based on the foregoing, we find this claim must be denied due to the Claimant's failure to prove the State had a duty towards Claimant to maintain the area of roadway where Claimant was injured. We need not discuss further the remaining issues in this cause. It is, therefore, hereby ordered that this claim be, and is, hereby dismissed.

(No. 86-CC-0266—Claimant awarded $35,000.)

TAFT SMITH, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed August 9, 1994.

GOLDSTEIN, GOLDBERG & FISHMAN (ROBERT COHEN, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (DIANN MARSALEK, Assistant Attorney General, of counsel), for Respondent.

HOSPITALS AND INSTITUTIONS—*control of dangerous insane persons—duty owed by State—reasonable care.* The State has a duty to exercise reasonable care in restraining and controlling dangerous insane persons committed to its custody so that they will not have the opportunity to inflict foreseeable injury upon themselves or others.

SAME—*negligence—requisite proof.* In order to establish negligence, the Claimant must prove that the Respondent breached a duty owed to the Claimant and that the Respondent's breach was the proximate cause of the

Claimant's foreseeable injury, and comparative negligence will also be applied.

SAME—*mental patient's attempted escape and resulting injuries were foreseeable—State's negligence proven.* The attempted escape of a patient at a mental health facility and injuries suffered by him when he fell down a stairway while trying to flee were foreseeable, and the patient was awarded damages in his negligence claim against the State, where the patient had made several prior attempts to escape and effectuated an escape on at least one previous occasion, the State knew of the patient's history of violent behavior, his hand restraints were loosened without a doctor's orders, and there was inadequate security at the facility.

OPINION

FREDERICK, J.

This is a tort action filed by Claimant, Taft Smith. Most of the facts are not in dispute. On November 2, 1984, Claimant was admitted to the John Madden Mental Health Facility. This mental health facility is under the control of the Illinois Department of Mental Health and Developmental Disabilities.

Claimant recalled being admitted to the facility when the police brought him there on November 2, 1984. Claimant does not recall giving permission to admit him to the facility but the evidence shows he voluntarily signed in. He recalls being placed in the quiet room of Pavilion Two on that morning because he had created a disturbance by knocking pumpkins off a counter. He remained in the quiet room in full-leather restraints throughout the day. He was without clothing while he was there. Claimant remembers getting out of the restraints the next morning, on November 3, 1984, and a security guard putting the same restraints back on and then removing the restraints again. He recalls leaving the quiet room with nurse Parikh, returning there and then fighting with her. He escaped the pavilion by throwing a bench through a plate glass window. He was returned by the

Maywood police department to the facility. He was then placed back in the same quiet room with the same restraints. No other restraints were placed on Mr. Smith. When breakfast was brought to Claimant by a Mr. Pal, Mr. Pal removed the restraints around Claimant's right hand and then Mr. Pal returned to retrieve the breakfast tray. Mr. Smith escaped from the restraints, pushed Mr. Pal aside, and left through the unlocked door to the outside. Mr. Pal chased after Claimant. Claimant recalls losing his balance at the top of the stairs when Mr. Pal was reaching for him. He remembers seeing a bone sticking through his right leg and a doctor coming to his aid.

Claimant was taken to Loyola Foster McGaw Hospital where Dr. Mark Lorenz performed surgery on his legs. Claimant's legs were placed in casts and he was in traction during the remainder of his stay. Claimant remembers being transferred to Cook County Hospital where the casts were removed until another operation was conducted on his right ankle. Later, while still in the hospital, he was treated by whirlpool therapy and exercises to teach him to walk. Claimant recalled going back to Fantus Clinic for dressing changes, whirlpool treatment and physical therapy. He recalls beginning to walk with the use of a walker and then with crutches. Claimant began to learn with a therapist how to walk with a cane about ten months later. Claimant testified that the farthest he now walks is from his house to the street in front. Claimant also testified that his hospital bills were paid. Claimant denied having any prior injuries to his legs.

Mr. Smith testified that he was 45 at the time of the hearing and lived in his own apartment. While testifying, he was under medications. At the hearing, he complained of constant pain in his right ankle and left knee. He stated that he had difficulty keeping his balance and suffered se-

vere pain when standing to walk. He testified that the longest period of time that he could stand without pain was ten minutes.

Mr. Pal testified that on November 3, 1984, he was in his fourth year as a staff psychologist at the John Madden Mental Health Facility. Mr. Pal testified that the facility did not use straightjackets or handcuffs to restrain patients. Mr. Pal testified that there were two rooms used to restrain and seclude patients, called the quiet room, at Pavilion Two. Those patients were routinely checked every hour.

On November 3, 1984, Mr. Pal volunteered to work. His duties were assigned to him by the nurse in charge, a Joan Culbertson. He arrived at the facility at about 8:00 a.m. and spoke to the nurse from the previous shift, Lillian Parikh. He recalls her informing him that Mr. Smith had escaped from the full-leather restraints, that he had been taken from the quiet room, returned to the same room with nurse Parikh, and that Claimant had attempted to strangle her there. Further, Ms. Parikh informed Mr. Pal how Mr. Smith then succeeded in escaping the facility. Mr. Pal also recalled that another patient had a seizure for about 15 minutes at the same time he arrived at the facility. Mr. Pal did not help with that patient but instead was instructed to serve Mr. Smith breakfast. Nurse Culbertson told Mr. Pal to take Mr. Smith a breakfast tray while Mr. Smith was in full-leather restraints in the quiet room. At 8:15 a.m. Mr. Pal, under instructions from Mrs. Culbertson, served Mr. Smith his breakfast tray and removed the restraints from Mr. Smith's right hand so that he could feed himself.

Later that same morning, Mr. Pal was instructed by nurse Culbertson to go to retrieve the breakfast tray. Mr. Pal observed three of the restraints attached to Mr.

Smith's left arm and legs as he entered the quiet room, but did not see the two remaining restraints because of a sheet covering Claimant's body. As Mr. Pal stepped into the room, Claimant jumped up from the bed, pushed Mr. Pal aside, and ran from the quiet room. Claimant ran naked down the hallway and through the nurses' station. Mr. Smith exited Pavilion Two through an unlocked door. As a general rule, that door was the only door that was kept unlocked.

Mr. Pal saw no security guards present at the pavilion at the time of Mr. Smith's escape. He chased after Claimant and came within 50 feet of Mr. Smith. He saw Mr. Smith descending stairs leading to Frontage Road. He did call for Claimant to stop. Mr. Pal testified that when he got to the top of the stairs, he saw Mr. Smith lying at the bottom of the stairs with an open fracture to his right ankle.

Nurse Joan Culbertson testified to being the charge nurse at the facility on November 3, 1984. She knew Mr. Smith from his prior treatment at the facility. She worked the same shift as Mr. Pal and saw Mr. Smith in restraints when she arrived. She heard of Mr. Smith's escape from the restraints. She testified that the door adjacent to the nurses' staff was kept unlocked during the day. She confirmed that one method of restraining patients in the quiet room was to double the restraints so that twelve restraints were used. She recalled checking Mr. Smith's restraints when she arrived on shift and that Mr. Smith tried to get her to loosen the restraints. She indicated that the routine was for Mr. Pal to check Mr. Smith every 15 minutes.

Dr. Felix Panahon was a staff physician at the facility on November 3, 1984. He testified that only physicians could order the implementation or removal of leather re-

straints. Nurses had no authority to order the removal of restraints. The quiet room was reserved for patients who were either agitated or violent. He recalled finding Mr. Smith at the base of the stairs, naked and with an open fracture of the right ankle and gross deformity of the left knee.

Dr. George DeSadier, director of admissions of the facility, testified that in determining when to admit a patient in 1984, the factors to be considered were first, whether the patient could care for himself and second, whether the patient was dangerous to himself or others. He stated that the patient was asked to sign a voluntary admission form to show his willingness to be treated at the facility. If a patient is away from the facility on an unauthorized absence, upon his return to the facility he would be taken back to the same pavilion from where he had escaped. He testified that Mr. Smith was a voluntary admission based upon Mr. Smith's signature on the voluntary admission form.

Mr. Jerry Russell, the security chief for the facility, testified that no exterior fences or gates existed at the facility on November 3, 1984. He testified that no security guards were on station at each pavilion. There was not enough money to support that much staff. He acknowledged that if he came on shift after an individual had escaped from the facility, he would not assign any additional security to that patient or suggest further restraints, although he indicated that he had the authority to make recommendations to the psychologist of the unit to add restraints. He testified that his security officers did assist in the application and removal of restraints if requested to do so.

In the 10 years prior to Claimant's admission to the John Madden Mental Health Facility on November 2,

1984, he had been admitted to other facilities and Madden's on 16 different occasions. Claimant's most common diagnosis was schizophrenia paranoia. The inpatient admission forms indicate that Respondent was aware on November 2, 1984, that Claimant was brought to the facility by the police because he had torn up his home. It is noted that Mr. Smith had a lengthy psychiatric history, was viewed as manipulative, and was interviewed while in full-leather restraints. On the admission form bearing Claimant's signature, it was noted that Claimant was not suitable for informal admission because he had torn up his house, threatened to hurt everyone, and had broken dishes. The facility discharge summary indicates that upon admission, Mr. Smith was distorting events about his behavior prior to his admission. The notes also show that nurse Parikh, who Mr. Smith attempted to choke, was pressing charges against Claimant and that Mr. Smith should not be readmitted to Pavilion Two until the charges were resolved.

On the handwritten admission form dated November 2, 1984, at 4:00 a.m., it is stated that Claimant was naked except for a robe he was wearing, that he did not want to be there, and that he denied PCP abuse. The notes also relate that officer Merrill called advising, "Do not underestimate individual * * * he has quick temper * * * and patient's family lives in fear." Mr. Smith is described as wearing a robe and handcuffs. Mr. Smith's admission diagnosis for November 2, 1984, at 4:45 a.m. lists a diagnosis of intermittent explosive disorder. Mr. Smith was taken to Pavilion Two in handcuffs.

Claimant's first medication by a physician on November 2, 1984, included Thorazine four times daily. He was further ordered to be placed in full-leather restraints for eight hours or less beginning at 7:15 a.m. on November

2, 1984. He was also given another tranquilizer by physicians' order on November 2, 1984, being Haldol four times daily. Later that day, at 3:15 p.m. and 11:15 p.m., he was again ordered into full-leather restraints with an additional dosage of Haldol. Claimant's medical chart indicates that on November 2, 1984, he was given Haldol and Thorazine on four occasions beginning at 7:00 a.m. Claimant's only medication on November 3, 1984, was at 8:15 a.m. when he was given one dose of Haldol.

The nurses' notes indicate Claimant was placed in full-leather restraints for throwing pumpkins on the floor. At 12:30 p.m., security helped the staff take Mr. Smith to the bathroom and return him to full-leather restraints. Security again helped Mr. Smith to the bathroom at 3:50 p.m. A notation is made at 11:15 p.m. that Mr. Smith remained in full-leather restraints because of unpredictable behavior and that he was dangerous to himself and others. By midnight it was noted that he had removed the full-leather restraints and security was called to reapply them. The staff notes continue with entries at 5:45 a.m. on November 3, 1984, and indicate that Mr. Smith removed the full-leather restraints a second time. Mr. Smith stated that he wanted to return to his room and did so. Five minutes later, he returned to the quiet room and attempted to choke nurse Parikh and ran through the unit. He threw a bench through a window and escaped from the building. Claimant was returned and placed back into the quiet room in the restraints at 6:30 a.m., after being captured by the Maywood police.

Mr. Smith's diagnosis was redefined by a staff physician on November 2, 1984, as impulse control disorder, acute severe in cyclothymic personality disorder.

The facility requires that its personnel keep entries on restraint/seclusion record forms. On the first form re-

flecting Claimant's stay, it is indicated that by 7:15 a.m. Mr. Smith was placed in the quiet room and remained there through 3:15 p.m. Claimant had his right hand loosened for breakfast but not for lunch. He was continued in restraints for eight additional hours from 3:15 p.m. through 11:15 p.m. because it was noted that he was unpredictable and unmanageable. He was shouting and fighting with security as they put him back into restraints. He was served dinner without having his right hand loosened. He spent that evening in restraints and was escorted by security to the bathroom at 10:15 p.m. By 11:15 p.m., he was returned to restraints for another eight hours by physician order because he continued to be unpredictable and unmanageable.

At 5:15 a.m. he removed the restraints again and security helped reattach them. At 5:45 a.m. he removed his restraints for a third time, left the quiet room, and then attacked nurse Parikh. He was returned by security and placed into the restraints in the quiet room. By physician order he was placed back into the restraints for a period to last eight hours. He was served breakfast at 8:15 a.m. and given Haldol with the assistance of security at 8:30 a.m. He then escaped the restraints for a fourth time at 9:30 a.m.

Additional documents note that nurse Culbertson freed Claimant's right hand so that he could feed himself breakfast but that he was still bound by five restraints at the time. Later examination of the quiet room by Mr. Pal showed that the bolts that held the bed down were shaken loose and that Claimant had slipped from the restraints.

Mr. Smith was taken by ambulance and admitted to the emergency room at the hospital on November 3, 1984, at 9:35 a.m. Claimant had an open fracture at the

right ankle with a possible left knee fracture. Pain medication was prescribed by the assigned orthopedic surgeon, Dr. Mark Lorenz, as well as an IV, ice, antibiotics and splints to both right and left legs. Additional pain medication was prescribed along with a dose of Haldol before Dr. Lorenz scheduled surgery for that afternoon. X-rays taken on November 3, 1984, of the left knee showed a "markedly comminuted fracture of the proximal tibia involving the articular surfaces. There were also multiple small bony fragments in the region." The x-rays of the right ankle were found to reveal a markedly comminuted fracture of the distal fibula and tibia. The fractures involved the articular surfaces. There were multiple small bony fragments in the region. Also noted are soft tissue lacerations. Dr. Lorenz performed an open reduction surgery on Mr. Smith's right ankle. His operative report indicated that he found "severe comminution" upon entering Mr. Smith's right ankle. Because of the size of the opened wound and the instability of the ankle, the doctor inserted a large pin and attached it to another pin in order to secure the bones in proper alignment. Dr. Lorenz placed a similarly large pin in Mr. Smith's left foot to correct the knee fracture by the use of traction. Mr. Smith was sent to the recovery room with his legs in traction.

Further x-rays revealed that the fracture lines were still evident on November 19, 1984. On November 20, 1984, a second operation was conducted by Dr. Lorenz under general anesthesia. Additional pins were inserted by Dr. Lorenz into Mr. Smith's right tibia. Mr. Smith remained at Loyola Hospital for one month before being transferred to Cook County Hospital. Mr. Smith remained in Cook County Hospital as an in-patient from December 4, 1984, until December 18, 1984. The x-ray report of

July 11, 1985, indicates a finding of "mild post traumatic degenerative type arthritis to the left knee." The findings in the right ankle indicate "marked distortion and deformity in the ankle joint due to past trauma."

The Respondent has a duty to exercise reasonable care in the restraining and controlling of dangerous insane persons committed to its custody so that they will not have the opportunity to inflict foreseeable injury upon themselves or others. *Houston v. State* (1977), 32 Ill. Ct. Cl. 143.

To prevail, Claimant must prove that the Respondent breached its duty owed to Claimant and that Respondent's breach was the proximate cause of his injury and that the injury was foreseeable. Comparative negligence will also be applied. *Houston, supra*; *Walker v. State* (1982), 35 Ill. Ct. Cl. 583.

In *Walker, supra*, this Court found that the State failed to use due care in rendering treatment to a senile patient, that the State's negligence was a proximate cause of patient's escape and subsequent injury when he jumped from an unlocked third story window as the evidence showed that the Respondent's personnel were aware of the patient's tendency to escape and security measures to prevent escape were not adopted. The patient in *Walker* was 76 years of age. He was admitted to the Illinois Public Health Hospital in Chicago with a diagnosis of senile and confused. He was placed on the fifth floor geriatric unit. The patient attempted several times to leave the facility by the elevator. The hospital was warned by the patient's family that the patient must be watched carefully as he had a tendency to run away. Later the patient was missing. The patient was found lying on the ground outside the hospital's east windows. One window was open and the blinds torn. The window had no lock, bars or protective screen.

The claimant in *Walker, supra*, called an expert witness who testified that it was foreseeable that a confused geriatric patient with a longing to go home might be able to leave the ward. The expert also testified that the security system at the hospital was inadequate, relying too much on human control and not enough on mechanization. He further testified other facilities had a much higher degree of mechanized security. The Court found that the injury to the patient was foreseeable.

The Claimant in the present case did not call an expert witness. However, it is clear from the evidence that the State breached its duty to Claimant, that the injury was foreseeable, and that Respondent's negligence was a proximate cause of Claimant's injury. There is no question that the State knew that Claimant was violent and had attempted to escape and actually escaped prior to the final attempt to escape wherein he was injured. Without a doctor's order the restraints on one hand were loosened and Claimant was left alone. There is also no question that security was inadequate at the facility due to understaffing. Respondent was negligent in failing to protect Claimant from his human tendencies. He had slipped from the restraints three times and had effectuated one escape prior to the attempted escape where he injured himself. He had attempted to choke one employee. Security had helped on a prior occasion at mealtime and Claimant had been fed with restraints on a prior occasion.

It is not necessary for Respondent to have foreseen the exact circumstances of the rendering of harm to Claimant for the harm to have been the proximate result of negligence. It is not essential for foreseeability that the person charged with negligence should have foreseen the precise injury which resulted from his act. *Neering v. Illinois Central Railroad Co.* (1943), 383 Ill. 366.

In this case it was foreseeable that Claimant would attempt to escape and that such escape attempt by a naked, insane person might very well result in injury. The Claimant was injured as he was running from Mr. Pal as he tried to escape.

The Claimant has provided undisputed evidence of his injury due to his uncontrolled descent of the stairs at the facility on November 3, 1984. He went through multiple reduction surgeries and remained in casts and traction for 30 days. His treatment continued for two more weeks as an inpatient and then for ten months as an outpatient. His medical bills were paid and thus are presumed reasonable. All of the pain and disability that Mr. Smith testified about is uncontradicted. However, there was no medical corroboration or testimony concerning future pain and suffering and future disability. Under the law, Mr. Smith is entitled to recover, considering the nature and extent of his injuries, damages for pain and suffering, disability, and past medical expenses. His medical bills totaled $23,972.01. The x-ray report from 1985 indicates marked deformity and post-traumatic arthritis. He lives with pins in both extremities. He cannot ambulate any distance, uses a cane for walking, and cannot stand for any period of time longer than ten minutes.

For all of the above reasons and authorities cited, it is the order of this Court that Claimant, Taft Smith, is awarded $23,972.01 for medical bills, $20,000 for all pain and suffering, $15,000 for all disability, for a total of $58,972.01. The Respondent is granted a set-off for the $23,972.01 paid by the Respondent for medical bills. This is not a collateral source as the payment was by the party. *Scott v. State* (1990), 43 Ill. Ct. Cl. 85.

Therefore, it is ordered that Claimant, Taft Smith, is awarded $35,000 in full satisfaction of his claim.

(No. 86-CC-1891—Claim dismissed; petition for rehearing denied.)

PETER ROELS, Claimant, *v.* THE BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES, and EASTERN ILLINOIS UNIVERSITY, Respondents.

Opinion filed January 13, 1995.

Order on petition for rehearing filed April 12, 1995.

LAWRENCE T. RUDER, for Claimant.

DUNN, ULBRICH, HUNDMAN, STANCZAK & OGAR (DAVID S. DUNN, of counsel), for Respondents.

NEGLIGENCE—*dangerous condition—elements of claim.*The Claimant alleging negligence based upon the existence of a dangerous condition bears the burden of proving by a preponderance of the evidence that the Respondent breached its duty of reasonable care, that the Respondent's negligence proximately caused the injury, and that the Respondent had constructive notice of the dangerous condition from all the circumstances in the case.

SAME—*pole vaulter injured—notice of defect not established—claim dismissed—petition for rehearing denied.* In a pole vaulter's claim alleging that injuries he sustained in a practice vault at a track meet hosted by the Respondent were caused by defective pads in the landing area, the claim was dismissed and a petition for rehearing was denied, since testimony indicated that the landing area was properly assembled, there was no proof that the materials used were unsafe or that the Respondent had notice of an alleged defect, and the proximate cause of the Claimant's injury was the improper manner in which he completed his vault.

OPINION

RAUCCI, J.

This cause comes before us after hearing on Claimant Peter Roels' claim for damages for personal injuries suffered on April 20, 1985, while participating in the Pepsi Invitational Track Meet sponsored and hosted by Respondent Eastern Illinois University (EIU) which is

under the jurisdiction of Respondent Board of Governors of State Colleges and Universities.

A discussion of the evidence is necessary for the disposition of the claim. Claimant was a pole vaulter who represented William Rainey Harper Community College at the meet. Pole vaulting is considered to be an inherently dangerous event. The pole vaulter first sprints down a runway which is 170 to 180 feet long. As the athlete approaches the landing area he plants his pole into a "planting area." His speed and upper body technique should ideally provide sufficient momentum to carry him to heights ranging from 13 to 16 feet. He should have sufficient height to vault over a cross bar. He then descends into a landing area comprised of sections of foam padding. A vaulter "stalls out" when he has insufficient momentum to carry him through the vault. It is a common occurrence during pole vaulting.

The landing area or pit is where the vaulter lands after his jump. A "planting box" is located immediately in front of the main landing area. To each side of the planting box are U-shaped pads (aprons). A separate foam pad or plug is adjacent to and immediately next to the planting box. It is typically secured to the main landing pad with hooks. Directly behind the plug are the various areas of the landing area. Claimant alleges that the pads which comprise the landing area are to be covered with a spike pad. The spike pad is intended to protect the vaulter's lower extremities from entering the space between the foam pads. The spike pad is secured to the foam pads by hooks which are intended to prevent the spike pad from sliding. The thrust of Claimant's position is that there was a better design available than the one used at EIU.

Prior to the injury, Claimant was, as would be expected, in good physical health and suffered no physical

limitations. The night before the meet he had consumed beer, and felt drunk.

Before he vaulted, he had the opportunity to examine the landing area, and normally he did. On this occasion, however, he did not "make a conscious effort" to do so. He did not at any time walk up to the area with the objective of inspecting it even though he had not previously used a mat of this type. He did not observe any defect.

During a warm-up practice vault, Claimant was injured when he stalled out during an attempted 15-foot vault. Claimant, who had been taught to land on his back or to ride the pole down when possible landed feet first because he thought it was the safest way. When he descended facing the runway (with his back to the pit) "the next thing I knew, my foot had gone through the pieces of the mat." Claimant's right foot had impacted the pole vault landing area and entered an exposed opening between the foam pad called the plug and another pad which comprised the main landing area. Claimant maintains that the area should have been covered by the device known as a "spike mat" or "spike pad." His right foot impacted the ground under the landing area and broke his right ankle. Claimant received emergency treatment in Charleston, and at Lutheran General Hospital in Des Plaines, Dr. Paul Katz performed reconstructive surgery on Claimant's right ankle. Claimant was hospitalized at Lutheran General Hospital for 10 days. His medical expenses to date total $11,364.77.

Claimant testified that he can't participate in activities that use his leg without suffering pain.

Neil Moore testified that he was the head track coach at EIU and was director of the meet. He had 30 years experience coaching track and field events. As host,

Eastern was responsible for conducting the meet and insuring that the athletes competed under safe conditions. EIU had hosted the Pepsi Invitational Track Meet for about five years preceding the 1985 meet. EIU had also hosted the NCAA Division II and III national track meets at the same track at the same time. It was the only time that both events had been hosted at the same time by an institution in the history of the United States. During Moore's 15 years at EIU, the school had hosted approximately 10 meets per year.

Moore had purchased the pit approximately three years prior to the 1985 Pepsi meet. When he bought it, he believed that it was the first of its type, and was impressed favorably with it. "It was a prototype. It set the trend." He believed that the pit met all of the specifications of the NCAA regulations.

The officials for the meet were two injured "outstanding vaulters" who were EIU students, Mark Hamilton and Roxy Wood. They had other helpers also. Officials have complete authority to deal with shifting of the pit during competition. During meets, Moore watched as closely as possible to assure that the meet was run efficiently, safely and on schedule. Moore, on the occasion of the 1985 Pepsi meet, had extra work done to make the pit as safe as possible. He wasn't satisfied with the area around the planting box, and had tied the steel rings attached to the apron and plug with very strong nylon cords about the size of the little finger to give additional support. He did this because the pit sometimes shifts and might need to be adjusted.

Athletes can object to unsafe conditions. Moore testified that if the plug is fastened without the nylon cords, it is loose and that is why he ties the plug to the main pit with the cord. The bond is much tighter with the cords

than without the cords. He last inspected the pit about an hour before the competition.

Moore testified that on the day in question, all three rings across the top of the plug were tied as well as additional plugs on the sides. He was familiar with the manufacturer's instructions for assembly, and the pit was assembled in conformity with those instructions. Additionally, he had taken additional precautions with the nylon cord tied in the plug area.

Moore testified that he was about 55 feet away from the pit when Claimant made his vault. On Claimant's cross-examination, he testified that while he did not see Claimant land, he did observe the vault. He felt that Claimant took a bad fall and ran to the pit. In response to Claimant's counsel's question of what he observed that led him to feel this way, he stated

> "Well, because of his indecision at the time when the pole stopped moving, the pole stalled out and it had not come to a complete vertical. If it had, he could have gotten off into the main pit. It had a slight lean and the longer he waited, the more it started coming back and then he was forced to bail out."

On redirect, he testified that most experienced vaulters recognize that an exposed gap between pads is dangerous, and that vaulters can stop and object to a dangerous condition. Additionally, he testified that if the spike cover had moved to expose an opening, it would have been readily observable.

We have often stated the rule that the Claimant bears the burden of establishing by a preponderance of the evidence that Respondent breached its duty of reasonable care, that the negligence of Respondent proximately caused the injury, and that the Respondent had actual or constructive notice of the dangerous condition from all the circumstances in the case. *Berger v. Board of Trustees of the University of Illinois* (1988), 40 Ill. Ct. Cl.

120; *Rossett v. State* (1985), 37 Ill. Ct. Cl. 118; *Talbott v. State* (1983), 45 Ill. Ct. Cl. 885; *Hitt v. State* (1982), 35 Ill. Ct. Cl. 798; *Claycomb v. State* (1981), 35 Ill. Ct. Cl. 200; and *Nolan v. State* (1983), 36 Ill. Ct. Cl. 194.

The evidence indicates that the Respondents exercised reasonable care in assembling the landing area. There is no evidence that Respondent had either actual or constructive notice of the alleged defect. The existence of a better design, as alleged by Claimant, imposes no duty on Respondent in the absence of evidence that the device used was not safe. Moore testified that the landing area was properly assembled, and that he examined it about an hour before the meet. Claimant did his practice vault before the start of the meet. There is no evidence that anyone had notice of the alleged defect prior to the accident. Claimant did not notice it, the officials did not notice it, and Moore did not notice it.

The evidence indicates that one proximate cause of the Claimant's injury was the manner in which he completed the vault which was contrary to the way he was taught to land.

Claimant has failed to meet his burden of proof and the claim should be dismissed.

It is therefore ordered, adjudged and decreed that this claim be, and it is hereby, dismissed with prejudice.

ORDER

RAUCCI, J.

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

We have considered the Claimant's petition for rehearing and the arguments contained therein, and we find that our original opinion should stand.

It is therefore ordered that the Claimant's petition for rehearing is denied.

(No. 86-CC-2517—Claim denied; petition for rehearing denied.)

BERTHA PRO, Individually and as Administrator of the Estate of ELIO PRO, Deceased, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed September 30, 1994.

Order on petition for rehearing filed February 9, 1995.

BERTHA PRO, *pro se*, for Claimant.

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

HIGHWAYS—*negligence—faulty design or maintenance of guardrails—proof required.* A Claimant alleging injuries due to the faulty design or maintenance of guardrails must prove by a preponderance of the evidence that the State negligently designed or maintained the subject guardrails, the State knew or should have known of the dangerous condition, and that failure to implement stricter standards or otherwise maintain the guardrails was the proximate cause of the Claimant's injury.

SAME—*driver killed when car went over embankment—no negligent design or maintenance of guardrails—claim denied.* In a claim brought by the estate of a driver who was killed when his car left the road and went over an embankment, although the Claimant's expert testified that guardrails constructed in 1970 and still in existence in 1984 at the time of the decedent's accident were obsolete and should have been upgraded prior to the accident, the Court of Claims denied the claim, finding that the State did not have notice of a condition dangerous to persons traveling the roadway with reasonable care, and that it was not feasible to require the State to constantly implement changing standards for guardrails.

OPINION

JANN, J.

Claimant, Bertha Pro, as Administrator of the Estate of Elio Pro, deceased, and Bertha Pro, individually, filed a

complaint in the Court of Claims on March 3, 1986. In her complaint Mrs. Pro alleges negligence on the part of the Respondent, State of Illinois, which resulted in the death of her son, Elio Pro. She alleges that her son was driving an automobile on Veteran's Parkway in Normal, Illinois, on March 3, 1984, in a southerly direction. She further alleges the decedent's vehicle left the roadway and traveled in the median strip inside the guardrail until the vehicle went over an embankment into a creek and her son was killed. She claims the State was negligent in its erection and maintenance of the guardrail which she alleges prevented the vehicle from returning to the roadway. The State filed its answer denying the claim on May 1, 1986.

The case was tried by the Commissioner assigned to the case. The evidence consists of the two-volume transcript of testimony from August 22, 1990; certain admissions from the request for admissions filed by Respondent (which includes a transcript of the coroner's inquest); Claimant's exhibits and Respondent's exhibits. Oral arguments were heard on February 18, 1993.

The Facts

The Claimant's decedent, Elio Pro, died in the early morning hours of March 4, 1984, in a single-vehicle accident along Veteran's Parkway in Normal, McLean County, Illinois. The accident occurred at about 2:00 a.m. at a site 550 feet north of the intersection with East Vernon Avenue. Veteran's Parkway is a four-lane road, with two southbound and two northbound lanes. There is a grass median between the northbound and southbound lanes which is 30 feet wide. There are dual bridges which span a creek at the scene of the accident, however the grass median does not slope down to the creek. There are concrete retaining walls on either side of the creek. It is

17 feet, 2 inches from the creek bed to the top of the retaining walls, and from the retaining walls, it is a sheer drop to the creek below.

There is no overhead lighting at the creek. The closest lighting was at an intersection about 3/10 of a mile away. At the time of the accident, the posted speed limit for Veteran's Parkway was 45 miles per hour and the average daily traffic count was 15,700. The bridge for southbound traffic had concrete parapets which were two feet off the edge of the pavement. The concrete parapet on the median for southbound traffic and the creek were protected by 125 feet of guardrail. This included 100 feet of guardrail plus a 25-foot terminal section with the first 12½ feet of the terminal section at full height and the last 12½ feet comprising a turn-down. The dual bridges were originally constructed in the 1940s. In 1970, the pavement at the dual bridges was upgraded and the guardrails were installed. There was no major construction at this site since the 1970 to 1972 time period and the configuration of the guardrail and the retaining walls were unchanged from that period to the date of the accident.

At approximately 2:00 a.m. on March 4, 1984, the car that Mr. Pro was driving left the roadway and began traveling in the grass median between the northbound and southbound lanes of Veteran's Parkway. The car proceeded in a southerly direction in the median until the car went over the concrete retaining wall abutting the creek, at which time the car dropped over the edge and into the creek below. There were no passengers found in the car and there were no eyewitnesses to the accident.

Sometime between 1:00 a.m. and 2:00 a.m. on March 4, 1984, the decedent drove Mr. Russell Shelton to Mr. Shelton's Towanda home after a party on the east side of Bloomington. Mr. Shelton had met the decedent

at this party and there was beer being served at the party. Mr. Shelton testified that he had consumed probably 10 beers at this party. Mr. Shelton further testified that the route from the party to Towanda would include proceeding northbound on Veteran's Parkway, that the vehicle Mr. Pro was driving was a Mazda RX-7, and that Mr. Pro and Mr. Shelton were the only persons in the vehicle as it proceeded northbound to Towanda. Mr. Pro let Mr. Shelton off in Towanda and Mr. Pro then started driving back to Bloomington going southbound on Veteran's Parkway. Decedent drove off the pavement into the grass median and then drove over the creek's retaining wall where he died.

This accident was investigated by Sergeant Ralph Ebert of the Normal police department. Mr. Pro was already dead when Sergeant Ebert arrived. The accident had been reported to the police by a passerby who had happened upon the scene while walking. The investigation revealed that there appeared to be a tire mark and two scrape marks across the top of the north end of the median guardrail for southbound traffic. Sergeant Ebert scraped the marking at the scene and it came free. He believed the substance to be tire substance. The tread design of the tire mark on the guardrail turn-down matched the tread design of decedent's automobile. Sergeant Ebert also observed a set of tire impressions that started just off the roadway approximately ten feet to the north of the guardrail that proceeded across the guardrail turn-down, and then straight toward the creek retaining walls. The markings on the guardrail turn-down and the tire impressions in the grass median appeared to be fresh. The grass in the median was still in a downward position and in the direction of what Sergeant Ebert felt was the vehicle's direction of travel. The tire impression could be traced from the north retaining wall all the way back to

the guardrail turn-down. There was another set of tire impressions in the median, but those tire impressions had a larger wheel base than that of decedent's auto.

Scrape marks were observed on the south retaining wall, approximately eight feet above the creek bed. The paint marks in the scrape observed on the south retaining wall were made by a gray automobile and the decedent's vehicle was charcoal gray.

The auto decedent was driving was a 1983 Mazda sports coupe. The headlight switch was in the on position and there was no damage to the wheels or tires of the vehicle. An engineering inspection of the vehicle by Professor Hank Campbell of the Department of Industrial Technology at Illinois State University revealed that the decedent had not been engaged in a hard braking maneuver. Sergeant Ebert observed no evidence of braking or other evasive maneuvers at the scene. From all the evidence, including Professor Campbell's study, it appeared the vehicle was in excellent condition before the accident, and that there were no mechanical problems which contributed to the accident.

Professor Campbell testified that there was no damage to the tires or wheels of the car. Professor Campbell further testified that in hard braking situations, there would usually be some discoloration on some of the retaining clips, but that there was no such discoloration apparent on Mr. Pro's vehicle. Additionally, Professor Campbell testified that the car was not in a brake lock-up condition at the time of the accident, that the car had rack and pinion steering which is a very quick and direct way to steer, that the steering mechanism was functional even after the accident, and that the steering wheel was in a straight ahead normal driving position at the time of investigation. Professor Campbell was of the opinion that

there were no evasive maneuvers taken at the time of the accident.

At the time of his death, Elio Pro was engaged to be married. He was attending Illinois State University and he had been working between 20 and 40 hours per week at an Eagle supermarket. Mr. Pro was survived by his mother, Bertha Pro, two sisters and one brother.

It is Claimant's position that the guardrails had a causal relationship to the death of Mr. Pro. Mr. Andrew Svirha, who was a civil engineer with IDOT's district three division, testified the guardrails near the creek where decedent died were installed during a construction project which started in 1970 and was finished in 1972. Mr. Svirha further testified that at the time of the 1970 to 1972 project, IDOT's policy regarding the installation of guardrails, and the decision of where to put guardrails, was governed by the design manual, and that during the 1970 project, the road would be constructed in accordance with the policy in force at the time of the construction.

Mr. Charles David Sanders, IDOT's expert on guardrails, testified as part of his duties as policy engineer for IDOT, and as a former unit chief of the standards and specifications department for IDOT, that he and his employees have maintained records of all standards that have been issued by IDOT as highway standards. Mr. Sanders testified that the documents which compose Respondent's Exhibit Number 3 were the applicable standards governing the 1970 road project and that Respondent's Exhibit Number 4 constituted the design manual which governed the same project. Mr. Sanders was able to determine that the minimum guardrail length required for the 1970 project was 112.5 feet and the guardrail which was in fact constructed during the 1970 project

conformed to that minimum standard. Mr. Sanders further testified that his review of IDOT's records indicated that there had not been any upgrading of these guardrails.

Mr. Ralph Demoll, a civil engineer with IDOT's district three division, testified that IDOT's policy concerning upgrading guardrails is that when IDOT undertakes a major improvement such as resurfacing or geometric improvement, then IDOT also upgrades the guardrail at that time. Mr. Demoll further testified that it is not IDOT's policy to upgrade guardrails simply because IDOT's standards for guardrails change. Finally, Mr. Demoll testified that there were no major construction projects or improvements made at the site from 1970 to 1984.

Mr. Sanders testified that, in addition to upgrading guardrails at the time of a major construction project, IDOT might upgrade the guardrail if the guardrail had been the subject of major citizen complaints or if located at a high accident location. Mr. Sanders further testified that he had looked through IDOT's records dealing with this accident and that the evidence he found was that there had not been any citizen complaints or evidence that this was a high accident site. Mr. Sanders' review indicated that there had not been any accidents of significance at the guardrail.

The dual bridges were originally constructed in the 1940s. In 1970, the pavement at the bridges was upgraded and the guardrails were installed. There were no changes to the creek or retaining walls during the 1970 project. The guardrail in question was 125 feet long and had not been changed in any manner since its original installation in 1970, and as conceded by IDOT's engineers, there were no barriers, fences, signs, or other warnings at or near the retaining wall.

IDOT's engineers testified that the standard for length of guardrail in 1970 were set forth in standard 2231-3 and section 2-240.07 of the 1968 IDOT design manual.

Standard 2231-3 is entitled "Typical Applications of Steel Plate Beam Guardrail." The diagrams entitled "Guard Rail at Structure" require a minimum of 100 feet of guardrail according to the IDOT engineers. However, section 2-240.07 of the 1968 IDOT design manual requires a minimum guardrail length of 112 feet and 6 inches in the present situation. According to IDOT's own engineers, section 2-240.07 of the design manual overrides standard 2231-3.

IDOT's position was that the extra length of the guardrail in question (12½ feet) was sufficient protection for both the concrete bridge parapet and the 17-foot drop to the creek, and that there was no need for additional protection right at the retaining wall itself.

Michael Griffin was Claimant's expert. Mr. Griffin is an engineer with the Cook County highway department. Although he is now chief engineer of the right-of-way department, he had previously been resident engineer in charge of construction projects. He had been trained in the selecting, locating and designing of traffic barriers, and was familiar with the State of Illinois design standards for guardrails on highways. Part of his past responsibility with the Cook County highway department had been the design of guardrails. He had been licensed as a professional engineer for 28 years at the time of the hearing. The court accepted Mr. Griffin as an expert based on his qualifications.

Claimant's expert testified that the guardrail, as originally constructed, was not long enough. In 1964, the National Academy of Scientists National Research Council

published *Highway Research Board Special Report 81*. This publication specifically deals with overpasses with twin bridges, which is the situation at the location in this case. This publication indicates a desired length of guardrail of 150 to 200 feet.

IDOT engineers have adopted the position that special report 81 was merely a recommendation and not a mandate. Mr. Griffin also described report 81 as a guide rather than a standard for the construction of guardrails, and admitted that the State standards were controlling to the issue of whether the guardrail in this case was constructed within the proper parameters. The IDOT engineers conceded that the guardrail standards in Illinois were basically whatever the engineers at IDOT said they were. What Charles Sanders (IDOT's expert witness) calls a "standard" is whatever IDOT has adopted and therefore decided to call a standard. The IDOT design manual is written by IDOT engineers. The design manual is based in large part upon Federal publications. Special report 81 played a large role in what was eventually adopted by IDOT in its design manual. However IDOT makes the decision as to which Federal recommendations it does not adopt and IDOT did not adopt the recommendation of 150- to 200-foot guardrails at dual bridges.

IDOT considered the creek to constitute a roadside hazard because the creek traversed the entire median and because there was a 17-foot vertical drop to the creek with no slope or incline. IDOT's engineers acknowledged that the purpose of the guardrail in question was to protect not only against the concrete bridge parapet, but also against the vertical drop to the creek. According to IDOT engineers, regardless of the concrete bridge parapet, there would still have been a need for a guardrail to protect against the vertical drop to the creek.

Claimant's expert testified that the lack of barriers, fences or other warnings in correct proximity to the retaining wall was a hazardous condition. In Mr. Griffin's opinion, IDOT's reliance on standard 2231-3 was misplaced. This standard does not directly relate to the type of hazard that actually existed at the location where Mr. Pro died. Standard 2231-3 does not address the situation of a non-traversable roadside hazard spanning the entire width of the median. Standard 2231-3 does depict a hazard which is analogous to the location herein which is the drawing entitled "Guardrail in Median of 30 Feet and Less" for two center piers. This standard requires the guardrails to taper so that they meet in the center of the median. This would prevent a car from getting behind the guardrails and striking the center piers. In Mr. Griffin's opinion, the 17-foot drop involved in this accident was more hazardous than the center piers depicted in standard 2231-3. A driver can see the center piers, but may not be able to see the drop off. If you hit a pier at low speed you should survive, but if you go over the vertical drop, even at five m.p.h., you would most likely be killed. IDOT's engineers admitted that the injuries caused by a 17-foot vertical drop at five m.p.h. would be much more severe than a five m.p.h. impact with a center pier. IDOT's expert testified that the vertical drop has a severity index of 9.8, which meant that 99% of the people going over the drop are going to be killed.

Mr. Sanders confirmed that report 81 was presented as recommendations and guides as opposed to adopted standards. He also testified that other parts of report 81 indicated that the appropriate length for the guardrail in this case was a minimum of 75 feet. Mr. Griffin also testified that in his opinion, IDOT's policy of upgrading guardrails to the extent possible when the project next

came up for repair or maintenance of some kind was a reasonable policy. Mr. Griffin further testified that changes are generally made on roadways in the State when the roadway is scheduled for a new repair or improvement.

In 1977 the American Association of State and Highway Transportation Officials (AASHTO) published guidelines and suggestions for guardrail placement and length. The title of the publication was "Guide for Selecting, Locating and Designing Traffic Barriers." Section III-E-4 of the 1977 AASHTO publication determines the length of guardrail. The length of guardrail need is determined by the posted speed limit and the average daily traffic count. This guide does not have a listing for 45 m.p.h. but does have a listing for both 40 m.p.h. and 50 m.p.h. According to this guide, the length of need for 40 m.p.h. is 240 feet and the length of need for 50 m.p.h. is 320 feet. The run-out length at 40 m.p.h. is 240 feet and the length of need for 50 m.p.h. is 320 feet. IDOT engineers concede that the guardrail run-out length is based upon braking requirements. The run-out length at 40 m.p.h. is 240 feet because it takes 240 feet to bring a vehicle to a stop or regain control of the vehicle, when traveling 40 m.p.h. The recommendations set forth in the 1977 AASHTO publication were adopted, almost verbatim, in the 1978 IDOT design manual. The 1978 IDOT design manual, however, broke down the guardrail length of need requirements into 5 m.p.h. increments, rather than the 10 m.p.h. increments set forth in the 1977 AASHTO publication. The 1978 IDOT design manual required 280 feet of guardrail at the location of this accident. The guardrail in question does not conform to these standards. However, these standards were adopted after the guardrails were put in place in 1970.

The concept of guardrail "run-out length" was introduced with the Highway Research Board's special report 107. Special report 107 was based upon data accumulated before 1970. IDOT, having participated in the study, was aware that for an average daily traffic count of 15,700 at 45 m.p.h., a run-out length of 280 feet was required. IDOT engineers agree that it is a part of their duty to monitor structures on State highways. Teams of IDOT engineers inspect the condition of bridges on a cyclical basis. There is currently a two-year inspection cycle for bridges. Wen a bridge is inspected pursuant to this cycle, the guardrail at the bridge is also inspected. If during one of these periodic inspections an IDOT engineer sees an unsafe condition, he is supposed to note it in his report.

Mr. Griffin testified that in his opinion, IDOT has a duty to upgrade and maintain guardrails. Mr. Griffin also expressed the opinion that, if a hazard exists and guardrail standards come out that indicate the guardrail should be a longer length, the longer guardrail should be installed and IDOT should not wait until the next time there is a major construction project at that site.

Because the nature of roadside hazards can change, IDOT has adopted a specific program to inspect for unwarranted guardrails. This policy to specifically inspect for unwarranted guardrails has been in effect for the last 10 years. In order to adhere to this policy, it has been necessary for IDOT and maintenance engineers to inspect every guardrail in the State of Illinois. IDOT engineers, however, testified that it was IDOT policy to change guardrails only in conjunction with "major construction" projects.

Oral arguments were held on February 18, 1992. Claimant's attorney argued that IDOT had a duty to upgrade the guardrails in question to meet more rigorous

standards than those in effect upon their initial installation because the State misapprehended the nature of the hazard. Claimant argued the guardrails installed were to protect a bridge parapet rather than the 17-foot drop in the median strip. Claimant's counsel argued that a tapered set for guardrails ending and beginning in a point which would prevent persons getting behind the rail would have averted Claimant's fatal injuries and that Respondent was negligent in failing to apply the more rigorous standard at the time the subject guardrails were installed.

Claimant's counsel acknowledged that pure comparative negligence was the applicable standard at the time of the occurrence. He further acknowledged that no evidence exists as to what caused Claimant to enter the median strip.

Respondent argued that an imposition of mandatory upgrades of guardrails is not economically feasible and that the imposition of such a financial burden might encourage the retention of outdated standards and practices by IDOT. Respondent further argued that the State is not an insurer of persons driving off the roadway.

Respondent also addressed the issue of comparative negligence stating that although comparative negligence applies, it is impossible to determine Claimant's portion of fault due to the lack of evidence as to what caused Claimant to leave the roadway.

Claimant's counsel reasserted his contention that deviation from the roadway and into the area behind the guardrail was foreseeable and that the guardrails were negligently designed and argued that Respondent bears the burden of showing Claimant's contributory negligence, if any.

Both parties submitted briefs in this matter.

In order to prevail in this case, Claimant must prove by a preponderance of the evidence that Respondent was negligent in the design or maintenance of the subject guardrails, that the Respondent knew or should have known of a dangerous condition and that failure to implement stricter standards or otherwise maintain the guardrails was the proximate cause of Claimant's injuries. *Evans v. State* (1988), 40 Ill. Ct. Cl. 140; *Kraemer v. State* (1990), 42 Ill. Ct. Cl. 23.

A review of applicable case law cited by both parties and through the Court's research leads us to two cases which most closely apply to the facts of this case. In *Hodge v. State* (1981), 35 Ill. Ct. Cl. 51, Claimant sought to recover damages due to striking a concrete box culvert with 8-inch by 10-foot headwalls rising 1.5 feet above the pavement lying near the traveled portion of the highway. Claimant struck the headwall after veering off the roadway, presumably caused by a bald tire. Claimant argued that "the presence of the headwall rendered the roadway unsafe" and introduced evidence that highway construction standards in existence on the date of the accident were such that concrete culverts, such as that involved, were obsolete as of March 3, 1943, and were in the process of removal by the State and county. *Hodge, supra*, at 52, 53.

The Court held that changes in highway construction standards to provide greater safety to the motoring public do not necessarily require that the State constantly upgrade highways to meet those standards. The Court further found that such an imposition of responsibility would be impossible to meet in view of public finances and available manpower. *Hodge v. State, supra.*

The Illinois Supreme Court has also recently addressed a similar circumstance in *DiBenedetto v. Flora Township* (1992), 153 Ill. 2d 66; 605 N.E.2d 571; 178

Ill.Dec. 777. The Claimant was killed in a one-car accident when his car crossed the center line of a county highway, entered the shoulder and overturned in a drainage ditch, even though it was alleged that the ditch was unusually steep. The Court found in pertinent part:

"Drainage ditches along streets and highways are both commonplace and necessary. People are not expected to drive in them and the public cannot be an insurer of those who do. Although there is a paucity of cases on this issue, we interpret the lack to the fact that the conclusion is obvious and that the opposite result would be contrary to normal expectations and experience in the affairs of life." *DiBenedetto, supra.*

The Supreme Court discussed proximate causes and found the proximate cause of the accident was the loss of control of the vehicle and its being driven off the traveled way. *DiBenedetto, supra.*

Based upon the foregoing, we hereby find Claimant has failed to meet its burden of proof in demonstrating a breach of duty by the State and that proximate cause has not been proven. Claimant's tragic death is certainly lamentable, but the evidence is not adequate to support an award in this cause. There was no notice of a dangerous condition to persons traveling the roadway with reasonable care. Claimant's assertion that new standards must be implemented constantly to guardrails must fail for lack of feasibility.

This claim is hereby denied.

ORDER

JANN, J.

This cause comes on to be heard on Claimant's petition for rehearing. The Court has reviewed the record herein and finds Claimant's petition is hereby denied.

(No. 86-CC-2714—Claim denied.)

RONALD SAULTER, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed May 23, 1995.

AMBROSE & CUSHING (LAWRENCE J. GRIFFIN, of counsel), for Claimant.

JIM RYAN, Attorney General (PHILLIP ROBERTSON, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*State owes duty to provide inmates with reasonably safe conditions—foreseeability.* The State of Illinois has a duty to provide inmates of its correctional facilities reasonably safe conditions within which to exist, but the State is charged with a duty only when harm is legally foreseeable, and a legal duty requires more than a mere possibility of an occurrence.

SAME—*boxing injury—no proof of notice to State of defective apparatus—claim denied.* Where an inmate suffered a hand injury when a pole suspending the boxing bag he was striking broke loose from the metal structure to which it was attached, his personal injury claim was denied, since the inmate assumed some risk of the activity in which he was engaged, and he failed to prove that the apparatus in question was defective or that the State had actual or constructive notice of its imminent failure.

OPINION

PATCHETT, J.

This is a claim which arose as a result of an injury suffered in the gymnasium at a Department of Corrections facility. Mr. Saulter was an inmate at the correctional center. He was an experienced boxer and was working out on a heavy bag in the gymnasium. The bag had been constructed in a squatting rack. The squatting rack was a metal structure that had a pole through it from which the bag hung. This resulted in there being 18 inches on either side of the bag, between the bag and the metal structure. It appears that the State at least had some notice that the bar on top of the squat rack would move as the bag was being punched.

As Mr. Saulter was hitting the bag, the bar broke loose, and Mr. Saulter's hand hit the metal pole. He fractured his fourth metacarpal (or knuckle). He claims significant injuries as a result of that fracture.

In an extremely well argued and well researched brief, Mr. Saulter's counsel argues that the State created the dangerous situation, and therefore, the State did not have to have actual or constructive notice of it. In fact, a representative of the State evidently testified that he had seen the bar move or wiggle. Obviously Mr. Saulter also had seen the bar wiggle or move as he struck it. He continued to use the bag in any event.

Mr. Saulter is asking the State to pay for his injury because they were aware of the fact that the bar supporting the bag moved while it was being struck, but absolve him from any blame. This is despite the fact that he also knew that the bar would move as the bag was struck.

Considering the date of the injury, this claim would be made under the law of pure comparative negligence.

For there to be liability, however, at a minimum it must be reasonably foreseeable to the State that this injury could happen. Of course, it is reasonably foreseeable that many injuries could happen while people are using the gymnasium and strenuously exercising. This is particularly true in the use of certain equipment such as boxing bags.

The State was not required to furnish the recreational facilities in question, nor was Mr. Saulter required to use those facilities.

The Respondent has argued that the bar in question was not secured with wires but with a padlocked chain. In addition, the Respondent pointed out that Mr. Saulter

may not have been a member of the class of inmates, namely the Boxing Team, that was supposed to be using the heavy bag at all. However, the Claimant counters by saying that he used the bag on a consistent basis and was never deprived of the use of the bag.

The State of Illinois has a general duty to maintain its premises in a reasonably safe condition. (*Munster v. State* (1988), 40 Ill. Ct. Cl. 171.) More specifically, the State has a duty to provide inmates of its correctional facilities with reasonably safe conditions within which to exist. *Thomas v. State* (1987), 40 Ill. Ct. Cl. 188, 190.

The State, however, is charged with a duty only when the harm is legally foreseeable. A legal duty requires more than a mere possibility of an occurrence. The State was not required to furnish a heavy bag at all. However, once the State undertook to furnish such a bag, it was required to provide a reasonably safe heavy bag. It is not, however, required to be an insurer of its premises. It is not required to provide items, especially in a gymnasium, which could never, under any circumstances, create an injury.

Mr. Saulter has the burden of proof as a Claimant. Mr. Saulter has failed to prove by a preponderance of the evidence that the heavy bag in question was defective. In addition, Mr. Saulter has failed to prove by a preponderance of the evidence that the State failed to meet its duty. There is no evidence showing an actual notice of imminent failure, nor of constructive notice of imminent failure.

Further, Mr. Saulter bears a heavy burden of assuming the risk of the activity with which he was involved. The Claimant also failed to prove that the apparatus was not set up in conformity with industry standards in effect at the time. *White v. State* (1984), 38 Ill. Ct. Cl. 1.

For all the reasons stated above, we find that the Claimant has failed to meet his burden of proof. Therefore, this claim is hereby denied.

(No. 86-CC-2805—Claim denied.)

SYLVIA TOURLOUKIS, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed February 1, 1995.

SPINAK, LEVINSON & ASSOC. (ARTHUR H. LEVINSON, of counsel), for Claimant.

JIM RYAN, Attorney General (ERIN M. O'CONNELL, Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*State is not insurer of persons using roadways—knowledge of dangerous condition.* The State is not an insurer of persons using its roadways, and a Claimant must prove by a preponderance of the evidence that a dangerous condition existed, and that the State knew of the condition which proximately caused the incident complained of.

SAME—*duty of care—shoulder drop-off cases.* The State has a duty to maintain the shoulder of its highways in a manner reasonably safe for its intended purposes, but the standard of care is higher for a highway than the shoulder, since the reasonably intended use of the highway requires a greater level of care than the shoulder.

NEGLIGENCE—*automobile accident—failure to prove State had notice of highway shoulder defect—claim denied.* In a claim arising out of an automobile accident, the proof adduced to support allegations of negligent maintenance and inspection of a highway shoulder and sewage grate and failure to warn of a dangerous condition, was insufficient to render the State liable for the Claimant's injuries, where, despite testimony that repairs had been made to the grate in question, the Claimant failed to establish when the repairs were made, the State's notice of the alleged defect, or the existence of an extremely dangerous condition.

OPINION

JANN, J.

Claimant seeks to recover damages sounding in tort for the alleged negligent maintenance and/or inspection of a road shoulder and failure to warn of the allegedly dangerous condition.

Facts

On August 3, 1985, between 5:00 and 7:00 p.m., Claimant was driving northbound on Interstate 94 at approximately 12900 south (just north of the 130th Street exit). Claimant testified she became confused as to her direction and location. Claimant attempted to pull on to the shoulder but her right front tire hit a hole at the edge of the highway, causing Claimant to lose control of her car, which crossed the traffic lanes and hit a wall at the innermost side of the northbound lanes. Claimant was traveling at 50-55 m.p.h. Claimant lost consciousness at this point.

Claimant suffered multiple bruises and abrasions, wore a neck brace for a short time, and was off from work for several days. The vehicle was a total loss.

On August 8, 1985, Claimant returned to the scene of the accident and took photographs of the depression in the shoulder Claimant believes caused her accident, which turned out to be a sewage grate located at the edge of the shoulder closest to the highway.

At the hearing, Claimant testified on her own behalf. Respondent called one witness, Mr. John Richard Cannon, who is the field technician for the Calumet Expressway maintenance yard. He has been employed in various related capacities for over 26 years and was the person responsible for maintenance of the stretch of road on which

the accident occurred. After this action was commenced, Mr. Cannon took photographs of the area where the accident took place. All of the above photos were placed in evidence at the hearing.

Mr. Cannon testified that part of his duties involved responding to public and police complaints or notices regarding defects in his jurisdiction. Mr. Cannon testified that no complaints were received with regard to the grate in question prior to the accident in question. There were questions raised whether repair work had been done on the grate during the seven months between the date of the accident and the date of Mr. Cannon's photographs. The department's records were not clear as to exactly what work had been done. Mr. Cannon recalled repairs made in the general area several days before the accident to the travel lanes and possibly a ramp later in the month. He did not recall any repairs to the sewer grate in question and stated the condition of the grate was not defective in the photos he took in April 1986. However, Mr. Cannon stated that the photo appeared to evidence a patch behind the grate which by its whitened appearance had been in place at least over one winter.

Mr. Cannon stated that either he or another employee routinely made inspections of the roadway. Mr. Cannon traveled the area in question every weekday at the time of the accident, as he lived in the area. However, there was no direct testimony as to how often actual inspections were made.

The Law

The Court has consistently held that the State is not an insurer of persons using its roadways and Claimant must prove by a preponderance of the evidence that a dangerous condition existed and that the State knew of

the condition which proximately caused the incident complained of. *Scarzone v. State* (1990), 43 Ill. Ct. Cl. 207, citing *Simpson v. State* (1985), 37 Ill. Ct. Cl. 76.

The photographs submitted by Claimant show a grate substantially below the level of the remainder of the shoulder, especially at its west and northern edges. No testimony was offered as to the actual depth of the grate as opposed to the road surface. The State has a duty to maintain the shoulder of its highways in a manner reasonably safe for its intended purposes, but the standard of care is higher for a highway than the shoulder since the reasonably intended use of the highway requires a greater level of care than the shoulder. (*Siefert v. State* (1989), 42 Ill. Ct. Cl. 8.) In *Siefert*, the Claimant's estate recovered because the State had actual notice of a shoulder condition described as "real bad" even by the State's witness.

Doyle v. State (1993), 45 Ill. Ct. Cl. 194 contains a discussion of this Court's holdings in numerous shoulder drop off cases which are analogous to the case at bar. (*Id.*, 199-200.) We have rarely found liability against the State except in cases of extremely dangerous conditions or when the State had direct or constructive notice of a defect. In *Doyle*, there was an alleged drop off of about six inches. The State's highway maintainer testified if he had seen the drop off, he should have reported it and requested repairs. Despite these factors, no award was made due to lack of notice.

Claimant's brief contends that the State had constructive notice of the allegedly dangerous condition based upon Mr. Cannon's testimony that repairs had been made to the grate in question at some point. No evidence was offered to establish the date of the repairs, which may have preceded the date of the accident.

We find Claimant has failed to prove by a preponderance of the evidence that the State had constructive notice of the alleged defect. There was also insufficient evidence of an extremely dangerous condition to otherwise justify an award.

This claim is hereby denied and this cause is dismissed.

(No. 86-CC-2919—Claimant awarded $463.51.)

MILES BARNES, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed December 2, 1994.

MILES BARNES, *pro se*, for Claimant.

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

PRISONERS AND INMATES—*lost property—guard let inmate enter Claimant's cell—State liable.* Where the Claimant's property was lost after a corrections officer negligently allowed another inmate to enter the Claimant's cell without permission, and the Claimant produced documentation as to the value of the items lost, the State, upon admitting that the incident occurred and failing to present evidence or respond to the Claimant's request to admit, was liable for the value of the property as alleged by the Claimant.

OPINION

FREDERICK, J.

This is a prisoner's lost property case filed by inmate Miles Barnes on April 9, 1986. The case was tried on August 30, 1991. Claimant seeks $463.51 in damages.

The evidence indicates that a corrections officer opened Claimant's cell without permission and let another

inmate in Claimant's cell. The Claimant lost the property which he listed in his complaint. Claimant had a trust fund ledger which indicated that he had purchased all of the items subsequently lost. The prices and dates purchased correspond to Claimant's list of property taken from his cell. Claimant does not know who the guard let in his cell but believes the other inmate was gang related. Claimant testified he was not a member of a gang. Other than the eight-track tape player, Claimant received none of his other property back. However, the tape player was broken. The Respondent presented no evidence. The Respondent also failed to respond to Claimant's request to admit.

The Respondent was negligent in allowing another inmate into Claimant's cell. (*Byrd v. State* (1988), 41 Ill. Ct. Cl. 158.) While we have allowed recovery only under very narrow circumstances in non-bailment cases, this is such a case. The Respondent has admitted a correctional officer allowed another inmate into Claimant's cell. The Respondent has also admitted the missing property and the value thereof by failing to respond to the request to admit.

For the foregoing reason, Claimant, Miles Barnes, is awarded $463.51 in full satisfaction of his claim.

(Nos. 86-CC-3046, 86-CC-3058 through 86-CC-3072 inclusive, 86-CC-3365 through 86-CC-3368 inclusive, 86-CC-3497 through 86-CC-3499 inclusive, 86-CC-3351, 87-CC-0115, 87-CC-0117, 87-CC-0148, 87-CC-0149, 87-CC-0231 through 87-CC-0233 inclusive, 87-CC-0352 through 87-CC-0356 inclusive, 87-CC-0405, 87-CC-0406, 87-CC-0472 through 87-CC-0478 inclusive, 87-CC-0480, 87-CC-0481, 87-CC-0654 through 87-CC-0658 inclusive, 87-CC-0827, 87-CC-1102, 87-CC-1241, 87-CC-2016 through 87-CC-2022 inclusive, 87-CC-2569 through 87-CC-2572 inclusive, 87-CC-2574 through 87-CC-2580 inclusive, 87-CC-2582 through 87-CC-2589 inclusive, 87-CC-4145 through 87-CC-4148 inclusive, 87-CC-4150, 88-CC-0311—Claimant Enrique David, M.D. awarded $283.50; Claimant Augustin Vitualla, M.D. awarded $178.00.)

ROLANDO BAUTISTA, M.D., MANNY CHUDWIN, M.D., ROBIN CLEMONS, M.D., VINCENT COSTANZO, M.D., JAMES C. DANIELS, M.D., ENRIQUE DAVID, M.D., MAYANK DOSHI, M.D., HARRY FARBER, M.D., MORRIS FRIEDELL, M.D., PETER FRIEDELL, M.D., JACK FUHRER, M.D., GANIYU KEHANDE, M.D., MARGARET LEVY, M.D., GEORGIA LUBBEN, M.D., CARTER MECHER, M.D., HARSHAD MEHTA, M.D., BENGALORE MURTHY, M.D., MARK NISSENBAUM, M.D., WITOLD RYBICKI, M.D., JOSEPH TAN, M.D., AND AUGUSTIN VITUALLA, M.D., Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed October 12, 1994.

FRIEDELL CLINIC, for Claimants.

ROLAND W. BURRIS, Attorney General (MICHAEL F. ROCKS, Assistant Attorney General, of counsel), for Respondent.

PUBLIC AID CODE—*medical vendor-payment claims—timely invoice requirement.* Pursuant to the Illinois Department of Public Aid rules and the Public Aid Code, medical vendors seeking payment for services rendered to public aid recipients must, as a prerequisite to recovery, establish that they submitted properly prepared and documented invoices, and that such invoices were received by the Department within one year of the date of service.

VENDOR-PAYMENT CLAIMS—*physician services rendered to public aid recipients—failure to timely submit properly prepared invoices—claims dismissed.* Claims brought by physicians who sought payment for various consultation, surgical, and other medical services rendered to public aid recipients were dismissed, based upon the Claimants' failure to submit properly prepared and documented invoices to the Department of Public Aid within one year of the relevant dates of service.

SAME—*physician services—limited awards granted for correctly invoiced claims.* In a vendor-payment action brought by 21 physicians seeking

payment for various services rendered to 87 public aid patients, where the Department of Public Aid tendered payment on 13 of the patient accounts to the extent that the Claimants established the Department's receipt of their timely-submitted invoices, those payments constituted payment in full by the Department, and with respect to the other 74 accounts, partial awards for proper and timely-invoiced charges were granted on two of the claims, but all of the remaining claims were dismissed.

OPINION

MITCHELL, J.

Each of these 87 court actions presents an individual Claimant-physician's vendor-payment charges, pursuant to section 11—13 of the Public Aid Code (or PAC) (305 ILCS 5/1—1, *et seq.*), for medical services rendered to an Illinois Department of Public Aid (IDPA) recipient or a Spenddown enrollee (*St. Anthony Hospital Medical Center v. State* (1991), 44 Ill. Ct. Cl. 98) under the department's Medical Assistance Program (or MAP). The subject services are identified by five-digit Procedure Codes (PCs), relating to medical procedures as listed in the physicians' *Current Procedural Terminology, 4th Ed.* (or CPT-4), and by the dates of service (or DOS), the dates on which Claimants rendered the various services. (See *University of Illinois at Chicago v. State* (1992), 44 Ill. Ct. Cl. 356; and *Kim v. State* (1991), 43 Ill. Ct. Cl. 286, 289-91.) In its consolidated report, IDPA advises that it had paid for the services identified in 13 of these patient accounts, to the extent that Claimants' pleadings establish the Department's receipt of their timely-submitted invoices for such services. These payments constitute payment-in-full for the related services. (*Ryan v. State* (1990), 43 Ill. Ct. Cl. 213.) Respondent denies vendor-payment liability (except as to two partial accounts identified *infra*), for the remaining 74 accounts. The Claimants having received notice of Respondent's denial, the Court makes the following findings.

Consultant Services and Surgery Issues. A consultation is the service performed by a physician-specialist in a certain medical field, at the request of a patient's attending physician with respect to the diagnosis and/or treatment of a particular illness, such that the requesting, or attending physician retains ongoing responsibility for the patient's direct care. As defined by IDPA's policy, a consultation comprises "the entire package of physician services required to arrive at a decision and/or recommendation regarding a patient's condition and plan of treatment." (MAP *Handbook For Physicians*, Topic A-240.) IDPA questions Claimant Friedell's charge (no. 86-CC-3067), in the absence of a written report or other explanation of a change in the patient's condition, for an "initial consult" (either PC-90620 or PC-90630), when Claimant had charged and been paid for the same service to the same patient performed two weeks earlier. Also questioned are charges by Claimants Daniels and David (nos. 86-CC-3499 & 86-CC-3071), absent explanatory documentation, for consults performed within one to two days of other consults for the same patients, for which other physician-specialists had charged and been paid. Applicable *Handbook* policy states that no payment will be made

> "for multiple consultations by physicians of different specialties unless the need [medical necessity] for such is substantiated by the recipient's physical condition or complications." (*Id.*, topic A-240.)

as explained and justified in documents accompanying the consultants' invoices. In another instance (no. 87-CC-0354), Claimant David's charge for a pathology consult performed during surgery (PC-88329) had been refused payment because Claimant had miscategorized, in his invoice, the type-of-service (T.O.S.) role in which he was performing when rendering that consult. When preparing their invoices, physicians are to identify (by proper code) a T.O.S. role which logically and consistently relates to

each procedure (PC) charged in that invoice. IDPA had refused payment of Claimant David's charge for another account (no. 87-CC-4148) because he had failed to identify, in his invoice, the physician who had requested his consult services. (*Ryan v. State, supra* at 214-15.) In each of these cases, Claimants' pleadings fail to establish that their properly-prepared and documented invoices, identifying the referring-physician and listing a T.O.S. role consistent with each PC charged, had been received by IDPA prior to the one-year deadline for such receipt imposed by IDPA Rule 140.20 (89 Ill. Adm. Code, section 140.20) and by Medicaid regulation (42 C.F.R., section 447.45).

In no. 86-CC-3064 Claimant Clemons charged for hospital-visit care of a maternity patient. IDPA advises that it had paid another physician for the Cesarean-section delivery (PC-59501) of this patient's child; and that said "combined service package" payment included all antepartum and postpartum care of the patient during her inpatient stay. Claimant was thus charging for a portion of the service package, even though the other physician had charged, and been paid for, all services comprising the C-section delivery package. (Compare *Treister & Wilcox v. State* (1989), 42 Ill. Ct. Cl. 185, 187-89; and IDPA Rule 140.413(a)(9) (89 Ill. Adm. Code section 140.413(a)(9).) In another claim (87-CC-2019), Claimant Vitualla charged for a surgical procedure considered by the Department as "performed for cosmetic purposes," and thus excluded from MAP-coverage by IDPA Rule 140.6(k) (89 Ill. Adm. Code, section 140.6(k), reprinted in *Handbook* Topic 103). Claimant's invoice was refused payment in a voucher-response notice which advised that "additional information [would be] required," in any rebill-invoice of the charge (*Handbook* App. A-5, error code C02), to es-

tablish possible coverage of the procedure (*Kim v. State, supra*, at 290-91); and while Claimant alleges three rebill-invoices, he fails to establish that any of them was received by IDPA within the prescribed one-year period. *St. Therese Medical Center v. State* (1992), 45 Ill. Ct. Cl. 370; and *Palos Community Hospital v. State* (1983), 46 Ill. Ct. Cl. 458.

Access-Restrictions And Invalid Payee-Option Number. Nineteen accounts are identified as involving services to recipients who were subject to IDPA's RRP (Recipient Restriction Program) requirements, *i.e.,* IDPA recipients who had

"* * * received medical services in excess of need and with such frequency or in such a manner as to constitute an abuse of [their] medical care privileges * * *." (PAC §11—26(a))

An RRP recipient's access to nonemergency care is limited to those services which have been authorized in writing by the recipient's primary care physician (PCP). See *Kim v. State, supra* at 292-93. As to the 19 accounts here challenged, Claimants fail to establish that their invoices, accompanied by the DPA 1662 authorizations of their patients' PCPs, had been received by IDPA within the prescribed one-year period.

Claimant Murthy's claims for payment of seven accounts for services rendered during 1985 are contested as a result of his failure properly to identify, in his invoices, the payee-option, number-coded address to which vendor-payments for specific services were to be mailed. In 1985 IDPA authorized each MAP-enrolled physician to designate up to four different mailing addresses to which subsequent payments for his or her MAP-services were to be mailed. This multiple address option was made available as a bookkeeping accommodation, in recognition that a physician might be affiliated with two or more

group practices, or might maintain a practice in offices at two or more locations. By entering a *pre-arranged* payee number on each DPA-form invoice submitted, the physician could thereby inform the department as to which of several *pre-designated* addresses he or she wished its payment of that invoice to be mailed.

IDPA reports that during 1985, Claimant Murthy had designated only a single address (*i.e.*, only Payee-Option number 1) to which all payments for his MAP services were to be sent. Despite this fact, he had listed Payee address "3" on each invoice offered in support of these seven accounts, thus causing confusion as to what address he was directing payments of these invoices were to be mailed. Because Claimant had not previously designated either a Payee "2" or "3" address, it was unclear what mailing instruction he had intended to convey in these invoices. Although Claimant could have resolved this confusion by timely submitting rebill-invoices listing a correct Payee-number, he does not allege here that he had taken that action prior to IDPA Rule 140.20's deadline.

"Clean Claim" Rebill Requirement. Other invoicing errors had prevented Claimants from obtaining payment on certain accounts. These errors or omissions include:

(a) a failure accurately to identify, by name and correct provider number, the physician who had performed the services being invoiced (*e.g.*, in nos. 87-CC-0476, 87-CC-4150 & 88-CC-0311—compare *Brand, Beck & Hoover Assoc. v. State* (1992), 44 Ill. Ct. Cl. 284);

(b) a failure accurately to identify the patient by his/her IDPA-assigned RIN (Recipient Identification Number, no. 87-CC-0352—see *Gupta v. State* (1990), 42 Ill. Ct. Cl. 269, 272-73);

(c) a failure to identify the place of service (P.O.S.) or facility in which the services were rendered (no. 86-CC-3531—see *Ryan v. State*, cited *supra*);

(d) a failure accurately to identify, by coded entry, the diagnosis, or medical condition, which occasioned the need for treatment (no. 87-CC-0353—see *Riverside Medical Center v. State* (1988), 40 Ill. Ct. Cl. 274, *et seq.*; and

(e) a failure to identify the services performed, by entry on the invoice of correct PCs (no. 87-CC-0354—see *Ramabrahmam v. State* (1990), 43 Ill. Ct. Cl. 351).

Claimants could have resolved these deficiencies by preparing and submitting "clean claim" (42 C.F.R. §447.45(b)), rebill-invoices, reporting therein to IDPA all corrected or previously-omitted data. (*St. Therese Medical Center, Palos Community Hospital*; *Ryan v. State, supra* at 215; and *Kim v. State, supra* at 290-91). The complaint allegations offered here suggest, however, that Claimants had failed to take such remedial actions—and thereby exhaust their administrative remedy (705 ILCS 505/25; and Court of Claims Regulations sec. 790.60), within the prescribed one-year period.

TPL Adjudications Not Reported. Respondent reports that 10 of these 74 accounts charge for services rendered to recipients who had TPL (third party liability) insurance coverage available, from Medicare (42 U.S.C. §1395, *et seq.*) or a commercial healthcare insurer, on the dates said services were rendered. As IDPA's MAP is the payer of last resort whenever a TPL insurer has or may have primary payment responsibility (42 U.S.C. §1396a(25); 42 C.F.R. §§433.135 through 433.154; *Handbook* topic 120, *et seq.*; *Rock Island Franciscan Hospital v.*

State (1984), 37 Ill. Ct. Cl. 343; *Pilapil v. State* (1988), 41 Ill. Ct. Cl. 223; *Treister & Wilcox, supra*, 189-90; and *Rockford Urology Assoc., Ltd. v. State* (1993), 45 Ill. Ct. Cl. 376), the Claimant was required: to bill his or her charges for such services for the primary insurer's adjudication, and then to report the result of that adjudication when submitting his or her residual charges (in items 37A through 38D of the DPA 2360 invoice-form) for IDPA's adjudication.

The record here shows that, in some cases, Claimants had initially invoiced their charges to IDPA without first billing them to the insurer of a recipient believed to have TPL coverage; and IDPA had refused payment of these invoices because of the absence, in Claimants' invoices, of any report of a prior adjudication by the TPL insurer. In other cases, the DPA-form invoices alleged as complaint exhibits fail to report TPL adjudications by such recipients' insurers; and Claimants' pleadings do not establish IDPA's receipt of their invoices, with TPL adjudications properly reported, within the time prescribed by IDPA Rule 140.20 (*Christ Hospital v. State*, No. 92-CC-0018, opinion filed Mar. 24, 1992). Absent accurate and timely reporting of such adjudications, IDPA is left to conclude that these charges may well be the payment responsibility of the recipients' primary insurers.

Invoices Not Shown Received By IDPA. Respondent identifies 57 of these unpaid accounts or partial accounts, Claimants' pleadings for which fail to establish that any DPA-form invoice of the related charges had been received by IDPA within one year following the dates of service (DOS).

Court of Claims Regulations section 790.50(a)(3) (74 Ill. Adm. Code 790.50(a)(3)) requires a claimant to identify in his or her complaint both the previous, administrative presentations of a claim to a State agency, and the

"action taken" by the agency in response to that claim. Once both specific invoices and specific IDPA voucher (or "remittance advice") responses to those invoices are presented by a PAC section 11—13 vendor-claimant, the department can investigate efficiently and report its position; and the Court is then able effectively to assess (a) the merits of the claim and the claimant's prior invoice-presentations of it, and (b) the reasons for IDPA's prior refusal to pay it. Medical-vendor claimants' heedful compliance with Court of Claims Regulations section 790.50(a)(3)'s requirements is especially important, because State payment liability is contingent upon a showing, in such claimants' complaints, that their invoices had been received by the department prior to IDPA Rule 140.20's prescribed deadline. *Simon v. State* (1987), 40 Ill. Ct. Cl. 246, 249; *Brand, Beck & Hoover Association v. State, supra* at 286-87; and *Kim v. State, supra* at 293-94.

IDPA's invoice-processing system records each invoice, upon its receipt, and issues a voucher-response to the vendor who had submitted the invoice, notifying the vendor that the invoice is being paid, refused payment, or suspended for review of payment-entitlement (*Handbook* topic 142). If payment is refused, the voucher-response notice will list a coded reason for the refusal (*Treister & Wilcox v. State* (1989), 42 Ill. Ct. Cl. 185, 187 & 191), referring the vendor to a MAP *Handbook* provision which explains the reason and may suggest corrective action (e.g., submittal of a rebill-invoice with all required data correctly reported or documented). (*Kim v. State, supra* at 290-91.) The vendor is cautioned that, if a particular invoice is not acknowledged by a notice within 60 days after the invoice was submitted, he or she should promptly submit a replacement-invoice to IDPA. *Handbook* Topic 144; *Peterson v. State* (1990), 43 Ill. Ct. Cl. 347; and *Kim v. State, supra* at 293-94.

As to these 37 accounts, Claimants' pleadings fail to supply or identify any voucher-response notice or other document which would enable IDPA to verify that any invoice of their related charges had been received by the department within one year following the corresponding DOS. In the absence of such verification notices, the Court finds that no State vendor-payment liability exists under IDPA Rule 140.20. *Rock Island Franciscan Hospital v. State* (1987), 39 Ill. Ct. Cl. 100; *Forutan v. State* (1991), 43 Ill. Ct. Cl. 377, 379; and *Northwest Community Hospital v. State*, Nos. 93-CC-1152, 93-CC-1153 (Order filed Sept. 13, 1993).

It is hereby ordered and adjudged that Enrique David, M.D. (Provider No. 036043640) is awarded $283.50 for PC-49581 rendered on DOS March 5, 1986, to recipient Morgan (no. 87-CC-4148); and Agustin Vitualla, M.D. (Provider No. 036056239) is awarded $178 for PC-31600 rendered on DOS April 26, 1985, to recipient Peoples (no. 87-CC-2578), said awards being the maximum amounts payable under IDPA's MAP for said services; and that Respondent's summary judgment motion on the complaints and underlying causes, as to the balance of these 87 claims, is granted; judgment as to said balance is entered against the 21 Claimant physicians and in favor of Respondent as to all issues presented; and (subject only to the two above awards) these claims are dismissed.

(No. 87-CC-0370—Claimant awarded $100,000.)

CATHERINE M. CARLSON, Claimant, *v.* BOARD OF REGENTS OF THE REGENCY UNIVERSITIES SYSTEM, as administrator of Illinois State University, an agency of the State of Illinois, Respondent.

Opinion filed May 13, 1994.

PREE & PREE and ROBERT S. O'SHEA, for Claimant.

JOSEPH GOLEASH, JR., for Respondent.

NEGLIGENCE—*premises liability—notice of dangerous condition required.* The State's duty to persons legitimately on its premises is to maintain the premises in reasonably safe condition, and a showing of actual or constructive notice of a dangerous condition is required in order to establish the State's negligence.

SAME—*slip and fall in dormitory shower room—State had notice of dangerous condition—award granted.* The State was liable for injuries suffered by a student when she slipped and fell in a puddle of water caused by wet hanging clothes in a dormitory shower room, since there had been prior complaints to university employees that students were laundering clothes in the shower room thereby establishing the State's constructive notice of the dangerous condition, and the State was negligent in failing to provide adequate lighting, handrails, warnings, or otherwise maintain a safe passageway to and from the shower.

OPINION

MITCHELL, J.

The evidentiary hearing was held August 15, 1991, in the Springfield, Illinois, Court of Claims facility. At the completion of the hearing, it was agreed that the parties would have the opportunity to introduce further evidence by evidence depositions, if filed prior to January 1, 1992. No such evidence depositions were filed.

The transcript of the hearing was filed on September 20, 1991, and after many continuances granted to Claimant by agreement of the parties or for good cause, Claimant's brief was filed on December 16, 1992.

Though Respondent was given more than adequate time to file its brief, it has not done so.

This is a claim for personal injuries suffered on September 13, 1984, in the course of a fall by Claimant on a wet tile floor in the exit passageway of a shower-bathroom of a dormitory at Illinois State University. Claimant alleges that her fall was the result of Respondent's negligence in its maintenance of the exit passageway.

Her uncontradicted testimony shows that Claimant, then a 19-year-old sophomore student at ISU, at about 4:00 p.m., September 13, 1984, had showered, "dried off," put on her rubber thongs, robe and contact lenses, and entered the "dark" exit passageway, where she slipped on a puddle of water which was caused by a pair of lady's "soaking wet" trousers, hanging on a wall hook to Claimant's left. Although the bathroom area she was leaving was lighted, both the exit passageway and the floor therein were dark. There was nothing which Claimant could grab to arrest her fall.

Claimant's testimony further shows that, because there were other facilities in the building for laundering, girls in the dormitory had complained to the University's resident assistants in each of the four wings and, specifically, to resident assistants Schimke and Cain, that the "* * * international students * * * tended to do their laundry in the bathrooms."

Claimant's testimony, medical reports received without objection and a stipulation as to medical expenses show that she suffered injuries in the fall resulting in: (1) permanent and severe migraine headaches; (2) a neck injury for which she later underwent an anterior cervical disectomy and inter-body fusion of the C5-6 disc with bone graft from the right iliac crest; (3) a temporary loss of

feeling in her left arm which was corrected by the neck surgery; (4) permanent "* * * pinching, burning in my left shoulder blade, pain in my arm and in my * * * two fingers and my thumb;" and (5) a temporary bruise on her right hip.

In the course of examination and treatment by many physicians, Claimant was prescribed not less than 27 different medications, resulting in a temporary chemical addiction. In addition to the neck surgery, Claimant has received one or more x-rays, bone scans, CAT scans, EMGs, myelograms, discograms, and angiograms. She has worn or borne a figure eight brace, hip soaking, diathermy, an arm sling, a finger brace, ultra sound, transcutaneous electrical new stimulation, hot packs, cervical traction, a soft collar, and a high collar.

Claimant incurred medical expenses in the sum of $44,754.91 through sometime in 1986, when she received classes in pain management at the Mayo Clinic and ceased the use of all medication and medical help for matters arising from the 1984 injuries.

Three physicians have advised Claimant that she "* * * will always have these headaches." Dr. Alvary, who performed the neck surgery with Dr. Nagib in 1985, reported in 1986:

"I have advised her that all her symptoms were directly caused by her accident. I have treated her before, in 1982, for an unrelated back problem and I have a series of records to show that in 1980, 1981 and 1982 she did not mention any complaints similar to the one for which she had her surgery. Her pain was neurological and not myofascial in origin and it was directly related to trauma."

The Court has on many occasions required a showing of actual or constructive knowledge of a dangerous condition in order to establish the State's negligence. (*Smith v. State* (1989), 41 Ill. Ct. Cl. 42 (standing water).) Here, this Court finds that Respondent had constructive knowledge

of the standing water puddle in the passageway. Had its employees responded to students' complaints as to laundering of clothes in the washroom, the State would have discovered the wet condition of the exit passageway. Thus, in *Ondes v. State* (1991), 43 Ill. Ct. Cl. 272 at 277, this Court recognized that the State and its maintenance people would be on constructive notice of a dangerous gymnasium condition where students had knowledge of the condition (*i.e.*, students' swinging on and breaking light fixtures).

"The State's duty to persons legitimately on its premises is to maintain reasonably safe conditions." (*Owens v. State* (1989), 41 Ill. Ct. Cl. 109, 111.) It is the opinion of this Court that the condition of the exit passageway floor was dangerous (*i.e.*, a water puddle, a dark area, absence of handrail, absence of warnings of risk), that Respondent had constructive knowledge of that condition, that Respondent was negligent in failing to maintain a safe passageway.

The Court hereby awards $100,000 to the Claimant, Catherine M. Carlson.

(No. 87-CC-0738—Claim denied.)

RICHARD F. PATTON, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed August 25, 1994.

SUSAN SHATZ, for Claimant.

ROLAND W. BURRIS, Attorney General (THOMAS L. CIECKO, Assistant Attorney General of counsel), for Respondent.

PRISONERS AND INMATES—*false imprisonment—elements of claim.* In order to state a claim for false imprisonment, the Claimant must show that

the Respondent caused the Claimant's extended prison confinement, that the confinement was against the Claimant's will, and that the Respondent acted intentionally and without having reasonable grounds to believe that the Claimant should be further confined.

SAME—*inmate was not negligently confined beyond sentence—claim denied.* An inmate's false imprisonment claim alleging that the State negligently kept him confined beyond his minimum projected release date was denied, where the State accurately computed the inmate's sentence based upon information in its possession and was not responsible for a county's failure to timely transmit jail credit information, and there was no proof of the State's intent to confine the inmate beyond his sentence; and the record indicated that the inmate was actually released prematurely because he was improperly given credit for time served in a Mississippi prison on a separate crime.

OPINION

SOMMER, C.J.

Claimant asserts that the Department of Corrections (hereinafter "IDOC") damaged him by "negligently keeping him in confinement * * * from September 9 [*sic*], 1984, when he [allegedly] should have been released, until November 18, 1985, when he was actually released." (Complaint, par.1.) Claimant had been separately convicted in Mississippi and Illinois for two unrelated crimes of manslaughter, receiving a 20-year sentence in Mississippi in 1980 and a 5-year sentence in Illinois in 1984. Of the potential combined 25-year prison sentences, he ultimately served a total of 5 years, 8 months and 4 days (3/14/80-11/18/85), and a significant portion of that time (approximately 2½ years) consisted of credit given for prior time spent in county jails awaiting trial and sentencing. Claimant's actual confinement in *prisons* was slightly over 3 years and 2 months on the combined 25-year sentences.

The following timeline documents significant events crucial to this claim. It is drawn from the objective facts contained in the exhibits which the parties tendered into evidence:

8/20/80 Mississippi sentence of 20 years for manslaughter, retroactively served to 3/14/80 due to jail time. Mississippi Department of Corrections (hereinafter "MDOC") computes maximum discharge date as 3/14/2000.

3/8/82 Transferred by MDOC to custody of Cook County sheriff for Illinois trial.

3/10/82 Enters Cook County jail. This information is not received by IDOC until 11/18/85, same date that sentence was recomputed resulting in Claimant's immediate release.

2/27/84 Sentenced by Cook County circuit court to IDOC for 5 years for manslaughter:

- credit to be given for Illinois jail time served;
- sheriff of Cook County to deliver Claimant to IDOC; and
- IDOC to confine Claimant "until the above sentence is fulfilled."

3/5/84 Claimant supposed to be returned to custody of MDOC by Cook County sheriff. However, Claimant actually remains in Cook County custody until 4/3/84. This information is not received by IDOC until 11/18/85, same date that Claimant's sentence was recomputed resulting in immediate release.

3/13/84 IDOC sentence calculation worksheet, based on 2/27/84 sentence date, shows:

- projected out date of 8/27/86 (2½ years); and
- mandatory out date of 2/27/89 (5 years).

However, Claimant at this point has not entered IDOC custody inasmuch as the Cook

	County sheriff directly returned Claimant to MDOC.
9/10/84	This is date IDOC later determines would have been "correct" projected out date based on Cook County jail credit, but information to compute it is not made available to IDOC by Cook County until 11/18/85, same date that Claimant's sentence was recomputed resulting in immediate release.
9/25/84	Mississippi parole board denies Claimant parole on his Mississippi conviction because it is "not in best interest[s] of society" and continues matter for review in one year. As of 10/1/84, MDOC shows projected discharge date of 4/9/96 based on credits allowed.
8/26/85	Taking up above one-year continuance, Mississippi parole board now finds eligibility for parole and orders Claimant's return to Illinois and release from Mississippi custody on 10/16/85. Time served since 3/14/80 (including Illinois jail time) is 5 years, 7 months, and 2 days on original 20-year Mississippi sentence.
10/17/85	Cook County sheriff takes custody of Claimant from MDOC and returns Claimant to Illinois.
10/18/85	Cook County transfers custody of Claimant to IDOC at Joliet. This is the point that Claimant first entered IDOC custody.
11/2/85	Claimant is transferred to Vandalia.
11/8/85	IDOC writes Cook County asking for amount of Claimant's jail credit.
11/18/85	Cook County answers 11/8/85 inquiry and shows custody from 3/10/82-4/3/84 (2 years, 24 days).

11/18/85 New IDOC sentence calculation worksheet is prepared and shows:

- custody date of 3/10/82 (date Cook County had initially taken custody from MDOC);
- projected out date of 9/10/84 (2½ years); and
- mandatory out date of 3/10/87 (5 years).

11/18/85 Claimant immediately released from IDOC custody. 33 days have elapsed since prior MDOC release.

Claimant asserts that, by reason of Respondent's allegedly erroneous initial computation of his Illinois good time "out date," he was denied parole by Mississippi on September 25, 1984, and was unlawfully incarcerated from that point until his eventual November 18, 1985, Illinois release.

Claimant alternately refers to his claim as negligent confinement or unlawful incarceration, but the applicable tort theory, quite simply, is false imprisonment. Numerous Illinois decisions have addressed the basic elements of such a claim. (See, *e.g., Meerbrey v. Marshall Field & Co., Inc.* (1990), 139 Ill. 2d 455, 474, 564 N.E.2d 1222, 1231 and *Hajawii v. Venture Stores, Inc.* (1984), 125 Ill. App. 3d 22, 25, 465 N.E.2d 573, 576 (1st Dist.).) These cases involve the frequent situation where a merchant's security officers detain a customer or employee on suspicion of shoplifting. However, the theory has also been utilized where law enforcement personnel arrest an individual for the commission of a crime. (See, *e.g., Fort v. Smith* (1980), 85 Ill. App. 3d 479, 481 and 484, 407 N.E.2d 117, 119 and 121 (5th Dist.) and *Sparling v. City of LaSalle* (1980), 83 Ill. App. 3d 125, 126, 403 N.E.2d 769, 770 (3d Dist.).) Although Claimant has not pleaded

the specific elements of his particular claim, they can be readily distilled from the above case law:

(1) Respondent caused Claimant's alleged extended prison confinement;
(2) The extended confinement was against Claimant's will; and
(3) Respondent acted intentionally and without having reasonable grounds to believe that Claimant should be further confined.

(See also, Illinois Forms of Jury Instruction, sec. 42.31, *Matthew Bender & Co., Inc.,* 1993.) Those are the allegations that should have been (but were not) pleaded by Claimant. For purposes of this opinion, it will be assumed, *arguendo*, that at all times the confinement was against Claimant's will. Thus, this claim must stand or fall based on application of the evidence to the first and third elements of the tort.

Element One—Causal Connection: Did Respondent Cause Claimant's Alleged Extended Confinement?

The February 27, 1984, sentencing order from Cook County circuit court directed Respondent to "take [Claimant] into custody and confine him in the manner provided by law until the above [5-year] sentence is fulfilled." While the order also provided that Claimant was to be given credit for time which he had served in the Cook County jail awaiting trial and sentencing, the order did not quantify that credit nor did it specify either the minimum projected "out date" or the mandatory "out date." The order was silent in terms of the data needed for Respondent to perform those specific computations.

The Unified Code of Corrections imposes on the county sheriff and circuit clerk the duties of assembling that data and transmitting it to Respondent. Section 5—

4—1(e)(4) requires the sheriff to provide the information to the circuit clerk, who in turn is to then transmit it to Respondent. (730 ILCS 5/5—4—1(e)(4).) Section 3—8—1(a) imposes a separate duty on the sheriff to independently transmit that data to Respondent. (730 ILCS 5/3—8—1(a).) Thus, if all had operated according to the statutory scheme, Respondent would have received the jail credit data here twice, once from the circuit clerk and once again from the sheriff. However, the record is silent on both accounts; there is no evidence to prove that either transmission occurred. Rather, the state of the evidence is that this critical data was first received by Respondent on November 18, 1985, the same date that Respondent recalculated the sentence and immediately released Claimant.

Accordingly, Claimant has failed to establish causal connection against Respondent for his alleged extended prison confinement. The unrefuted evidence demonstrates that Respondent had accurately computed both the minimum projected "out date" (8/27/86) and the mandatory "out date" (2/27/89) based on the information which it actually possessed. At most, Claimant's alleged confinement beyond the adjusted minimum projected "out date" of September 10, 1984, resulted from the failure of the sheriff and circuit clerk to timely transmit that data to Respondent. But even part of that conclusion is speculative, for it cannot be said with any certainty that Mississippi would have paroled Claimant in 1984 but for the allegedly erroneous Illinois data. Claimant has not tendered into evidence a transcript or other report of proceedings from his September 25, 1984, Mississippi parole hearing. As of that hearing, Mississippi's sentence computation record showed a projected early release date of July 8, 1996, based on accumulated good behavior credits. All that can be gleaned from the record is that with almost 12 years then remaining on his Mississippi sentence, the Mississippi parole

board unilaterally believed it not in the best interest of society to release Claimant at that time. The reasons supporting its decision are not articulated in the record, and Claimant's self-serving explanation must be disregarded as untrustworthy hearsay. From all that can be determined from this record, the Illinois detainer played no role in the 1984 Mississippi parole denial. All that can be concluded with certainty is that Claimant's continued 33 days in custody after October 16, 1985 (Mississippi parole date), through and including his release on November 18, 1985, had resulted from the failure of the Cook County sheriff and Cook County circuit clerk to timely transmit the jail credit data to Respondent. Respondent itself did not in any manner cause Claimant's alleged extended prison confinement.

Element Three—Scienter: Did Respondent Act Intentionally and Without Having Reasonable Grounds to Believe that Claimant Should Be Confined?

Claimant entered Respondent's custody on October 18, 1985, after the Cook County sheriff brought him back the second time from Mississippi. At all relevant times prior to that point, Claimant had been in the custody of only the Mississippi Department of Corrections or the Cook County sheriff. Section 3—2—2(h) of the Unified Code of Corrections gives Respondent the power to investigate its prisoners' grievances. (730 ILCS 5/3—2—2(h).) Pursuant to that power, Respondent has established an Office of Advocacy Services and has adopted specific grievance procedures for inmates to follow. (See 20 Illinois Administrative Code, ch. I, section 440.20 and sections 504.800 through 504.870.) As best can be gathered from the record, Respondent did not require Claimant to adhere to the formal grievance procedures in this instance but instead voluntarily took it upon itself to contact the

Cook County sheriff to assemble the jail credit data. When the sheriff answered on November 18, 1985, Respondent prepared a new sentence calculation worksheet, saw the September 10, 1984, projected "out date," and immediately released Claimant. In total, Claimant spent only 32 days in Respondent's custody, and that period resulted from Respondent having to compel the sheriff to comply with his statutory duties to assemble the pertinent jail credit data. Given the magnitude of both Respondent's operations and the sheriff's jail operations and given the serious nature of Claimant's conviction, that 32-day wait can hardly be unreasonable. Accordingly, Respondent had reasonable grounds to believe that Claimant should be confined, promptly investigated and acted upon Claimant's grievance, and had no intent to confine Claimant beyond his sentence.

Additional Affirmative Matter Apparent from the Record

The irony of this claim is that the supposedly "correct" November 18, 1985, sentence calculation worksheet was erroneous and that Claimant was *prematurely* released by Respondent. Claimant's projected "out date" was based on half of his sentence, 2½ years. That would be the equivalent of 912 days in prison. As a matter of law, a convict is not entitled to credit for time spent in custody while incarcerated in another state as the result of a crime committed there, even if a detainer is served on the convict in that state. (*People v. Gardner* (1988), 172 Ill. App. 3d 763, 768, 527 N.E.2d 155, 158 (3d Dist.); *People v. Roberts* (1977), 47 Ill. App. 3d 524, 528, 362 N.E.2d 106, 109 (4th Dist.):

"[I]t would thwart the plain meaning of [the statute] to give a defendant credit for being 'in custody' for his confinement on the [out-of-state] charge since such was not 'a result of the offense for which the sentence was imposed' [citations omitted]. We believe that since defendant's confinement [out-of-state] was on a wholly unrelated charge, to give him credit for time served there while the Illinois detainer was pending would be giving him a

windfall not intended by the statute." *People v. Roberts*, 47 Ill. App. 3d at 528, 362 NE.2d at 109.

In other words, the period which Claimant spent in Mississippi between April 4, 1984, and October 16, 1985, inclusive (1 year, 6 months, 12 days) should *not* have been applied as a credit against his Illinois sentence, for it was time spent in custody for the original Mississippi crime. A review of the record reveals that Claimant had only accrued 759 days of credit on his Illinois sentence at the point that Respondent received custody on October 18, 1985:

1982 (3/10-12/31)	=	299 days
1983 (1/1-12/31)	=	365 days
1984 (1/1-4/3)	=	94 days (leap year)
1985 (10/17)	=	1 day
		759 days TOTAL

Thus, at the point that he entered Respondent's custody, Claimant had an additional 153 days remaining on his Illinois sentence before he would be eligible for early release. The correct projected "out date" should have been March 19, 1986. Respondent's November 18, 1985, release was 121 days too soon.

Accordingly, Respondent was indeed negligent, but not as Claimant would have this Court believe. In its haste to process Claimant's grievance, Respondent erroneously recomputed Claimant's projected "out date" and released him from prison approximately 4 months before he would have been entitled to be released. Far from harming Claimant, Respondent gave him a windfall. Lacking any basis in either law or fact, it is therefore ordered that this claim is denied.

(No. 87-CC-0750—Claim denied.)

KENSLEY HAWKINS, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed May 16, 1994.

Order filed January 25, 1995.

KENSLEY HAWKINS, *pro se*, for Claimant.

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

PRISONERS AND INMATES—*inmate's hand burned when plug to sewing machine shorted out—burden of proof not met—claim denied.* An inmate failed to sustain his burden of proof in a claim for burns received when the plug to a sewing machine shorted out, where there was no evidence indicating that the State was negligent in allowing the accident to occur, that the inmate had suffered permanent injuries, or that the accident was the cause of his present injuries.

OPINION

SOMMER, C.J.

Claimant was a former resident of the Joliet State Penitentiary. On the morning of March 24, 1985, he was on work assignment at the furniture factory located in the prison. He was assigned to the sewing machines which were used to sew fabric covers for the furniture. As he was attempting to plug the sewing machine, the plug and wall fixture shorted out. This resulted in a flame which caused first and second degree burns to his hand.

Mr. Hawkins was treated and released from the prison infirmary. At his own request, he was reinstated to his job in the furniture factory a few days later. However, he was not placed in a position that required the use of his injured hand.

The Claimant testified at the hearing of this case that he has experienced a loss of feeling in certain fingers of the hand since the incident. Dr. Tilden testified for the Respondent that the burn was relatively minor. It was

treated promptly. The treatment was effective, and no ill effects of the incident should remain.

In order to meet his burden of proof, Mr. Hawkins must show that the Respondent was negligent in allowing the accident to occur. Given the limited amount of information available to the Court, it is clear that Mr. Hawkins failed to meet this burden. In addition, Mr. Hawkins must prove that the accident was the cause of his present complaint. He also failed to meet this burden of proof.

Mr. Jack McSweeney was in charge of electrical maintenance for the prison. He gave testimony as to the probable cause of the short and resulting flame. The sewing machines in question used locking plugs. Most people tend to routinely remove plugs by pulling on the cords. With a locking plug, any pull on the cord can exert sufficient pressure to tear the wiring loose from the plug housing. Mr. McSweeney testified that the cord which caused Mr. Hawkins' injuries had been repaired. During the repairs, the hot and ground wires were reversed, which resulted in a high-voltage short.

No evidence was presented which showed any repair of the plug in question. It is interesting to note that the Claimant was in charge of the machine in question.

More importantly, Mr. Hawkins completely failed to show that he had permanent injuries or the cause of such injuries.

For the reasons stated, we hereby deny this claim.

ORDER

PATCHETT, J.

In May 1994, this Court entered an opinion denying this claim. The Claimant, a resident of the Illinois De-

partment of Corrections, filed a subsequent motion asking for additional time. This Court entered an order allowing him 90 days from the effective date of the order to file any post-trial motions he wished to file. To date, none have been received.

Therefore, this claim is denied, pursuant to the earlier order.

(No. 87-CC-1139—Claim denied.)

SCOTT BLUMSTEIN, Administrator of the Estate of ROBERT W. BLUMSTEIN, M.D., Deceased, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 30, 1995.

JULES R. CHERIE, LTD., for Claimant.

JIM RYAN, Attorney General (IAIN D. JOHNSTON, Assistant Attorney General, of counsel), for Respondent.

PRACTICE AND PROCEDURE—*claim for damages under Medical Practice Act—State's motion to dismiss denied.* The Court of Claims denied the State's motion to dismiss a claim brought by the decedent physician's estate for damages arising out of the baseless suspension of the decedent's medical license, since the claim sufficiently alleged that the suspension was without any reasonable basis in fact, and because the Claimant was not required to pursue actions not recognized under existing law in order to meet the Court's exhaustion of remedies requirement.

STATUTES—*Medical Practice Act—State's liability for unwarranted suspension of physician's license.* Pursuant to section 46 of the Medical Practice Act, in the event that the Department of Professional Regulation's order of suspension of a physician's license is without any reasonable basis in fact of any kind, the State shall be liable to the injured physician for special damages suffered as a direct result of said order.

SAME—*Medical Practice Act—order suspending physician's license had basis in fact—summary judgment entered for State and against Claimant.* Where testimony by several of the decedent physician's patients and the State's expert provided an ample and reasonable basis in fact for an order imposing a 90-day suspension on the physician's license, although the suspension

was subsequently reversed the physician's estate could not prevail on its claim seeking damages for the wrongful suspension, and summary judgment was entered for the State and against the Claimant.

OPINION

EPSTEIN, J.

This is a claim for special damages arising out of the allegedly baseless suspension of the Claimant's decedent's medical license a decade ago in 1984. This claim was brought under section 17.12 of the former Medical Practice Act of 1923 (formerly Ill. Rev. Stat., ch. 111, par. 4451), which was reenacted as section 46 of the Medical Practice Act of 1987 (which replaced the 1923 Act, see P.A. 85-4) and which was codified at 225 ILCS 60/46. Jurisdiction of this Court is based on section 8(a) of the Court of Claims Act (705 ILCS 505/8) as liability is premised on the foregoing Illinois statute.

This statutory provision (225 ILCS 60/46) provided in 1984 and as reenacted provides now as follows:

> "In the event that the Department's order of revocation, suspension, placing the licensee on probationary status, or other order of formal disciplinary action is without any reasonable basis in fact of any kind, then the State of Illinois shall be liable to the injured physician for those special damages they have suffered as a direct result of such order."

The Facts

In November of 1984 the Department of Registration and Education (the "Department," since renamed the Department of Professional Regulation) suspended the medical license of the Claimant's decedent, Dr. Robert W. Blumstein, who was constrained to suffer the 90-day suspension while he appealed it because Illinois law did not authorize a stay pending administrative review of the Department's order, *Blumstein v. Clayton* (1985), 139 Ill. App. 3d 611, 487 N.E.2d 1176 (1st Dist.)

A year after the fact, the circuit court (Judge David Shields, presiding) reversed Dr. Blumstein's suspension as against the manifest weight of the evidence in a 41-page opinion that reviewed in great detail and substantially rejected the four lay witnesses, the one expert witness and other evidence that the Department had arrayed against Dr. Blumstein and held that the Department had not carried its burden of proof "by clear and convincing evidence" as required by the statute. (*Blumstein v. Clayton*, No. 84 CH 10585, Judgment Order, November 25, 1985.) The Department did not appeal. A year later, Dr. Blumstein died.

His widow, Zaddie Blumstein, filed this claim in 1986 as administratrix of his estate. Claimant alleged that the Department's order was "without any reasonable basis in fact" (complaint, par. 13) and claimed damages of lost income and loss in value of decedent's medical practice totalling $1,000,000 as a "direct result of the * * * suspension." Complaint, pars. 11, 14.

In 1990, Zaddie Blumstein died. Scott Blumstein, the son of Dr. and Zaddie Blumstein, succeeded her as administrator and was eventually substituted as the Claimant in this cause.

Procedural History of this Case

This case was placed on general continuance on October 5, 1987, pursuant to section 25 of our Act (705 ILCS 505/25) and section 790.60 of our Regulations (74 Ill. Adm. Reg. 790.60), on the Respondent's motion, due to Claimant's several lawsuits against other parties arising out of the decedent's suspension. The case was restored to active status in this Court in 1989.

In early 1990, the Claimant filed a motion for partial summary judgment as to liability. In that motion, the Claimant contended that the "obvious legislative purpose"

of the statute was "to provide redress to those physicians who had been wrongfully required to suffer the suspension * * * of their licenses * * *." (Claimant's motion for summary judgment, par. 7) and that the statutory standard of liability "encompasses the factual scenario of this case * * * the wrongful suspension of a physician's license against the manifest weight of the evidence adduced at the [departmental administrative] hearing" (*id.*, par. 8). After briefing, that motion was denied by a summary order entered May 4, 1993. (This opinion, *inter alia*, further explains the denial of that motion.)

On August 20, 1993, the State filed a motion to dismiss, contending (1) that the complaint failed to state a cause of action in that it failed to allege "facts" in support of its contention that the Department's order lacked a reasonable basis in fact, and (2) that the circuit court's opinion and judgment order establishes that there was in fact sufficient factual or evidentiary basis for the Department's suspension order to meet the statutory standard, and (3) that the action here should be dismissed under section 25 of our Act (705 ILCS 505/25), due to Claimant's failure to exhaust other potential remedies (*i.e.*, sources of possible recovery) in that she had not "pursued an action against the patients [of Dr. Blumstein]" whose complaints and testimony had led to the suspension and whom the decedent had accused of making 'false, frivolous and/or nonmeritorious complaints' to the Department."

Nominally, this case is before us on the Respondent's motion to dismiss, two aspects of which raise issues that are properly the subject of a motion to dismiss and should be decided first notwithstanding the unusual timing of this motion which the Claimant understandably protests.

However, after we dispose of the dismissal aspects of the State's motion, the Court will consider this case as on

cross-motions for partial summary judgment as to liability with respect to the third aspect of the current motion because (1) the Respondent's motion is properly a summary judgment motion insofar as it presents the circuit court opinion as undisputed evidence, as did Claimant's summary judgment motion, and (2) because both sides have presented this case for decision as to liability on the basis of the pleadings and the circuit court determination, and (3) because the thrust of both the Respondent's current motion and the Claimant's prior summary judgment motion is the legal issue of whether the circuit court proceedings demonstrate or fail to demonstrate breach of the statutory standard of liability under §17.12 of the former Medical Practice Act (reenacted as 225 ILCS 60/46) and (4) because neither party has even suggested that there are disputed material facts in this case or that evidentiary proceedings are required.

The Motion to Dismiss

The Respondent's motion to dismiss must be denied. Respondent's pleading objection is more than adequately met by the simple reply that an allegation that "there is nothing" is sufficient to allege a complete absence of something required, at least as a matter of pleading. Here the Claimant alleged that the Department's suspension order was issued "without any reasonable basis in fact" (complaint par. 13), which is sufficient to allege an actionable statutory defect in the Department's proceedings. (Proving that allegation, of course, is a different matter.) Respondent has advanced no cogent answer to the Claimant's question of exactly what should, or might, be added to this allegation to make it sufficient. Paragraph 8 of this complaint sufficiently alleges a violation of former section 17.12 (now 225 ILCS 60/46).

Respondent's other dismissal argument must also be rejected. Although this Court is constrained by our statute to enforce the requirement that Claimants "exhaust all other remedies and sources of recovery" (705 ILCS 505/25) before recovering from the State—the "exhaustion doctrine" that is peculiar to claims against the State in this Court—we have never required claimants to pursue claims that existing law bars or fails to authorize as a precondition to litigating a claim here against the State of Illinois. Yet without a shred of authority, the Respondent argues that the decedent and his estate should have pursued actions against his complaining patients and witnesses. If a legal basis lies for that alternative recovery that the Respondent postulates, it has not been shown.

As the Claimant correctly points out, complainants and witnesses in quasi-judicial State proceedings, which includes professional license disciplinary proceedings such as those that are the subject of this case, are absolutely privileged. (See, *e.g.*, *Kalish v. Illinois Education Association* (1987), 157 Ill. App. 3d 969, 510 N.E.2d 1103; *Thomas V. Petrulis* (1984), 125 Ill. App. 3d 415, 465 N.E.2d 1059; *Parillo, Weiss & Moss v. Cashion* (1989), 181 Ill. App. 3d 920, 537 N.E.2d 851.) Neither our statute nor our rules nor our precedents impose an obligation on litigants to seek to change settled law in order to pursue to exhaustion alternative remedies that do not currently exist, as a matter of law, but which can be imagined by creative counsel or which might be created by future legislation or judicial decision. We decline to expand the exhaustion doctrine to encompass such speculative possibilities of causes of action. Indeed, doing so would in some instances place claimants and their counsel in an untenable posture given the constraints of Supreme Court Rule 137 and Federal Rule 11.

Summary Judgment

This case presents this Court with a rare opportunity to review the standard of liability under section 46 of the Medical Practice Act of 1987 and its predecessor and its many companion provisions in other Illinois professional and occupational license statutes. Although this Court has had occasion to decide cases under these provisions (see, *e.g., Andreoli v. Department of Professional Regulation* (1993), 93 CC 2227), there is a remarkable dearth of precedent almost two decades after these provisions were originally enacted by the General Assembly in 1975 (see Public Act 79-1130). (For convenience, this opinion refers to former section 17.12 of the Medical Practice Act of 1923, as amended, by its contemporary incarnation as section 46 of the Medical Practice Act of 1987, 225 ILCS 60/46.)

In this case, we revisit these provisions against the arguments (1) by the Claimant that section 46 should be expansively read in light of its "obvious legislative purpose" of providing relief to physicians whose licenses are wrongfully or incorrectly suspended or revoked, and (2) by the State that section 46 imposes the substantively identical standard as Supreme Court Rule 137 for pleadings, and therefore the test is whether the Department's charges were totally without supporting factual or evidentiary basis. We do not believe that either side is exactly right.

As we held by our earlier order denying the Claimant's summary judgment motion, it is clear that this statute does not provide relief to every medical licensee whose suspension (or other disciplinary order) is reversed by the courts. The standard of liability under this statute is plainly a higher standard than mere reversible error by the Department. We have not been appraised of any

showing of any legislative intent, obvious or not, that section 46 or its antecedent was intended to have the broad remedial effects that Claimant argues; our own research discloses none. The statutory language, which is the starting point and hopefully the dispositive point in any statutory construction analysis, plainly requires a far narrower reading and yields a much more limited liability than that for which the Claimant contends.

The operative words of the statute that define the standard of liability of the Department and hence of the State are: "without any reasonable basis in fact of any kind." (225 ILCS 60/46.) This is similar to the language of one part of Supreme Court Rule 137 (although the Rule 137 language is phrased in the affirmative, as a mandate), *i.e.,* the "well grounded in fact" language. However, it does not necessarily follow that the Rule 137 standard and the section 46 standards are identical as the Respondent contends.

There are at least four points of distinction from Rule 137 that should be noted for present purposes:

(1) The section 46 standard is concerned only with factual basis and not with legal basis (Supreme Court Rule 137 covers both).

(2) The section 46 standard has three extraordinary and arguably redundant words—"of any kind"—added to the articulated standard which at some point but not in this case must be construed and, if possible, given some meaning and effect.

(3) The section 46 standard of liability applies to the "*order* of formal discipline" that is issued or entered by the Department rather than to any pleadings that might initiate disciplinary proceedings.

(4) Violation of the section 46 standard of conduct by the Department gives rise to State liability well beyond attorney's fees and litigation expenses: this statute creates liability for consequential special damages which, as the damages request in this case shows, may be extensive.

We do not find it necessary to the decision of this case to review the Rule 137 caselaw to elucidate the standard for factually groundless pleadings that give rise to liability (primarily for attorney's fees) under that rule. The issue here is the factual basis that existed or failed to exist for the Department's 1984 order of suspension against the Claimant's decedent. The issue is not whether the Department was right, or whether its order meets the legal standards applicable to the discipline itself, as the Claimant contends. The issue is not the factual basis that supported or failed to support the Department's initial charges, as the Respondent at one point suggests. The issue is the factual basis for the Department's order. That much is plain.

It suffices for us to hold, as we do, that under section 46 and its predecessor, the Department was required to have some reasonable basis in fact to support its suspension order, and that this requirement entails both a basis in fact and one that is reasonable.

We recognize that this two-pronged standard is a stringent one that imposes a difficult hurdle for claimants that is akin, though not necessarily identical, to a probable cause standard or a Rule 137 pleading standard. However, the "reasonable basis in fact" standard is the standard that the General Assembly has written into law, and it can be altered by further legislation but not by this Court. We also recognize that this opinion does not address or resolve all of the potential legal issues concerning the appli-

cation of section 46 and its companions in the various Illinois licensing statutes that are not fairly presented by this case.

In this case, applying the section 46 standard, we must conclude that the Department had ample basis in fact, and a reasonable basis in fact, in the testimony of several of the decedent's patients and in the opinion of its own expert, a physician of considerable experience, to impose the 90-day suspension on the decedent. It is not necessary to review in detail the record of the Department's disciplinary hearing, as the sufficiency of the record to support the Department's order against the section 46 standard is clear.

It is neither appropriate nor necessary to consider the reasons that the Court later rejected the Department's case against the decedent; such review is not within the province of this court and, as indicated above, it is irrelevant whether or not the Department was ultimately correct or whether it ultimately prevailed against a different legal standard (i.e., the disciplinary standards of proof and of culpability). This court, in applying section 46's "reasonable basis" standard to the undisputed facts of this case, addresses only the *Department*'s factual basis for *its* order at the time that it entered its order. That basis sufficed to comply with the statute.

We appreciate that the decedent, and his widow and son, have pursued this cause all these years, at least in part, to vindicate his name and reputation. We understand that the decedent alleged and we assume he believed that the complaints against him were unfounded and malicious. However, there is no evidence whatever in the record that that was true. More importantly, there was not a shred of evidence produced that the Department knew that any of its evidence was untrue when it

entered its suspension order and there is no finding by the Court, nor any intimation, that any of the evidence was offered in less than good faith by the Department or by any of the witnesses. This case presents a situation where the record affirmatively shows that the Department acted reasonably on the facts presented to it and on the facts determined by it and on the conclusions reached by its expert, although its case turned out collectively to be legally insufficient to suspend the decedent's license. That insufficiency, however, is not enough to result in liability under section 17.12 of the (former) Medical Practice Act or its contemporary statutory companions. This Court is constrained to reject this claim.

Conclusion

For the foregoing reasons, the Respondent's motion to dismiss the complaint is denied, and the Respondent's motion to dismiss, considered as a motion for summary judgment is granted. Judgment on this claim is entered for the State and against the Claimant.

(No. 87-CC-2814—Claim dismissed.)

WARREN BUCKNER, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed May 27, 1988.

Order filed January 27, 1995.

WARREN BUCKNER, *pro se*, for Claimant.

JIM RYAN, Attorney General (JAN SCHAFFRICK, Assistant Attorney General, of counsel), for Respondent.

PRACTICE AND PROCEDURE—*complaint alleging medical malpractice—affidavit requirement.* Section 2—622 of the Illinois Code of Civil Procedure

requires a medical malpractice claimant to file with the complaint an attached affidavit declaring that the affiant has consulted a health professional, the professional has determined in a written report that there is a reasonable and meritorious cause for the filing of the action, and the affiant has concluded that there is a reasonable and meritorious cause for the filing of such action, or alternatively, the affiant shall declare that he was unable to obtain a consultation before the expiration of the statute of limitations.

PRISONERS AND INMATES—*inmate given 30 days to file health professional affidavit—claim abandoned and dismissed.* Upon the State's filing of a motion to dismiss the medical malpractice count of an inmate's claim against the State arising out of his prison employment, the inmate was granted 30 days to obtain and file with the Court the statutorily-required health professional affidavit in support of his medical malpractice allegations, but due to the inmate's subsequent abandonment of the claim, it was dismissed.

ORDER

DILLARD, J.

This cause coming to be heard on the motion of Respondent to dismiss count II of Claimant's complaint, due notice having been given the parties hereto and the Court being duly advised in the premises:

The Court finds: That Claimant filed a complaint in the instant cause on March 17, 1987. The claim alleged therein appears to have arisen from Claimant's employment as an inmate working as a butcher in the dietary building at the Lincoln Correctional Center, Lincoln, Illinois.

We find that count II of the complaint filed herein is a medical malpractice claim, and that it fails to show any compliance with section 2—622 of the Illinois Code of Civil Procedure. (735 ILCS 5/2—622.) Section 2—622 requires Claimant to file an affidavit attached to the complaint. The affidavit is to declare that affiant has consulted with a health professional, the professional has determined in a written report that there is a reasonable and meritorious cause for the filing of the action, and the affiant has concluded that there is a reasonable and meritorious cause

for the filing of such action. Alternatively, affiant shall declare that affiant was unable to obtain a consultation because the consultation could not be obtained before expiration of the statute of limitations.

We find that section 2—622(g) of the Illinois Code of Civil Procedure (735 ILCS 5/2—622(g)) makes Claimant's failure to comply with section 2—622 grounds for dismissal under section 2—619.

It is hereby ordered that Claimant shall obtain and file with this Court a valid health care professional affidavit within 30 days of the filing date of this order or the Respondent's motion is automatically granted and count II of the claim herein is dismissed.

ORDER

SOMMER, C.J.

This cause coming to be heard on the report of the Commissioner and the motion of this Court, due notice having been given, and this Court being fully advised, finds that the Commissioner had scheduled hearings on five previous dates at which the Claimant did not appear; and the notices for the last two hearing dates, June 2, 1994, and October 6, 1994, were returned to the Commissioner as undeliverable by the post office. The Court cannot proceed without knowledge of the Claimant's address. Thus, it appears the Claimant has abandoned this claim, and it should be dismissed. It is therefore ordered that this claim is dismissed.

(No. 87-CC-3327—Claim denied.)

WILLIE LEWIS, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 13, 1995.

WILLIE LEWIS, *pro se*, for Claimant.

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

EXHAUSTION OF REMEDIES—*inmate must exhaust remedies before filing claim*. An inmate attacked by another inmate must pursue and exhaust his other administrative, legal, and equitable remedies before filing a claim in the Court of Claims.

PRISONERS AND INMATES—*prerequisite to State's liability for attack by fellow inmates—foreseeability.* The State may only be liable for attacks on inmates by other inmates if the State's agents anticipated, or should have anticipated, that third persons would commit criminal acts against the Claimant.

SAME—*Claimant attacked by other inmates—failure to exhaust remedies or establish State's notice—claim denied.* The Court of Claims denied the claim of an inmate who sought damages for injuries received in an attack by other inmates, because the Claimant failed to exhaust his administrative remedies and did not produce evidence of the State's actual or constructive notice that an attack was going to occur.

OPINION

PATCHETT, J.

This is a claim by a resident of the Illinois Department of Corrections. On December 11, 1986, Mr. Lewis was a resident of the Stateville Correctional Center. At approximately 6:00 p.m., he was en route from his work assignment to his cell block. He was the victim of an attack by several other inmates. It was undisputed that he was seriously injured as a result of this attack.

Mr. Lewis has brought a claim against the State of Illinois for the injuries he suffered. The trial of this claim was held before a Commissioner of this Court. Mr. Lewis was the only witness. His testimony was undisputed as to the attack and the results of that attack.

Unfortunately for Mr. Lewis, he failed to meet two important requirements for recovery for his injuries. First, Mr. Lewis failed to exhaust his other remedies. As this Court recently held in *Howell v. State* (1993), 45 Ill. Ct. Cl. 60, an inmate attacked by another inmate must pursue and exhaust his other remedies before filing a claim. The Court dismissed a factually similar claim where an inmate was attacked by another inmate because he did not attempt to recover for his damages via any other remedies, administrative, legal, or equitable. The Court cited *Doe v. State* (1991), 43 Ill. Ct. Cl. 172, and *Lutz v. State* (1989), 42 Ill. Ct. Cl. 124, 126.

Because Mr. Lewis made no attempt whatsoever to explore his other opportunities for recovery, this claim must fail. However, it is also important to note that the State may only be liable for attacks on inmates by other inmates if the State's agents anticipated, or should have anticipated, that third persons would commit criminal acts against the Claimant. There was no evidence produced at the trial of this case that agents of the Illinois Department of Corrections had either actual or constructive notice that an attack was to occur on Mr. Lewis. In the absence of that notice, there is no liability on behalf of the State. *Chils v. State* (1985), 38 Ill. Ct. Cl. 196, *Carey v. State* (1981), 35 Ill. Ct. Cl. 96, *Daugherty v. State* (1991), 43 Ill. Ct. Cl. 316.

For the reasons stated above we deny this claim.

(No. 87-CC-3668—Claimant awarded $13,200.)

GEORGE WOLFF, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed August 8, 1991.

Opinion filed September 30, 1994.

BUTLER, RUBIN, NEWCOMER, SALTARELLI, BOYD & KRASNOW (STEPHANIE LEIDER, of counsel), for Claimant.

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

REAL PROPERTY—*trees cut down by State—Court's calculation of value reconsidered.* On the State's motion to reconsider the Court's award of $18,265.33 to the Claimant for the loss of 16 trees cut down by the State, although the Court had properly adopted the Claimant's expert's method of valuing the trees based upon their functional purpose relative to the property, it used the wrong calculation when estimating the average diameter of the trees cut, and after the Court properly recalculated their value, the Claimant was awarded $13,200.

REMEDIES—*State not liable for interest absent statute—interest on property damage award denied.* Interest is not payable by the State unless the State is expressly named in a statute as being liable for interest, and since there was no statutory basis for an award of interest on a claim against the State for property damage, the Claimant's request for post-judgment interest was denied.

OPINION

BURKE, J.

Claimant was the owner of a parcel of land approximately 20 acres in size. The northern boundary of his property abuts U.S. Highway Route 20. Until August 12, 1985, a row of Siberian Elm trees, running parallel to Highway 20, was situated on his property. The trees were in this location in excess of 30 years. On August 12, 1985, a certain number of trees were removed by Henrickson Tree Service. The trees were cut down and removed pursuant to a contract with the State.

Claimant did not count the number of trees on his property prior to August 12, 1985, and did not know the number of trees in existence. He estimated that there were 27 live trees and 5 trees remained; therefore, he concluded that 22 trees were removed. Claimant did not know the exact diameter or height of the trees.

Mr. Kramer, a commercial arborist licensed by the State of Illinois as a tree expert and certified by the Illinois Arborist Association was offered as an expert arborist on behalf of Claimant. Mr. Kramer visited Claimant's property and observed the five remaining Siberian Elm trees. The remaining trees were approximately 30 years old and stood 40 to 45 feet tall. The diameters of the remaining trees were in the range of approximately 22 to 26 inches as measured 4½ feet from the ground. He stated that the trees were alive, healthy, fully foliated and growing.

Mr. Kramer prepared a valuation report at the request of the Claimant. He assumed that 25 trees were removed. However, Mr. Kramer based his valuation on the destruction of only 22 trees and appraised the value of the trees at a total of $34,750. He based this value on the size, condition, location, purpose and function the trees served relative to the property. The value was based upon functional purpose rather than abstract or aesthetic purposes. The purposes were to screen the view of the highway from the residence for privacy concerns, block the north wind, control drifting snow, dirt and dust filtration, noise abatement, control of soil erosion and to offer definition to the property. Mr. Kramer stated that he could only locate 14 physical stumps and used a probe rod to determine the existence of some stumps.

The State did not dispute that some of the Claimant's trees were wrongfully removed and destroyed. The State and Claimant disagree on the following:

(a) The number of trees removed and destroyed from Claimant's property;

(b) The method by which damages are to be determined for the unauthorized removal and destruction of the trees.

Mr. Joseph Kostur of the Illinois Department of Transportation did not have personal knowledge of the number of trees removed, but a diary of tree removals was kept by the Department of Transportation which indicated that only 16 trees were removed.

The job diary is kept by the Illinois Department of Transportation (IDOT) on a regular basis. The diary is required to be kept on every contract in accordance with a booklet provided by the Federal Highway Federation. The diary also indicated the diameter of the 16 trees removed. Mr. Kostur stated that the trees are measured because contractors are paid by the number of trees removed and paid by the diameter of the trees. For IDOT tree removal purposes, the diameter of a tree is measured two feet above the ground.

Claimant asserts that the testimony of a commercial arborist expert is sufficient evidence for the Court to award damages. The expert determined the value of the trees removed in the following manner. He measured the five remaining trees to determine the range of diameters for the destroyed trees. He then calculated a base value utilizing a table prepared by an industry trade group in association with the United States Department of Labor. The table is widely accepted and establishes a base value of a tree using the number of square inches in a cross section measured 4½ feet above ground. The base value was adjusted after consideration of the tree species, condition, function and location. He determined that the value of 22 live Siberian Elms removed by State was $34,750.

This Court finds that 16 trees, or 72.7% of the total claimed, were removed. Therefore, the appropriate damages following Claimant's method of calculations would be $25,272.73 or 72.7% of $34,750.

Respondent, citing *Roger v. Enzinger* (1950), 339 Ill. App. 376, 89 N.E.2d 853 (2nd Dist.), asserts that Claimant's method of proving damages is prohibited. Respondent's position is that the only proper method of measuring damages is the loss of fair market value of the land after the removal of the trees. The Respondent asserts that the Claimant is entitled to nominal damages in the sum no greater than $1,000 because he failed to prove any legally recognizable measure of damages.

Respondent asserts that assuming *arguendo* that Claimant's method of proving damages is proper, the amount of damages is much less than the $34,750 claimed because Claimant's expert overestimated the number and size of the trees cut. Respondent also argues that the expert utilized too long a life expectancy for the trees because the State subsequently took title to the pertinent property through its eminent domain powers. Neither party cites cases relating to this last argument.

The valuation of damages should be determined at the time of the injury without speculations of the unknown future destruction of the property based upon a subsequent occurrence, *i.e.* condemnation. Both parties cite *First National Bank of Des Plaines v. Amco Engineering Co.* (1975), 32 Ill. App. 3d 451, 335 N.E.2d 591 (2nd Dist.). Claimant cites the case for the proposition that the appropriate measure of damages is the diminution in value of the property as a result of the taking of trees. Respondent cites the case to support its proposition the Claimant should receive nominal damage. The *First National Bank of Des Plaines* case involved the wrongful removal of trees

and the primary issue was the proper measure of damages. In that case, plaintiff contended that the proper measure of damages for the wrongful removal of trees was the cost of replacing the trees or the cost of restoring the property to a reasonable approximation of its condition prior to the trespass. Defendants maintained that the measure of damages is depreciation of the value of the realty due to the removal. The *First National Bank of Des Plaines* court stated that, "As a general rule, the measure of damages for injury to realty is the difference between the fair market value of the property before and after the injury to the premises." (335 N.E.2d at 593.) The Court, citing *Rogers v. Enzinger*, noted that the general rule has been applied to the destruction of ornamental or shade trees.

The *First National Bank of Des Plaines* court made a further observation. The Court stated that:

"Where the property injured, although part of realty, has a value which can be accurately determined without reference to the freehold, the recovery may be for the property in its severed condition and not for the difference in the value of the land before and after the defendant's misconduct. (Citations omitted.) Other jurisdictions, in dispensing justice between the parties allow the reasonable cost of replacing the trees or for the reasonable cost of restoring the property to approximate, as near as possible, its original condition. (Citation omitted.) This, it would seem is the more equitable rule, but Illinois law has not, to date, recognized such rule." *Id.* at 593.

Claimant's reply brief cites two cases, *Roark v. Musgrave* (1976), 41 Ill. App. 3d 1008, 355 N.E.2d 91 (5th Dist.) and *Myers v. Arnold* (1980), 83 Ill. App. 3d 1, 403 N.E 2d 316 (4th Dist.). In *Roark v. Musgrave*, the Court upheld the trial court's order where plaintiff was awarded damages for defendant's wrongful cutting and removal of trees from plaintiff's land. The plaintiff presented evidence of damages that indicated the depreciation in the value of the property but did not utilize the method of establishing the difference between the fair market value of the land before and after the injury. The *Roark* expert

testified to net loss without determining the fair market value of the property. The *Roark* court stated:

> "So-called 'rules' as to the proper measure of damages in a particular type of case are guides only, and should not be applied in an arbitrary, formulaic, or inflexible manner.
>
> * * *
>
> To the extent that the cases cited by Defendant suggest that proof must be introduced as to the *market value* of the land immediately before and the *market value* after the injury (citation), we do not think that they reflect the preferable, less rigid, modern view." 355 N.E. 2nd at 95.

The *Roark* decision, issued 11 months after *First National Bank of Des Plaines*, apparently has guided Illinois towards the more equitable and modern view.

The *Myers v. Arnold* opinion did not involve the destruction and removal of trees. The *Myers* court noted that Illinois cases have not always clearly distinguished between situations where the injury was to the land and those wherein the injury was to an object having a value ascertainable without reference to the land.

The Claimant argues that it is seeking the amount of damages by which the value of the property was diminished by the loss of particular trees. Claimant's expert did not opine as to the sum which would be necessary to replace fully mature trees. Claimant argues that his expert testified for the express purpose of directly correlating the value of the trees to the property on which they were situated. The expert did base his opinion on size, condition, location, purpose and function the trees served relative to the property.

In essence, the Claimant's position is that its expert testified to the net loss in value to property without establishing the value of the property prior to or after the removal of the trees. This is similar to the testimony presented by the landowner in *Roark*. The expert in *Roark* estimated that the property had been depreciated by $20

an acre. The expert did not establish the market value of the property prior to or after the injury. He stated, as did Claimant's expert in the case at bar, what the net loss was to the property.

The testimony of Mr. Kramer definitely correlated his valuation of the trees to the property on which they were situated. The Court accepts Claimant's expert testimony as credible and appropriate to ascertain damages; however, another problem arises because of the assumptions made by the expert in arriving at the damages. Mr. Kramer testified that because the trees were no longer in existence, his calculations of the value of the trees were based on two assumptions. Claimant told him to assume 22 trees were removed and then measured the five remaining trees and assumed that the smallest tree and the largest tree still standing would be the extremes and all of the missing trees would fall within those two extremes. He testified that the first five diameters of trees listed on Respondent's Group Exhibit No. 1 are the diameters of the trees remaining. The first five diameters as measured in inches are 23, 22, 25, 24 and 18. The average diameter is 22.4 inches.

The job diary indicates the diameter of the trees removed ranged from 8 inches to 20 inches, with an average diameter of 16.2 inches. The Court finds the diameter of the 16 trees destroyed to be the diameters stated in Respondent's Exhibit No. 2. The average of 16.2 inches is 72.3% of the expert's assumed average of 22.4 inches.

The Court shall restore the injured party to as good a position as he held prior to the tort. (Restatement of Torts 2d, section 901.) Claimant's method of proving damages is accepted and the expert's value of the trees destroyed is discounted to arrive at a value that reflects the number and the diameter of the trees, determined by

this Court to be destroyed. Claimant arrived at a value by assuming the number of trees removed and assuming that the trees had an estimated diameter. Therefore, the Court takes $34,750, the value as it related to 22 trees, and discounts it by 72.7% to reflect the Court's finding of 16 trees. This adjusted value would be $25,263.25. The second adjustment is to discount $25,263.25 by 72.3% to reflect the finding that the average diameter of the trees removed was 16.2 inches rather than 22.4 inches assumed by the expert.

Wherefore, it is hereby ordered that Claimant is awarded $18,265.33 for loss of 16 trees with an average diameter of 16.2 inches, in full and complete satisfaction of this claim.

OPINION

SOMMER, C.J.

This claim comes before us on a motion to reconsider filed by the Respondent in regard to an opinion of this Court filed August 8, 1991. Oral argument on the motion was held by the Court on October 26, 1992. The parties have filed briefs in regard to the motion to reconsider.

The matter before us is the value of Siberian Elm trees that were cut down on the Claimant's property by a contractor hired by and under the direction of the Illinois Department of Transportation.

The record before us is flawed, making a decision in this claim difficult. For example, it was difficult for the Court to make a finding as to the number of trees cut. The Claimant testified that 22 live trees and 1 dead tree were cut down. The Claimant's expert, who examined the site, could not determine how many trees were cut down,

as he could not find stumps for 23 trees—some of the stumps had been ground out by a stump remover. The expert probed for old roots but still could not find 23 trees; but figured the value of 23 trees in any event. The Claimant based his figure of 22 live trees on photographs not introduced into evidence and hearsay from a third party. The photographs that were entered into evidence did not show all the trees.

The Respondent's evidence of the number of trees was also subject to attack in that it consisted of two Xeroxed pages from a Department of Transportation diary listing the cut trees. The diary began with tree number 7 and ended with tree number 22. No explanation was given of the absence of the page showing the location of the trees 1 through 6.

Equally as odd, the Claimant's expert to establish value used estimated diameters for the trees that he could not find; as he admitted to finding evidence of fewer than 22 live trees.

This Court in reviewing this matter is bound by the record and will not act as an advocate for either party. Items of evidence must be properly before the Court. Simply because a party failed to introduce evidence or make an objection that was available to it is not a ground for a new trial. The standard for ordering a rehearing is that the Court "overlooked or misapprehended" points of law or fact. *See section 790.220 of Illinois Court of Claims Regulations, Ill. Adm. Code 790.220.*

We agree with the opinion's finding that 16 trees were cut, as the preponderance of the evidence establishes that at least 16 trees were cut. The Claimant did not meet his burden of proof as to the possibility of an additional seven trees having been cut. We do, however,

accept the Claimant's method of valuing the trees. No other method of valuation was entered into evidence by the Respondent; and we believe the case law then allowed for functional valuation of the trees.

We note, though it has no bearing on the current claim, that the General Assembly has passed the Wrongful Tree Cutting Act, effective January 1, 1986 (740 ILCS 185/1), which grants triple damages based on the stumpage value of wrongfully cut trees.

The Respondent supports the finding that 16 trees were cut; but then, argues that the Court proceeded to apply the wrong calculation as to the value of the trees cut. According to the Respondent, a tree's worth increases somewhat geometrically with its increase in size. The Respondent argues that this Court used a straight line computation, to reduce the average diameter of the trees from 22.4 inches to 16.2 inches. The Respondent wishes to use tables attached to an exhibit of the Respondent and the diary pages to establish a lower value, tree by tree. The Claimant argues that the tables were not properly introduced into evidence, nor was the proposed methodology of the valuation in evidence.

The Claimant's expert's direct testimony established that the square inch diameter was used in his calculation. The Respondent on cross-examination showed the expert his computations, which included the table previously referred to by the expert in his direct testimony as the standard valuation table "prepared by the United States Department of Labor Consumer Pricing" establishing a base price of "$27 per square inch cross section of trunk." The expert identified the documents as his calculations of the value of the trees. The Respondent's attorney did then introduce the calculations and the table into evidence. This was objected to by the Claimant's attorney, and rightly so.

The calculations and the table should have been introduced during the Respondent's presentation of its case. However, we find that a proper foundation for the documents, including the table was laid; and the calculations and table were properly admitted into evidence. It was unorthodox to introduce the tables and calculations into evidence upon cross-examination, but we do not find it to be reversible error, as a foundation was laid.

We find that the introduction of the diary was proper under the business records exception to the hearsay rule. The Respondent did not object to the introduction of a copy. In the oral argument, the Respondent has asked us to award a minimal amount, for which it introduced *no evidence*; or to recalculate the award. The Respondent urges a recalculated valuation of between $11,000 and $12,000. However, the Court's calculation tree by tree indicates a value of $13,200. The Court used the methodology of the Claimant's expert.

We find that the opinion of August 8, 1991, was in error when it used the wrong calculation when it reduced the average size of the trees cut. Even with reduced size, the Claimant is somewhat advantaged as the State's measurements were taken two inches from the ground rather than four inches as the Claimant's expert urged.

We, therefore, grant the Respondent's motion to reconsider; and upon reconsidering the matter find that the Claimant should have been awarded $13,200.

The Claimant, at the oral argument, asked for post-judgment interest on the award made on August 5, 1991. Our decision is not a "judgment" as the word is used in section 2—1301 of the Code of Civil Procedure (735 ILCS 5/2—1301); rather our decision is a recommendation to the General Assembly that can be dismissed, or

accepted in whole or part by that sovereign body. No one can levy on the basis of our opinion, nor does our opinion act as a lien. Interest is not payable by the State unless it is expressly named in a statute as being liable for interest. (*Doe v. State* (1988), 40 Ill. Ct. Cl. 37.) Section 2—1303 of the Code does not expressly name the State as liable for interest. Therefore, we will deny interest on this claim.

It is therefore ordered that the motion to reconsider is granted and the opinion of August 8, 1991, is reconsidered and the Claimant is awarded $13,200.

(No. 87-CC-4055—Claim dismissed.)

MICHIGAN AVENUE MANAGEMENT, INC., Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed January 23, 1990.

Order filed November 3, 1994.

DEUTSCH, LEVY & ENGEL (MICHAEL J. DEVINE, of counsel), for Claimant.

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

CONTRACTS—*lease—plain language controls absent ambiguity.* Where there is no ambiguity, the Court of Claims cannot go beyond the plain language of a lease.

SAME—*leases for period of years—early termination provision—State could terminate mid-month—hold-over.* Leases between the State and the Claimant lessor, which ran for periods coinciding with the State's fiscal years and which contained a provision allowing for the State's early termination by giving 120 days written notice, constituted leases for a period of years, and nothing therein prohibited the State from terminating mid-month since proper notice was given, and pro-rata monthly payments were applied, but the State improperly held over on one of the leases for which it had sent notice of termination.

STIPULATIONS—*landlord-tenant dispute—claim dismissed with prejudice pursuant to parties' agreement.* A claim involving a series of leases between the State and the Claimant lessor was dismissed with prejudice pursuant to the parties' stipulation.

ORDER

SOMMER, C.J.

This cause coming to be heard on the Claimant's motion for summary judgment and this Court being fully advised in the premises, finds the first six counts of the complaint are in regard to separate leases by the State of parts of the building at 910 S. Michigan Avenue, Chicago. The leases in each count, except count IV, began on July 1, 1985, and ran to June 30, 1987. The lease in count IV began August 1, 1985, and ran to June 30, 1987. The count notes that the periods of these leases reflect the State's fiscal year which begins on July 1 and ends on June 30. The leases between the Claimant and the State contained the following paragraph:

"Early termination: Lessee shall have the option to terminate this lease by giving 120 days written notice to the Lessor of its intention to exercise this option."

The State did give the Claimant written notices of more than 120 days of its intention to terminate. The date of termination for the leases in counts I through IV was December 13, 1986, while the date of termination for the leases in counts V and VI was August 18, 1986. The whole controversy in counts I through VI is whether the State could establish a termination date on any day or whether it had to terminate and the end of a month. The Claimant argues that payment was monthly and that the general rule of law is that leases terminate at the end of the month where the payment is monthly. The Claimant would be correct if the leases were month to month; but this Court finds that the leases were for a period of years (generally

following the State's fiscal years). The plain language of the leases would allow termination on any date. Where there is no ambiguity, this Court cannot go beyond the plain language of the instrument. The Claimant pleads that there is an ambiguity in that the leases do not provide for pro-rata monthly payments. We find that the parties established a monthly payment schedule, but the leases are for a period of years, not month to month; and thus can be terminated at any time or date, provided proper notice is given; therefore, pro-rata monthly payments are implied.

Count VII of the complaint concerns a lease at the same building that was to terminate on October 31, 1986, pursuant to a notice of termination delivered by the State to the Claimant, but the State did not actually leave until December 13, 1986. This Court finds that the State's notice terminated the lease and that the State did "hold-over." The State cannot have it both ways. It cannot seek to end sister leases on a specific date and then claim that the termination does does not apply when the State wishes to stay awhile longer. Whether the "hold-over" was wilful is a question of fact. Insomuch as this claim must be sent to a Commissioner for a hearing on counts VIII and IX, damages to the building by the State, the Commissioner shall hear evidence on whether the hold-over was wilful. It is therefore ordered that the Claimant's motion for summary judgment is denied in regard to counts I through VI, and that the motion for summary judgment is granted partially as to count VII, and this claim be sent to Commissioner Whipple for hearing.

ORDER

SOMMER, C.J.

This cause is before the Court on the parties' stipulation to dismiss action with prejudice, the Court being fully advised in the premises:

The stipulation to dismiss the claim herein is hereby accepted, and it is therefore ordered that the claim herein be, and the same is, hereby dismissed, with prejudice.

(No. 87-CC-4172—Claimant awarded $2,500.)

LUCIOUS HAYES, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed May 23, 1995.

ROBERT M. HODGE, for Claimant.

JIM RYAN, Attorney General (STEVEN SCHMALL, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*negligence—State's notice required.* A finding that the State is negligent requires actual or constructive notice to the State which can be met by a showing of foreseeability as to the particulars.

SAME—*duty to provide safe working conditions.* Because of the unique relationship between the State and a prison inmate, the State has a duty to provide safe conditions and adequate supervision for inmates to perform assigned tasks.

NEGLIGENCE—*inmate's eye injured by ash from boiler—State liable—award reduced to extent of inmate's comparative fault.* The State was liable for the Claimant's eye injury which occurred when the inmate with whom he was shoveling hot ash in a prison boiler room turned on a fan, since the presence of a fan two to three feet from the boiler, allowing its operation by inmates without supervision and the failure to require inmates to wear safety glasses constituted negligence on the part of the State, but the inmate's comparative negligence reduced his award by 50%.

OPINION

EPSTEIN, J.

This is a prisoner's negligence claim against the State, alleging negligence by the Department of Corrections ("DOC") resulting in physical injury to the Claimant's eyes. The case was tried before Commissioner Sternik,

and is before the Court for final decision on the trial record and the Commissioner's report.

The facts surrounding the incident that caused the Claimant's injury are largely undisputed. On the night of March 21, 1987, the Claimant was working in the boiler room at the Vandalia Correctional Center with another inmate, John Snyder, clearing ash from two of the prison's 11 coal-fired boilers without supervision and without protective glasses. The supervisor, Mr. Keeling, was away from the two inmates at the time in his office. Two other inmates were hauling the ash away.

The procedure was to cool the ash before inmates removed it. The proper procedure was to drop the grates on the side of the boiler, allowing ash to fall into a pit, where it was allowed to cool down. The ash was then shoveled from a pit beneath the boiler and loaded by shovel into wheelbarrows. (The supervisor, Mr. Keeling, testified that he trained all inmates in this procedure and that it is not usually hazardous; the Claimant denies being taught this procedure.)

The supervisor testified that the Claimant had cleared ash for approximately six weeks prior to the March 21, 1987, incident. He said Claimant had performed all the requirements for clearing ash before that date, and that safety goggles were available for use but not required, and were sometimes used by inmates on this duty. He also testified that his supervisor's office was upstairs and that he could see the back side of the boiler from the office. At the time of the incident, the supervisor said he was coming down to the boiler room when he was informed of an accident. The Claimant told him he had something in his right eye and pain.

Claimant testified that immediately before the accident he was helping break up cinder in the boiler and Snyder, the other inmate, was raking it out; that Snyder

Snyder, the other inmate, was raking it out; that Snyder turned a valve in the boiler which created smoke; that ash quickly filled the boiler room; and that Snyder then turned on a fan two or three feet from the boiler (apparently attempting to clear the air). Claimant testified that ash was blown into his right eye. Claimant said that inmate Snyder had been on this job longer than he and, as the senior ash man, decided procedures. Claimant also testified that the supervisor had previously ordered that the ash be taken out immediately that evening.

After the incident, the supervisor assisted Claimant wash his eye and administered eye rinse. Claimant still complained of eye pain. The supervisor took him to the prison hospital, where a nurse could not observe anything in his eye. After treatment, Claimant went back to work with an eye patch over his right eye.

The next morning Claimant still complained of pain and again was taken to the prison hospital, where the duty nurse said he had a corneal abrasion. She authorized him to be taken to Centralia hospital, where Dr. Desai treated him with pain killer and authorized further treatment at Mt. Vernon hospital. Claimant saw Dr. Desai seven times over the course of his treatment from March 22, 1987, to May 12, 1987. Claimant's own doctor, Dr. Rosenberg, examined him on May 11, 1988; his doctor's letter was admitted into evidence (Claimant's Exhibit No. 1). Dr. Rosenberg stated that while one eye did tear abnormally, this and other defects in Claimant's eyes were probably not related to the work injury. His letter also states that there were no remnants of the injury of March 1987, but also stated that there was a syndrome present that could occur following a corneal abrasion but also could derive from other injury or disease. He could not say if this syndrome (a shedding of a small area of cells on the external surface of the cornea)

was related to or caused by the injury of March 1987. Claimant also submitted an affidavit by inmate Snyder that was supportive of Claimant's testimony.

Our Commissioner found the supervisor to be a credible witness and found that he did in fact teach the proper procedure for clearing ash to both inmates, a finding that we adopt. It is also clear, as our Commissioner found, that the inmates, particularly inmate Snyder, were not following the proper procedure and knew or should have known the correct procedure.We adhere to those conclusions, but they do not dispose of this claim. We have found two aspects of this case that constitute negligence on the part of the DOC and thus the State.

First, a fan located two or three feet from a boiler being unloaded of hot ash should not be operable by inmates, however well "trained" or instructed, and should be operable only by or at least in the presence of a responsible supervisor. Although the other inmate was obviously wrong, as well as wrongheaded, to turn on the fan in this situation, he should never have been placed in a position of being able to take such unilateral action. His improper response was at least partly the responsibility of the DOC and reflects inadequate supervision. The evidence also demonstrated that the supervisor, even assuming his ability to observe the entirety of the ash-removal operation from his office, was not close enough to intervene in case of mistake, and was not close enough to prevent inmate Snyder from operating the fan even had he seen him do it (which is not claimed).

Second, although safety glasses were undisputedly available to the inmates working on this hazardous assignment, the Respondent acknowledged that neither the prison work rules nor the supervisor mandated that inmates wear glasses during ash cleaning. This too was negligent.

In *Dorsey v. State* (1977), 32 Ill. Ct. Cl. 449, this Court held that a finding that the State was negligent requires actual or constructive notice to the State, which can be met, among other ways, by a showing of foreseeability as to the particulars. Such foreseeability is apparent in this case with respect both to the operation of the fan and as to the failure to wear safety glasses when handling potentially hot ash.

In *Hughes v. State* (1984), 37 Ill. Ct. Cl. 251, it was held that because of the unique relationship between the State and a prison inmate, the State has a duty to provide safe conditions and adequate supervision for inmates to perform assigned tasks. In the present case, the Claimant has demonstrated that the State failed in both elements of this duty on the March 1987 occasion of the Claimant's injury. The State clearly required the Claimant to work in a dangerous workplace (which is not in itself improper) without supervision and without providing or requiring adequate safety precautions (providing as to the fan; requiring as to the safety glasses).

We therefore find the State, through its Department of Corrections, negligent in providing an unsafe work situation and failing to supervise it. However, we also accept the State's contention that the Claimant was guilty of substantial comparative negligence that must be taken into account in making an award. This Claimant was negligent himself in at least two ways.

First, he knew that the other inmate, Snyder, was neither a supervisor nor held any other official authority on the work detail and thus had no authority over him irrespective of prisoners' own self-imposed hierarchy, which has no legal significance whatever. Claimant thus followed Snyder's directions and methods at his own risk.

Second—and more importantly—and irrespective of the State's failure to require these inmates to wear protective glasses, the Claimant was seriously negligent in not electing to wear protective glasses while shoveling potentially-hot ash when such glasses were available to him, as is undisputed. Any reasonable adult should know better. And absent a showing that the Claimant is somehow mentally disabled or incompetent, not alleged here, that is the standard to which an adult, even a prisoner, is held under our law. The Claimant did not comport himself with due regard for his own safety, and accordingly must be held to be comparatively negligent in a manner substantially contributing to his injury. We find the Claimant 50% at fault in the comparative negligence causing his injury.

The damages to be awarded are more troublesome in this case than the liability analysis. No permanent injury was proven, and the short-term injury, while undoubtedly painful and bothersome, did not generate out-of-pocket expenses for the Claimant, as the State paid for his initial medical care. After review of the limited damages evidence submitted, and giving due credence to the medical testimony and the Claimant's testimony, we find that the appropriate compensatory damages for the Claimant's injury is $5,000.

Accordingly, we award the Claimant $5,000 reduced by 50% comparative fault. Claimant is awarded the sum of $2,500.

Ordered: judgment is entered for Claimant Lucious Hayes against the Respondent in the amount of $2,500.

(Nos. 88-CC-1363, 88-CC-4290 cons.—Claimant awarded $137.14; petition for award of costs denied.)

RUDOLPH LUCIEN, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed May 18, 1994.

Opinion filed August 29, 1994.

RUDOLPH LUCIEN, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (WENDELL DEREK HAYES, DIANN K. MARSALEK and JENNIFER M. LINK, Assistant Attorneys General, of counsel), for Respondent.

PRISONERS AND INMATES—*negligent loss of personal property—what inmate must prove.* An inmate of a State correctional facility may recover for the negligent loss of personal property from his cell if specific evidence is presented that the inmate had no cellmate, that the lost property was outside the reach of passersby, that the cell door was locked when the inmate left his cell, that there was a lot of traffic in the gallery, and that the State was in complete control of the cell doors.

SAME—*inmate's property lost during prison shakedown—State was negligent.* Where the Claimant testified that, prior to being taken from his cell to a different gallery during a prison shakedown for contraband, he moved his personal property to the back of the cell and locked the door but found the door open and the items missing upon his return, the State was found liable for the loss of the Claimant's property, since it was negligent in unlocking the cell door and allowing other inmates to be in the area when the Claimant was not present.

SAME—*inmate's testimony regarding cost of item used to establish value—award granted.* Due to a prisoner's situation, his testimony as to the commissary cost or original cost of an item is good practical evidence of its value, and based upon the Claimant's unrebutted testimony regarding the original and commissary costs of personal items lost due to the State's negligence, he was awarded damages for those items, and was also awarded the stated value of two lost books and the reasonable depreciated value of two sheets.

SAME—*State not liable for costs unless specified in statute—petition for costs denied.* The State of Illinois is liable for costs only if the statute awarding costs specifically and clearly names the State as being liable, and since the State was not so named under the general statute awarding costs to plaintiffs who recover damages, an inmate's petition for an award of costs in his claim for lost personal property was denied.

OPINION

SOMMER, C.J.

The above claims, seeking damages of $163.09 for lost property, arose from the same incident; and were consolidated by agreement of the parties at the hearing before the Commissioner.

At the time of the incident complained of, the Claimant was an inmate at the Pontiac Correctional Center.

The Claimant grieved his loss to the Pontiac Inquiry Board and the Administrative Review Board. In both cases his claim was denied, except that he was finally reimbursed $4 for two blue sheets.

The Claimant testified that while he was an inmate at the Pontiac Correctional Center in September of 1987 the prison was in a process of an institutional lockdown and shakedown as a result of a prison staff member being killed. It was during this shakedown period, on September 11, 1987, that the Claimant testified he was taken to a different gallery and held while his personal cell was searched by prison staff. After the "shakedown" of his cell, he returned to find certain personal items missing. He had no cellmate. The Claimant testified that the total worth of these items was $163.09.

The Claimant presents as his basis of recovery a negligence theory. An inmate of a State correctional facility may recover under a negligence theory for the loss of personal property from his cell if specific evidence is presented that the inmate had no cellmate, that the lost property was outside the reach of passersby, that the cell door was locked when the inmate left his cell, that there was a lot of traffic in the gallery and that the State was in complete control of the cell doors. *Walker v. State* (1986), 38 Ill. Ct. Cl. 286.

The Claimant testified that the population of his gallery was removed, so that the prison authorities could search for contraband. The Claimant further testified that he moved his property to the back of his cell; and locked the door. When he was released to return to his cell, he found his cell door open and other inmates released ahead of him in the gallery. We find the State negligent in unlocking the Claimant's cell and allowing other inmates to be in the area when the Claimant was not present.

The Claimant was denied recovery at his administrative hearings due to the fact that he could present no evidence that he had the items; or if he had them, they were contraband or belonged to someone else.

The items listed in no. 88-CC-1363 and their value included: one pair of black booties ($25 yarn cost); two blue blankets ($14.82); ten Parker ball-point pens ($22.10); nine tubes of Colgate toothpaste ($14.22). The black booties were on the contraband slip. The Claimant testified that they were made from yarn issued by the LTS staff or purchased and sent in; and classes in knitting were held at the institution. The black booties were declared contraband because they were not sold at the commissary. The black booties obviously existed; and the Claimant makes a good case for his right to possess them. Therefore, we will compensate the Claimant for the loss of the booties. As we stated in *Seats v. State* (1994), 46 Ill. Ct. Cl. 418, "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 * * *." (*Id.* at 420.) The values so established are to be weighed by the Commissioner and Court. We find the Claimant's assignment of $25 value of the yarn to make the black booties is not unreasonable. We will award the Claimant $25 for the black booties.

As to the remaining items claimed under no. 88-CC-1363, there is no evidence beyond the Claimant's testimony that the Claimant had such items; however, the Claimant's testimony was *prima facie* evidence that he had the items; and the State did not specifically rebut his testimony. The Claimant's testimony then becomes a matter of weight. In this claim we will accept the Claimant's testimony that he had the items, as they are common commissary items a prisoner would be expected to have; and the Claimant is specific in his description and number of the items missing and is not excessive. Additionally, we will apply the *Seats* doctrine and find the Claimant's valuations reasonable. Therefore, we will award the Claimant $51.14 for the loss of the commissary items.

The items listed as missing under no. 88-CC-4290 included: one law book—*Fundamentals of Paralegalism* ($23.95); a law dictionary—*Black's Law Dictionary* ($40); one pamphlet—Illinois Criminal Law and Procedure ($12); two blue sheets ($11).

The Pontiac inquiry board recommended that the librarian check to see whether or not *Fundamentals of Paralegalism* belonged to the library. The Administrative Review Board found that the book did belong to the library. There was no record of the other books.

Thus, in the case of *Fundamentals of Paralegalism*, the Claimant's testimony was rebutted; and we cannot make an award for the loss of the book. The other two books remained missing. These are not commissary items that a prisoner would normally have, but in light of the work the Claimant does, it is reasonable that he would have such books. Therefore, we will weigh the evidence in the Claimant's favor and award him the value of the books. Applying the *Seats* doctrine, the Claimant's valuations

seem reasonable and we award the Claimant the stated amount for the loss of the books.

As for the two blue sheets, the Claimant was given $4 for them by the Administrative Review Board. Though the sheets were old, the Claimant testified they were like new. We find the depreciation applied excessive and will award the Claimant an additional $5 (See *Seats* for a discussion of depreciation.)

It is therefore ordered that the Claimant be paid $137.14 to reimburse him for the value of his lost property in the above two claims.

OPINION

SOMMER, C.J.

This claim arises upon the Claimant's petition for award of costs. On May 18, 1994, this Court issued an award to the Claimant in the above-entitled claims for personal property lost while the Claimant was an inmate at the Pontiac Correctional Center.

The Claimant is now petitioning for costs. Included in his claim are the costs of copying, postage, etc. In order for a party's costs to be paid, a statute must authorize such payment. Costs include filing fees, witness fees, deposition fees and expenses, jury fees, etc. Items such as copying and postage are not costs, as they are not authorized by statute to be paid.

The only item cited by the Claimant recoverable as costs is the one-half filing fee that he paid in no. 88-CC-1363. This fee amounted to $7.50.

The State of Illinois is liable for costs only if the statute awarding costs specifically and clearly names the State of Illinois as liable for costs. *I & D Pharmacy, Inc.*

v. State (1984), 37 Ill. Ct. Cl. 37, 42. *Cayman Associates Ltd. v. State* (1980), 33 Ill. Ct. Cl. 301.

The general statute that allows the awarding of costs to plaintiffs who recover damages does not name the State of Illinois as being subject to the payment of costs under that statute. (735 ILCS 5/5—108.) Thus, costs are not recoverable in the present claims. It is therefore ordered that the petition for award of costs is denied.

(No. 88-CC-1713—Claim denied.)

In re APPLICATION OF THAIS EDWARDS.

Opinion filed February 15, 1995.

CHADWICK & LAKERDAS (JAMES G. LAKERDAS, of counsel), for Claimant.

JIM RYAN, Attorney General (ROBERT J. SKLAMBERG, Assistant Attorney General, of counsel), for Respondent.

LAW ENFORCEMENT OFFICERS AND FIREMEN COMPENSATION—*prerequisite to recovery—killed in the line of duty.* Pursuant to section 2(e) of the Law Enforcement Officers and Firemen Compensation Act, an award may be granted where a police officer is killed in the line of duty as a result of injury received in the active performance of duties as a law enforcement officer, including injury received as a result of a willful violent act by another which is related to the officer's performance of his duties whether or not he is on duty, or in attempting to prevent the commission of a crime or apprehend a suspect, whether or not the officer is on duty.

SAME—*eligibility for compensation—legislative intent—risks inherent in law enforcement.* In enacting the Law Enforcement Officers and Firemen Compensation Act, the legislature intended to compensate survivors of law enforcement officers who were exposed to risks greater than those to which the public is exposed, and the Court of Claims will compensate for deaths whereby an officer risks his life in the public interest, but not for a death unrelated to the risks inherent in the law enforcement profession.

SAME—*attempted robbery—off-duty police officer killed in motel room—claim denied.* An off-duty police officer who was killed in an attempted robbery in a motel room where he was staying with a female companion under an

assumed name was not killed in the line of duty, and his wife was denied recovery, since the officer was acting as a public citizen where he never informed his assailant that he was a police officer, threatened him with arrest, or called fellow officers for back-up.

OPINION

FREDERICK, J.

This cause is before the Court on Claimant, Thais Edwards', application for death benefits pursuant to the Law Enforcement Officers, Civil Defense Workers, Civil Air Patrol Members, Paramedics, Firemen and State Employees Compensation Act (hereinafter referred to as the "Act"). (820 ILCS 315/1, *et seq*.). Claimant was the wife of deceased City of Chicago police officer Gregory R. Edwards. Claimant claims the death benefits available pursuant to the Act. This Court, on March 15, 1989, entered an order that a hearing was necessary for the purpose of determining whether the decedent was "killed in the line of duty" as defined in section 2(e) of the Act. 820 ILCS 315/2(e).

At the request of Claimant, a hearing was conducted on April 5, 1994, at which time Claimant was represented by counsel. One witness, detective Alan Szudarski, was presented on behalf of Claimant and Claimant's five exhibits were offered and admitted into evidence.

The cases coming before this Court wherein we must determine whether a police officer was "killed in the line of duty" are very difficult cases. This case is no exception. We are always sympathetic to the survivors but must follow the law on a case-by-case basis.

The Facts

The Claimant's decedent, Gregory Edwards, was a City of Chicago police officer. Gregory Edwards was off

duty on September 29, 1987, at 12:30 a.m. Mr. Edwards was at the Roberts Motel, room 114, with a female companion, Angela Williams. Gregory Edwards was registered at the motel under the name Gregory Richards. Ms. Williams and Mr. Edwards were asleep in the bed. Ms. Williams woke Mr. Edwards up when she heard someone attempt to open the door. Mr. Edwards got dressed and Ms. Williams went into the washroom. Mr. Edwards exchanged words with someone outside. Without identifying himself as a police officer, and without calling for back-up, Mr. Edwards opened the door. Ms. Williams then heard gunshots fired. When she exited the washroom, she saw Mr. Edwards on the floor.

Mr. Edwards was carrying, and used in the altercation, a .44 caliber "Bull Dog" revolver. This was not a Chicago police department weapon. It was a secondary weapon. At the time, policemen were not allowed to carry a .44 caliber Bull Dog. However, at the time, police officers were permitted and encouraged to carry their weapons when off duty. There were handcuffs in the room and Mr. Edwards' star was also lying in the room.

Melvyn Wright was apprehended and convicted of the murder of Mr. Edwards. Melvyn Wright was at the motel with the intent to obtain money.

Chicago police detective Szurdinski testified that Mr. Edwards was not only off duty but had begun his furlough. He also testified that the woman he was with was not his wife and that Mr. Edwards registered in the motel under the name of "Gregory Richards."

The Law

Claimant correctly argues that the Act does not require a police officer to be "on duty" when his death is caused by violence or accident. Section 2(e) of the Act,

however, specifies that a person is "killed in the line of duty" as a result of injury received in the active performance of duties as a law enforcement officer. 820 ILCS 315/2(e).

Subsections (1) and (2) of section 2(e) provide two instances in which a law enforcement officer receives an injury in the active performance of duties of a law enforcement officer without the specification that he be on duty. An officer may recover pursuant to subsection (1) if the injury is a result of a willful act of violence other than by the officer and a relationship exists between the commission of such act and the officer's performance of his duties, whether or not the officer is on duty. Subsection (2) would allow recovery if the officer is attempting to prevent the commission of a criminal act or apprehend an individual suspected of committing a crime, whether or not the officer is on duty.

Claimant cites *Hicks v. State* (1973), 29 Ill. Ct. Cl. 535 in support of her position. In *Hicks, supra*, the officer was off duty and the Court found that he was killed in the line of duty. He observed a robbery taking place, attempted to prevent the commission of a crime, and was killed.

Claimant also cited two cases where fire fighters were off duty. *In re Rawson* (1982), 35 Ill. Ct. Cl. 415 and *In re Schultz* (1982), 35 Ill. Ct. Cl. 900.

The Respondent maintains that officer Edwards was not killed in the line of duty because the Act requires the officer to be engaged in the "active performance of law enforcement duties." (820 ILCS 315/2(e).) The Respondent's position is that Claimant's decedent was not responding as a police officer but merely as any other private citizen. When Mr. Edwards opened the door, he became a victim of an attempted robbery.

In support of its position, the Respondent cites *In re Application of Georgean* (1973), 28 Ill. Ct. Cl. 408. In *Georgean, supra*, the Court adopted the "risk inherent in law enforcement" standard in these cases. The intent of the Court is to compensate for deaths whereby an officer risks his life in the public interest and the intent is not to compensate for a death unrelated to the risks inherent in and peculiar to the profession of law enforcement. 28 Ill. Ct. Cl. at 411.

It was the opinion of the Court in *Georgean, supra*, that the legislature intended to compensate survivors of law enforcement officers who were exposed to risks greater than those to which the public is exposed. (28 Ill. Ct. Cl. at 413.) In this case, officer Edwards was not exposed to any risk greater than a person of the general public. The cases cited by Claimant involve an officer who became involved in a dangerous situation and became involved in the performance of official duties.

There is no evidence that Mr. Edwards announced that he was a police officer at the time of the incident or that he told the offender to cease his conduct or face arrest. The record reflects that Mr. Edwards said, "Are you having trouble with this door knob? Well then get the fuck away from the door." He did not call for back-up. He was in a somewhat compromising situation using an assumed name. Mr. Edwards was not acting in the line of duty. The facts of this case are somewhat similar to the facts in *In re Application of Schaffer* (1989), 42 Ill. Ct. Cl. 218. In *Schaffer, supra*, the decedent was killed during a robbery. Officer Schaffer was acting as a private citizen, not as a police officer, and compensation under the Act was denied.

We find that in the present case Mr. Edwards was killed while acting as a public citizen. While we sympathize with the Claimant, Thais Edwards, we are constrained to

find, based on the foregoing, that officer Edwards was not "killed in the line of duty" as required by section 2(e) of the Act. Claimant has failed to prove by a preponderance of the evidence that Mr. Edwards' death resulted from the performance of his duties as a law enforcement officer.

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

(No. 88-CC-1907—Claim denied.)

CHARLES OTT and PATRICIA OTT, Claimants, *v.*
THE STATE OF ILLINOIS, Respondent.

Opinion filed August 25, 1994.

LINDNER, SPEERS & REULAND (WILLIAM DELANEY, of counsel), for Claimants.

ROLAND W. BURRIS, Attorney General (JANICE SCHAFFRICK and TERRY OVERTON, Assistant Attorneys General, of counsel), for Respondent.

HIGHWAYS—*State owes duty of care—Claimant must prove notice of defect.* While the State owes a duty of care in the maintenance of its highways, it is not an insurer of the safety of persons traveling upon them, and in order to prevail a Claimant must establish that the State had actual or constructive notice of a defect involving the highway, and the mere fact that a defective condition existed is not sufficient to constitute an act of negligence by the State.

STATE—*negligence—when constructive notice is imputed to State.* Constructive notice is imputed to the State where a condition, by its evident nature, duration, and potential harm, should necessarily have come to the attention of the State so that the State should have made the repairs.

NEGLIGENCE—*automobile accident caused by missing stop sign—no notice to State—claim denied.* In a claim seeking damages for injuries sustained in an automobile accident at an intersection with a missing stop sign, the Claimant failed to establish that the State had notice of the dangerous condition and the claim was denied, where there was no proof that the city dispatcher's office reported the downed stop sign to the State, and although the

sign had been missing for at least two days prior to the accident, that length of time was insufficient to charge the State with constructive notice.

OPINION

PATCHETT, J.

This matter comes before the Court after a hearing before a Commissioner of this Court. All the evidence was adduced at the hearing, and the Respondent made a motion for directed verdict at the close of the evidence. Following that, the Commissioner filed a confidential recommendation to the entire Court.

The essential facts in this claim were undisputed. On April 29, 1987, at approximately 11:30 p.m., the vehicle occupied by the Claimant, Charles Ott, as driver and Patricia Ott as passenger was struck by an automobile driven by Merbeth Muzzarelli. This collision occurred at the intersection of Illinois Route 59 and 83rd Street in Naperville, Illinois. Mr. Muzzarelli had filed a claim, which was dismissed for want of prosecution on March 1, 1993.

Mr. and Mrs. Ott were traveling westbound on 83rd Street, a two-lane paved roadway. Mr. Ott had his lights on and was traveling at about 35 miles per hour. He did not reduce his speed as he approached and entered the intersection with Route 59. Mr. Ott further testified that he did not see any traffic control signs or signals as he approached and entered the intersection.

As Mr. Ott entered the intersection, he noticed the lights from Muzzarelli's car traveling southbound on Route 59 only 20 feet away. Mr. Ott applied his brakes and turned sharply to the left, but the vehicles collided.

Officer James Bedell of the Naperville police department responded to the scene of the accident. When he arrived at the scene, he noticed that the stop sign at the

northeast corner of the intersection for westbound traffic on 83rd Street was missing. Officer Bedell further testified that he had noticed the stop sign missing two days prior to the accident. At that time, he had notified the dispatcher and requested that the dispatcher notify the proper authorities. Officer Bedell, however, had no knowledge as to whether the dispatcher's office had taken any action on his report.

Carol Berry, dispatcher supervisor for the City of Naperville, testified that when notice of a downed stop sign within the jurisdiction of the State was reported, it was the City of Naperville's policy and procedure to contact the State of Illinois and advise them of the problem. However, she had no personal knowledge that a report of the downed stop sign in question was made in April of 1987, nor did she have any personal knowledge of the dispatch office making a report to the State of Illinois, Department of Transportation.

The parties stipulated that the downed stop sign in question was within the jurisdiction of the State of Illinois, Department of Transportation. The parties further stipulated that Patricia Ott had received $5,000 in settlement of her claim against Muzzarelli and $15,000 in settlement of her claim against the Township of Naperville.

The central question in this case is whether the Claimants have met the burden of proving that the Respondent had notice of the downed stop sign. The Court of Claims has consistently held that while the State does owe a duty of ordinary care in the maintenance of its highways, the State is not an insurer of the safety of persons traveling upon them. (*Hollis v. State* (1981), 35 Ill. Ct. Cl. 86, 88.) In order to prevail, a claimant must establish that the State had actual or constructive notice of a defect involving the highway. (*Scroggins v. State* (1991),

43 Ill. Ct. Cl. 225, 227.) The Court has held that the mere fact that a defective condition existed is not, in and of itself, sufficient to constitute an act of negligence on behalf of the State. (*Palmer v. State* (1964), 25 Ill. Ct. Cl. 1, 2.) Therefore, the Claimant clearly had the burden of proving that the Respondent had either actual or constructive notice of the missing stop sign.

The Claimant produced no evidence that the Respondent had actual notice of the downed stop sign. While it was clearly established that the City of Naperville had such knowledge, there was no evidence that this information was passed on to the State of Illinois.

Whether the State had constructive notice of the defect depends on the facts of each individual case. The standard to be applied to this issue was set in *Scroggins v. State* (1991), 43 Ill. Ct. Cl. 225, 227-228. There this Court held that:

> "Constructive notice is imputed to the State where a condition by its evident nature, duration, and potential harm should necessarily have come to the attention of the State, so that the State should have made repairs."

In *Skinner v. State* (1975), 31 Ill. Ct. Cl. 45, 50, this Court was faced with a very similar factual situation. There two cars collided at an intersection in which a stop sign was missing at the time of the accident. The Court found that the stop sign had been down for a little less than two days. The Court ruled that the condition must have existed for a sufficient length of time before the Respondent could be charged with negligence for not ascertaining or correcting the condition. The Court concluded that two days was not a sufficient amount of time to charge the State with constructive notice. The Court relied on an earlier decision, *Hilden v. State* (1971), No. 5652, filed May 11, 1971), which was misreported at 27 Ill. Ct. Cl. 214 as being a contracts case. There the Court

held that a two-day malfunction of a traffic signal was not a sufficient length of time to hold the State liable on constructive notice.

Obviously the facts in this case are similar to the facts in *Skinner* and *Hilden*. It can only be clearly established that the stop sign was down for two days prior to the accident. There is a total lack of proof that the State had actual notice of a defect. Based on prior decisions and the facts of this case, we conclude that the Claimants have failed to meet their burden of proof that the State had constructive notice of the defective condition. Therefore, we are granting the motion for directed verdict and denying liability and this claim.

(No. 88-CC-2692—Claim denied; petition for rehearing denied.)

ELMAN H. CLECKLEY, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed May 10, 1994.

Order on petition for rehearing filed September 19, 1994.

ROBERT M. HODGE, for Claimant.

ROLAND W. BURRIS, Attorney General (STEVEN SCHMALL, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*medical malpractice—elements of claim.* To prove medical malpractice, the Claimant must first establish the standard of care by which the Respondent's conduct is to be measured, that the Respondent deviated from the standard of care, and that the Respondent's conduct proximately caused injury to the Claimant; and 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.

SAME—*medical malpractice—podiatrist could not establish standard of care for family practitioner.* Since a medical malpractice Claimant must

establish that his expert is a licensed member of the school of medicine about which he proposes to express an opinion, in an inmate's medical malpractice claim against a family practitioner who treated his foot, a board-certified podiatrist was not competent to render an expert opinion as to the standard of care to be followed by the family practitioner.

SAME—*medical malpractice—Claimant's burden of proving proximate cause.* Because 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 his injuries defeats the claim, and the Claimant must sustain his burden by proving, generally through expert testimony, that the Respondent's breach of the applicable standard of care is more probably true than not the cause of the Claimant's injury.

SAME—*medical malpractice—infection resulting in amputation of inmate's toes—proximate cause not established—claim denied.* A medical malpractice claim alleging the failure of prison physicians to perform appropriate tests and properly diagnose an infection in a diabetic inmate's foot resulting in amputation of several toes was denied, since even assuming that the State waived the Claimant's lack of competent expert testimony as to the physicians' deviation from the applicable standard of care, the medical reports and other testimony failed to show by a preponderance of the evidence that any alleged deviation was a proximate cause of the Claimant's injury.

OPINION

FREDERICK, J.

Claimant filed his complaint sounding in medical negligence in the Illinois Court of Claims on February 25, 1988. The Claimant alleged that in 1987, while he was serving a sentence in the Illinois Department of Corrections, the State failed to diagnose his condition of osteomyelitis which led to the loss of three of Claimant's toes from his left foot and pain and suffering. The cause was tried before Commissioner Rochford.

The Claimant, Elman Cleckley, testified at the trial of this cause. Mr. Cleckley was 70 years old. He testified he has been an insulin-dependent diabetic for 30 years and takes 50 units of insulin daily. At the time of his incarceration, Claimant also suffered from high blood pressure and cataracts.

On June 7, 1986, Claimant entered Cook County Jail.

On July 11, 1986, while in Cook County Jail, Claimant developed gangrene in his left big toe. The toe was amputated in August of 1986 and the foot healed completely.

On November 27, 1986, Claimant was transferred to Joliet Reception and Classification Center where a physical examination noted Claimant had a history of diabetes, tuberculosis, eye trouble, high blood pressure, arthritis in his hands, and the amputation of the big toe from his left foot.

Claimant was transferred to Jacksonville Correctional Center on December 11, 1986. On January 10, 1987, the Claimant presented himself to the prison infirmary after noticing a blister on his left foot that started to drain pus. Doctor John Peterson, a family practitioner, performed a physical examination and noted that the Claimant's second toe was swollen and black. The doctor did not note any redness or swelling in the rest of the foot. Dr. Peterson diagnosed cellulitis in the second toe and he ordered an aerobic culture and antibiotics. He did not order an anaerobic culture.

On January 17, 1987, Claimant reported pus coming from the toe. On January 18, 1987, the drainage was noted and on January 19, 1987, the area was treated with Betadine ointment.

On January 21, 1987, Claimant was admitted to the prison infirmary with a temperature of 100 degrees and he was placed on intravenous antibiotics. Dr. Peterson examined and reviewed Claimant's history and diagnosed gangrene cellulitis.

On January 22, 1987, Dr. Drennan performed a debridement of the affected area. Claimant was further treated with oral antibiotics, Betadine soaks, and hydrotherapy foot massage. Claimant was released from the prison infirmary on February 9, 1987.

On April 18, 1987, a second toe became infected. Claimant was admitted to Passavant Area Hospital on April 24, 1987, where his second toe was amputated by Dr. Drennan. Claimant was treated with intravenous antibiotics. Bone and tissue were surgically removed. Claimant was released to his unit on May 12, 1987.

On May 12, 1987, an examination revealed that the surgery site had healed well. On July 16, 1987, Claimant presented with his third and fourth toes swollen with blisters and signs of infection. He was given antibiotics. A diagnosis of cellulitis was made and the Claimant was placed on IV medication and Betadine foot soaks. On July 27, 1987, Claimant's third and fourth toes were amputated at Passavant Area Hospital. The pathology report indicated cellulitis. Claimant returned to the prison infirmary and remained there until his amputation site healed. On August 22, 1987, Claimant's foot was sore, swollen and draining. He was put on antibiotics and instructed as to applying compression dressing on his foot.

On September 3, 1987, Claimant had some draining. He was given a prescription for antibiotics and instructed to see a physician after his release from prison. Claimant was released from prison on September 4, 1987. On September 4, 1987, Claimant had swelling from his foot to his lower leg.

Claimant first saw Dr. John Bartel on September 22, 1987. He next saw Dr. Bartel on October 27, 1987. An x-ray at that time indicated Claimant had osteomyelitis of the foot. Claimant was admitted to Illinois Masonic Medical Center on November 11, 1987. During this 19-day hospitalization, some infected bone and tissue were removed.

Claimant was examined again by Dr. Bartel on December 17, 1987. The doctor noted that the patient's

condition was improved but noted a blister on the second metatarsal of the left foot. On January 4, 1988, examination revealed an ulceration on Claimant's left foot. Dr. Bartel debrided the lesion, applied antiseptic, and provided a pad for Claimant's shoes. On January 30, 1988, the ulceration had worsened.

Dr. Bartel recommended further surgery to remove infected bone, but Claimant refused. On February 25, 1988, Claimant was admitted to Little Company of Mary Hospital and the surgery was scheduled, however, Claimant left the hospital prior to surgery.

On March 17, 1988, Claimant was admitted to Little Company of Mary Hospital under the care of Dr. Kalimuthu. On March 24, 1988, a debridement and resection of the second metatarsal bone of the left foot was performed and infected bone fragments were removed. Additional x-rays evidenced osteomyelitis of the second metatarsal. Claimant's condition improved and he was discharged on April 4, 1988. The discharge diagnosis was: (1) infected abscess of the left foot, (2) osteomyelitis of second metatarsal, (3) uncontrolled diabetes, and (4) peripheral vascular disease.

Claimant was hospitalized from November 29 to December 10, 1988, for further debridement of the infected left foot.

Claimant was again hospitalized from January 20 to February 3, 1989, at which time the affected area of the left foot was debrided and infected bone removed. Dr. Stachowski, a consulting physician, summarized Claimant's condition as follows:

"My feeling * * * is that he has a chronic infection of his foot with underlying chronic osteomyelitis. I think that the prognosis of this foot is poor and that he will eventually need, perhaps, a below-the-knee amputation. I think that therapy at this time is local therapy and good hygiene."

Claimant took some time to heal. Arrangements were made for a visiting nurse agency to follow his blood sugar and to check on his dressings.

Claimant was then seen by Dr. John Bartel on February 28, 1989, and March 9, 1989. Dr. Bartel noted the new problems at the first and fourth metatarsal and recommended amputation of the front of the foot.

Claimant testified that he consulted Dr. Bartel who told him that more radical surgery was required to finally cure the osteomyelitis. Claimant declined the surgery. Claimant received dressings and Betadine, a disinfectant, from Fantus Clinic.

The Claimant submitted copies of medical bills for treatment rendered after he left the penitentiary. The submitted medical bills total $38,366.51.

Dr. John A. Bartel, a doctor of podiatric medicine, testified on behalf of the Claimant and he testified without objection. Dr. Bartel is the medical director of the School of Podiatric College at the Illinois Masonic Medical Center and is board certified by the American Board of Podiatric Surgery in foot surgery. Dr. Bartel testified that he treats 100 patients annually for serious diabetic infections.

Based on a review of Claimant's medical records, Dr. Bartel testified that Claimant had an infection in January 1987. Dr. Bartel stated the symptoms of cellulitis and osteomyelitis are redness, swelling, open wound, drainage and pain. He stated that osteomyelitis can only be distinguished from cellulitis by the severe pain and long duration of pain caused by osteomyelitis.

Dr. Bartel further testified that Claimant would not be able to report the pain because he was suffering from

diabetic neuropathy which results in sensory loss, muscle weakness, atrophy and decreased deep tendon reflexes.

In Dr. Bartel's opinion, the only way the treating physicians could have distinguished between osteomyelitis and cellulitis in this case would be through x-rays and anaerobic cultures.

Dr. Bartel testified that the standard of care for diabetic foot infections is set forth in *The Management of Diabetic Foot Problems*, Jocelyn Clinic of New England Deaconess Hospital (1984). The procedures indicated are culture, bed rest, antibiotic, appropriate drainage, proper dressings, and neuropathic x-rays.

Based on the authorities, his review of records and his treatment of the Claimant, Dr. Bartel testified without objection that Dr. Peterson's failure to take an x-ray constituted a deviation from the standard of care. The ability to establish osteomyelitis through an x-ray depends on how much bacteria has attacked the bone. Where the infection is well advanced, an x-ray could give a definitive reading. Dr. Bartel stated that standard treatment for diabetics, where vascular compromise is a problem, includes both aerobic and anaerobic cultures. Dr. Bartel concluded that the failure to take an anaerobic culture was a deviation from the standard of care.

Aerobic and anaerobic cultures are necessary to determine the proper level of antibiotics necessary to heal an infection. Dr. Bartel testified that with osteomyelitis, skin can cover a wound and give the appearance that it is clean or healed even though it is still infected. It will break down later and drain and then come back again. Dr. Bartel believed that this process occurred to Claimant.

After the culture was taken, Claimant was treated with Keflex for three days, then with Ampicillin for three

days, and then with Keflex. Dr. Bartel opined that this was inconsistent with any infectious disease process of which he was aware. Dr. Bartel testified Claimant should have been given an antibiotic for at least five days and up to ten days, or if osteomyelitis was diagnosed, an antibiotic should have been given for up to six weeks. He claims it was a deviation from the standard of care to change from one antibiotic to another and using it for a short period not knowing whether osteomyelitis was present. Relying on *The Management of Diabetic Foot* by Levin (1977), Dr. Bartel also testified that intravenous antibiotics should have been ordered instead of oral antibiotics because they provide greater concentration to the infected area.

With respect to the debridement performed on January 22, 1987, Dr. Bartel testified that it was unclear from the records whether the debridement procedure was sterile. Relying on the fact that a registered nurse signed the records, Dr. Bartel believes the debridement procedure was improper because it was not performed by a physician under sterile conditions. Dr. Bartel gave the opinion that this procedure constituted a deviation from the standard of care regardless of whether Claimant's diagnosis was for cellulitis or osteomyelitis.

Dr. Bartel further testified that a Betadine solution rather than an ointment is more effective in healing an infection. Dr. Bartel contends that it was inappropriate to use solution and ointment on Claimant. Dr. Bartel relied on *The Diabetic Foot*, which states, "topical paste and cream should be avoided because of their tendency to promote maceration." Maceration is a softening and dampening of an infected area and is harmful because it allows the infection to spread when moisture gets into the area and opens up the fascia planes. It also closes the area and prevents the infection from draining.

Dr. Bartel contends that the medical staff deviated from the standard of care by not opening the toe sooner than the debridement on January 22, 1987. Dr. Bartel testified that since there was a culture, there must have been drainage and the area should have been opened immediately in case of infection. Dr. Bartel contends that debridement or incision and drainage should have been done promptly regardless of whether cellulitis or osteomyelitis was diagnosed. Dr. Bartel contends that the debridement procedures and Betadine ointment soaks were not the equivalent of incision and drainage. The debridement would remove the outer layer of tissue and effectively open the area up to allow draining, but the Betadine ointment would close it and stop it from draining. However, Dr. Bartel candidly admitted that Claimant's condition improved after the debridement procedure.

Dr. Bartel also testified that it was improper to soak Claimant's foot at the same time Claimant's toe was being debrided. Soaking could result in an open wound being further macerated by the ointment, fluids and hydromassage causing the fascia planes to open further perpetuating the infection. Dr. Bartel admitted that sometimes after the infection is healed, soaking and whirlpool to debride is indicated. However, it is Dr. Bartel's opinion that this is not true in the case of an acute infection such as Claimant had.

Dr. Bartel contends that after bone was removed during debridement, a culture and/or pathology report should have been completed to determine the source of the problem. Dr. Bartel contends that the failure to do this was a deviation from the standard of care.

Claimant's ability to control his blood sugar level would increase his ability to heal. Dr. Bartel contends that while Claimant was incarcerated, his blood sugar level was not under tight enough control.

Dr. Bartel first treated Claimant following his release from Jacksonville Correctional Center in September 1987. Following x-rays taken in October, Dr. Bartel diagnosed Claimant as having osteomyelitis. Dr. Bartel performed surgery in November and removed the remaining infected parts of the phalanxes. The pathology report and the aerobic and anaerobic cultures confirmed the diagnosis of osteomyelitis. Dr. Bartel could not testify to a reasonable degree of medical certainty that Claimant's infection would have healed at Jacksonville had cultures, x-rays, incision and draining been performed because diabetics are a difficult problem. Without adequate care, the chance of healing was much less. In Dr. Bartel's opinion, it was certain Claimant would continue having problems and require further surgery. Dr. Bartel concluded that ultimately Claimant would need a below-the-knee amputation.

Dr. John Peterson, a medical doctor, was the medical director of Jacksonville Correctional Center during the period of Claimant's incarceration. He managed Claimant's treatment during his incarceration at Jacksonville. Dr. Peterson testified that he had been in private practice for 11 years and was on staff at Passavant Area Hospital. Dr. Peterson is certified in family practice and treats both diabetic and non-diabetic patients with foot problems in his private practice and at Jacksonville Correctional Center. Further, he was a board member for various diabetes-related organizations and a speaker for the State American Diabetes Association.

Dr. Peterson treated cases of osteomyelitis as a bacterial infection of the bone. He described the principle signs of osteomyelitis as redness, swelling, pain and drainage if the condition goes untreated. He testified that in his clinical opinion, Claimant did not have osteomyelitis in January of 1987. He found no evidence of osteomyelitis

in the physical examination. Dr. Peterson determined that Claimant did not have osteomyelitis because the end of his second toe was black and he had no redness or swelling in his foot. He found no reason to suspect that any other part of the foot was infected.

The medical staff was treating Claimant for a number of medical problems, including diabetes, hypertension, and glaucoma. As a medical doctor, Dr. Peterson is trained in general medicine. He stated that podiatrists, such as the Claimant's expert, Dr. Bartel, generally do not treat someone who has diabetes or hypertension and that they are limited to treating the foot and ankle.

Dr. Peterson testified that inmates at Jacksonville Correctional Center received the same, if not a better, standard of care than they would receive in the Jacksonville Community Hospital because the infirmary is so accessible.

Dr. Peterson believed that Dr. Bartel's criticisms and opinions are flawed because Dr. Bartel's report rests on the assumption that Claimant had osteomyelitis when Dr. Peterson first treated him in January of 1987. Dr. Peterson found no evidence to suggest that osteomyelitis was present. Dr. Peterson opined that Claimant could have developed the disease after his release from Jacksonville. Dr. Peterson suggested that the result of Dr. Bartel's report is based on that initial erroneous assumption.

At the initial examination, Dr. Peterson ordered an aerobic culture for Claimant's gangrenous toe and put him on Keflex, an antibiotic. Because the culture established that Claimant's infection was sensitive to Keflex, Dr. Peterson did not change the medication. Dr. Peterson did not order x-rays because the absence of redness or swelling in the foot established that the condition in Claimant's

second toe had not affected the rest of his foot. Dr. Peterson referred Claimant to Dr. Drennan, a general surgeon at Passavant Hospital, because his condition appeared to be a surgical problem that required surgical debridement. Dr. Drennan agreed with the diagnosis of gangrene to the toe. Dr. Drennan debrided Claimant's second toe and prescribed Betadine hydrotherapy. Dr. Peterson and Dr. Drennan concurred in diagnosis and treatment.

Dr. Peterson testified that Betadine ointment was appropriate for Claimant's condition because it prevents infections from spreading. Dr. Drennan had successfully used the therapy for years. Claimant's condition gradually improved following the debridement procedures. He was eventually released from the infirmary to the prisoner population at Jacksonville. He was taken off the antibiotics, but he continued daily Betadine hydrotherapy foot massage.

Claimant experienced no further medical problems until April of 1987 when the proximal part of his toe exhibited signs of possible infection. He was admitted to Passavant Hospital where Dr. Drennan amputated his second toe. Dr. Peterson concurred with the decision to amputate, concluding that if it had not been done, the infection could have been life-threatening and could have spread to the rest of Claimant's foot and possibly to the rest of Claimant's body. Following the surgery, the area surrounding Claimant's amputated toe began to heal.

Dr. Peterson testified that no more aerobic cultures were necessary because Claimant was responding well to the antibiotic and there was no reason to repeat a culture with improvement. An anaerobic culture is a deep culture which is used only if there is evidence of a deep infection, redness or swelling in the foot, according to Dr. Peterson. It was not ordered for Claimant because these clinical

signs were not present in Claimant's foot. For the same reasons, Dr. Peterson did not order any x-rays since there was no involvement of the foot. In regard to Dr. Bartel's assertion that the wrong antibiotic was used, Dr. Peterson stated that the culture and sensitivity report demonstrated that Keflex was the correct antibiotic. He was able to discontinue it because the toe had healed and there was no further evidence of infection. Dr. Peterson used oral rather than IV medication because it had been effective. However, Dr. Peterson noted he would use IV medication if he were treating osteomyelitis.

Following the debridement on January 21, 1987, the top of Claimant's second toe was open, but there was no sign of infection or drainage from February to April of 1987. Dr. Peterson disputed Dr. Bartel's assertions that the Betadine soaks were improper and that Claimant had a diabetic pressure ulcer. Dr. Peterson found that Claimant's condition was a vascular problem stemming from a lack of blood supply to his toe. Dr. Peterson testified that the better control one has of diabetes, the less vascular problems one will have. Dr. Peterson indicated that smoking also decreases blood flow and that Claimant would help improve his condition by not smoking.

Dr. Peterson disputed Dr. Bartel's claim that some of the debridements were non-sterile and performed by non-physicians. Dr. Peterson and Dr. Drennan performed all the surgical debridements using sterile gloves, sterile drapes and sterile treatments. Following the amputation, there was no evidence of a deep infection or drainage which would have suggested the need to perform another culture.

Dr. Peterson also took issue with Dr. Bartel's assertion that Claimant's blood sugar levels were not monitored frequently enough. Dr. Peterson testified that there

was frequent monitoring of Claimant's blood sugar levels during his incarceration and the State dietician consulted with Claimant to try to get him to comply with his diabetic diet. Claimant's blood sugar level was measured at 14 when he entered the Department of Corrections. His blood sugar level dropped from 14 to 9 after two months in the infirmary. Dr. Peterson testified that this is a significant improvement in light of the fact that a non-diabetic would have a level of six. Claimant's blood sugar level returned to 12 following his return to the general population.

Dr. Peterson countered Dr. Bartel's complaint that there was no incision and drainage by stating that there was no indication it was necessary because there was no evidence of redness or swelling of the foot.

In response to Dr. Bartel's testimony that the presence of an exuded bone in Claimant's foot was a sign of osteomyelitis, Dr. Peterson testified that Dr. Bartel erroneously assumed that there was an exuded bone from his reading of Claimant's medical records. Dr. Peterson testified that Claimant did not have a bone that exuded through the skin. Dr. Peterson testified that bone did not come out, but instead Dr. Drennan removed the blackened area.

Dr. Peterson indicated that Dr. Bartel failed to order x-rays or any cultures or diagnose osteomyelitis when he first saw Claimant on September 22, 1987. Dr. Bartel did not diagnose osteomyelitis until October 27, 1987, almost two months after Claimant was discharged from Jacksonville. Dr. Peterson noted that, in his medical opinion, Claimant could have developed osteomyelitis during that period of time. The pathology reports which followed the amputations confirmed the diagnosis of cellulitis and did not show evidence of osteomyelitis.

In response to whether there is a danger of maceration with Betadine soaks, Dr. Peterson testified that such a danger exists with a pressure ulcer, but that was not the case with Claimant who had a gangrenous toe.

Dr. Peterson testified that a high blood sugar level such as Claimant's on February 14 could be a sign of noncompliance or infection. Dr. Peterson testified that the debridement done was equivalent to the incision and drainage procedure used with a diabetic foot infection. Furthermore, he said that the incision and drainage procedure is used when there is a deep infection to allow for drainage.

From May to July, Claimant's foot had healed and there were no signs of infection. The third and fourth toes appeared to be infected on July 16, 1987. On July 17, Claimant's third and fourth remaining toes appeared reddened. This was the first time Claimant's toes or foot exhibited signs of reddening. Dr. Peterson testified that both cellulitis and osteomyelitis can cause reddening or swelling. There was swelling of the left foot and ankle on July 19th which could have resulted from cellulitis as well as other infections. Claimant was given intravenous antibiotics on July 21, 1987. However, Dr. Peterson's notes indicated that Claimant's foot had no swelling, redness or pain.

Dr.Peterson testified that Claimant suffered from peripheral vascular disease and diabetic neuropathy and he acknowledged that as diabetes progresses, a diabetic may lose sensation both to touch and pain.

Subsequent to the amputation on July 27, 1987, Dr. Peterson examined Claimant on August 4 and found Claimant's foot was clean and healing. There were no signs of infection and his blood sugar level was good. Dr. Peterson continued the use of antibiotics for 10 days. On

August 5, the incision exhibited one small open area with red serous drainage, but no sign of infection. On August 6, there was a small amount of bleeding from the incision, but no redness, swelling or pain and the incision was clean. On August 8, the incision was clean and there was no drainage.

September 3, 1987, was the last time Dr. Peterson saw Claimant. Some discharge was present from the amputation site, the skin around the rest of the incision looked good. Shortly before his discharge, Claimant developed some swelling and drainage. He was put on antibiotics for a possible infection in his foot. Dr. Peterson testified that the medical staff's ability to respond to Claimant's new condition was limited because of his imminent release. Because Claimant's foot was not completely healed, Dr. Peterson stressed the need for him to seek immediate medical attention after his discharge.

Dr. Peterson testified that Claimant's condition from January 12 to September 4, 1987, was a recurrent problem rather than a persistent one and that his infection only became persistent right before his release. From May to July, Claimant experienced no problems with his foot. He was in the general population and walking without experiencing a problem. For individuals who have serious peripheral vascular disease, such as Claimant, who had a toe amputated prior to his arrival at Jacksonville, the question is not if they lose more toes, but when. Dr. Peterson stated that while Claimant never had any specific testing for peripheral vascular disease, the most likely cause of his initial amputation was the peripheral vascular disease which is the deterioration caused by diabetes. Dr. Peterson testified that while a diabetic may not feel pain, there is redness and swelling, and if the condition is left untreated, it will point to the surface and cause drainage.

In Dr. Peterson's opinion, it is unlikely that osteomyelitis could have been present without the symptoms of redness or pain. In explaining his treatment of Claimant's condition, Dr. Peterson testified that the presence of redness and swelling could signal either osteomyelitis or cellulitis. First, the patient is treated for cellulitis. If the condition does not improve, the doctor must then think about osteomyelitis and further tests.

Dr. Drennan's final diagnosis of Claimant was Buerger's Disease and gangrene in the third and fourth toes of the left foot. Buerger's Disease is an indication of vascular problems wherein the toes become gangrenous. Smoking would worsen the condition of a diabetic's toes to the point at which he would lose them.

Finally, Dr. Peterson acknowledged having heard of the two diabetic foot books presented as authority by Dr. Bartel, however he admitted that he had never read them.

Cindy Boston, a registered nurse, testified that she is currently the health care administrator at Taylorville Correctional Center in Taylorville, Illinois. She was the health care administrator at Jacksonville during the time of Claimant's incarceration. She has also worked as the head nurse at Passavant Hospital since 1970. Nurse Boston did not treat Claimant. Her testimony was based on her review of Claimant's medical records, her own summary of his medical records, Dr. Bartel's original statement, deposition and letter to the Claimant's attorney, and the personal property inventory records of Claimant during his stay at Jacksonville. Ms. Boston presented three personal property inventories of Claimant from January 12, April 21 and July 20, 1987. Claimant had nine packs of cigarettes in April and eight in July. The January and April inventories revealed that Claimant had soda pop and the July inventory established that Claimant had cookies in his possession.

Nurse Boston testified that Claimant appeared for medical treatment approximately the same number of times that he failed to appear. Inmates can refuse any form of medical treatment unless it involves a life-threatening condition.

With respect to sugar products, soda pop and cookies in Claimant's inventories, nurse Boston discounted the notion that Claimant was medically treating his diabetic condition. She testified that it is not standard procedure for diabetic inmates to treat their own diabetes. Help was available to an inmate with a low blood sugar level within a few minutes. Inmates are afforded daily access to the health care unit to request medical services.

The visits Claimant missed at the health care facility were for showers, cleaning his feet in the bath, applying dressings, and allowing the nursing staff to monitor his progress.

For an inmate on a special diet, instruction is given, a copy of the diet is brought to dietary, and the inmate goes to a special diet line. Claimant received daily insulin injections at the health care unit.

In response to Dr. Bartel's criticisms, nurse Boston disagreed with Dr. Bartel's assertion that no culture was taken on January 17 when it was reported that pus was present. The medical staff had already taken a culture on January 12 prior to starting Claimant on the medication. Results of the culture established that Claimant was sensitive to the medication and she concluded that it was the proper treatment.

She testified that Dr. Bartel was incorrect in stating that only physicians can perform debridements and that the debridements were not performed under sterile conditions. A debridement procedure can be as simple as

cleaning a wound, a job which nurses can perform. Doctors Drennan and Peterson performed all of the surgical debridements. Registered nurses performed non-surgical debridements under sterile conditions.

In response to Dr. Bartel's assertion that there was an entry citing decreased swelling in Claimant's foot, ankle and calf on April 18, nurse Boston testified that Dr. Bartel was relying on a subjective assessment that Claimant himself gave to Dr. Duval. The note reflects Claimant's own description of what the toe looked like, not whether there was actually any swelling present.

The American Correctional Association ("ACA"), an accrediting body responsible for inspecting correctional facilities and reviewing all aspects of care to insure general standards are met, had approved the conditions at the Jacksonville Correctional Center.

Jacksonville uses a hydrotherapy foot massage pursuant to the physicians' orders. The process was described as a small soaking foot bath with a motor that vibrates the water, not comparable to the much larger whirlpools used in community hospitals. The foot massage at Jacksonville is used with a solution, ordered by the physician, to gently shake the water in order to clean a wound and remove only dead tissue as opposed to doing it by hand which would also remove healing tissue.

The law is clear that to establish medical malpractice, Claimant must first establish the medical standard of care by which the Respondent's conduct is to be measured, that the Respondent deviated from the standard of care, and that the Respondent's conduct proximately caused injury to the Claimant. (*Massone v. Holmes* (1990), 197 Ill. App. 3d 886.) 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 Claimant has attempted to establish the standard of care through the testimony of Dr. Bartel, a board certified podiatrist, who is well-qualified and experienced in the treatment of the diabetic foot.

Dr. Bartel testified that the standard of care for treatment of the diabetic foot is set forth in *The Management of Diabetic Foot Problems*, Jocelyn Foot Clinic of New England (1984). The proper procedures as indicated in that text are culture, bed rest, antibiotic, appropriate drainage, proper dressings and neuropathic x-rays.

However, the law is also clear that it must be established that the Claimant's expert is a licensed member of the school of medicine about which he proposes to express an opinion. While Dr. Bartel appears to be an eminently qualified podiatrist, he is not licensed in the same school of medicine as Dr. Peterson, a licensed medical doctor board certified in family practice. Accordingly, a podiatrist is not competent to render expert opinion as to the standard of care to be followed by a family practitioner in this case. *Dolan v. Galluzzo* (1979), 77 Ill. 2d 279; *Purtill v. Hess* (1986), 111 Ill. 2d 229.

Claimant has therefore not proven that the standard of care for a family practice medical doctor dictated an x-ray of the Claimant's foot to make a proper diagnosis and

a determination of whether Claimant was suffering from cellulitis and/or osteomyelitis. It is Claimant's position that Respondent's failure to x-ray the affected area constituted a deviation from the standard of care. We cannot agree because of the lack of competent medical expert testimony.

Respondent contended that the Claimant was not suffering from osteomyelitis at the time and that an x-ray was not indicated because the doctors did not observe redness of the area and that Claimant did not report pain. Respondent did not establish another standard of care nor did Respondent dispute the standard of care presented by Claimant. No non-treating experts testified for Claimant or Respondent as to the standard of care on this point.

Respondent's failure to x-ray the Claimant's foot establishes a deviation from the standard of care as set forth by Claimant's expert for a podiatrist but not for a medical doctor. If Claimant had called an expert licensed in the same school of medicine who gave similar opinions as Dr. Bartel or if we found a waiver of the expert's qualifications based on Respondent's incredible lack of objections, we could have found a deviation from the standard of care. The symptoms of cellulitis and osteomyelitis are essentially the same except that osteomyelitis has more intense pain and a longer duration of pain. The providers could not rely on Claimant's pain as an indicator since Claimant suffered from peripheral neuropathy which reduced his sensitivity to pain.

In addition, there were other signs which could have been indicators of osteomyelitis. On January 20, 1987, Dr. Peterson's notes indicated the presence of pus in the affected area and that the patient had a fever of 101 degrees. Dr. Peterson admitted that both of these symptoms

could have indicated osteomyelitis. Also in April of 1987 the patient demonstrated swelling in the calf and ankle, which is another possible indicator of osteomyelitis.

The Respondent failed to object to the opinions of Dr. Bartel and in light of Claimant's complete medical history, the Respondent's physicians most likely could not have made a reliable diagnosis without an x-ray of the foot and anaerobic cultures which would have conclusively distinguished between cellulitis and osteomyelitis. However, there is no competent expert testimony on this point that we can consider.

Those practicing the medical arts in the penitentiary are held to the same standard of care as those practicing in the communities in 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. Such a restraint would be the imminent release of a patient and the subsequent inability to continue treating the patient. However, those types of 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. Kuhn* (1978), 56 Ill. App. 3d 997, 1002.

The second issue is whether the Respondent's failure to x-ray and perform anaerobic cultures on the Claimant's foot and make a conclusive diagnosis was a proximate cause of the Claimant's injury. Even if we were to consider that the Respondent waived any objection to the

opinions of Dr. Bartel, the critical testimony of Dr. Bartel is as follows:

Q. "Do you have an opinion as to a reasonable degree of medical certainty that if these indicated procedures had been followed, cultures, x-rays, incision and draining and so forth during the time period that Mr. Cleckley was in Jacksonville Correctional Center whether his infection would have healed and he could have saved all or some of his toes?"

A. "There is no way to say that for certain because diabetics are a difficult problem, but without adequate care and standard of care the chances of him healing up was much less and I feel that the patient should have—even if he was incarcerated should have standard of care."

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 285.) 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.) Dr. Bartel was specific in his opinions that Dr. Peterson deviated from the standard of care. However, Dr. Bartel did not specifically testify or state words to the effect that it was more probably true than not true that Respondent's negligence was

the proximate cause of Claimant's injury. (*Kaplan v. Berger* (1989), 184 Ill. App. 3d 224.) Claimant spent a considerable amount of his time questioning Dr. Bartel in regard to establishing the standard of care and the deviations therefrom. The testimony as to proximate cause is virtually nonexistent and is too speculative even if we accepted Dr. Bartel's opinions against a medical doctor. As the Claimant must establish that the failure to diagnose 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.

Dr. Bartel, a podiatrist, testified that in his opinion and assuming Claimant had osteomyelitis while under the care of the Respondent, if Claimant had been diagnosed and the infected bone had been removed, the Claimant would have had a chance to heal and further surgeries would have been prevented.

However, the Claimant's treatment history does not lend credence to his position. Claimant's history indicated a multitude of health problems including diabetes, tuberculosis, eye trouble, high blood pressure and arthritis, in addition to a prior amputation. Claimant had one toe amputated prior to his incarceration in the State facility while incarcerated at a Cook County facility. In the opinion of Respondent's expert, Dr. John Peterson, M.D., the issue was not if further amputation would be necessary, but rather when they would be necessary. In addition, Claimant's failure to comply with some of his medical treatment may have contributed to his own injury.

Evidence was presented to establish that Claimant missed a number of scheduled visits at the health care facility for monitoring of Claimant's progress and he had refused to comply with his current doctor's recommendation and had discontinued treatment. There were also periods of time while incarcerated that Claimant did not have foot problems and the toes were healing.

Finally, and most importantly, the pathology reports on the bone removed by amputation from Claimant during his incarceration did not indicate the presence of osteomyelitis. This would indicate that no osteomyelitis existed during this time, which would support Dr. Peterson's contention that osteomyelitis developed after Claimant was discharged.

Following each of the amputations performed during Claimant's incarceration, pathology studies were performed on the bone and the pathology reports did not indicate the presence of osteomyelitis. Respondent's expert, Dr. John Peterson, testified Claimant may have developed osteomyelitis in the period following his release from the State prison on September 4, 1987, and Dr. Bartel's diagnosis of osteomyelitis on October 27, 1987.

We find that Claimant has failed to prove by a preponderance of the evidence that any alleged deviation was a proximate cause of Claimant's injury. The evidence is more probable than not that Claimant did not have osteomyelitis until very late in his incarceration or after release and prior to the x-rays taken by Dr. Bartel. The fact that the pathology reports did not indicate osteomyelitis, the fact that Claimant had periods of no infection or medical problems to his feet, and the fact Dr. Bartel did not initially order x-rays are all significant in our decision.

We also find that the cigarettes, soda pop and cookies listed in the inventory sheets do not constitute comparative

negligence. The burden of proving Claimant's comparative negligence was upon the Respondent. (*Casey v. Baseden* (1986), 111 Ill. 2d 341.) However, not every negligent act of a claimant will be considered under the doctrine of comparative negligence. We find the evidence presented too speculative to sustain a finding of comparative negligence regarding the cigarettes, soda pop and cookies.

For the foregoing reasons, it is ordered, adjudged and decreed that the Claimant's claim is denied.

ORDER

FREDERICK, J.

This cause comes on Claimant's petition for rehearing, or in the alternative, a new trial, and the Court having reviewed the entire docket and all pleadings, transcripts, and the Court's opinion, and the Court being fully advised in the premises, wherefore, the Court finds:

(1) That the Court correctly apprehended the facts and the law in this case.

(2) That even if the podiatrist's testimony was competent, the Claimant failed to prove by a preponderance of the evidence that Respondent's actions were the proximate cause of Claimant's injury.

(3) That the Court found the testimony which established a lack of proximate cause more credible.

Therefore, it is ordered that Claimant's petition for rehearing or in the alternative, a new trial, is denied.

(No. 88-CC-3240—Claim denied.)

NORMAN C. JOHNSEN, Claimant, *v.* BOARD OF TRUSTEES OF SOUTHERN ILLINOIS UNIVERSITY, Respondent.

Opinion filed January 13, 1995.

CARR, KOREIN, TILLERY, KUNIN, MONTROY, GLASS & BOARD (STACI M. YANDLE, of counsel), for Claimant.

REED, ARMSTRONG, GORMAN, COFFEY, THOMSON, GILBERT & MUDGE (JOHN L. GILBERT, of counsel), for Respondent.

EMPLOYMENT—*wrongful discharge—program cutbacks—tenured professor's claim denied.* A tenured university professor could not prevail in his claim seeking damages for the wrongful termination of his teaching position, where the evidence showed that, after the Claimant's program was validly eliminated due to cutbacks, the university made substantial efforts to place the Claimant in suitable alternate employment given the available positions and the Claimant's desires, but no such position was available at the university.

OPINION

FREDERICK, J.

Claimant filed his claim in the Court of Claims on March 15, 1988. Norman C. Johnsen, the Claimant, contends that the Respondent, the Board of Trustees of Southern Illinois University, improperly terminated his position as a tenured professor.

The Claimant was initially hired by Southern Illinois University at Edwardsville (SIUE) as a community development specialist in 1962. Claimant remained in that position for five years until he switched his focus to the development of SIUE's new campus in 1967. On April 1, 1967, Professor Johnsen was appointed to the Department of Earth Sciences, Geography and Planning, and was fully tenured on April 1, 1971. In September 1971 the Illinois Board of Higher Education approved the Masters of Science Degree in City and Regional Planning (MCRP

program). The MCRP program was in the Earth Sciences Department within the Division of Social Sciences.

Southern Illinois University at Edwardsville is an institution of higher education governed by its own by-laws and statutes adopted by its board of trustees. Among those statutes and by-laws are specific guidelines regarding tenure within the university. Pursuant to the by-laws and statutes approved July 1, 1964, with amendments on March 10, 1977, SIUE adopted regulations regarding the termination of tenured faculty. These regulations permit termination of a tenured professor for cause or in case of financial exigency or cutbacks in its programs. The statutes and by-laws indicate that the termination process of a tenured professor should conform to the principles of the American Association of University Professors (AAUP).

In April of 1983 Claimant learned of the university's intent to terminate the MCRP program. At that time, Social Sciences Dean Susan Jacobitti informed Claimant that the trustees of the university were likely to eliminate the program. Following this meeting with Dean Jacobitti, Claimant met separately with Dean Samuel Pearson, Jacobitti's successor and vice president, and with Barbara Teters, then vice president provost.

On May 4, 1984, Dr. Teters and Dean Pearson met with Professor Johnsen to inform him of the schedule of events assuming that the decision to terminate the MCRP program would be approved by the board of trustees. On May 14, 1984, Dr. Teters sent a letter to Claimant outlining the substance of their earlier meeting.

As part of the May 14, 1984, letter, Dr. Teters outlined the university's plan concerning Claimant's future employment. First, Claimant would remain on full salary for two years and would be given a light teaching load;

second, Dr. Teters would circulate Claimant's curriculum vitae (CV) to all units in Academic Affairs and to the directors of other areas for consideration for employment with or without a period of retraining; third, a proposal for preparatory period would be considered if Claimant wished to seek employment external to the university; fourth, the director of personnel would see to it that Claimant received all job announcement sheets and would also forward copies of the appropriate job announcements from other agencies and institutions; and finally, the director of personnel would write to his counterparts in other State institutions to ascertain whether they had any openings that would have been of interest to Claimant. Claimant made no objections to this plan.

Additional programs and tenured faculty were terminated along with Claimant's program and Claimant's tenured faculty position, including the Human Services program and several other faculty members, all of whom the university sought to accommodate along with Claimant.

On June 14, 1984, Dr. Teters sent a letter to Claimant informing him of five openings which were anticipated to occur in the School of Social Sciences during the following two years. She also reiterated her intent to circulate Claimant's CV with her recommendation that he be given prior consideration for any openings within the following two years.

On June 15, 1984, Dr. Teters sent a memo to the dean of the School of Social Sciences indicating that Claimant and other affected faculty might be seeking appointments to the positions which were outlined in her letter dated June 14, 1984. Dr. Teters also requested that any applications from Claimant and other affected faculty members be given consideration and that no other persons should be offered positions unless the candidacy of

Claimant and other affected faculty members were reviewed.

On July 19, 1984, Dr. Teters circulated Claimant's CV to the Academic Affairs Conference. Dr. Teters requested that the CV be reviewed and that Claimant be given consideration for any openings in the following two years. The deans were instructed to inform Claimant directly if any position became available. The following day, the dean of the School of Social Sciences sent a memo to department chairs identifying faculty which had been adversely affected by termination of the MCRP program and expressing their desire to remain with the university. The chairs were informed that the faculty's CVs were in the dean's possession and available for review.

On September 18, 1984, Dr. Teters sent a memo to Claimant and other affected faculty members with an attached job announcement for the position of academic advisor. The faculty members were instructed to reply to the director of the office of Academic Services. Claimant did not follow up on the academic advisor position and received no further contact from the university regarding possible openings.

Dr. Teters and Dean Peterson continued to consider Claimant for positions and explore employment possibilities for Claimant following Dr. Teters' memo of September 18, 1984, although Claimant may not have been aware of these efforts.

In 1986, pursuant to Claimant's internal grievance, the disciplines in which he believed he could continue to teach were canvassed by the university. No positions were identified which were either available or for which Claimant was best qualified.

A peer committee was formed in May of 1985 to review the university's administration's efforts to respond to all the faculty affected by the various program terminations at the time. The committee was styled the Ad Hoc Committee. The committee determined that the university's efforts regarding Claimant were adequate.

While Claimant was not told to seek work elsewhere after his meeting with Dean Jacobitti, her memorandum clearly established that Claimant knew or should have known of the uncertainty of his position as early as May of 1983. Claimant never identified a position which Claimant believed should have been made available for him or was available and which he could fit. Had Claimant applied for the position in the office of Academic Services of which he was notified on September 18, 1984, he likely would have been hired for that position. Claimant voluntarily retired in June of 1986 and has been receiving retirement benefits ever since.

The parties are in agreement that the termination of the Claimant's tenured position was to conform to the principles of the American Association of University Professors (AAUP). The parties disagree on what those principles are. The testimony of Dr. Peters established that the university interpreted its policies to obligate the university to be as helpful as possible, match employees with needs, perhaps provide modest retraining and special consideration for positions.

The university's obligation was characterized by Dr. Teters as an obligation to make every reasonable effort within prevailing constraints to find other employment for displaced tenured faculty depending upon the circumstances. Dr. Teters confirmed this as the view of the administration of the university pursuant to its tenure policy. Dr. Teters also indicated that if there were appropriate

openings in existence which could be filled by Claimant or other displaced faculty, the university would make a special effort to try to see that the person received the position. She clearly indicated that no positions would be created.

Claimant's expert, Matthew Finkin, explained the obligation, according to Claimant's position, as the university making every effort to find a suitable position for Claimant if there was one for which he was qualified. He understood the obligation to include the amendments to the AAUP.

Respondent contends that the evidence established that the university was obligated to make reasonable efforts under all prevailing and applicable circumstances to attempt to find alternate employment for the Claimant within the university until he retired in July of 1986.

Claimant contends the AAUP's later adopted Recommended Institutional Regulations (RIRs) which put a duty on the university to make every effort to find Claimant a suitable position. Respondent argues the university never adopted the RIRs.

In a wrongful discharge case, the burden is upon the claimant to prove his case by a preponderance of the evidence. (*Leonida v. State* (1979), 33 Ill. Ct. Cl. 125.) Claimant's position appears to be that because he is a tenured professor whose program was validly abolished, he can sit back, do nothing, and even fail to apply for a position. If the university does not make every effort to find him suitable employment within his department whether such employment exists or not, he can then collect $222,747.53.

We find this position untenable. We need not find that the university must make every reasonable effort or every effort because under the facts of this case, using either

effort would have made no difference. When the MCRP program was validly terminated, additional programs and faculty were also terminated. There were only so many positions available which could be filled by the affected faculty. It is unfortunate, but there just was not an employment fit for Claimant within the university. As there was no employment fit, he was not wrongfully discharged. If Claimant had shown a position for which he was qualified that went to a non-tenured faculty member during the two-year period or some other evidence that he was wrongfully denied an employment fit for him, he would have been well on his way to meeting his burden. We are convinced under the facts and circumstances of this case that the Respondent made substantial efforts to place Claimant in employment within the contexts of available positions and Claimant's desires. The evidence, however, is overwhelming that there just was not a position for Claimant at SIUE after the MCRP program was terminated.

We are also concerned with Claimant's attempts to mitigate his damages. If we had found a wrongful discharge, which we have not, it appears from the evidence that beyond retiring, Claimant did virtually nothing to mitigate his damages. (*Umbaugh v. Board of Trustees of SIU* (1985), 37 Ill. Ct. Cl. 151.) Because of our decision on wrongful discharge, we need not reach the issue of lack of mitigation.

For the foregoing reasons, and because we find Claimant was not wrongfully discharged, it is the order of this Court that Claimant's claim be and is hereby denied.

(No. 89-CC-0270—Claim denied.)

MARGO SCHNEIDER, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed October 4, 1994.

SKALETSKY & MANNIS (SCOTT SKALETSKY, of counsel), for Claimant.

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

HIGHWAYS—*negligent highway design or maintenance—what Claimant must prove.* In order to recover in an action for the negligent design, construction and maintenance of a roadway, the Claimant must prove by a preponderance of the evidence that a dangerous condition existed, that the Claimant knew of the condition, and that the condition proximately caused the incident.

NEGLIGENCE—*personal injuries—bicyclist's tire lodged in sewer grate—claim denied.* Recovery was denied in a bicyclist's claim for personal injuries received when her bicycle tire lodged in a parallel sewer grate adjacent to the roadway, because there was no evidence that the State had notice that the area in question was used extensively by bicyclists or that prior similar incidents had occurred.

OPINION

JANN, J.

Claimant was injured while riding a bicycle on Illinois Route 132 near the intersection of Riverside Drive in Gurnee, Illinois, on July 28, 1987, at approximately 4:00 p.m. Claimant's bicycle struck a sewer grate as Claimant was trying to avoid a protruding mirror on a passing van. The bicycle tire lodged in the sewer grate causing Claimant to flip over the handlebars. Claimant suffered injuries to her lip, teeth and general bruising and soreness to her body.

Claimant asserts that the State was negligent in designing, constructing and maintaining the sewer grate

adjacent to the roadway. The openings in the grate in question run parallel to the curb rather than perpendicular.

In order to recover, Claimant must prove by a preponderance of the evidence that a dangerous condition existed, that Respondent knew of the condition and that the condition proximately caused the incident complained of. *Scarzone v. State* (1990), 43 Ill. Ct. Cl. 207.

Claimant was riding outside the striped roadway near the curb when she encountered the sewer grate. She testified that she moved toward the curb to avoid a passing motorist whose mirrors protruded into the area where Claimant was riding. Claimant would ordinarily be expected to ride upon the striped roadway barring unusual circumstances or the specific designations of bicycle lanes outside those used by vehicular traffic. As Claimant was acting to protect herself from other traffic, her conduct in moving to the area outside the striped roadway was reasonable under the circumstances.

There was no testimony offered by either party as to whether the white lines painted on the sides of the roadway in question were to demarcate the limits of the usable highway or to establish a lane for use by bicyclists. There was also no evidence that Respondent had notice that the area in question was extensively used by bicyclists or that similar incidents had occurred in the prior 51 years of the existence of the roadway as presently configured. Claimant asserts that because the parallel grate is open and obvious, the State is automatically on notice of a dangerous condition. We disagree. No evidence was offered to support this contention.

We find *Cole v. City of East Peoria* (1990), 201 Ill. App. 3d 756, 559 N.E.2d 769 (3rd Dist.), rehearing denied,

June 27, 1990, most analogous on the issue of notice. In *Cole*, a father brought suit for injuries suffered by his daughter when her bicycle tire caught in a similar parallel sewer grate. The circuit court granted summary for the city but the appellate court reversed and remanded the case. Constructive notice was a key factor in the decision. Unlike this case, however, there was substantial evidence indicating notice to the city:

"* * * (1) since at least 1979, the City knew of the danger of the * * * grates * * * and had replaced * * * broken or damaged * * * [grates] with [new grates] containing safety features; (2) the area of the street where the minor's injuries occurred had an extended white line four feet from the curb on the side of the grate; (3) the area between the white line and the nearest curb was being used extensively by bicyclists and pedestrians; and (4) prior to the injury to the minor, the City had notice that another bicyclist had been injured when a wheel of a bicycle * * * had fallen through a similar grate." *Cole*, 201 Ill. App. 3d at 761; 559 N.E.2d at 773.

We find the Claimant has failed to prove her case by a preponderance of the evidence and hereby deny this claim.

(No. 89-CC-0398—Claim denied.)

NORA M. HANAWELL, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 3, 1995.

OLIVER, CLOSE, WORDEN & GREENWALD (THOMAS E. GREENWALD, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (SEBASTIAN N. DANZIGER and CYNTHIA J. WOOD, Assistant Attorneys General, of counsel), for Respondent.

HIGHWAYS—*negligence—what Claimant must prove.* The State is not an insurer against all accidents which may occur by reason of the condition of its highways, and to prevail in a negligence action the Claimant must prove, by a

preponderance of the evidence, that the State breached its duty of reasonable care and that any negligence flowing from the breach proximately caused the accident and the Claimant's injuries.

SAME—*maintenance of highways—State owes duty of reasonable care.* It is the duty of the State to exercise reasonable care in the maintenance and care of its highways and to keep them in reasonably safe condition in order that defective and dangerous conditions likely to injure persons lawfully on the highways shall not exist.

NEGLIGENCE—*negligence—notice of defective condition required.* A Claimant must show that the State had actual or constructive notice of a defect in order to recover on a negligent highway maintenance claim, and to demonstrate constructive notice, the Claimant must show by a preponderance of the evidence that the defect was of such a nature that the State should have known of its existence in the exercise of due diligence, and that it was substantial enough and existed for such a length of time that reasonable persons would conclude that immediate repairs should be made.

SAME—*motorcyclist struck loose concrete—claim denied.* In a claim for injuries sustained when a motorcyclist struck a loose piece of concrete on a highway, the evidence failed to establish either the State's negligent maintenance of the roadway or constructive notice of the alleged dangerous condition, where the road was maintained on at least a weekly basis, no proof was offered of recent prior complaints or defective patching work, and the Claimant did not show that the piece of concrete actually caused the accident or had been in the road long enough to impute constructive notice to the State.

OPINION

JANN, J.

Facts

On August 12, 1986, Nora Hanawell was leaving work in Roscoe, Illinois, and returning home on a motorcycle when she allegedly struck a piece of concrete in the roadway, causing her motorcycle to crash resulting in injury to her knee. Hearing was held on December 3, 1993, in Chicago.

Claimant was traveling westward on Highway 75 west of its intersection with Interstate 90. She testified that she was preparing to change lanes and checked her mirrors, then over her right shoulder. As she turned her head forward and reached for the signal light to indicate

her turn, she struck something on the pavement and lost control of her motorcycle. She and the motorcycle fell to the right, coming to rest on the side of the roadway. Claimant attempted to get up but was unable to walk due to injuries to her knee.

Claimant's co-worker, Joyce Warden, had been traveling behind Claimant and stopped to assist her. Ms. Warden did not witness the accident. As Joyce Warden was assisting Claimant, she noticed a piece of concrete which appeared to have broken free of the roadway lying in the roadway near Ms. Warden's truck. Claimant also saw the piece of concrete at that time. It was described as being triangular, eight to nine inches long, four to five inches wide and three to four inches thick.

Claimant's injuries resulted in hospitalization for arthroscopic and reconstructive surgery to her right knee. Claimant testified to continuing pain, degeneration and limitation of her normal activities due to the injury. Claimant's medical bills to date are submitted as $8,250.15. Claimant also submits substantial damages for lost time from her employment and potential employment.

The Law

Claimant alleges negligent maintenance and repair of the highway by the State and constructive notice of the "substantial disruption of the concrete surface" at the accident site. (Claimant's complaint at paragraph 4.) Both Claimant and Respondent have submitted briefs.

The primary issue in this cause of action is constructive notice by the State as to the condition of the roadway on the date of the accident. Claimant admits there was no actual notice. Claimant testified that she traveled the same stretch of Highway 75 every day for six years and that the road had been in poor condition for approximately six

months. An area approximately 1½ miles long had been repeatedly patched. Joyce Warden and Rita Armato also testified that the roadway at the accident scene had been in poor condition with potholes and patching for at least nine months. Neither Claimant nor her witnesses had ever filed a complaint regarding the road condition with IDOT preceding the accident in question.

Respondent presented Charles Rockwell, a communications technician at IDOT. Mr. Rockwell testified as to IDOT's procedures for recording and investigating complaints or reports of road conditions from police, public citizens and departmental personnel. Mr. Rockwell testified that no complaints were received or recorded for the location between July and September 1986.

Robert Hodgson testified that he has been employed by IDOT for 30 years. He was employed as a maintenance field engineer since 1984. Mr. Hodgson's duties included supervision of highway maintenance crews responsible for the area at issue in this cause. Mr. Hodgson testified that roadway inspections in the area are made daily to weekly depending on conditions and that at the time of the accident, patching crews were sent to fill potholes two to three times per week at Route 251 and Highway 75. He further testified that Route 75 was in "good" not hazardous condition in 1986 although it was deteriorated due to age, salt, heavy traffic and semis.

Greg Hachmaister, a highway maintainer for IDOT since 1973, testified that no complaints were received regarding an obstruction or pothole at the accident site prior to August 12, 1986. On cross-examination, Mr. Hachmaister testified when shown Claimant's Exhibit 25 (a photo purportedly of the accident site, taken November 14, 1986), that there was evidence of patching and normal deterioration attributed to the age of the roadway.

We have routinely held that "the State is not an 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, citing *Gray v. State* (1954), 21 Ill. Ct. Cl. 521.) To prevail in a negligence action, Claimant must prove, by a preponderance of the evidence, that the State breached its duty of reasonable care and that any negligence flowing from the breach proximately caused the accident and Claimant's injuries. (*Allen v. State* (1984), 36 Ill. Ct. Cl. 242, 243-44, citing *Laine v. State* (1977), 32 Ill. Ct. Cl. 10.) It is the duty of the State to exercise reasonable care in the maintenance and care of its highways in order that defective and dangerous conditions likely to injure persons lawfully on the highways shall not exist. (-., citing *Moldenhauer v. State* (1978), 32 Ill. Ct. Cl. 514.) The exercise of reasonable care requires the State to keep its highways in "reasonably safe condition" by using reasonable diligence in such maintenance. (*Scroggins, supra*, at 227.) Reasonably safe does not mean perfect as held in *Allen, supra*, at 244.

"[T]he Court has never held that all State roads must be bump free. To hold that they must, would be to make the State an insurer." *Id* at 247.

Allen involved a very similar circumstance to that herein. The claimant in *Allen* asserted that a patched area of Route 57 about one-half mile from its intersection with Route 45 caused him to lose control of his motorcycle and resulted in injuries. Claimant asserted the patched area was a defective condition of which the State had notice and that the roadway was not in a reasonably safe condition. The Court rejected claimant Allen's arguments on the basis of uncontroverted testimony by respondent's witness, an IDOT field maintenance technician, who described IDOT's policies regarding patching and patching materials. The witness stated that the patched area in question was acceptable within State highway maintenance standards.

Similar testimony was related in the case at bar and even Claimant stated that she had observed regular maintenance and repair of potholes, sometimes within one day of her noticing a pothole. She stated that repairs sometimes took from three days to three weeks.

The mere fact that a defective condition existed, if, in fact, it did exist, is insufficient to constitute an act of negligence by the State. (*Palmer v. State* (1964), 25 Ill. Ct. Cl. 1, 2.) "A claimant must show that the State had actual or constructive notice of the defect in order to recover on a negligent highway maintenance claim." *Scroggins, supra*, at 227, citing *Pigott v. State* (1968), 26 Ill. Ct. Cl. 262.

Claimant asserts that the State was required to do major reconstruction of the road surface in order to make the roadway safe for travel. We disagree. To require reconstruction of the roadway because of its age or repeated patching alone would be to require the State to become an insurer of perfect road conditions.

To demonstrate constructive notice, Claimant must show by a preponderance of the evidence that a defect was of such a nature that the State should have known of its existence in the exercise of due diligence. (*Wagner v. State* (1978), 32 Ill. Ct. Cl. 50, 55.) To prove constructive notice, Claimant must show that the "defect was substantial enough and * * * existed for such a length of time that reasonable persons would conclude that immediate repairs should be made * * *." (*Aetna Casualty v. State* (1984), 37 Ill. Ct. Cl. 179, 181.) Claimant has not demonstrated that the alleged piece of concrete which caused the accident existed for any length of time. It has not been shown with certainty that the piece of concrete was actually struck by Claimant or the direct cause of the accident.

If we accept the premise that the loose piece of concrete caused Claimant's accident, it appears most analogous to a line of cases involving debris on the roadway. In *Wagner v. State* (1978), 32 Ill. Ct. Cl. 50, a motorcyclist skidded on gravel on an exit ramp and sustained fatal injuries. In *Baker v. State* (1989), 42 Ill. Ct. Cl. 110, the driver of an auto hit gravel on a highway exit ramp. In both cases the Court found that lacking evidence of the length of time the debris was upon the roadway, the State could not be charged with constructive notice of debris constituting a dangerous condition.

Claimant has cited a number of cases to support her case involving awards made on the basis of failure to warn of dangerous conditions. We find these cases inapposite as Claimant has made no allegations of failure to warn in her complaint.

Respondent has presented evidence of at least weekly maintenance of the roadway in question with crews removing debris and patching potholes. No evidence was presented to indicate that the patching was done in a defective manner or inconsistent with IDOT standards.

We find Claimant has failed to prove by a preponderance of the evidence that the area of the highway in question was unreasonably dangerous and unfit for vehicular traffic due to negligent maintenance. Claimant has failed to prove constructive notice of a dangerous condition and has admitted the State had no actual notice of the alleged dangerous condition.

It is therefore ordered that this claim be, and hereby is, denied.

(No. 89-CC-0662—Claim dismissed.)

RANDALL SHARP, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 4, 1995.

THILL, KOLODZ & FAVARO (SCOTT BARBER and THOMAS J. KOLODZ, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (THOMAS L. CIECKO, Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*State not insurer of safety of users of highways—negligence.* The State is not an insurer of the safety of users of its highways, and in order to prevail on a negligence claim there must be proof that the State had actual or constructive notice of a dangerous condition, and that the alleged defect was the proximate cause of the Claimant's injury.

NEGLIGENCE—*crash attenuation device struck by motorcyclist—notice lacking—claim denied.* Despite the Claimant's allegations that a metal crash attenuation device attached to a concrete median was defective and dangerously extended into the roadway where the Claimant struck it when his motorcycle skidded on a patch of oil, the Claimant failed to prove that the State had actual or constructive notice of the alleged defect and his claim was denied, where the device had been rebuilt six months prior to the accident and the State received no complaints about it thereafter.

OPINION

RAUCCI, J.

This cause comes before the Court on a tort claim filed by Claimant for damages arising out of Claimant's operation of a motorcycle on September 4, 1986, on State Route 14 in Des Plaines, Illinois. Claimant came in contact with a metal crash attenuation device attached to a concrete divider separating opposing lanes of traffic. He alleges that the metal crash attenuation device was in a dangerous and unsafe condition as a result of previous accidents and as a result of improper care and maintenance. A protective flange that "feathers" into the concrete was allegedly not present.

The principal issues are (1) whether the State had actual or constructive notice of a dangerous or unsafe condition, (2) whether the metal attenuation device was bent out into the left lane, and (3) whether the slipping of Claimant's rear wheel as a result of going over a foreign substance was the proximate cause of the accident.

On September 4, 1986, a dry and partly cloudy day, Claimant was operating his motorcycle in a southeasterly direction on Route 14 in the City of Des Plaines. As he entered an S-curve, the road went slightly uphill. The S-curve had a concrete median dividing the opposite lanes of traffic and at the end of the concrete was a metal crash attenuation device.

Traveling at about 25 miles per hour in the right lane as he entered the curve, the back wheel "slipped out" after rolling over what he believed (and in his notice of his intent to file an action on account of personal injuries, described as) an "oil patch." He corrected his angle and came up[right]. He then moved from the right lane into and beyond the left lane, brushed the median scraping his little finger and elbow, and while trying to get back into the left lane, his left leg was hooked by the metal crash attenuation device. The leg was broken.

Claimant testified that the metal crash attenuation device was not, at the time of the accident, attached to the concrete median. He testified that on the date of the accident, the metal crash attenuation device, rather than being attached, was bent out into the roadway. Claimant suffered a compound fracture of the tibia and fibula, a cut below his knee and nerve damage to his left foot, and particularly the toes. Two metal rods were surgically inserted into his leg, and he incurred in excess of $11,000 in medical expenses. He was in constant pain for three months after the accident, and still experiences pain in his leg and foot.

Claimant had traveled the road previously, and had noticed the alleged defect approximately eight times from April to September 4, 1986. Claimant's friend, Lawrence Miller, testified that he had observed the defect in March 1985 and in August 1986. Claimant's father testified that the day after the accident he observed the defect.

Joseph Kostur, Jr., who at the time of the accident was the district safety and claims manager for the Illinois Department of Transportation, testified both as a witness for Claimant and for Respondent. He testified that the feathered flange is an "integral part" of the crash attenuation device, and that when you have "a concrete barrier wall, it is a definite, absolute, fixed hazard to oncoming traffic * * *."

Kostur further testified that to the best of his knowledge, after investigation, he could not find records that there was any problem with the crash attenuation device for a period of six months prior to the accident. He further testified that he had a memorandum dated December 28, 1988, which indicated that the device had been rebuilt on April 20, 1986.

The State is not an insurer of the safety of users of its highways. (*Cotner v. State* (1987), 40 Ill. Ct. Cl. 71.) In order for Claimant to prevail, he must prove that the State had actual or constructive notice of the dangerous condition. (*Norman v. State* (1982), 35 Ill. Ct. Cl. 693.) "The mere fact that a defective condition existed, if, in fact, it did exist, is not, in and by itself, sufficient to constitute an act of negligence on the part of the respondent." (*Palmer v. Northern Illinois University* (1964), 25 Ill. Ct. Cl. 1.) Claimant, in order to prevail, must also show that the alleged defect was the proximate cause of his injury. *Stanley v. State* (1986), 39 Ill. Ct. Cl. 107.

Claimant has failed to establish that the State had actual or constructive notice of the alleged defect. The evidence establishes that the affected area had been rebuilt on April 20, 1986, and the record does not establish that any actual notice was given to the State thereafter of any defect. Since the roadway was maintained by the City of Des Plaines (while the median area was the responsibility of Respondent), we find the passage of time from April 20, 1986, until September 4, 1986, did not establish constructive notice of this particular defect. Because we find that the State did not have notice of the defect, it is not necessary to determine whether the defect actually existed.

Claimant has failed to meet his burden as to proximate cause. The evidence establishes that Claimant's rear wheel "skidded out" and caused him to lose control immediately prior to the breaking of his leg. He testified that he believed he hit an oil patch, and in his notice so alleged.

The claim should be dismissed.

It is therefore ordered, adjudged and decreed that this claim be, and it is hereby, dismissed with prejudice.

(No. 89-CC-0775—Claimant awarded $53,270.51.)

CHARLOTTE DUPREY, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed September 30, 1994.

LOWENSTEIN, HUBBARD, SMITH & KAGAWA (CARLTON M. KAGAWA, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (CAROL J. BARLOW, Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*negligence—what Claimant must prove.* In order for the Claimant to recover against the State, she must prove that the State owed a duty, that the duty was breached by a negligent act or omission, and that such negligence was the proximate cause of her injuries, and to be held liable, the State must have actual or constructive notice of a dangerous condition and permit it to exist without warning the traveling public.

NEGLIGENCE—*failure to maintain bridges and guardrails can constitute negligence.* Although it does not constitute negligence for the State to continue to use old highways and bridges even when it knows that their design is not as safe as modern designs, the State's failure to properly maintain roads and bridges can be the basis for a negligence claim if a traveler's deviation from the ordinary course of travel is reasonably foreseeable and is a normal incident of travel.

SAME—*car broke through guardrail—accident was foreseeable—State liable.* Where the Claimant's vehicle, upon striking a bridge guardrail at a speed of seven miles per hour, toppled the guardrail and fell into the river below, the State was liable for the Claimant's injuries, since the presence of the guardrail at the location in question conceded the foreseeability that motorists would deviate from the ordinary course of travel, and the State had inspected the guardrail seven months before the accident and knew that it was in extremely poor condition.

SAME—*defective guardrail—Claimant's award reduced to reflect comparative negligence.* In the Claimant's negligence action against the State for failure to properly maintain a bridge guardrail, since there was no evidence to corroborate an officer's testimony that he smelled alcohol on the Claimant at the accident scene, the Court of Claims could not find that the Claimant was impaired, but her award was reduced to the extent of her comparative negligence in driving too fast for conditions and failing to use due care to keep her vehicle under control.

OPINION

SOMMER, C.J.

The Claimant seeks damages from the State of Illinois for injuries she received as a result of the State's negligence in maintaining a guardrail on a bridge. The guardrail toppled over when the Claimant's vehicle collided with the rail; and the Claimant's vehicle fell into a river.

On November 23, 1986, at approximately 1:00 a.m., the Claimant, returning from a birthday party in Hegeler, Illinois, was driving her car north on Vermilion County

Road 680, one mile east of Georgetown, approaching the East Bridge, which was maintained by the State. The Claimant testified that it was raining hard. As she rounded a curve and approached the bridge at about 30 m.p.h., she saw two dogs run in front of her. She further testified that she swerved and slightly braked her car to avoid the dogs. She then lost control of her car, and it collided with the south guardrail of the bridge. The car then was deflected across the bridge into the north guardrail. Upon impact, the north guardrail toppled over the side of the bridge. The car then went off the north side of the bridge, hitting its rear bumper and landing upside down in the river 28 feet below.

The first officers at the scene were Georgetown officer Estes and Ridgefarm officer Rouse. The reporting officer, deputy Kevin Rollins, of the Vermilion County Sheriff's Department, arrived at approximately 1:30 a.m. When deputy Rollins arrived, he immediately went to the car, finding officer Rouse propping the Claimant's head out of the water to let her breathe. The officers waited for the ambulance before moving the Claimant. Deputy Rollins testified he observed the smell of alcoholic beverage within the passenger compartment and on the Claimant. He marked the police report under apparent physical condition, "Had Been Drinking." It is noted that the medical bills indicate a blood alcohol level test was administered at the hospital, but the record is silent as to any result of this test. In direct testimony, the Claimant denied having had anything alcoholic to drink at the party.

An ambulance took the Claimant to the emergency room at St. Elizabeth's Hospital in Danville. The Claimant was comatose and required placement in a trauma care unit. She was transferred to Burnham Hospital in Champaign, where she remained in a coma until December 23,

1986. Two weeks later the Claimant was transferred to Mercy Hospital for rehabilitation therapy for four weeks. After her release, she continued therapy while living with her daughter until the Claimant's financial situation made the therapy impossible. Currently the Claimant lives with her brother in a trailer provided for her by her daughter.

The Claimant's diagnosis after the accident was that she had suffered a closed head injury described as subdural hematoma on the left hemisphere, and probable occipital lobe infarction (stroke of the occipital lobe), third cranial nerve palsy, ptosis of the left eyelid, partial collapsed left lung, and depression. Her daughter, Patty True, described the Claimant as having "a big gash in her head, great big hole in her head."

Upon discharge the Claimant's diagnosis was of anoxic encephalopathy, which means there is a brain injury and brain damage from lack of oxygen. Since the accident, she suffers from long and short term memory loss. She continues to have soreness and discomfort in her right side, as well as droopiness in her left eye. She has difficulty maintaining stability while walking. She is unable to go out on her own. She must rely on others. Otherwise, she testified in November of 1992 that she was able to take care of herself.

Prior to the accident, the Claimant supported herself as a LPN, taking care of VA patients in her home, earning approximately $25,000 to $30,000 per year. She can no longer support herself, and lives on $426/month disability benefits from Social Security. As a 60-year-old woman, the Claimant's life expectancy is 22.4 years.

The Claimant's statements of the accident at the trial were conflicting. She testified at the trial on August 21, 1991, under cross-examination, that she was driving in the

left lane of the two-lane road approaching the bridge. Then under re-direct, she testified she was in the right lane. She said the dogs were on the left side of the road in front of her and that she swerved to the left to avoid them; but later under re-direct, she stated she swerved to the right. The Claimant stated that she does not remember everything about the accident, or much of her life before the accident as a result of the memory loss she has suffered.

The East Bridge was constructed in 1922; and the guardrail in question was added in 1964. The Claimant called Dr. Robert Mains, a specialist in structural engineering, to testify at trial. Dr. Mains stated his opinion that the guardrail did not meet the American Association of State Highway Officials' (AASHO) standards for 1965. The guidelines state the rail design should withstand a 10,000 pound impact. That would equal a 35 to 37 m.p.h. speed by the Claimant's car. The Claimant's rate of speed was calculated by both Dr. Mains and a reconstruction specialist, Alex Sorton, to be about seven m.p.h. At the seven m.p.h. impact, the railing gave way without shearing or bending the bolts which held it in place. Dr. Mains stated this was evidence that the railing was not properly anchored and was in need of repair.

The bridge maintenance engineer in 1986 was David Sebright. He testified that he, along with a co-inspector, Thomas Kelly, inspected the bridge in February of 1986. The inspection of the railing showed that the concrete curb had deteriorated and that the railing was loose. The railing shook when pushed by hand. He gave the railing a rating of two, meaning it did not meet current acceptable standards. A rating of one would have meant no railing existed. Any railing built in the early 1960s would not meet current standards. The requirement on new construction of bridges is a crash-worthy rail.

The current bridge maintenance engineer is Jerry Gearlock, who testified the bridge was on a five-year replacement plan. The bridge was actually replaced in 1990. Prior to replacement, the bridge was inspected every year. Mr. Gearlock also stated that the purpose of the railing was for delineation and protection of traffic to keep it from running off. He commented on the AASHO guidelines, stating that the guidelines cover designing new bridge rails and reconstruction contracts, but they do not govern maintenance activities.

The Claimant presents as her basis for recovery that the State was negligent in its maintenance of the bridge guardrail and is therefore liable for her injuries. The State proposed two affirmative defenses: the first that the Claimant was the sole proximate cause of her injuries; and the second, in the alternative, the Claimant was comparatively negligent.

In order for the Claimant to recover against the State, she must prove the State owed her a duty, and that duty was breached by a negligent act or omission, and that such negligence was the proximate cause of her injuries. *McCoy v. State* (1975), 37 Ill. Ct. Cl. 182.

The testimony of the bridge maintenance engineer, Mr. Sebright, is evidence that the guardrail and the curbing holding the guardrail were in poor condition. The Claimant has labeled this a dangerous condition, and attempts to prove that because the State had actual knowledge that the railing had received a poor rating nine months before the accident that this is evidence of negligence on the part of the State. To be held liable the State must have actual or constructive notice of a dangerous condition and permit it to exist without warning the traveling public. (*Clark v. State* (1974), 30 Ill. Ct. Cl. 32.) A dangerous condition can mean a condition unfit for the

purpose which it was intended. (*Allen v. State* (1984), 36 Ill. Ct. Cl. 242.) Mr. Gearlock's testimony that the purpose of the rail was for delineation and protection of traffic to keep it from running off suggests that the bridge rail did not fulfill its purpose since the Claimant's motor vehicle was allowed to run off.

The established law is that when a highway or bridge design standard is altered, existing structures built under older design standards do not have to be altered. (*Hodge v. State* (1981), 35 Ill. Ct. Cl. 50.) Put another way, it is not negligence for the Department of Transportation to continue to use old highways and bridges, even if they know their design is not as safe as modern designs.

This Court has ruled that failure to properly maintain older roads and bridges can be negligence on the part of the State. The numerous pothole cases in which this Court has made awards are examples of failures of maintenance. For an example, see *Stills v. State* (1989), 41 Ill. Ct. Cl. 60. This Court also has found that failure to maintain guardrails can be negligence on the part of the State. (*Kolski v. State* (1976), 31 Ill. Ct. Cl. 307; *Keller v. State* (1982), 36 Ill. Ct. Cl. 99.) The above cases involved damaged guardrails that were not repaired by the Department of Transportation. The standard is that liability can only be imposed where a traveler's deviation is foreseeable; and when the deviation can be deemed a normal incident of travel. (*Keller* at 103.) In the claim before us, the bridge was a narrow two-lane curving bridge built in 1922.

We believe that the case of *Michalak v. County of La Salle* (1984, 3rd Dist.), 121 Ill. App. 3d 574, 459 N.E.2d 1131, is instructive in the present claim. In the *Michalak* case, the motorist impaled his automobile on the end of a guardrail protecting a curve. We believe that the statements of the Court in *Michalak* are equally applicable in the present claim.

"* * * The guardrail stands as a warning of danger, a guide to the eye in keeping to the roadway, and a barrier of sufficient strength to withstand the ordinary weights and forces to which it is subjected. * * * It is a question of fact whether a guardrail along a highway need be suitable merely as a warning, or might suffice physically to prevent vehicles from running off the highways into places of danger. [Citation.]"

"* * * A duty may be owed to a motorist who deviates from the ordinary course of travel if such deviation was reasonably foreseeable. *Hoffman v. Vernon Township* (1981), 97 Ill. App. 3d 721."

"We believe existence of a guardrail at the location in question concedes the foreseeability that motorists would deviate from the ordinary course of travel in the direction of the guardrail. If motorists never deviated from the traveled portion of the highway, then the guardrail itself would not be necessary." 121 Ill. App. 3d at 576.

As the Illinois Supreme Court has stated: "A duty [is] owed where the occurrence involved is reasonably foreseeable." *Cunis v. Brennan* (1974), 56 Ill. 2d 372, 308 N.E.2d 617, 619.

As the Claimant has argued and the *Michalak* case states, the presence of a guardrail concedes the foreseeability of motorists deviating from the ordinary course of travel.

Therefore, we find that the State owed the Claimant a duty, and that duty was to keep the guardrail in reasonably good condition, though not to the AASHO standards on an old bridge. A guardrail that fell into the river under the bridge when struck at seven m.p.h. was not in reasonably good condition. Additionally, the State knew of the condition of the guardrail, and rated it just above having no guardrail at all. We find the condition of the bridge rail to be a particularly egregious example of lack of maintenance. Therefore, we find the State breached its duty to the Claimant. However, this claim has been decided on its facts only and does not lay down a general rule that all old bridge rails must be maintained in a condition greater than required when built or found after some years of aging.

The Claimant had a duty to use due care and to keep her vehicle under control. *Harris v. State* (1986), 38 Ill. Ct. Cl. 176, 178. *Howell v. State* (1959), 23 Ill. Ct. Cl. 141.

The Claimant testified that she could see "not very much," only 20 to 30 feet, ahead of her due to the hard rain. She testified that she was traveling approximately 30 miles per hour when she saw the dogs come onto the road in front of the bridge. The Claimant was traveling 44 feet per second at 30 miles per hour. Yet, she testified that she could see only 20 to 30 feet ahead. A driver is required to adjust his or her speed to that which is reasonable and proper when a special hazard exists due to weather conditions. (625 ILCS 5/11—601.) We find that the Claimant was driving too fast for conditions as she approached the bridge. She had less than a second to react to any sudden hazard that might occur. By putting herself in such a position, the Claimant failed to use due care and keep her vehicle under control.

The fact that the Claimant was confused in her testimony could be resultant from her memory impairment due to her injuries. We attach little weight to this confusion.

Additionally, we note that the reporting officer, Deputy Kevin Rollins, noted the presence of alcohol in the Claimant's automobile and on the Claimant. Even if there is evidence of alcohol having been drunk, a Court may not draw the conclusion that the driver was impaired without corroborating evidence. *Wagner v. Zbonzak* (1982), (2nd Dist.) Ill. App. 3d 268, 443 N.E.2d 1085.

The following discussion took place at the trial:

Commissioner:	"What you are telling me is there is medical records going in but you're not stipulating that the blood alcohol result whatever it may be is the result and you are waiting for the State to prove it up."

Mr. Kagawa (Claimant's attorney):	"Right"
Commissioner:	"Which I expect the State is going to do at some point in this case."
Mr. Rock (Assistant Attorney General):	"Exactly"

No blood alcohol level was ever introduced into evidence by the State. Thus, this Court cannot find that the Claimant was impaired by alcohol.

Additionally, no brief was filed by the State, even though one extension of time was granted to do so. The Claimant did file a brief.

The *Michalak* case states that (with the advent of comparative negligence) "* * * courts have been less willing to label an actor's conduct as a remote cause or condition of the injury." (121 Ill. App. 3d at 578.) Thus, we find that the Claimant's driving and the condition of the bridge rail were both proximate causes of the Claimant's injuries.

No party or persons in this entire proceeding pointed out the significance of the fact that the accident in question occurred on November 23, 1986. Modified comparative negligence became the law on November 25, 1986; thus, as the date of the accident is controlling, damages are to be figured on a pure comparative negligence basis.

In apportioning the negligence we find the Claimant's conduct to have been 2/3 of the proximate cause of her injuries.

The Claimant had medical expenses of $59,811.53 which were testified to as being reasonable and necessary by Dr. Richard A. Rak.

The Claimant's injury is clearly permanent and has deprived her of her livelihood (which was not claimed), and her lifestyle. She has had pain and suffering in the past, present, and future. The Claimant is claiming

$100,000 for pain and suffering and permanency. We will award that amount. Therefore, the Claimant's total damages are $159,811.53. After deducting for her negligence, the Claimant's damages are $53,270.51.

The Claimant has requested costs. The State of Illinois is liable for costs only if the statute awarding costs specifically and clearly names the State of Illinois as liable for costs. (*I & D Pharmacy, Inc. v. State* (1984), 37 Ill. Ct. Cl. 37, 42.) The general statute that enables the awarding of costs to Claimants who recover damages does not name the State of Illinois as being subject to the payment of costs. 735 ILCS 5/5—108.

We, therefore, award the Claimant $53,270.51 in full and complete satisfaction of injuries she suffered when her automobile went through a loose bridge rail on the State-maintained East Bridge on Vermilion County Route 680 on November 23, 1986.

(No. 89-CC-1759—Claim dismissed.)

RICHARD MEDDER & SALLY MEDDER, Claimants, *v.*
THE STATE OF ILLINOIS, Respondent.

Opinion filed October 4, 1994.

HARRY J. STERLING, P.C., for Claimants.

ROLAND W. BURRIS, Attorney General (CAROL J. BARLOW, Assistant Attorney General, of counsel), for Respondent.

CONTRACTS—*intentional interference with lease contracts—no bad faith—claim dismissed.* In a claim by property owners alleging that the State Department of Transportation interfered with their month-to-month lease contracts and caused tenants to terminate leases prematurely by notifying them of the State's future acquisition of the property, the action was dismissed,

since although the State did not actually acquire the property until six months after the tenants had moved, there was no bad faith on the State's part in following notification procedures established by State and Federal law.

OPINION

SOMMER, C.J.

This claim comes before us on the Respondent's motion to dismiss. Oral argument was held before the full Court on November 9, 1993.

The Claimants owned two residential properties which they were renting on month-to-month leases.

In May of 1986 the Illinois Department of Transportation sent notices to the tenants. These notices stated that the Department of Transportation would be acquiring the properties. The notices stated that construction work would begin on or about June 30, 1986. The notices also stated that the tenants would not be required to move before 90 days; and when they were to vacate they would be sent a 30-day notice. In fact, the tenants moved in June; while the property was not finally taken until December of 1986.

The Claimants are alleging tortious interference with the lease contracts by the Department of Transportation. The Claimants seek damages of lost rent from June to December and utility costs incurred by them.

The Court previously has decided an identical claim (*Buetow v. State* (1992), 44 Ill. Ct. Cl. 93.) The same notices were sent in *Buetow*; and the property was not acquired until about six months after the tenants had moved. The only difference between the *Buetow* claim and the present one is that the *Buetow* claim concerned a 33-unit apartment building.

The claim in *Buetow* was denied because, "The record does not support a finding of a lack of good faith on the part of IDOT." *Buetow* at 95.

One element of proof necessary for establishing an intentional interference with a contract is that the breach be unjustified or in bad faith. We find no bad faith on the part of the Department of Transportation in this claim. The Department simply followed the procedures established by State and Federal law and regulations.

Though the parties in the present claim did not cite *Buetow* and concerned themselves whether a contract really existed between the Claimants and the tenants, we find that this Court's ruling in *Buetow* is controlling.

It is therefore ordered that the Respondent's motion to dismiss is granted; and that this claim is dismissed.

(No. 89-CC-1762—Claim denied; petition for rehearing denied.)

JUN HARDEMAN, JR., Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed February 8, 1995.

Order on petition for rehearing filed May 2, 1995.

DENNIS FEINBERG, for Claimant.

JIM RYAN, Attorney General (COLLEEN MCCLOSKEY VON OHLEN, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*premises liability—what Claimant must prove.* The State is not an insurer of the safety of persons visiting its buildings, but rather it owes a duty of reasonable care in maintaining the premises, and a Claimant bears the burden of establishing by a preponderance of the evidence that the State breached its duty of reasonable care, that the breach proximately caused the injury, and that the State had actual notice of the dangerous condition.

SAME—*chair collapse—no notice of defect—claim denied.* A man who was injured when his chair collapsed in the waiting room of an office of the Secretary of State could not recover in his premises liability claim, since he produced no evidence that the State had actual or constructive notice that the chair was in a dangerous or defective condition.

OPINION

PATCHETT, J.

The Claimant seeks recovery for personal injuries sustained when a chair located in the Secretary of State's office collapsed as he attempted to sit in it.

On the afternoon of July 11, 1988, the Claimant appeared at the Office of Secretary of State, Administrative Hearing Facility, at 188 West Randolph, Chicago, Illinois. Mr. Hardeman was there to participate in a hearing regarding his driving privileges. After the receptionist instructed him to find a seat in the waiting area and complete forms, he proceeded to the chair in question. The chair was a side-entry type chair which was equipped with a retractable desk top that could slide down to the side of the chair, or it could be pulled up as a desk. As Mr. Hardeman approached the chair, he pulled the desk top up to the upright position. He testified that he did not notice any evident defect in the chair. He sat down on the chair, and it collapsed. An unidentified young man helped Mr. Hardeman out of the chair and onto his feet.

Mr. Hardeman testified that after the fall, he experienced warmth and then pain in his back. He declined the receptionist's offer to call paramedics, but he was unable to proceed with the hearing. He then proceeded to the Michael Reese Health Center where he underwent a physical exam and x-rays. He was prescribed medication.

The Claimant continued to experience back pain and returned to the doctor on July 9, July 25, August 29, and

September 2, 1988. During the visit of September 2, 1988, the doctor prescribed physical therapy. He attended three sets of physical therapy in October 1988 and January and September 1989.

In January 1989 Mr. Hardeman returned to his doctor, who prescribed continued therapy and limited the Claimant's activities. His doctor noted that the Claimant had made progress by February 1990, and he discontinued treatment by 1991. Mr. Hardeman testified that he still experiences stiffness and occasionally wears a back brace. He takes aspirin for pain, and he has generally limited his physical activity since the accident.

Mr. Hardeman testified that he had a bullet removed from his calf in 1979. In 1983 he had back pain for which he was hospitalized. At that time, he received an injection in his back, therapy, and traction. He testified that from 1983 to July 1988 he did not suffer any back pain.

In support of his claim for lost wages, he testified that during the summer of 1988 he was working as a playground supervisor, earning $8.75 an hour. He testified that he incurred a loss of less than $500. In addition, Mr. Hardeman testified that he was teaching a four-hour-a-day GED program and he incurred a loss there of $400.

During the 1988-1989 school year, Mr. Hardeman was assigned as a substitute teacher in a Chicago public school. He admitted that he was not off pursuant to a doctor's order or recommendation.

It should also be noted that Mr. Hardeman did not produce any documentation in support of his wage loss claim.

Ms. Eileen Foxman, secretary to the director for the Department of Administrative Hearings, testified for the

Respondent. Her duties included property control liaison. She was responsible for the inventory of the State property and the removal of damaged property.

Ms. Foxman testified that when a report of damaged furniture was received, the item was removed and transported to Springfield. Ms. Foxman had no record nor knowledge of any other chairs collapsing. In addition, she did not know of any reports of a defective chair at the location of this incident.

The Claimant failed to produce any evidence which would indicate that the State had notice of a defect in the chair. The burden is on the Claimant to produce such evidence. (*Divis v. State* (1969), 27 Ill. Ct. Cl. 135, 137.) The Claimant has the burden of establishing that the Respondent had notice of the defect. The Respondent is not required to plead lack of notice as an affirmative defense.

The State is not an insurer of the safety of persons visiting its buildings. Rather the State owes a duty of reasonable care in maintaining the premises. (*Berger v. Board of Trustees of University of Illinois* (1988), 40 Ill. Ct. Cl. 121, 124.) The Claimant bears the burden of establishing by a preponderance of the evidence that the State breached its duty of reasonable care, that the breach proximately caused the injury, and that the State had actual or constructive notice of the dangerous condition. *Secor v. State* (1991), 44 Ill. Ct. Cl. 215, 217.

Here there was no evidence presented to the Court that the State had any actual or constructive notice that the chair was in a dangerous or defective condition.

Therefore, the Claimant has failed to meet his burden of proof as to the issue of notice. This claim is denied.

ORDER

PATCHETT, J.

This cause comes before the Court upon a petition for rehearing filed by the Claimant. The Court previously denied this claim in an opinion filed on February 8, 1995.

In his petition for rehearing, the Claimant fails to state any grounds which would be the basis for granting a rehearing. The Court has reviewed the file and the opinion and sees no reason to deviate from its previous decision.

Therefore, the motion for rehearing is denied.

(No. 89-CC-2015—Claim dismissed; petition for rehearing denied.)

EDWARD A. SCOTT, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed November 28, 1989.

Order on petition for rehearing filed December 21, 1994.

EDWARD A. SCOTT, *pro se*, for Claimant.

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

LAPSED APPROPRIATIONS—*joint stipulation rejected—claim for legal services dismissed—lack of appropriated funds.* The Court of Claims could not approve the parties' joint stipulation providing that the Claimant was entitled to $3000 for legal services rendered to the Medical Center Commission, and the attorney's claim was dismissed and his petition for rehearing was denied, since there were insufficient funds remaining in, or transferable to, the relevant appropriation, and the Claimant also failed to comply with the statute requiring that he file a copy of the contract for professional services with his complaint.

ORDER

MONTANA, C.J.

Claimant, Edward Scott, brought this claim seeking payment in the amount of $3,000 for legal services rendered to the Medical Center Commission during the period of time between July 1, 1986, through August 29, 1986. He alleged that he made many demands for payment but has never been paid.

The parties filed a joint stipulation wherein they agreed to the following:

(1) Scott performed legal services for the Commission in July and August of 1986 as a special assistant Attorney General.

(2) Scott presented bills for this work to the Commission but these have not been paid.

(3) The amount of the bills are reasonable and fair; and conform to the usual and ordinary charges in the State of Illinois for the work done by Scott.

(4) Scott is justly entitled to the amount claimed for the work done for the Commission.

The claim is now before the Court for approval of the stipulation.

This Court is not bound by such stipulations, and we are unable to approve the one at bar for two reasons. First, an issue involving jurisdiction exists. Although neither party addressed it, an issue involving jurisdiction may be raised at any time and by the Court. The Medical Center Commission was created by the Medical Center District Act. (70 ILCS 915/0.01 *et seq.*) In relevant part the statute (section 2) provides:

"There is hereby created a body politic and corporate under the corporate name of Medical Center Commission, hereinafter called the Commission, [and by that name it]

* * *

"* * * shall have perpetual succession, power to contract and be contracted with, *to sue and be sued except in actions sounding in tort*, to plead and be impleaded, to have and use a common seal, and to alter the same at pleasure. *All actions sounding in tort against the Commission shall be prosecuted in the Court of Claims.* * * *" (Emphasis added.) 70 ILCS 915/2.

In his complaint at paragraph 2, Claimant alleged that the claim is based on contract. The jurisdictional issue is whether a contract claim against the Medical Center Commission may be brought in the Court of Claims.

Our research did not reveal any cases in the Court of Claims expressly holding one way or the other. The Illinois Supreme Court in *Williams v. Medical Center Comm.* (1975), 60 Ill. 2d 389; 328 N.E.2d 1, did discuss the tort immunity provision of the statute but did not comment on whether contract cases may be brought in the Court of Claims. In its treatment of the issue, the supreme court cited section 4 of Article XIII of the Constitution of 1970 which states: "Except as the General Assembly may provide by law, sovereign immunity in this State is abolished." The General Assembly did expressly single out tort claims in section 2 of the Act, stating that they must be brought in the Court of Claims. The General Assembly could have, but did not, provide that any other types of lawsuits must be brought in the Court of Claims. The argument could be made that, by including one but not any others, the General Assembly did not intend to grant the Medical Center Commission any other immunity. An examination of the Claimant's billings attached to his complaint does indicate that the Medical Center Commission has been made a defendant in other courts.

However, the departmental report (which was compiled by the Medical Center Commission and 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) indicates that the Medical Center Commission would have paid the Claimant with funds appropriated by the legislature for fiscal year 1987. Such funds have lapsed and there is no question that this Court has jurisdiction to hear and decide claims for lapsed appropriations.

Assuming (without deciding) that this Court has jurisdiction over the claim, we would be constrained to deny it anyway. The departmental report indicates that the funds with which the claim could have been paid were appropriated in line item appropriation number 839-5701-1200-0000 for contractual services. The report further indicates that the Medical Center Commission spent this appropriation down to virtually nothing. Although the report indicates that funds were available for transfer under section 13.2 of the State Finance Act (the two percent transfer statute, 30 ILCS 105/13.2), from line item appropriation number 839-571-01-6-600-0000 for Acquisition of Land, said line item does not appear to be transferable under that statute. Thus even if we were to assume jurisdiction over the claim, we would have to deny it due to lack of sufficient lapsed appropriation.

We note that the Medical Center Commission, in response to question number 7 in the departmental report which asked why the claim was still unpaid, stated "Claim was disputed but is now resolved. Now the MCC is merely seeking funds to pay it." For this Court to provide those funds by way of an award would be tantamount to making an appropriation. We find that the parties, or either of them, should seek the funding for the settlement

from the legislature. According to the Constitution, not only is this Court's jurisdiction conditioned on what the legislature provides, appropriation of funds is also the prerogative of the legislature. For purposes of possible consideration of this matter by the legislature, we find that the record indicates that the Claimant did provide the services at a price which was fair and reasonable, if not low, for attorney time. We further find that the Claimant did not file a copy of his contract with his complaint as required by section 790.50(c) of the Court of Claims Regulations. (74 Ill. Adm. Code 790.50(c).) From the record before us, a written contract for the services would have been required under section 9.01 of the Illinois Purchasing Act (30 ILCS 505/9.01), and the failure to comply with said statutory requirement would render any contract void under section 10 of the Illinois Purchasing Act.

Accordingly, it is hereby ordered that this claim be, and hereby is, dismissed.

ORDER

SOMMER, C.J.

This cause coming to be heard on the petition for rehearing filed by the Claimant, due notice having been given, and this Court being fully advised, finds:

(1) That the departmental report indicates that the Claimant would have been paid from the F.Y. 1987 contractual services appropriation.

(2) That $4.87 remained unspent in the contractual services appropriation for F.Y. 1987.

(3) That funds remaining in the acquisition of land appropriation for F.Y. 1987 are not transferable to the contractual services appropriation. 30 ILCS 105/132.

(4) That this Court may not grant an award for services performed where no funds remain in the relevant appropriation line, or can be transferred thereto. *Graham, O'Shea, & Hyde v. State* (1983), 44 Ill. Ct. Cl. 175.

(5) That no contract for professional services was filed with the Comptroller as required by law. 30 ILCS 505/9.01.

(6) That for the reasons cited above this Court cannot pay this claim.

(7) That the Claimant's remedy is presentation to the General Assembly.

(8) That this Court's previous denial of this claim was a correct application of the facts to the law.

It is therefore ordered that the petitioner's motion for reconsideration is denied.

(No. 89-CC-2270—Claim denied.)

COMMERCIAL UNION INSURANCE CO. and JACK KELLY, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed April 14, 1995.

SAUL R. WEXLER and PAUL M. SENGPIEHL, for Claimant.

JIM RYAN, Attorney General (ANNE LOEVY and KENNETH LEVINSON, Assistant Attorneys General, of counsel), for Respondent.

HIGHWAYS—*duty owed to users of highways—reasonable care.* The State is not an insurer against all accidents which may occur by reason of the condition of its highways, but the State owes a duty to all users of its highways to

maintain them in a reasonably safe condition by using reasonable diligence in such maintenance.

SAME—*negligence—Claimant must show State's notice of defect.* In order to recover, the Claimant must prove by a preponderance of the evidence that the State had actual or constructive notice of the defect causing the accident, and constructive notice is established 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.

NEGLIGENCE—*damage to vehicle—State did not have constructive notice of defect—claim denied.* A claim by an automobile owner and his insurer for vehicle damage caused by a loose piece of pavement was denied based upon the State's lack of actual or constructive notice of the defect, where no problems had been seen or reported at the location in question, and the Claimant testified that the slab of concrete was level with the rest of the road until the vehicle in front of him struck it, causing it to pop up and hit the Claimant's car.

OPINION

SOMMER, C.J.

This claim is brought on behalf of Jack Kelly and Commercial Union Insurance Company, as subrogee, for damages sustained to Mr. Kelly's automobile on January 25, 1987. At approximately 3:00 p.m. on January 25, 1987, the Claimant was driving his Ford Taurus southbound on Route 53 in the vicinity of Palatine, Illinois. Mr. Kelly was driving near the overpass over Palatine Road in the far left lane. His vehicle's speed was approximately 55 miles per hour, the posted speed limit. As he drove, a piece of pavement came up from the road in front of him and because of a car on his right and a barrier on his left, he had no choice but to drive over the chunk of pavement. He testified that the car in front of him jarred the pavement loose and it popped up after that car passed over it. When his vehicle struck the concrete slab, the slab disintegrated but not before it destroyed the undercarriage of his vehicle. Mr. Kelly described that concrete slab as being approximately 15 inches wide, 8 to 10 inches long, and 4 to 6 inches deep. Mr. Kelly was the owner of the vehicle in

question and his insurance company was Commercial Union Insurance. The vehicle was totally destroyed according to the appraisal done by that company. Mr. Kelly claimed to have paid approximately $20,000 for the Ford Taurus and much evidence was adduced at the hearing regarding the value of the vehicle.

It is well established that "the State of Illinois is not an 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, citing *Gray v. State* (1954), 21 Ill. Ct. Cl. 521.

The State owes a duty to all users of its highways to maintain its highways in a reasonably safe condition. (*Scroggins* at 227, citing *Berry v. State* (1968), 26 Ill. Ct. Cl. 377.) "The State's duty is to maintain highways in 'reasonably safe condition' by using reasonable diligence in such maintenance." (*Scroggins* at 227, citing *Wing v. State* (1977), 31 Ill. Ct. Cl. 473, 476.) The Claimant must prove by a preponderance of the evidence that the State had actual or constructive notice of the defect causing the accident in order to recover. *Scroggins* at 227.

It can be concluded from the testimony that the piece of concrete that the Claimant's vehicle struck was of a significant size. However, that by itself does not prove that prior to the accident there existed a defect at the accident location which the State knew or should have known was a hazardous defect. The State's repair crews patrolled the area each day looking for defects. None was reported at the site of the accident, by the repair crews, police, or the public.

In this case there is no proof that the State had actual notice of the defect which eventually caused the damage in this case; and, therefore, the Claimant must rely upon

constructive notice. The test to establish constructive notice is "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 228.) While it is apparent from Mr. Kelly's testimony and demeanor that he is essentially accurate about the events of that day, there is no evidence to suggest that there was constructive notice on behalf of the State regarding this location and defect.

This claim is very similar to *Scroggins*. In that claim, a piece of concrete tipped up when the Claimant ran over it exposing a piece of wire that punctured the Claimant's tire thereby causing an accident. In *Scroggins*, this Court ruled a highway defect may have caused the accident, but there were no facts to place the State on constructive notice that a defect existed. In the present claim the Claimant testified that the piece of concrete was level with the rest of the road until the moment that the vehicle ahead of him ran over it. Though cracks existed in the pavement, we find that these cracks alone were not a condition of such evident nature and potential for harm so as to impute to the State constructive notice of a hazardous defect.

It is therefore ordered that this claim is denied.

(No. 89-CC-2280—Claimant awarded $1,200.)

DEBORAH D. HARRIS, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed December 23, 1993.
Order filed December 9, 1994.

CAROLYN B. SMOOT, for Claimant.

ROLAND W. BURRIS, Attorney General (WENDELL DEREK HAYES, Assistant Attorney General, of counsel), for Respondent.

DISCOVERY—*request for confidential motor vehicle accident reports—limited disclosure required.* On the State's motion for reconsideration of a discovery order directing it to produce to the Claimant motor vehicle accident reports containing allegations that traffic lights malfunctioned at an intersection where the Claimant had an accident, the Court of Claims ordered that, under the confidentiality provisions of section 11—412 of the Motor Vehicle Code, the records themselves did not have to be produced, but the State was required to provide the names and addresses of all witnesses from such reports.

STIPULATIONS—*traffic accident—stipulated settlement entered.* Pursuant to the parties' joint stipulation for settlement in a claim arising from a traffic accident, the Court of Claims determined that the proposed award of $1,200 was fair and reasonable, and such award was entered in full and final satisfaction of the claim.

OPINION

RATH, COMM.

Upon reconsideration of order to compel production, the issue now before the Commissioner had its origins in Claimant's motion to compel answers to Claimant's interrogatories.

After a teleconference call pursuant to the stipulation of the attorneys for the parties on Claimant's "Motion to Compel," this Commissioner ordered the parties through their counsel to submit authorities on the questions presented.

The narrow issue arises under section 11—412 of the Illinois Vehicle Code (625 ILCS 5/11—412, formerly Ill. Rev. Stat. (1991) 95½, 11—412.) That statute, a copy of which is attached hereto as Exhibit "A," pertains to the confidentiality of motor vehicle accident reports, and requires generally that the reports are treated as confidential. Claimant seeks production of reports containing allegations that lights malfunctioned at a particular intersection where

the Claimant had an accident, based on Claimant's claim of malfunctioning lights, so that, presumably, Claimant can obtain information that the State had notice that the lights at this particular intersection did not work or function properly, and that the State had notice of that fact.

Accordingly, Respondent submitted authorities by quoting portions of the statute and setting forth, inaccurately, an isolated quotation from a 1963 opinion of the Illinois Supreme Court in a criminal case. (*People v. Turner* (1963), 29 Ill. 2d 379, 194 N.E.2d 349, 352.) Correctly set forth, Respondent's "authority" was as follows:

> "* * * It is settled that the trial court may, in proper cases, order the production of such reports, but it is equally well settled that the use of such documents is restricted to impeachment. (*People v. Wolff*, 19 Ill. 2d 318, 323, 167 N.E.2d 197.)"

The case from which the preceding quote was extracted dealt with a convict's claim of error on appeal, that the trial court should have ordered a police officer to produce a copy of the police officer's report for examination by defense counsel. The opinion reveals that the criminal prosecutor objected to production of the report on the ground that the report could be used for impeachment only, but that the convict's attorney had stated that he did not intend to impeach the officer. The prosecutor's objection to the production of the report was sustained by the trial court and affirmed on appeal by the Illinois Supreme Court. The supreme court held that since the convict's attorney had disclaimed any intent to impeach the witness, the trial court did not err in refusing to require the police to produce the report.

The case cited by the Illinois Supreme Court in the above quotation was a 1960 criminal case (*People v. Wolff* (1960), 19 Ill. 2d 318, 126 N.E.2d 197) which contained an exhaustive discussion of the state of the law in respect

to the right of the criminally accused to examine documents held by the prosecution. In the *Wolff* case, *supra*, the convict appealed a decision of the trial court which denied him the right to examine certain documents allegedly possessed by the prosecution. The Illinois Supreme Court held that the defendant was, indeed, prevented from any effort to lay a foundation pursuant to which he could demand the production of documents consisting of witness statements. The supreme court held that the trial court should have permitted defense counsel to lay a foundation for the production of documents, but further held that on the record as a whole, reversal of the judgment against the convict was not required.

The Commissioner is hard pressed to understand the applicability of any of the authorities originally submitted by Respondent to the issues presented in the case at bar.

Claimant's arguments and authorities filed January 27, 1992, contain no citation of authority whatsoever, other than quoted excerpts from statutory provisions combined with Claimant's "interpretation" of the statutory provisions as they may relate to the issues in the case at bar. Claimant argued that under section 11—412 the confidentiality provisions are to protect the individuals submitting the reports and not Respondent's Department of Transportation. Claimant pleads that Claimant must know the identity of persons submitting the reports in respect to malfunctioning lights, and that Respondent is shielding itself behind the statute not to protect the confidentiality of the person submitting the reports, but to escape Claimant's allegations of the State's liability to Claimant because of the malfunctioning traffic lights. Claimant submits no authority for the proposition that reports of malfunctioning lights at other times and on other

occasions constitutes admissible evidence tending to support the testimony of Claimant that the lights malfunctioned on the occasion of Claimant's injuries.

Thus, armed with the weighty authorities and arguments submitted by Respondent and Claimant, the Commissioner concluded that under the provisions of section 11—412, it did not appear to be a legislative purpose to protect Respondent against disclosure of facts and circumstances tending to show Respondent's prior notice of defective or malfunctioning traffic lights. The Commissioner directed the preparation of an order on the Commissioner's ruling and advised counsel that the Commissioner would hold the order in order to allow Respondent to voice any objections to the form of the order. The Commissioner received the proposed order from Claimant on November 4, 1992, and, there being no objection by Respondent's attorney, the order on motion to compel was entered 11-16-92 by the Commissioner requiring that Respondent permit discovery of pertinent reports and records pertaining to allegations of, or reports concerning the operation or malfunctioning of lights at the intersection involved in this case over a period of eight years prior to the date of the accident.

Approximately seven months later, Respondent filed a "Motion for Reconsideration of Order," complaining that Illinois Supreme Court Rule 201(b)(2) was applicable to this issue, and that the First District Appellate Court case of *Arnold v. Thurston*, handed down December 30, 1992, supports Respondent's argument that the reports in question are privileged against disclosure, citing no authority other than *Arnold v. Thurston* (1992), 240 Ill. App. 3d 570, 608 N.E.2d 418, 181 Ill. Dec. 345.

Claimant has responded to Respondent's motion for reconsideration by filing Claimant's "Memorandum of

Law in Support of Response to Motion for Reconsideration of Order." Once again, Claimant has not burdened the Commissioner with any citation of authority other than Claimant's interpretation of the case cited and relied upon by Respondent, *Arnold v. Thurston, supra*.

Since the decision in *Arnold v. Thurston* came down after the Commissioner's original order in this case, an examination of that opinion is in order. In *Arnold*, Justice Cerda identified the issue as being an appeal by the Illinois Department of Transportation and their chief counsel from a contempt order entered by a Chicago trial court against IDOT for refusal to comply with a production order.

The case apparently arose out of a traffic accident. The plaintiff had issued a subpoena to IDOT for a specific IDOT report relating to a specific accident involving the plaintiff and one of the defendants (Maria Thurston). IDOT refused to produce the report on the ground that they were confidential under sections 11—412 and 11—408 of the Illinois Vehicle Code. Upon hearing, the plaintiff argued that he desired the report for impeachment purposes and the trial court ordered IDOT to comply with the subpoena, including the documents and reports claimed by IDOT to be confidential or privileged.

Justice Cerda quoted section 11—412 of the Illinois Vehicle Code and recited IDOT's arguments that the reports could not be used as evidence in any trial arising out of the motor vehicle accident, and that the Legislature intended that the reports not be used for any purpose. Justice Cerda distinguished the case of *Cox v. Yellow Cab* (1973), 16 Ill. App. 3d 665, 306 N.E.2d 738 apparently on the basis of the fact that the report in the *Cox* case was not shown to have been forwarded to the Illinois Division of Highways (predecessor to IDOT), and that accordingly

the report should have been produced. Unlike the *Cox* case, *supra*, in *Arnold v. Thurston* there was no question that the accident report in question was filed with IDOT.

The court in *Arnold v. Thurston* concluded as follows:

> "Section 11—412 provides that the required accident report is confidential and cannot be used as evidence. There are two limited exceptions to the confidentiality provision for the cases of disclosing the identity of a person involved in a motor vehicle accident and disclosing the identity of any insurance carrier. In contrast, IDOT reports are stated to be privileged and not obtainable. Although the provision on the required accident report does not explicitly state that the documents either are not obtainable or are privileged, the intent appears to be that the documents are confidential and are not to be disclosed.
>
> "Even if the statute were not construed in this manner, Supreme Court Rule 201(b)(2) would apply to prevent the report's discovery because the statute provides that the report may not be used as evidence at a trial. The rule, which neither party discusses, provides that 'all matters that are privileged against disclosure on the trial * * * are privileged against disclosure through any discovery procedure.' 134 Ill. 2d R 201(b)(2)." *Arnold v. Thurston*, 608 N.E.2d 418 at 420, 421.

Accordingly, the contempt order against IDOT and its counsel was reversed and the order of the trial court compelling IDOT to comply with the plaintiff's subpoena was reversed.

Unlike *Arnold v. Thurston, supra*, Claimant in the case at bar does not seek the reports in question for impeachment purposes; but instead, Claimant seeks the reports in Claimant's efforts to develop information to the effect that Respondent knew, or should have known, that the lights at the intersection in question in this case were previously malfunctioning.

At this point, it should be noted that in Respondent's original argument and authorities submitted during December of 1991, Respondent states as follows:

> "It is the Respondent's position that pursuant to Illinois Revised Statutes and case law, turning over the reports is in breach on (*sic*) confidentiality of those documents, but would state further that the law does provide disclosure of the identity of the parties to the accidents."

It seems that Respondent retreats from the generosity expressed in the above quote in "Respondent's Motion for Reconsideration of Order" where Respondent argues, without, of course, any citation of authority as follows:

> "* * * the names and addresses of parties alleging malfunction of the traffic light which counsel seeks is (*sic*) irrelevant and would not lead to the discovery of relevant evidence. The condition of the traffic light at other times does not establish that the alleged condition existed at the time of the act complained of in the case at bar."

Claimant does not seek the reports or the identities and locations of persons making the reports to necessarily prove that the lights malfunctioned on the occasion of Claimant's injuries; instead, it appears that Claimant seeks the reports and identities principally for proof of prior knowledge on the part of Respondent.

On the basis of *Arnold v. Thurston, supra*, and Respondent's admission that Claimant is entitled to disclosure of the identity of parties to accidents wherein reports of malfunctioning lights were made, it will be the order of the Commissioner on reconsideration that such motion should be allowed in part and denied in part. That is to say, that Respondent will not be compelled to turn over the reports, but will be compelled to provide plaintiff with the names and addresses of witnesses from such reports where such reports or documents contain information pertaining to a claim or report of any person that the lights at the intersection in question malfunctioned.

It is therefore ordered that the State of Illinois by and through the Attorney General's office be, and is hereby, compelled to provide to Claimant, within 21 days from the date hereof, the names and addresses of all witnesses to accidents or conditions at the intersection in question occurring within the period set forth in the Commissioner's order of 11-16-92, where such reports, statements or documents contain any information relating

to a malfunction of the traffic lights at the subject intersection.

ORDER

JANN, J.

This cause comes before this Court on the parties' joint stipulation for settlement which states:

(1) This claim arose from a traffic accident that occurred on or about January 31, 1987, at Route 13 and Carterville Road in Williamson County, Illinois.

(2) The parties have investigated this claim, have knowledge of the facts and applicable law to the claim, and are desirous of settling this claim in the interest of peace and economy.

(3) Both parties agree that an award of $1,200 is both fair and reasonable.

(4) Claimant agrees to accept, and Respondent agrees to pay Claimant $1,200 in full and final satisfaction of this claim and any other claims against Respondent arising from the events which gave rise to this claim.

(5) The parties hereby agree to waive hearing, the taking of evidence, and the submission of briefs.

The Court is not bound by such an agreement, but it is also not desirous of creating or prolonging a controversy between parties who wish to settle and end their dispute. Where, as in the instant claim, the agreement appears to have been entered into with full knowledge of the facts and law, and is for a just and reasonable amount, this Court has no reason to question or deny the suggested award.

It is hereby ordered that the Claimant be awarded $1,200 in full and final satisfaction of this claim.

(No. 89-CC-2935—Claim denied.)

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

Opinion filed August 25, 1994.

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

HINSHAW & CULBERTSON (GARY R. LIETZ, of counsel), for Respondent.

NEGLIGENCE—*landowner's obligation to keep premises reasonably safe.* A landowner has an obligation to use reasonable care and caution to keep the premises reasonably safe, but a landowner is not required to give warning or precautions for dangers that are self-evident.

SAME—*spill on athletic arena steps—open and obvious condition—claim denied.* A claim brought by a spectator who slipped and fell on a spill on a university athletic arena stairway was denied, since the spill was an open and obvious condition, the spectator was not exercising reasonable care for his own safety by using the guardrails or watching where he stepped, and the procedures used by the university for cleaning the premises during sporting events showed its exercise of every reasonable precaution to prevent such accidents from occurring.

OPINION

PATCHETT, J.

This claim was filed as a result of a slip and fall accident at the University of Illinois Assembly Hall. The fall occurred on March 19, 1988, while the Claimant, Richard Shields, was visiting his son, Jeffery Shields. The Claimant and his son were attending the Illinois high school basketball championship at the Assembly Hall.

The Claimant did not leave his seat during the final two games of the tournament. His son left his seat during half time of the championship game to use the facilities. While returning to his seat, the Claimant's son did not tell him of any spills or adverse conditions on the stairs.

They stayed and watched the championship game until the final two or three minutes. In order to beat the traffic out of the parking lot, they left while the game was still in progress. They exited from their aisle and went down the stairs leading from section C, which is the top section of the Assembly Hall. The steps in section C are steep, and there are handrails on both sides of the aisle for the first seven steps.

As Mr. Shields neared the bottom of the steps, which would be near the first seven steps with the railing, he slipped and fell as a result of an apparent soda spill on the third or fourth step. He felt extreme pain in his left knee. He testified that he was not looking down at the floor as he descended the stairs, but was watching the game. He also testified that he was not using the handrails located on either side of the steps. He described the substance that he slipped on as being gummy and sticky.

Following the accident, Mr. Shields did not seek immediate medical treatment. Evidently he did not report the injury to any university staff. He returned to his son's dwelling, applied ice, and elevated his knee. He drove home the next day to Alton, Illinois. Since he continued to be in pain, he sought medical advice from his physician, Dr. Randall Rogalsky. Mr. Shields had a history of knee problems. At the time of his fall, he had a knee prosthetic. He essentially had an artificial knee. He was totally and permanently disabled due to previous injuries.

Dr. Rogalsky performed a revision of the knee prosthesis after the accident in question. Dr. Rogalsky testified

that it was his opinion that the knee replacement became loose in the fall, requiring the revision. Dr. Rogalsky continued to care for the Claimant after the surgery until October 1988.

Mr. Shields continued to have pain after the surgery and eventually consulted another physician, Dr. Edward Lansche, an orthopaedic surgeon. Dr. Lansche testified that a total left knee replacement was necessitated by difficulties caused by the replaced travel component that was performed by Dr. Rogalsky. Following the total replacement performed by Dr. Lansche, the Claimant continued to have problems with his knee. This required additional surgery and physical therapy. At the time of the trial of this case before a Commissioner of this Court on September 9, 1993, Mr. Shields testified that he was continuing to have problems walking and with physical activities such as standing, squatting, and bending. He had constant pain. The medical bills totaled $44,038.83.

Mr. Shields wrote several letters to the university requesting compensation for the injury. He told them that he was unable to work because of the injury. He indicated that one of the sources of damages was lost employment compensation, despite the fact that he had been unemployed since 1984.

Fred Rhodes, operations manager of Assembly Hall, detailed three specific procedures used in cleaning and maintaining the facilities at Assembly Hall during events such as the high school basketball tournament. There was a specific procedure regarding spills. The spills included soda and popcorn. The spills would be reported by an usher calling in on a two-way radio. There would be at least 30 to 40 radios in the hands of ushers for major basketball events. The reports would be sent to room 101, which is the main office of Assembly Hall. That office

would then contact Mr. Rhodes, and he would dispatch one of the two roving members of the spill crew to the site.

Between sessions of the tournament, Mr. Rhodes' staff went through the building utilizing concession workers, extra-help workers, and ushers to clean the facilities. This procedure would have occurred before the first of the last two basketball games played on the evening of the accident. Each individual was assigned a row and a section. That person walked the entire circumference of the section and picked up loose debris. At the end of the event, Mr. Rhodes checks with room 101 to compare their list with his list. This is an attempt to make sure that all spills were cleaned up.

The Claimant based his theory of recovery on negligence. He maintains that the University was negligent in its failure to properly maintain the facilities by failing to clean up the spill. He alleges that this caused him to fall and was the proximate cause of injuries to his knee.

A landowner has an obligation to use reasonable care and caution to keep the premises reasonably safe. A landowner is not required to give warning or precautions for dangers that are self-evident. (*Mullen v. Board of Trustees of the University of Illinois* (1985), 38 Ill. Ct. Cl. 44.) Mr. Shields testified that the spill covered the surface of the third and fourth steps of section C. Mr. Shields was responsible to see and observe any open and obvious conditions. Given his description of the size of the spill, we conclude that it was an open and obvious condition. In addition, Mr. Shields was not looking down, and he was not using the handrails which had been provided. Surely Mr. Shields was aware of his own physical limitations due to his artificial knee. In light of these limitations, we conclude that he did not use reasonable precautions in descending the stairs.

Mr. Shields has cited to the court *Ward v. K-Mart Corp.* (1990), 136 Ill. 2d 132, 554 N.E.2d 223. He uses this as the basis to assert that the university had a duty to anticipate that invitees would fail to appreciate the presence of substances on stairways when they are distracted or preoccupied with events taking place elsewhere. The Respondent has replied that the spectators are expected to exercise reasonable care for their own safety. *Ward, supra*, states that the landowner, or possessor of the land, is not expected to anticipate the negligence of others. Mr. Shields was not exercising reasonable care. The danger was open and obvious, and it should have been recognized by him.

The facts in this case are similar in many respects to *Thornburg v. State* (1986), 39 Ill. Ct. Cl. 139. In *Thornburg*, a university employee slipped and fell on a stairway at the entrance of a building. The stairway was wet because of heavy snow conditions outside the building. The university recognized its obligation with regard to this condition and had taken steps to remedy it. This is exactly what the staff of Assembly Hall does via their cleanup procedures. Mr. Rhodes testified that the university recognizes the possibility of spills in Assembly Hall, and it uses precautions to try and ensure the safety of invitees. It should be noted that Assembly Hall seats approximately 16,000 people.

We find that the university had taken every reasonable precaution to prevent accidents such as the one that happened to Mr. Shields. As we previously stated, the university is not an insurer.

For the reasons stated above, we hold that the Claimant has failed to show that the State breached its duty of

reasonable care in maintaining the facilities at Assembly Hall. For those reasons, we hereby deny this claim.

(No. 89-CC-2968—Claimant awarded $25,000.)

DEBBIE MORGE, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed September 18, 1991.

Order filed December 20, 1994.

STEINBERG, BURTKER & GROSSMAN (RICHARD J. GROSSMAN, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (THOMAS L. CIECKO, Assistant Attorney General, of counsel), for Respondent.

EXHAUSTION OF REMEDIES—*Claimant must exhaust other remedies and sources of recovery.* Pursuant to section 25 of the Court of Claims Act and section 790.60 of the Court of Claims Regulations a Claimant shall, before seeking final disposition of her claim, exhaust all other remedies and sources of recovery, and the exhaustion requirement is mandatory rather than optional.

SAME—*bus driver attacked by passenger—claim dismissed for failure to exhaust remedies—joint stipulation—award granted.* Although a bus driver's negligence claim for injuries sustained in an attack by a passenger from a State mental health facility was dismissed because the bus driver failed to exhaust all other remedies available to her, the parties subsequently entered into a joint stipulation of liability, and the bus driver was awarded $25,000 in full satisfaction of her claim.

ORDER

RAUCCI, 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:

The Claimant seeks recovery for her injuries that she sustained after being attacked by a passenger on the bus that she was driving. The Claimant was employed by the Frontier Coach Bus Company as a bus operator. The Frontier Coach Bus Company was under contract with the State of Illinois to provide bus services for the recipients of the W. A. Howe Developmental Center. The W. A. Howe Developmental Center is part of the Department of Mental Health and Developmental Disabilities.

Section 25 of the Court of Claims Act and section 790.60 of the Court of Claims Regulations require that any person who files a claim before the Court of Claims shall, before seeking final disposition of her claim, exhaust all of her remedies and sources of recovery. The Claimant was attacked by a passenger in the bus that the Claimant was operating. This Court has consistently held that exhaustion of remedies is a requirement and mandatory rather than discretionary and optional. *Essex v. State* (1987), No. 85-CC-1735, opinion filed October 1, 1987.

Therefore, prior to seeking final disposition of the instant cause in the Court of Claims, Claimant must exhaust all other available remedies by bringing a civil action against her attacker: this Court has consistently interpreted the exhaustion of remedies to be an inescapable requirement. In *Lyons v. State*, this Court stated that section 25 of the Court of Claims Act and section 790.60 of the Court of Claims Regulations, "quite clearly makes the exhaustion of remedies mandatory rather than optional." (*Lyons v. State*, 34 Ill. Ct. Cl. 268.) The Court further stated that if the exhaustion of remedies requirements were waived, "merely because claimant waited until it was too late to avail himself of other remedies, the requirement would be transformed into an option, to be accepted or ignored according to the whim of all claimants." (*Lyons* at 272.) That this Court's interpretation of Court of Claims Act section 25 and Regulations section 790.60 clearly

mandates that a claimant must exhaust all remedies available to him and if he has missed the deadline for one such remedy he cannot recover in the Court of Claims because he still had failed to exhaust all available remedies. Since the statute of limitations has run on the action against the attacker, this cause of action should be dismissed.

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

ORDER

MITCHELL, J.

Claimant filed a claim on March 17, 1989, alleging that the Respondent, State of Illinois, was in part negligent in its supervision of a certain patient and as a result of said negligence, Claimant received personal injuries. After reviewing the file and the joint stipulation of liability entered into by the parties, the Court hereby finds that the stipulation is fair and just and that the sum of $25,000 is hereby awarded to Claimant, Debbie Morge, in full satisfaction of any and all claims against the Respondent, State of Illinois.

(No. 89-CC-3683—Claim dismissed.)

BE-MAC TRANSPORT COMPANY, INC. and THEODORE WELCH for the use of PROTECTIVE INSURANCE COMPANY, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Motion for voluntary dismissal filed April 10, 1995.

Order filed May 16, 1995.

BERNARD & DAVIDSON (GARY SMITH, of counsel), for Claimant.

JIM RYAN, Attorney General (PHILLIP MCQUILLAN, Assistant Attorney General, of counsel), for Respondent.

PRACTICE AND PROCEDURE—*claim voluntarily dismissed.* Upon motion of the Claimants, their action against the State was voluntarily dismissed without prejudice, and each party was ordered to bear its own costs.

MOTION FOR VOLUNTARY DISMISSAL

PATCHETT, J.

Now come Claimants Be-Mac Transport Company, Inc. and Theodore Welch for the use of Protective Insurance Company, by their attorneys, Bernard & Davidson, and move this Court to allow Claimants to voluntarily dismiss this action, without prejudice, with each party to bear its/his own costs.

ORDER

PATCHETT, J.

Upon motion of Claimants, cause is dismissed without prejudice, with each party bearing its own costs.

(No. 90-CC-0156—Claim dismissed.)

MATTIA SABBARA, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed February 1, 1995.

HARVEY L. WALNER & ASSOC. (LEONARD B. MILLER, of counsel), for Claimant.

JOSEPH P. BUELL, for Respondent.

COLLATERAL ESTOPPEL AND RES JUDICATA—*applicability of doctrine of collateral estoppel.* The doctrine of collateral estoppel applies when a party participates in two separate cases arising from different causes of action and

some controlling fact or issue material to the determination of both causes was decided against that party in the former suit, and if the determination of such issue is properly presented, it will be conclusive of the same question in the subsequent action so long as the party against whom collateral estoppel is asserted was able to litigate the issue.

SAME—*defective sewer covers—unsuccessful claim against State's contractor precluded relitigation of negligence issues—claim dismissed.* Where the Claimant was unsuccessful in his claim against the State's contractor arising out of allegedly defective sewer covers used in the construction of a highway, the verdict in favor of the contractor precluded relitigation of the same negligence issues in a claim against the State, and therefore the claim was dismissed.

ORDER

RAUCCI, J.

This cause coming on to be heard on the Respondent's motion to dismiss pursuant to section 2—619(9) of the Code of Civil Procedure (735 ILCS 5/2—619(9)), the Court being fully advised in the premises, the Court finds:

(1) A prior adjudication against the Claimant in the circuit court of Cook County in the case of *Mattia Sabbara v. Monarch Asphalt Company*, No. 89-L-9703, collaterally estops Claimant from relitigating the issues raised in this case, principally whether the sewer covers constituted a dangerous condition which proximately caused his injuries and whether any failure to warn or barricade the area proximately caused his injuries.

(2) Claimant's circuit court action was against the Respondent's contractor who was constructing or repairing the highway in question. Claimant made substantially the same claims against Monarch that it makes against Respondent in the instant action.

(3) On March 24, 1994, judgment was entered on a jury verdict in favor of Monarch and against Claimant.

(4) The doctrine of collateral estoppel applies when a party participates in two separate cases arising from different causes of action and some controlling fact or question

material to the determination of both causes was decided against that party in the former suit. (*Cleveringa v. J. I. Case Co.* (1992), 230 Ill. App. 3d 831, 847, 595 N.E.2d 1193, 1205.) The determination of a fact or issue in the prior case will, if properly presented, be conclusive of the same question in the subsequent action. (*Housing Authority for LaSalle County v. Young Men's Christian Association* (1984), 101 Ill. 2d 246, 252, 461 N.E.2d 959.) The parties need not be identical in both cases, but the party against whom collateral estoppel is asserted must have been able to litigate the issue. (*Nagy v. Beckley* (1991), 218 Ill. App. 3d 875, 883, 578 N.E.2d 1134.) Collateral estoppel is most frequently asserted by a defendant to preclude relitigation of an issue which the plaintiff had unsuccessfully litigated against a different defendant in another action.

(5) In the instant case, Claimant litigated the same issues against the Respondent's contractor. The negligence alleged against Respondent by Claimant in the construction or repair of the highway is the same negligence alleged against the contractor. The verdict in favor of the contractor precludes relitigation of the same negligence issues against the Respondent.

It is therefore ordered that the Respondent's motion to dismiss pursuant to section 2—619(9) is granted, and this action is dismissed and forever barred.

(No. 90-CC-0194—Claim denied.)

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

Opinion filed May 5, 1995.

BERNARD DAVIS, for Claimant.

JIM RYAN, Attorney General (FRANK LYONS, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*premises liability—requisite proof.* In order to recover an award, a claimant must prove that the State was negligent in its maintenance of the premises and that it had actual or constructive notice of a dangerous condition, and while the State owes a duty of reasonable care in maintaining its premises, it is not an insurer of the safety of persons entering said premises.

SAME—*Claimant's chair slipped on floor—no proof of defect or notice—claim denied.* Recovery was denied in a claim for personal injuries suffered when the Claimant fell on the floor after his chair at a public aid office moved out from underneath him, where the Claimant was talking to someone a few seats away as he began to sit down, and no evidence was presented showing that the chair or floor were defective, or that the State had notice of any defect in the premises.

OPINION

JANN, J.

Hearing was held on this cause sounding in tort, on February 7, 1995, at Chicago, Illinois, before Commissioner Michael Kane.

On October 6, 1987, the Claimant, Stephen Stewart, entered the Department of Public Aid office at 8001 South Cottage Grove, Chicago, Illinois. Mr. Stewart had been in that office on numerous occasions in the past, and on this day he was there to seek a State card for medical treatment. There were rows of chairs located in the waiting area and he selected a chair in which to place his body. As he did so, the chair moved out from underneath him, causing him to fall to the ground and injure his back and legs. Mr. Stewart seeks compensation for those injuries in

this claim, maintaining that it was the negligence of the State which was the proximate cause of those injuries.

The floor in the location where this incident took place was made of tile. The chair in question was a metal chair of some sort which was similar to all the other chairs in the seating area. Mr. Stewart described his attempts to sit down as simply turning around and trying to sit down, feeling the chair slide out from underneath him as he sat on the edge and then falling to the ground. He presented no evidence to indicate that there was anything wrong with the chair or that there was anything wrong with the floor other than his description that it was slippery. Claimant did not testify to any defect in the condition of the floor which made it slippery. He simply presumed it was slippery as the chair had slid away from him as he attempted to seat himself. Claimant was helped to a seat after the fall by another client at the office whom he knew casually and Vanessa Lovett, a security guard at the office who witnessed his fall.

Claimant testified that he saw no defects in the chair prior to or after his fall.

Vanessa Lovett testified on behalf of Respondent. She stated that Claimant was talking to a person a few seats away as he began to sit down. Ms. Lovett's testimony was consistent with Claimant's as to the fact that the chair and floor appeared in no way defective.

In order to recover an award, Claimant must prove that the Respondent was negligent in its maintenance of the premises and that it had actual or constructive notice of a dangerous condition. While the State owes a duty of reasonable care in maintaining its premises, it is not an insurer of the safety of persons entering said premises. (*Noonan v. State* (1983), 36 Ill. Ct. Cl. 200.) Claimant has

provided no evidence of defect or notice of defects at the premises. Claimant has failed to prove these propositions by a preponderance of the evidence.

This claim is hereby denied.

(No. 90-CC-0919—Claim denied; petition for rehearing denied.)

DALE PETERS, Special Administrator of the Estate of
ROBERT D. PETERS, Claimant, *v.*
THE STATE OF ILLINOIS, Respondent.

Order filed August 25, 1994.

Order on petition for rehearing filed January 13, 1995.

FISCHEL & KAHN (DAVID W. INLANDER, of counsel), for Claimant.

JIM RYAN, Attorney General (PATRICK BREEN, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*child murdered by mother's boyfriend—no breach of duty by DCFS—claim denied.* A claim brought on behalf of a child who was murdered by his mother's boyfriend, alleging that the Department of Children and Family Services failed to investigate, report, and act upon reports of the child's abuse was denied, since the mother was responsible for the child's care and protection, no duty of care was owed the child by DCFS or its caseworker, and the mother's breach of parental duty was the proximate cause of the child's injuries.

ORDER

JANN, J.

This cause comes on to be heard on the motion of Respondent to dismiss, due notice having been given and the Court being fully advised in the premises finds:

Claimants allege Respondents breached a duty owed Claimant's decedent, a minor child, by returning him to

his mother's home where he was abused and eventually murdered by his mother's boyfriend. Claimants further allege willful and wanton conduct by Respondents in failing to investigate the abuse of decedent, failing to remove decedent from his mother's home, failing to inform proper authorities of the abuse, denying knowledge of the abuse, acting in a manner to impede an investigation of the abuse and failing to fully cooperate in the investigation.

Respondent cites *MidAmerica Trust v. Moffatt* (1987), 511 N.E.2d 964, 158 Ill. App. 3d 372 (5th Dist.) in support of its motion. A review of *Moffatt* indicates that the facts of this case are virtually identical. The *Moffatt* court dismissed the case finding no breach of duty by the caseworker and that no duty of care was owed the child by the caseworker. It held that the mother was responsible for the care and protection of her child. 511 N.E.2d 964 at 970, 971.

Moffatt further held that the claimed injuries were not proximately caused by any negligence of the caseworker, but by the mother's breach of parental duty.

We find *Moffatt's* reasoning fully applicable to the case at bar and hereby grant Respondent's motion to dismiss.

ORDER

JANN, J.

This cause comes on to be heard on Claimant's petition for rehearing. The Court having reviewed the record and being fully advised in the premises finds:

(1) Claimant misrepresents the Court's finding, asserting that duty arises only to children in its custody and makes conclusions not supported by the evidence in its arguments for rehearing.

(2) Claimant presents no case law to support its position.

(3) Claimant asserts that *MidAmerica Trust v. Moffatt* (1987), 158 Ill. App. 3d 372, 511 N.E.2d 964 (5th Dist.) presents a distinguishable precedent as the child was allegedly returned to his mother's home after a judicial determination as to the mother's fitness. The asserted determination is *not* clear and is specifically referenced as such in *Moffatt*.

(4) Claimant's decedent's death was caused by a third party. No duty has been established which could impute liability to DCFS or its caseworker. The imposition of duty Claimant asserts would hold DCFS to an impossible standard. The caseworker who saw decedent once would become liable for his eventual murder by a third party.

Claimant's petition is hereby denied.

(No. 90-CC-2917—Claimant Tiny Scott awarded $248.94.)

GEORGE ALARM COMPANY, INC., and TINY SCOTT, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed September 6, 1990.

Order filed December 20, 1994.

TINY SCOTT, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (MICHAEL F. ROCKS, Assistant Attorney General, of counsel), for Respondent.

LIMITATIONS—*breach of contract due to lapsed appropriation—when claim must be filed.* In an action for breach of contract filed as a lapsed appropriation claim and alleging that the sole reason for nonpayment on the

contract was the lapsing of appropriated funds, the applicable five-year statute of limitations begins to run at the end of the State's fiscal year in which the obligation is incurred.

LAPSED APPROPRIATIONS—*breach of contract due to lapse of appropriated funds—claims timely filed.* In two lapsed appropriation contract claims alleging that the sole cause of the State's breach of contract was nonpayment due to the lapsing of funds appropriated for the contract, the claims were timely filed within the relevant limitations period, and the State's motion to dismiss was denied.

SAME—*stipulation—reduced award entered.* Upon motion of the State and pursuant to its stipulation, the Court of Claims entered an award for the Claimant in an amount less than that sought, and dismissed the remainder of the claim.

OPINION

MONTANA, C.J.

Both of the claims at bar raise the issue of when the limitations period contained in section 22(a) of the Court of Claims Act (705 ILCS 505/1, *et seq.*) begins to run when the sole cause of the breach of the contract is the nonpayment due to lapsing of the funds appropriated for payment on the contract.

Claimant George Alarm Company, Inc. filed its claim on the standard lapsed appropriation form complaint on October 5, 1988, seeking $216 in payment for services rendered July 1, 1983. Claimant Tiny Scott filed his claim on the standard lapsed appropriation form complaint on April 23, 1990, seeking $329.25 in payment for emergency foster care services rendered from November 24, 1984, through December 19, 1984. The dates of the services in both cases are not in dispute.

The Respondent moved for dismissal on the grounds that the statute of limitations cited above was a bar to each claim. Although not expressly stated, it is apparently Respondent's position that the limitations period begins to run on the date that the services were rendered. We disagree.

While the five-year statute of limitations does not apply to all of the various kinds of lapsed appropriations claims (see *Ontis v. State* (1987), 40 Ill. Ct. Cl. 198), it is clear that it applies to lapsed appropriation claims arising from a contract. (*Goodwill Industries of Chicago v. State* (1982), 35 Ill. Ct. Cl. 318.) Both of the claims at bar arise from a contract. The only alleged breach of both contracts was nonpayment due to lapsing of the appropriated funds. Based on departmental reports attached to the motions to dismiss and offered as *prima facie* evidence of the facts contained therein pursuant to 74 Ill. Adm. Code 790.140, we find that no other breach occurred and but for the lapsing of the appropriations the claims would have been paid. See responses to question 16 in each report.

The facts in the cases at bar are similar to those in *Goodwill Industries and Cook County v. State* (1982), 35 Ill. Ct. Cl. 303. That case was filed as a lapsed appropriation claim and the only defense raised was the statute of limitations. The Court decided that the cause of action for the breach of the contract accrued and began to run when payment was due and not made. If that reasoning was applied to the cases at bar, motions to dismiss would be granted.

However, since the two *Goodwill* claims were decided, the Court has ruled on another claim involving the statute of limitations as it applies in lapsed appropriation claims. *Ontis v. State, supra*, was a lapsed appropriation claim which did not arise out of a contract. In that case the accrual date of the cause of action was at issue. Although the Court did not find it necessary to decide exactly what that date was (an internal agency regulation may have barred the claim earlier), the Court said:

"* * * In any event, a cause necessarily 'accrues' as of * * * the close of business on September 30 following the end of Respondent's fiscal year, following

which Respondent has no statutory authority to pay the claim from an expired appropriation. * * *" *Ontis, supra* at 200.

The September 30 date is the end of the three-month grace period allowed in section 25 of the Finance Act (30 ILCS 105/25), for agencies to pay their outstanding liabilities incurred in the prior fiscal year.

Although the *Ontis* claim did not involve a contract, we find that the approach taken should be applied in lapsed appropriation contract claims, too. The respondent agencies in the cases at bar had up to three months after the close of the fiscal year in which the obligations were incurred to make the payments. In *George Alarm*, payment could have been made any time up to September 30, 1984, and in *Tiny Scott*, payment could have been made any time up to September 30, 1985. Both claims were filed within five years of the end of the fiscal years in which the obligations were incurred. The reason this approach is better is that had these lapsed appropriation claims been filed here before those September 30 dates, they would have been dismissed as premature. It would be incongruous in the absence of statutory authority otherwise for us to hold that the limitations period began to run before the claim could be filed.

This decision is limited solely to breach of contract claims filed as lapsed appropriation claims where the sole reasons for the nonpayment on the contract is due to the lapsing of funds appropriated for payment on the contract. Insofar as *Goodwill Industries and Cook County v. State*, *supra*, is inconsistent, it is overruled.

Although the departmental reports filed with the motions to dismiss state in each case the services rendered were properly authorized and satisfactorily delivered, we are unable to go on and enter awards due to the inaccuracy and absence of fiscal dates in the reports. In *George Alarm*, the bill was an FY84 obligation but the

report contains fiscal data for FY89. The report in *Tiny Scott* does not contain any fiscal data.

For the reasons stated hereinabove, the motions to dismiss are denied and Respondent is ordered to provide the necessary fiscal data on each claim or otherwise plead within 30 days of the date of this opinion; it is further ordered that if Respondent does not comply, these claims are to be assigned to a Commissioner.

ORDER

PATCHETT, J.

This matter coming to be heard upon the motion of Respondent to enter an award for less than the amount claimed and to dismiss the remainder of the claim, due notice having been given and the Court being fully advised in the premises:

It is hereby ordered that the motion of Respondent be, and the same is, hereby granted, and the Claimant is awarded $248.94 pursuant to the Respondent's stipulation, and the remainder of the claim is dismissed.

(No. 90-CC-3343—Claim denied.)

LEANN NIXON, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed December 5, 1994.

MICHAEL FALCONER, for Claimant.

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

LAW ENFORCEMENT OFFICERS AND FIREMEN COMPENSATION—*when officer is "killed in the line of duty."* For purposes of the Law Enforcement Officers and Firemen Compensation Act, the phrase "killed in the line of duty" is defined as losing one's life as a result of injury received in the active performance of duties as a law enforcement officer if the death occurs within one year from the date of injury and the injury arose from violence or other accidental cause, except the term excludes death resulting from the willful misconduct or intoxication of the officer.

SAME—*off-duty police officer killed in altercation—claim denied.* Where an off-duty police officer was killed in an altercation after going to the home of a man with whom his wife had argued several days earlier, the officer was not killed in the line of duty and his wife's claim for compensation was denied, since the evidence showed that the officer was on a personal business matter where he was not in uniform, did not have his gun or badge, and failed to identify himself as a police officer, report his activities, or call for back-up.

OPINION

FREDERICK, J.

The claim of Claimant, Leann Nixon, comes before the Court pursuant to the terms and provisions of the Law Enforcement Officers and Firemen Compensation Act (820 ILCS 315/1, *et seq.*). The Claimant, Leann Nixon, is the widow of Chicago police patrolman Dean Nixon, who died on June 9, 1989.

The Court initially reviewed the application for benefits submitted by the Claimant, together with the written statement of officer Nixon's supervising officer and documentation submitted therewith, the medical examiner's certificate of death, the decedent's designation of beneficiary, and the report of the Attorney General. After that review, the Court entered an order that we were unable to determine whether officer Nixon was killed in the line of duty, as is a precondition of the granting of compensation under the Act.

A hearing was held before the Commissioner assigned to the case and oral arguments were held before the full Court.

The sole issue before the Court is whether officer Nixon was killed in the line of duty. Claimant would be entitled to an award if officer Nixon was killed in the line of duty. Such a determination is a factual issue to be determined by the Court. For purposes of the Law Enforcement Officers and Firemen Compensation Act, the phrase "killed in the line of duty" is defined as losing one's life as a result of injury received in the active performance of duties as a law enforcement officer or fireman if the death occurs within one year from the date of injury and the injury arose from violence or other accidental cause except the term excludes death resulting from the willful misconduct or intoxication of the officer or fireman. (*In re Application of Yoho* (1989), 42 Ill. Ct. Cl. 249.) The police officer must be in the active performance of his duties as a law enforcement officer for an award to be made.

In the instant case, the Claimant had an altercation with a Mr. Eagles several days before June 9, 1989. The dispute was resolved and the police were not called. On June 9, 1989, Mrs. Nixon apprised officer Nixon of the prior occurrence. Officer Nixon was off duty and in sweatpants and a t-shirt. He took his personal gun and his badge and drove to Herman Eagles' residence. Officer Nixon left his gun and his badge in the vehicle. He then spoke to a relative of Mrs. Nixon who lived in the building, refused his offer of assistance, and then went to the Eagles' back porch. A confrontation arose with Eagles' mother and then with Herman Eagles. Officer Nixon never identified himself as a police officer. Officer Nixon was at the back door of the Eagles' apartment. He was cut by Eagles. Shortly thereafter, he and Eagles fell off the porch area and officer Nixon died. The State's Attorney felony review official refused to file criminal charges

against Eagles and the Policemen's Annuity and Benefit Fund of the City of Chicago denied benefits based on officer Nixon's death.

The actions of the felony review attorney and the Policemen's Annuity and Benefit Fund have no bearing on the outcome of this case as their standards are different from the standards and burdens of proof before this Court. Claimant must prove by a preponderance of evidence that Claimant was killed in the line of duty as defined by the Act.

We find that Claimant was not killed in the line of duty based on the evidence presented in this case to the Court. The death of officer Nixon is a tragedy but we find he was not in the active performance of his duties as a law enforcement officer. The evidence shows that officer Nixon was on a personal business matter. The purported prior occurrence happened days before and the police were not called. At the time of death, officer Nixon was off duty, out of uniform, did not have his gun or badge on his person, failed to have back-up or report his activities, and did not identify himself as a police officer.

While we have great sympathy for Mrs. Nixon and applaud the fine efforts of her counsel, we are constrained to find that officer Dean Nixon was not killed in the line of duty and therefore, Claimant is not entitled to benefits pursuant to the Law Enforcement Officers and Firemen Compensation Act. For the foregoing reasons, the claim of Leann Nixon is denied.

(No. 91-CC-0193—Claim denied; petition for rehearing denied.)

MELISSA D. BROWN, Claimant, *v.* SOUTHERN ILLINOIS UNIVERSITY, Respondent.

Opinion filed October 16, 1991.

Opinion filed May 12, 1994.

Order on petition for rehearing filed August 8, 1994.

MAUREEN NELSON SCHUETTE, for Claimant.

REED, ARMSTRONG, GORMAN, COFFEY, THOMSON, GILBERT & MUDGE (STEVEN C. MUDGE, of counsel), for Respondent.

NOTICE—*negligence claim—prior suit filed by State in small claims court—section 22—1 notice not required.* In a negligence claim arising out of an automobile accident, the Claimant was not required to file a notice of injury within one year of the date of the incident as mandated by section 22—1 of the Court of Claims Act, where the State had filed a prior suit against the Claimant in small claims court and had become apprised of the circumstances of the action, thereby fulfilling the purpose of the notice requirement.

DAMAGES—*negligence—punitive damages not recoverable absent specific legislative authorization.* Since the Court of Claims Act does not specifically authorize the payment of punitive damages and there is a strong public policy against them, particularly when assessed against the government, the Court of Claims could not award punitive damages absent a specific statutory authorization by the General Assembly, and the Claimant's prayer for punitive damages in her negligence claim was dismissed.

NEGLIGENCE—*automobile accident—Claimant's contributory fault was more than 50% of proximate cause of crash—claim denied.* Despite evidence that the driver of a State-owned vehicle which the Claimant's car skidded into on a rain-slickened road was negligent in having an inoperable turn signal, the Claimant's request for recovery and her petition for rehearing were denied, based upon evidence showing that the Claimant's contributory fault in following too closely and locking the brakes when attempting to stop was more than 50% of the proximate cause of the accident.

OPINION

SOMMER, C.J.

This cause coming to be heard on the motion of the Respondent to dismiss, due notice having been given, and this Court being fully advised in the premises, finds that

this claim arose from an automobile accident on January 25, 1989. On July 14, 1989, the Respondent filed suit for damages in the small claims court in Madison County. The Claimant filed a counter-claim, and on February 9, 1990, the judge in Madison County ruled that the counter-claim must be filed as a claim in the Court of Claims, as the circuit court had no jurisdiction to hear a claim against the State. A notice of injury was filed with this Court on April 24, 1990, and the claim was filed July 20, 1990. The Respondent has moved for dismissal on the grounds that the notice of injury was not filed within one year of the occurrence of the accident, as per section 22—1 of the Court of Claims Act. 705 ILCS 505/22—1.

This Court notes the unusual circumstance of this claim. The Respondent was the party who initiated action by filing suit in Madison County. The Respondent hardly can maintain that it had no notice of the accident and the circumstances surrounding it. However, in past cases this Court has rejected the argument that if some State employees had knowledge of the accident, which they often do, the statutory notice requirement was met even if no notice was filed. (*Thomas v. State* (1961), 24 Ill. Ct. Cl. 137; *Munch v. State* (1966), 25 Ill. Ct. Cl. 313; *Bodine v. State* (1983), 35 Ill. Ct. Cl. 777.) We, however, believe that there is an operative distinction between State employees knowing that an accident occurred and the filing of suit based upon an accident.

As the State filed the suit, it was informed of the circumstances of the action and had the opportunity to investigate and make measured and official decisions. It is no longer a matter of some isolated State employees knowing about the accident. Thus, the purpose of the notice requirement would have been fully fulfilled, but more importantly, it should not be then invoked to prevent the

other party from exercising its full range of responses to the suit filed by the State. Indeed, the supreme court has recognized that filing in another court may satisfy the notice requirement of the Court of Claims. (*Williams v. Medical Center Commission* (1975), 60 Ill. 2d 389.) Therefore, we find that the Claimant was not required to file the notice within one year as required by section 22—1 of the Court of Claims Act under the circumstances of this claim.

The Claimant has requested punitive damages, and the Respondent has made a motion to dismiss that part of the complaint that prays for punitive damages.

Section 8(d) of the Court of Claims Act confers upon this Court jurisdiction in certain tort claims, to wit:

"All claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation * * *. * * *" 705 ILCS 505/8(d).

This Court traditionally has not awarded punitive damages, but the Claimant argues there is nothing in section 8(d), *supra*, or the Court of Claims Act to prevent this Court from awarding punitive damages.

Section 8(d), *supra*, uses the term, "cause of action." There are many definitions of a "cause of action," but it is usually understood to be a set of facts giving rise to a claim allowed and enforceable by a court. Punitive damages are not a cause of action but are a type of relief arising from some successful causes of action. (*McGrew v. Heinold Commodities, Inc.* (1986), 147 Ill. App. 3d 104.) Thus, section 8(d) of the Court of Claims Act does not specifically authorize, by its language, this Court to assess punitive damages, as it speaks in terms of causes of action, not types of relief.

The Claimant, in support of this Court's awarding punitive damages, would argue that article XIII section 4

of the Illinois Constitution abolishes sovereign immunity except as provided by the General Assembly. Thus, governmental units would be subject to causes of action and types of relief the same as corporations and individuals except when exempted by the General Assembly. Indeed, the General Assembly did act in regard to local government to prohibit punitive damages. (745 ILCS 10/2—202.) Therefore, the Claimant would argue that since the General Assembly did not act to prohibit the Court of Claims from awarding punitive damages, as it did in the case of local governments, the Court of Claims may award punitive damages.

Repeated cases state that punitive damages are not favored in the law. (For example see *Hammond v. North American Asbestos Corp.* (1983), 86 Ill. 2d 195.) In the same case, the supreme court directed that the courts should take action to see that punitive damages are not improperly or unwisely awarded.

The purpose of punitive damages is to punish and deter outrageous conduct. (*Winters v. Greely* (1989), 189 Ill. App. 3d 590, appeal denied 128 Ill. 2d 673.) Punitive damages are penal in nature, meant to punish the wrongdoer and not to compensate the injured. *Kelsay v. Motorola Inc.* (1978), 74 Ill. 2d 172. *Smith v. Hill* (1958), 12 Ill. 2d 588.

The fact that punitive damages have not been assessed against governmental units in Illinois is based on strong public policy grounds as well as sovereign immunity. Local governmental units in Illinois have been exempted by the General Assembly from punitive damages on the ground that it is unsound public policy to punish taxpayers for misconduct of employees over which they have no control. So strong is the public policy that recently a public railway corporation, METRA, not specifically named in

the Tort Immunity Act and not exempted from punitive damages in its enabling act has been held not to be subject to punitive damages on public policy grounds. *Smith v. Northeast Illinois Regulatory Comm. R.R. Corp.* (1991), 210 Ill. App. 3d 223, 569 N.E.2d 41.

In view of the fact that the Court of Claims Act does not specifically authorize the payment of punitive damages and that there is strong public policy against punitive damages, particularly when assessed against government, this Court cannot award such absent a specific authorization to do so by the General Assembly.

It is therefore ordered that the part of the motion to dismiss directed to the statutory notice is denied and the part of the motion to dismiss directed to punitive damages is granted and that the prayer for punitive damages in the amended complaint is stricken, and this claim shall be returned to the Commissioner for hearing.

OPINION

SOMMER, C.J.

This claim for property damages and personal injuries is brought against Southern Illinois University, Edwardsville, as a result of a collision between the Claimant's vehicle and one of the university's cargo vans.

The above vehicles collided at approximately 1:00 p.m. on January 25, 1989, on New Poag Road at its intersection with Bluff Road. The Claimant had just completed a final exam at the university and was on her way home to Wood River, Illinois. It was raining. The collision took place approximately one-tenth of a mile past the point where the Claimant had turned onto New Poag Road. The Claimant was following the university's cargo van from the point she turned onto New Poag Road, and

both she and the van driver claim to have been traveling at a reduced speed of 35 miles per hour (51.33 feet per second) due to the bad weather.

As the Claimant was following the university's van, she observed the brake light on the right rear of the van came on, but she did not notice that any light on the left side of the vehicle went on. It is undisputed that the van's left taillights (both turn signal and brake lamps) were not working. The van was gradually slowing down to make a left turn onto Bluff Road; its driver was concerned about not making a rapid left turn because there were no shelves in the van to prevent packages inside from sliding around or falling over.

The Claimant testified that she was following within three car lengths of the van at the point that the right brake light had come on. Assuming that a "car length" is in the neighborhood of 15 to 20 feet, that meant that she was at *most* approximately 45 to 60 feet behind the van, a distance that could be closed in roughly one second at a speed of 35 mph.

Upon seeing the van's right rear brake light come on, the Claimant immediately braked, and her car began to slide out of control. The Claimant sensed that she was about to collide with the rear of the van and attempted to move into the left, oncoming lane of traffic. As the van was making its left turn onto Bluff Road, the driver looked in the rear-view mirror, saw the Claimant's car coming out from behind the van, shouted "Oh, hell she's passing," and jerked the steering wheel to the right in an attempt to avoid a collision with the Claimant's car. Nonetheless, the front passenger side of the Claimant's vehicle struck the driver's door of the van, causing an impact which knocked the van over toward the right shoulder of the road and threw the van's passenger out of his seat and onto the floor.

Following the collision, the Claimant told the van's passenger that she was sorry and explained to the van's driver that she had lost control of her car. A State trooper who responded to the accident testified that the Claimant's car had gone into a slide because the Claimant had locked the brakes.

The Claimant alleges, in essence, that this collision resulted from the van's inoperative left rear turn signal and brake light. The university contends that, notwithstanding the faulty light, it did not cause this accident and that the contributory fault of the Claimant is more than 50% of the proximate cause of the collision and damages, thereby barring the Claimant's recovery pursuant to section 2—1116 of the Code of Civil Procedure. 735 ILCS 5/2—1116.

In reading the Claimant's brief and listening to her argument, one could easily come to the conclusion that liability has been fully established against the university simply by virtue of the uncontroverted fact that the van's right rear turn signal was inoperable at the moment of this collision. After all, that was a clearly negligent act on the part of the university which violated express provisions of the Illinois Vehicle Code, section 12—208(b) and 11—804(a), (b) (625 ILCS 5/12—208(b) and 625 ILCS 5/11—804(a), (b)). But it is a fundamental principle of tort law that proof of negligence does not complete a claimant's case. There is the further and more crucial question of proximate cause.

It simply is not enough to show that the supposed tortfeasor was guilty of some fault; in order to recover, the Claimant must also establish that the negligence complained of was the proximate cause of the Claimant's injury and damages. This legal principle has long been specifically applied in automobile negligence cases where

a portion or portions of the Vehicle Code have admittedly been violated by an alleged tortfeasor. Time and again courts have stressed that negligence alone does not create liability:

> "Such violations must in addition be shown to have proximately contributed to the injury before liability * * * can be predicated thereon." *Hestand v. Clark* (1952), 345 Ill. App. 480, 485; 103 N.E.2d 652, 654 (4th Dist.)

Thus, the critical inquiry in this case is not whether the university was negligent, but whether its negligence was the proximate cause of this collision.

The state of the evidence is such that the inoperable turn signal on the university's van was not the proximate cause. With a gap of at most between 45 and 60 feet between the front of her car and the rear of the university's van, the Claimant had put herself in a position where she had allowed only one second of time to both react and completely respond to anything that the van might do, proper or otherwise. The Claimant did not lose control of her car because of the van's broken turn signal. She skidded out of control because she was following the van too closely and locked up the brakes when attempting a panic stop. Accordingly, we find that the Claimant's own negligence was the proximate cause of this collision.

Notwithstanding the Claimant's assertions to the contrary, the addition of a turn signal would not have changed anything; this accident still would have occurred due to the insufficient distance which the Claimant had left between her car and the university's van. Accordingly, her claim is barred by section 2—1116 of the Code of Civil Procedure, as the Claimant's contributory fault was more than 50% of the proximate cause of the accident.

It is therefore ordered that this claim is denied.

ORDER

SOMMER, C.J.

This cause coming to be heard on the Claimant's petition for rehearing, due notice having been given, and both parties having filed briefs, and this Court being fully advised, finds that this Court by an opinion issued on May 12, 1994, found the Claimant to be more than 50% of the proximate cause of the accident complained of, and therefore denied the claim; and this Court having reviewed its opinion and having read the briefs filed by both parties in regard to the petition finds no good cause for reconsidering its basic finding as cited above.

It is therefore ordered that the Claimant's petition for rehearing is denied.

(No. 91-CC-0595—Claim denied.)

KELLY WHITE, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed December 2, 1994.

SCHOENFIELD & SWARTZMAN (RICH SCHOENFIELD and KIMBERLEE MASSIN, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (IAIN JOHNSTON, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*inmate fight—State's duty to restore order.* Inmates in prison have a reasonable right to personal safety, and when a fight breaks out the State owes a duty to the general prison population to restore order as quickly as possible and prevent the unwanted attack of inmates, regardless of other inmates.

SAME—*prison disturbance—inmate struck by birdshot from guard's gun—claim denied.* A correctional officer's firing of a .12 gauge shotgun

loaded with birdshot from a guard tower in order to halt a prison disturbance 60 feet away was reasonable under the circumstances, and an inmate's claim for injuries as a result of being struck by ricocheting pellets was denied, where several minutes after the fight had erupted inmates failed to respond to warning alarms as they had been instructed, and the guard used less than the maximum amount of force available to her in reacting to a potentially dangerous situation.

OPINION

PATCHETT, J.

The Claimant was a resident of the Illinois Department of Corrections. On October 5, 1989, he was eating dinner in the dining room, along with 150 to 200 other inmates. A fight broke out several rows from the Claimant between two inmates. A crowd quickly ringed the combatants to watch.

Officer McEwing was on duty that evening in the guard tower overlooking the dining hall. Officer Anderson was on foot patrol in the north dining hall. Officer Mancera was in the guard tower overlooking the south dining hall. Lieutenant Valestin was on floor duty in the south dining hall.

After officer McEwing observed the fight, she sounded the alarm bell. Inmates have been instructed that at the alarm's sounding, any extraneous activity should cease. They have been informed that they should sit or stand quietly where they are after the bell sounds. The bell was ignored in this case. The fight continued, and the crowd did not return to their seats. Officer Anderson approached the fighters and attempted to break up the disturbance. One of the fighters swung at him. Anderson then realized that he had no back-up or support. Two minutes after the bell had sounded, the fight was still going on. Officer McEwing picked up a .12 gauge shotgun and loaded it with birdshot.

The distance from the guard tower to the site of the fight was disputed. The court will accept the Respondent's estimate of approximately 60 feet. McEwing fired a warning shot toward the ceiling. This had no effect, and her next shot was aimed at the combatants. Mr. White states that the pellets from the second blast ricocheted off the floor and hit him in the lower leg and ankle. The fight continued, and McEwing fired a final load in the direction of the combatants. Mr. White states that this shot also ricocheted from the floor and resulted in wounds to his back and groin area. After the third shot, the fight stopped. The fighters allowed themselves to be cuffed by the officers on the floor.

Mr. White and others who were struck by the birdshot were taken to the infirmary, treated, and released. Mr. White was unable to walk for several days, and he claims that he still experiences discomfort from the pellets left in his leg. Mr. White has asked for $20,000 for his injuries.

Petitioners raised an argument for the first time in their brief that the State was negligent for failure to provide proper training to its correctional officers regarding the use of weapons in the tower. Petitioner's counsel argues that the use of tear gas would have been preferable to birdshot. He further argues that officer McEwing did not use gas because she erroneously thought she needed the warden's permission to do so. This turned out to be untrue. However, several of the other officers testified that the use of tear gas projectiles was contraindicated under the circumstances. In addition, the argument was made for the first time in the brief. Therefore, we decline to find liability based on that argument.

Inmates in prison have a reasonable right to personal safety. When a fight breaks out, the State owes a duty to

the general prison population to restore order as quickly as possible and prevent the unwanted attack on inmates, regardless of other inmates. However, being in prison is not in any way to be compared with being at Boy Scout camp. The officer's actions in this case were entirely reasonable, considering the situation she was confronted with. She sounded the alarm and waited for the inmates to respond as they had been instructed. Her first shot was in the ceiling. This too was ignored. By choosing to use birdshot, instead of a mini .14 caliber gun also in her possession, she used somewhat less than the maximum amount of force available to her. Under the circumstances, and considering the distance from the tower to the fight scene, the use of the shotgun in most circumstances would not be the use of deadly force. We find that officer McEwing reacted properly and promptly to a potentially dangerous situation. She did so in measured and reasoned steps. We therefore deny this claim.

(No. 91-CC-0600—Claimant awarded $87,684.91.)

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, Claimant, *v.* EASTERN ILLINOIS UNIVERSITY, an agency of THE STATE OF ILLINOIS, Respondent.

Order filed December 28, 1994.

Order filed April 28, 1995.

SORLING NORTHRUP HANNA CULLEN COCHRAN, LTD. (CRAIG BURKHARDT and MARK K. CULLEN, of counsel), for Claimant.

DUNN GOEBEL ULBRICH MOREL & HUNDMAN (DAVID DUNN, of counsel), for Respondent.

UTILITIES—*when utility's bill for services must be presented.* Pursuant to section 280.100(a) of the Illinois Administrative Code, a utility may render a bill for services or commodities provided to a nonresidential customer only if such bill is presented within two years from the date the services or commodities were supplied.

SAME—*contract for delivery of natural gas to university—arrearages—award granted after recalculation of payment due.* On cross motions for summary judgment filed by the Claimant utility company and the Respondent university arising out of a contract for the Claimant's delivery of natural gas to the university, the Court of Claims determined that, although the university owed the Claimant for gas overages which accrued over several years due to the Claimant's accounting errors and underbilling, not all of the arrearages accrued within the two-year statute of limitations, and after the Claimant recalculated the payment due for the billable usage within the statutory period, an award was entered for the Claimant in that amount.

ORDER

JANN, J.

This cause comes before the Court on cross motions for summary judgment and responses thereto by Claimant and Respondent. Oral arguments were heard on November 9, 1993, in Springfield, Illinois.

Facts

Claimant, Central Illinois Public Service Company ("CIPS") seeks $220,776.85 for delivery of natural gas to Respondent, Eastern Illinois University ("EIU") pursuant to a contract executed and acknowledged by the parties. The period of October 1984 through June 1990 is at issue herein. During this period, EIU received monthly invoices from CIPS for the transportation and delivery of natural gas purchased by EIU from third-party producers pursuant to the contract. EIU also received invoices from CIPS for natural gas purchased directly from CIPS at the "PGA" rate. The PGA rate is usually higher than the rates charged by third-party suppliers.

During a given month when the amount of gas purchased by EIU from third parties and transported to

CIPS for delivery was less than the amount actually used by EIU during that month, EIU either paid for the difference in volume at the PGA rate on file with the Illinois Commerce Commission or would agree to replace the deficit volume at a later date. If EIU elected to replace the deficit at a later date, CIPS would debit the deficit volume to the "natural gas bank balance." When EIU purchased excess gas in a given month, a credit was applied to the natural gas bank balance for future overusage.

Although Respondent EIU's answers to CIPS' amended complaint denies the allegations of paragraphs 11-13 of the amended complaint, EIU's cross motion for summary judgment appears to rely on the following:

"11. Due to record-keeping errors, credits to Eastern's volume 'bank' were overstated on one or more of the monthly statements for the calendar months of October, 1984 through June, 1990.

12. As a result of the overstatement of volume 'bank' balances, CIPS did not bill Eastern for various dollar PGA amounts, which it otherwise would have billed notwithstanding the record-keeping errors.

13. CIPS recalculated the 'bank' balances to correct for record-keeping errors. Pursuant to such recalculations, CIPS determined that PGA dollar amounts were owed for the months of August, 1989, September, 1989, May, 1990, and June, 1990 in the amount of $220,776.85."

CIPS submitted a bill to EIU on or about July 26, 1990, reflecting a negative "bank" balance of 685,267 therms existing as of June 30, 1990. This billing was in the amount of $220,776.85 and has not been paid to date by EIU. The billing reflected revisions of the "bank" balance based upon CIPS' internal audit and a report of independent public accounting by Arthur Anderson dated December 20, 1989, which corrected previous accounting errors.

The Law

The parties do not contest the amounts of gas actually delivered and used. The primary issue we must decide is the applicability of 83 Ill. Admin. Code 280.100(a) which provides:

"A utility may render a bill for services or commodities provided to:

* * *

(2) a nonresidential customer only if such bill is presented within two years from the date the services or commodities were supplied."

The parties agree EIU is a nonresidential customer. EIU asserts that pursuant to the above provision, CIPS may not recover amounts for overages actually accrued in the period prior to June 29, 1988, but billed in July 1990.

Claimant agrees that negative "bank" balances were contemplated by the parties and used for EIU's benefit for the periods September 1987 through May 1988 and again from June 1989 through January 1990. These negative balances were subsequently repaid by excess purchases by EIU during October 1989 and February 1990.

CIPS further argued that although accounting errors dated back to September of 1986 and were discovered in late 1989, gas bank arrearages comprising the $220,776.85 billed in July 1990 are specifically attributed to August 1989, September 1989, May 1990 and June 1990 by applying the FIFO (first-in-first-out) accounting method. This method would allegedly place all arrearages within the two-year time frame required by section 280.100(a) of the Ill. Admin. Code.

Respondent argues that the overstatements of "bank" credits booked by CIPS were actually understatements of usage. EIU points out that CIPS's complaint at paragraph 12 alleges a failure to bill for overusage. The Court specifically asked if this was an issue of material fact. Respondent stated that there were no facts in dispute and voiced a desire for ruling on the summary judgment motions.

Respondent further argued that through CIPS's errors, EIU was denied the opportunity to establish a positive "bank" balance by purchasing gas from third parties

at lower cost and that its ability to accurately budget for gas usage was impaired.

Respondent admits that EIU owes CIPS for 249,881 therms in overage for the two-year period preceding the July 1990 bill.

CIPS argued that the course of dealing, custom and usage with EIU which allowed for negative balances amounted to a waiver of the provisions of section 280.100(a) of the Ill. Admin. Code.

Neither the parties nor the Court were able to find applicable case law on this matter. We shall, therefore, proceed on the basis of strict construction of section 280.100(a) of Ill. Admin. Code.

CIPS' arguments that FIFO accounting methods place all arrearages within the two-year statute of limitations are not convincing. FIFO is a widely-accepted accounting principle which the Court recognizes.

However, FIFO consistently applied would have disclosed "bank" deficits in 1986 and allowed EIU to pay or obtain gas to offset said deficits in a timely manner. EIU did address deficits brought to its attention, presumably using a FIFO method during the course of the agreement prior to July 1990.

CIPS' admission of errors dating back to 1986 regarding the correct balance and the subsequent discovery of said errors in late 1989 make its argument of overages solely attributable to the two-year statutory period highly suspect. The evidence does not adequately support CIPS contentions.

The evidence indicates and the parties agree that CIPS received 6,848,643 therms of gas from third-party suppliers for EIU in the two years preceding July 1990.

EIU's metered usage of gas in the same period was 7,098,524 therms, resulting in a billable deficit of 249,881 therms of gas. The evidence indicates that CIPS has tested and determined EIU's meters are correct.

EIU cannot waive the provisions of section 280.100(a) through course of dealing, custom and use.

It is hereby ordered that CIPS' motion for summary judgment is denied to the extent it exceeds 249,881 therms of gas. EIU's motion for summary judgment is granted as to the deficit of 249,881 therms of gas which may be billed pursuant to section 280.101(a) Ill. Admin. Code. The payment shall be made at the applicable overage PGA rates for the two years in question.

The entire two-year deficit may not be attributed to June, 1990 as argued by CIPS based upon its FIFO accounting previously discussed. By the same token, EIU may not pay the cheaper third-party average price of $0.15 per therm as argued in its cross motion for summary judgment. EIU seeks to pay the lesser price based upon CIPS's earlier accounting errors. To allow EIU to pay the lower price would result in EIU benefitting from the same "rolling balance" methods it attacks in CIPS's practices.

Rider C to the contract states:

"The Company will not recognize a negative balance when the quantity of gas used by the customer for the billing period exceeds the customer's gas delivered to the Company [from third party wellheads], including a previous positive balance, such excessive volumes consumed shall be system (CIPS) gas subject to billing under the provisions of the applicable rate. (PGA)"

Further, there is no evidence that EIU had any PGA rate credits during the two-year period. EIU shall receive no PGA credits in the computation of the final payment to CIPS.

EIU shall receive credit for applicable take-on-pay charges and agency fees under the contract.

EIU shall pay applicable State and municipal taxes due CIPS on the negative balance of 249,881 therms.

CIPS shall submit a recalculation of payment due based upon the foregoing findings within 30 days of the date of this order. EIU shall have 30 days from the date of CIPS's filing to dispute said calculations.

ORDER

JANN, J.

On December 28, 1994, an order was entered denying Claimant's motion for summary judgment to the extent it exceeded 249,881 therms of natural gas. Respondent's cross-motion for summary judgment was granted as to determination of the deficit of natural gas at 249,881 therms. Claimant was directed to submit a recalculation of payment due based upon the findings of the Court.

Claimant has submitted a recalculation of payment due in accordance with the Court's order. The total amount of said payment is $87,684.91, which includes 249,881 therms of natural gas billed at the applicable Purchased Gas Adjustment (PGA) rate as filed by Claimant with the Illinois Commerce Commission, credits for take-or-pay charges, agency fees and the applicable State and municipal taxes.

Claimant's recalculation of payment due was timely filed on January 17, 1995. The Court's order of December 28, 1994, directed Respondent to file any dispute or objection to said recalculation within 30 days of Claimant's filing. Respondent has not filed any objection within the prescribed period.

Wherefore, we hereby award Claimant the sum of $87,684.91 as full and final compensation in this cause.

(No. 91-CC-0681—Claim denied.)

DONCHII MALONE, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed September 30, 1994.

DONCHII MALONE, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (LAWRENCE C. RIPPE, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*proof required in claim alleging unsafe recreational equipment.* If the State provides recreational equipment to inmates, that equipment must be in safe condition, and in order for an inmate to recover for injuries in the use of recreational equipment, he must show the State's breach of that duty, but the existence of a defect is not in itself negligence on the part of the State, as the State must be shown to have actual or constructive knowledge of the defect.

SAME—*wrist injured on gate during basketball game—no notice of defect—claim denied.* Recovery was denied in an inmate's claim for a wrist injury suffered when he slipped and fell against a gate in a prison yard while playing basketball, since even assuming that the inmate's testimony concerning the condition of the gate was more credible than that of the correctional officer who testified, there was no evidence that either the gate or the playing surface had obvious defects or constituted dangerous conditions of which the State had knowledge or should have had knowledge.

SAME—*medical malpractice—inmate's burden of proof not met.* A medical malpractice Claimant must establish a breach of duty through expert testimony, and establish that the Respondent deviated from the required standard of care, and an inmate's claim of delayed and inadequate medical treatment was denied, because he failed to show the applicable standard of care or any deviation therefrom by the State.

ORDER

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 $180,000 in compensation for personal injuries sustained by the Claimant while playing basketball at the Joliet Correctional Center. The Claimant's complaint contends that on July 20, 1990, at 2:00 p.m., he was playing basketball in the west segregation yard. While playing basketball, the Claimant contends he slipped on small rocks and sand which had come from the brick wall to which the basketball goal was fastened, and fell against the fence gate. The Claimant contends his left arm landed under the fence gate, and his left wrist was broken. The Claimant contends that the fence gate and the playing area were unsafe.

The Claimant also contends that he was not promptly afforded medical care, but was delayed 10 to 15 minutes in the west segregation area before being taken to the medical center where he was required to wait for over an hour before receiving medical attention. The Claimant contends he was driven to an "outside hospital" where he was required to remain seated in the emergency room for 20 minutes before receiving medical attention. He also contends that after his injury was treated, he received insufficient pain medication. He alleges that he has lost the use of his left arm and left wrist, and is accordingly entitled to substantial damages.

At the hearing in this cause, the Claimant testified that he was first incarcerated in Joliet on September 2, 1988. The incident from which this claim arose occurred July 20, 1990, between 2:00 p.m. and 2:30 p.m. The Claimant was incarcerated in the segregation unit, and after lunch inmates were taken to the yard by correctional officer Lt. Breeding. The inmates, including the Claimant, were allowed to play basketball.

The Claimant stated that on the surface of the yard there was debris from a brick wall upon which the basketball goal is mounted. As the Claimant was playing he fell and he broke his left wrist. He stated that the reason his wrist was broken is that "the gate pushed in," and his hand "went up under the gate." The Claimant testified that the gate was not secure, and that his hand landed "up under the pole, the bottom pole of the gate," and that is the circumstance that caused his wrist to break. The Claimant stated that the gate in question was a standard seven-foot wire gate, the frame of which was made of some type of metal.

The Claimant testified that the game he was playing was a game that involved running and jumping and some physical contact between the people who were participating. In response to questions at the hearing, the Claimant testified that the gate in question was there for security reasons to keep inmates from coming in or going out as they pleased. He also stated that the gate was not designed to provide a landing area for a person who was involved in a vigorous game who might lose his balance or fall to the ground.

On the occasion in question, the Claimant contends that his fall was caused by debris which had fallen from the brick wall onto the surface where the game was being played. The Claimant testified that the wall was not like a flat surface, but consisted of "big old chunks of bricks, that deteriorate onto the surface of the playing area." The Claimant testified that the debris "was all over back there." The Claimant testified that "we sweeps, you know, it out of the way. Usually, we sweeps it out of the way; but it wasn't like it usually be. It wasn't like thick. It was like just from the wall. It is an old wall that was built in the 1800s. So, I guess a little gravel falls. There was like a

sand-like surface, rocks here and there. There was like a sand, like a surface that came off the wall." The biggest debris was maybe a half an inch, and the smallest debris was not as big as the top of a pen. It was like sand on the surface with rocks here and there, according to the Claimant.

The Claimant had played basketball at this location many times. He testified that there was nothing about the condition of the playing surface that he was unfamiliar with. He testified he knew there was loose gravel that had fallen off the wall; and that from time to time the area had been swept up. On the occasion in question, the Claimant testified that the surface material from the wall was not noticeable until he fell. The Claimant stated he never fell before when playing basketball, but that he had seen others fall down many times.

The Claimant testified that when he fell, his arm pushed against the gate; and instead of the gate being secure, the gate pushed out and his arm ended up against the bottom pole. He testified that there was 2½ inches of space under the bottom pole; and that if the space had not been present the accident would not have happened because his arm would not have been able to go up under the pole—it would have landed on the pole. The Claimant stated that a person could have looked at the location and seen that there was a 2½-inch gap beneath the bottom support member of the gate.

After the accident, the Claimant advised correctional officers that he thought his wrist was broken. He testified he waited five minutes before he was taken to the prison hospital. When he arrived at the hospital, he was advised that there was nothing that could be done for him at that location, and that he would have to go to an outside hospital. He testified that he waited at the prison hospital for

an hour and a half or two hours while paperwork was completed. He was given ice to put on his wrist. Eventually, the Claimant was taken to the outside hospital and received a shot. When his wrist was examined at the outside hospital, he was advised that a specialist would have to be called. After a delay of about two hours, the Claimant was seen by Dr. Duffy who is a bone specialist. The Claimant was advised by Dr. Duffy that his wrist was broken badly. Dr. Duffy applied an arm cast for the Claimant; and replaced the arm cast later with another cast. He was in a cast for eight weeks.

The Claimant described the basis of his complaints concerning the medical care he received. The Claimant stated that the people at the medical facility at the prison did not act like there was an emergency. He stated that he received an insufficient amount of Tylenol 3. He stated that the correctional officers acted like they didn't care. The Claimant stated that he went through pain for three days because of the negligence of correctional officers.

At the time of the hearing, the Claimant testified that his wrist was not as painful, but that he could not turn his palm all the way up. He stated that he can't use his wrist to do a lot of things that he wants to do with his wrist. Observation by the Commissioner of the Claimant's use of his injured arm and wrist while handling his papers and testifying indicated that he was successfully able to use the left hand. The Claimant gestured to the Commissioner to demonstrate the limitations of his use of the left hand; and demonstrated that he could not turn his left hand palm-side up, but could only turn the hand approximately half of the distance needed to turn it palm-side up. At the time of hearing, the Claimant stated that he was supposed to be receiving therapy but had not been called to continue the therapy.

The Claimant testified that in his weightlifting activities, he could perform a bench press, but could not perform a "curl." In performing a bench press, the Claimant stated that he would lay on his back and push a barbell straight up and down to and from his chest. The Claimant contended he could lift about 100 pounds in repetitions of 5 sets of 10 lifts. He testified there were some exercises that have to be done "under hand" that he cannot do. He also testified that he engages in boxing, and that the injury has not really affected his ability to box.

The Claimant testified that the correctional officer, present at the time he was injured, made the statement that he had already reported that the gate in question should have been repaired earlier, because if it had not been repaired, "somebody was going to hurt himself."

On cross-examination, the Claimant stated that the wrist in question had been broken first when he was about 13 or 14 years old, and that the original broken wrist healed without loss of use. The Claimant is right-handed. The Claimant testified that in his job as a cell-house maintenance worker, he has no problems sweeping floors, but does have a problem mopping because of the injury to his left wrist.

Correctional officer Lt. Robert Breeding was called as a witness for the Respondent. Lt. Breeding testified that at the time of the accident, the Claimant was on the first of three "segregation yards." The yard is 20 feet by 24 feet; and the basketball rim is attached to the main prison wall. The area is fenced by a galvanized steel fence topped with razor blade wire. The surface is cement, and there is one gate to go in and out. The gate is padlocked. When the gate is locked, the gate has no movement in it. Lt. Breeding testified that the surface of the playing area is cleaned and brushed every day during good weather in

the summer. Lt. Breeding noticed nothing unusual about the surface of the playing area on the date of the Claimant's injury.

Lt. Breeding's attention to the Claimant's injury was called by a tower officer. Lt. Breeding then noticed that the Claimant was injured and in pain. Lt. Breeding called for keys so that the Claimant could be taken off the yard to obtain medical attention. The process took 5 to 10 minutes. The trip to the medical unit took two or three minutes. After arriving at the medical unit, the medical staff attended to the Claimant; and it was determined that the Claimant would have to go to an outside hospital for medical attention. After having first being checked to see if the Claimant's condition was life-threatening, it was 20 or 25 minutes until the Claimant received additional attention.

Lt. Breeding produced photographs taken of the basketball area on April 24, 1991, in contemplation of the hearing in the Claimant's case. The Respondent's photographic exhibits 1 through 12 were marked and identified, and entered into evidence. Lt. Breeding testified that the space beneath the fence in the gate is one inch, and that there is not sufficient room to put a hand under it.

Lt. Breeding denied making any statement to the Claimant or other inmates concerning the condition of the fence or gate; but admitted that he had made the observation that someone was going to get hurt because the type of basketball that was being played was wild.

Lt. Breeding testified that the gate in the fence in the area in which the Claimant was injured on the date in question was in good repair, and locked.

On cross-examination by the Claimant, Lt. Breeding testified that he knew for a fact that the surface of the

playing area had not been swept on the day in question, because when Lt. Breeding took the Claimant and other inmates to the basketball court, Lt. Breeding did not see the gravel or debris on the ground which needed sweeping. However, Lt. Breeding stated under cross-examination that the debris could have been there. Lt. Breeding unequivocally denied making any statement to the effect that someone needed to fix the gate.

The Respondent offered no other evidence. Neither party filed a brief.

This Court has previously held that if the State provides recreational equipment to inmates, that equipment must be in safe condition. In order for an inmate to recover against the Respondent for injuries in the use of recreational equipment, the Claimant must show that the State somehow breached that duty. (*Terry v. State* (1991), 44 Ill. Ct. Cl. 211, 213.) In *Rosario v. State* (1991), 43 Ill. Ct. Cl. 282, the claimant sought damages for an injury sustained by the claimant during a basketball game. The claimant contended that his foot went through the wooden basketball floor to a depth of four or five inches, causing him to injure his right ankle and break a bone in his upper-right instep. After recognizing that the State has a duty to inmates of penal institutions to maintain reasonably safe conditions, this Court observed as follows:

> "* * * the existence of a defect is not in itself negligence on the part of the State. (*Palmer v. State* (1964), 25 Ill. Ct. Cl. 1.) The State must be shown to have had actual or constructive knowledge of the defect." *Rosario* at 283.

In the *Rosario* case, the Claimant's injury may have been caused by weak wooden flooring, but this Court indicated that in the absence of direct evidence offered by the Claimant as to the nature of the defect which proximately caused his injury, the Claimant could not prove his claim.

In the present claim, the evidence is in conflict. The Claimant's theory of liability is that a lower portion of the gate to the basketball court was not secure, and that when the Claimant fell during the basketball game, his left hand and arm were permitted, due to the insecurity of the lower portion of the gate, to go under the gate and against a supporting pole, thereby causing the break to the Claimant's left wrist. Additionally, the Claimant contends that there was sand or debris which was on the playing surface which was not noticeable, until after the Claimant's fall. Officer Breeding testified emphatically that there were no loose connections on the gate, and that the fence and gate around the basketball court were in good repair. Pictures taken of the court where correctional officer Lt. Breeding testified that injury took place seemed to show a gate and fence with no obvious defects. The Claimant, on the other hand, contends that the pictures produced by officer Breeding and admitted into evidence are not of the court where he was injured or the fences and gates in question.

Even if the Court were to find that the Claimant's testimony regarding the condition of the lower portion of the gate was more credible than the testimony of correctional officer Lt. Breeding, there was no evidence that the condition of the gate and the playing surface was a dangerous condition about which the Respondent had knowledge, or should have had knowledge. Furthermore, if it is assumed that the lower portion of the gate surrounding the basketball court was not securely fastened, it is doubtful that knowledge of this condition could be said to be knowledge on the part of the Respondent that a dangerous condition existed which, if not corrected, could result in injury to those inmates using the basketball court for recreational purposes. The Claimant's argument is that if a

recreational basketball court has boundaries consisting of fences and gates, then the construction and repair of the fences and gates should be such that if a participant in a basketball game falls against the fences or gates, such fences or gates should be so constructed and maintained as to prevent the occurrence of injury to a person falling during a basketball game. It is clear from the evidence that the fences and gates were for security purposes and were not designed, maintained or repaired so as to furnish a cushion against pressure which might be exerted by the impact of a fall by an inmate using the basketball court.

Therefore, we find that, even given the Claimant's statement of the condition of the gate, there was no obvious defect from which the State could reasonably anticipate an injury to result therefrom. Additionally, the Respondent maintained the court daily; and there was no obvious defect on the surface of the court. Lt. Breeding noticed no debris; and the Claimant noticed nothing until he fell, when he noticed fine particles of sand or rock.

As to the portion of the Claimant's claim relating to the medical care provided to the Claimant, it is the finding of this Court that the claim be denied. Judge Burke in writing the opinion of this Court in *Pink v. State* (1991), 44 Ill. Ct. Cl. 295, opined that in cases arising from complaints of medical care, the Claimant must offer expert testimony or other evidence to prove the allegations of the complaint. Where the allegations of a Claimant are essentially allegations of medical malpractice, a Claimant must establish a breach of duty through expert testimony; and establish that the Respondent deviated from the required standard of care. In the case at bar, the Claimant has not shown the standard of care applicable, and has failed to show any obvious deviation from steps to provide

the Claimant with reasonable medical care. Accordingly, the Claimant has failed to meet his burden of proof.

It is therefore ordered that this claim is denied.

(No. 91-CC-1942—Claimant awarded $750.)

CHARLES ROBINSON, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed December 6, 1994.

CHARLES ROBINSON, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (MARINA POPOVIC, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*duty to provide inmates with safe place to live—use of force.* The State owes a duty to prison inmates to provide them with a safe place to live, but liability will be imposed on the State for the criminal acts of third parties only where the State's agent participated in, anticipated, or should have anticipated the alleged act; and correctional officers may use such force as is reasonably necessary to restrain an inmate to protect all parties from injury.

SAME—*inadequate medical care—lack of expert testimony—no claim stated.* To establish a claim for failure to provide adequate medical care, an inmate must establish through expert testimony that the State breached its duty to provide reasonable medical care, and where the Claimant failed to present expert testimony, was allegedly denied treatment for only a few hours, and suffered no permanent injuries, he could not state a claim for medical malpractice.

SAME—*excessive force—damages awarded.* Where the Claimant's testimony, bolstered by that of an unimpeached witness and the Claimant's medical records, showed that the Claimant was likely injured as a result of handcuffs being applied too tightly during a shakedown of his cell for contraband, and where correctional officers' testimony concerning the Claimant's alleged belligerent conduct was questionable, the Claimant stated a claim for the use of excessive force and was awarded damages.

OPINION

FREDERICK, J.

This is a tort claim filed by inmate Charles Robinson on January 14, 1991. Claimant alleges he was injured when guards used unnecessary force to put handcuffs on Claimant, squeezed the handcuffs too tightly, viciously twisted Claimant's chain, and further that he was then refused medical attention.

Claimant, Charles Robinson, was an inmate at the Joliet correctional center. On December 12, 1990, a shakedown was performed on Claimant's cell. Correctional officers Jones and Briggs indicated they found alcohol and other contraband in Claimant's cell. Claimant claims that he was injured by the officers and then denied medical attention.

Claimant was taken to the hospital on the morning of December 13, 1990. Claimant seeks $12,500 in damages.

At the time of trial, Claimant had been in prison for 23 years. Claimant testified that he believed that a lieutenant did not like him because he had two disciplinary tickets dismissed. Claimant was in protective custody cell 130. According to Claimant, the lieutenant came to his cell and said he had orders to shake Claimant's cell down. Claimant asserted that this lieutenant did not like him and had threatened him. Claimant had gone to the warden to try to "get this man off my back." On December 13, 1990, Claimant had a lot of fruit in his cell. He was going to make wine but had not done so yet. The guards, during the shakedown, took his fruit and an ashtray. The guards then tore up his cell. During this time, Claimant was handcuffed. Claimant testified the guards cursed him. They put him back into his cell. Claimant complained the handcuffs were too tight. He put his hands

through the bars. The officer vilified Claimant. When the officer took the handcuffs off, Claimant's hand was cut and his arm was swollen. Claimant testified he was in great pain. Claimant further testified the guard refused to take him to the hospital. The lieutenant threatened "to get" Claimant. Claimant testified that even though he was hurt and was cursed at, he did not attack the officers.

Claimant filed a grievance but the grievance was denied. Claimant testified that all of the disciplinary tickets issued by Lieutenant Van against Claimant were dismissed by the warden. This is unusual in the prison system and Claimant believes that is why the lieutenant hurt him.

Claimant did receive a ticket for the contraband taken from his cell on December 12, 1990. Claimant was handcuffed prior to the shakedown and remained handcuffed throughout the proceeding. Claimant testified he was screaming during the whole shakedown. Claimant received only a mild penalty for the contraband in his cell.

Claimant was taken to the hospital and given medical treatment when the next shift came on the next day. The shakedown was done at 7:30 p.m. Claimant went to the hospital shortly after 12:00 when they did the prisoner count. Claimant had no broken bones. He did have pain for about a week. His hand was swollen and he could not use it. He could only work with his left hand. Apparently, Claimant suffered no permanent injury. He does claim some shaking occurs in his arm when he writes. However, Claimant had arthritis and continues to have arthritis not related to the incident. Claimant seeks damages solely for pain and suffering.

The medical records indicate Claimant had some swelling and pain in his right hand over the wrist. The

pain and swelling appear to have resolved on or about December 19, 1990.

Inmate Brian Dugan testified for the Claimant. Mr. Dugan was in cell 128. He observed the guards shake down Claimant's cell by using a hand-held mirror. He heard Claimant say that the handcuffs were too tight. Claimant's voice was very loud. He heard Lieutenant Van use the word "nigger." He saw Lieutenant Van reach in the cell and he heard Claimant scream. He then saw Lieutenant Van with his mace out although the lieutenant never used the mace. Claimant was handcuffed with his hands behind his back and with his hands coming out the cell door in the tray slot. Mr. Dugan was 15 to 20 feet away. He was using a pocket mirror. He could not see into Claimant's cell. He could see the lieutenant and the other officer in front of the cell and he could see what those two did. He did see them take things from Claimant's cell and he heard Claimant "got busted for hootch." They took things from Claimant's cell that Claimant purchased in the jail. They took some round decorative balls made out of tissue paper from Claimant's cell and Claimant was yelling about that. Claimant appeared upset because they were taking his property. However, it appeared Claimant followed the officers' orders and Claimant did not threaten anyone. He heard Claimant ask to go to the hospital and Lieutenant Van refused to take him down to the hospital. Witness Dugan saw Claimant when he returned from the hospital and saw that Claimant's wrist was swollen.

Lieutenant Jerome Van testified that during a shakedown, it is standard procedure to handcuff each prisoner whose cell is to be searched. The inmate is handcuffed to the bar by the cell where he can oversee the shakedown that is taking place. He has received training in properly performing shakedowns at the academy in Springfield.

Lieutenant Van supervised the shakedown of Claimant's cell. He was aware of Claimant prior to the shakedown. This particular shakedown was a routine shakedown ordered by the superintendent. He testified they approached Claimant's cell and announced the shakedown. The Claimant became very belligerent. The Claimant was cuffed inside the cell through the opening, the cell door was opened, the Claimant came out, the Claimant was pat searched, and then cuffed to the bars by the cell so he could observe the shakedown. They then proceeded to shake down the cell. A considerable amount of homemade hootch and other contraband was found. After the search, Claimant was placed back in the cell. Claimant became belligerent again and told the officers he was going to mess up the lieutenant as soon as the handcuffs were off. Claimant went to the back of the cell and refused to come to the front of the cell to have his cuffs removed. Claimant continued to threaten the officers. When Claimant did come to the front of the cell, the lieutenant ordered the cuffs removed and he stood back with his mace ready because Claimant kept saying he was going to hit somebody once the cuffs were removed. The mace was never used. Lieutenant Van testified he never heard Claimant complain about the cuffs being too tight, and after the shakedown he did not see anything out of the ordinary regarding Claimant's wrists. He testified Claimant did not request medical attention. Lieutenant Van also testified he heard a rumor that Claimant was going to set him up. The lieutenant only pulled the mace after Claimant was back in his cell with the door locked.

Corrections officer Bruce Briggs testified that he was also present at the shakedown of Claimant's cell. He testified that Claimant was very vocal, swearing, yelling and cussing. Claimant was slow about coming to the cell

door to have his cuffs removed after the shakedown. He did not recall any problems after the shakedown. Officer Briggs took the handcuffs off. He did not hear Claimant claim the cuffs were too tight, that he wanted them loosened, or that his wrists were hurting. Officer Briggs testified Claimant swore at the officers and threatened them. However, he did admit it was procedure for an inmate to go to segregation for doing such things. Claimant was not sent to segregation. Officer Briggs also admitted Claimant did say Lieutenant Van was out to get him while Claimant was in his cell.

The State of Illinois owes a duty to prison inmates to provide them with a safe place to live. (*Holt v. State* (1990), 43 Ill. Ct. Cl. 195.) The State also owes prison inmates the duty to provide them reasonable medical care. (*Russell v. State* (1990), 43 Ill. Ct. Cl. 295.) The Court will only impose liability upon the State for the criminal acts of third parties where the State's agent participated in the alleged act or where the State's agent anticipated or should have anticipated the criminal attack. (*Daugherty v. State* (1991), 43 Ill. Ct. Cl. 317.) This Court has also held that correctional officers may use such force as is reasonably necessary to restrain an inmate to protect all parties from injury. The Claimant has the burden of proving the State's agents were negligent or used excessive force to prevail. *Simmons v. State* (1991), 44 Ill. Ct. Cl. 304.

To establish a claim for failure to provide adequate medical care, Claimant must establish through expert testimony that the State breached its duty to him. As no expert testimony was presented and because Claimant's alleged denial of medical treatment was only a few hours with no attendant permanent injuries, this portion of Claimant's claim must fail.

Whether the State's agents used excessive force thereby injuring Claimant's wrist is a factual inquiry involving the credibility of the witnesses. We have carefully reviewed the testimony presented to the Commissioner. The testimony is completely contradictory. Claimant, bolstered by his witness and the medical records, shows that Claimant was injured in a manner which likely came from handcuffs being applied too tightly through excessive force. The guards say nothing happened. We find that the testimony of Claimant and his witness has the ring of truth thereto. Claimant was not seriously injured and has no permanency. It is significant that the lieutenant only pulled out his mace when Claimant was back in his cell, that officer Briggs admitted Claimant said Van was out to get him, that Claimant did have a documented injury, that Claimant was not sent to segregation for the acts the Respondent's witnesses claimed he did, and that Claimant's witness testified and was not impeached in any way.

Based on the foregoing, we award Claimant $750 in full satisfaction of his claim.

(No. 91-CC-3002—Claim dismissed.)

STATE FARM INSURANCE CO., a/s/o BARBARA FABER, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed October 4, 1994.

GARRETSON & SANTORA, LTD., for Claimant.

ROLAND W. BURRIS, Attorney General (PHILLIP ROBERTSON, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*doctrine of respondeat superior.* Under the doctrine of *respondeat superior*, an employer is responsible for the actions of his employees

only when those actions are within the scope of his employment, and if a State employee commits a tortious act while on a frolic of his own, and for a purpose unconnected with the work he was hired to perform, the Claimant will be denied recovery.

SAME—*auto accident—State trooper was not acting within scope of employment—claim dismissed.* The Claimant's negligence suit against the State stemming from a car accident involving an off-duty State trooper driving a State-owned vehicle was dismissed, where the trooper had no authorization to use his squad car off duty, was not on government business, and was acting outside the scope of his employment at the time of the accident.

ORDER

JANN, J.

This cause coming to be heard on the motion of respondent to dismiss the claim herein, due notice having been given to all parties, and the Court being fully advised in the premises, the Court finds that:

(1) This action stems from an automobile accident occurring on June 20, 1990, involving Claimant Barbara Faber and Juan O. Morales, an Illinois State trooper.

(2) Trooper Morales was off duty at the time of the accident, but was driving a State-owned squad car.

(3) Trooper Morales was acting outside the scope of his employment at the time of the accident.

(4) Trooper Morales did not get official authorization to use his squad car off duty.

(5) Trooper Morales, when acting within the scope of his employment, is an agent of the State of Illinois (the principal).

(6) Under the doctrine of *respondeat superior*, an employer is responsible for the actions of his employees only when those actions are within the scope of his employment.

(7) If a State employee commits a tortious act while on a frolic of his own, and for a purpose unconnected

with the work he was hired to perform, the Claimant will be denied recovery. Where the evidence shows that the driver of a State vehicle had no authority to use it, and was not on government business, he was not an agent of the State of Illinois, and a claim based on the negligence of the driver will be denied.

As the Respondent has submitted evidence which clearly shows Trooper Morales was acting outside the scope of his employment when the accident occurred, his employer, the State of Illinois, is not liable for the damages sustained by Claimant.

It is therefore ordered that the Respondent's motion to dismiss is granted, and that the claim herein is dismissed with prejudice.

(No. 91-CC-3379—Claimant awarded $20,000.)

JANET HOLMAN, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed March 6, 1995.

ROUTMAN & LAWLEY, LTD. (ROBERT LAWLEY, of counsel), for Claimant.

JIM RYAN, Attorney General (DEBORAH ROSE, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*premises liability—what Claimant must show.* The State is not the insurer of the safety of invitees and must only exercise reasonable care for their safety, and in order to prevail on a premises liability claim, the Claimant must show that the premises were in a defective condition, that the defective condition was created by the State or existed for such a period of time as to allow the State to know of the defect and correct it, and that the defect caused the injury.

SAME—*halloween party on State museum premises—poor lighting and stored furniture created dangerous condition—award granted.* The Claimant

was entitled to damages for injuries received when she fell over low-lying furniture stored in the corner of a room where a Halloween party was being held at the Illinois State Museum, since the museum had invited adults to accompany children visiting the display, it created a dangerous condition which the Claimant could not be reasonably expected to discover by its placement of the furniture in a dimly lit room, and the Claimant's conduct in following her grandson to the corner of the room was reasonable and not the proximate cause of her injuries.

OPINION

MITCHELL, J.

The Claimant filed her complaint in the Court of Claims on May 20, 1991, seeking $30,000 in damages from the State of Illinois. She claims these damages for her pain, suffering, permanent injury, lost wages and medical bills which she incurred as a result of the State's breach of duty to maintain reasonably safe conditions at the Illinois State Museum Halloween event and display.

A trial was held on November 4, 1993. The evidence consists of a report of the trial proceedings, a photograph of the room where the injury occurred, the visitor's accident report, evidentiary stipulations as to Claimant's lost wages and medical bills, proposed testimony of treating physician Dr. Clifford Lynch, and an advertisement in the Halloween event at the Illinois State Museum. Both the Claimant and Respondent have filed briefs in this case.

Facts

The Claimant was attending a Halloween party at the Illinois State Museum with her grandson on October 26, 1990. The party had been advertised locally in the newspaper and through flier advertisements. The advertisement requested that children be accompanied by an adult, to come in costume and to bring a flashlight. The museum had set up different display rooms to hand out candy to the children and give the appearance of a "haunted

house." The Claimant entered the Discovery Room with her grandson.

Under normal conditions the room is arranged with tables and low-seated benches for children to use in the museum's regular displays. These tables and benches had been moved into the upper-right-hand corner of the Discovery Room next to the wall. In the middle of the room, there was a "slime pot" display where the children received the Halloween treat. The overhead fluorescent lights were turned off; however, the track lights on the left side of the room were turned on and dim. The track lights on the right side of the room near the tables and benches were not lit. The room was dark enough that the children's flashlights could be clearly seen. There were approximately 40-50 people in the room at the time of the accident.

The Claimant entered the room with her grandson. They proceeded in the direction of the pot in the middle of the room to see what was going in the pot. Her grandson then ran around the pot to the right corner toward the wall. As the Claimant followed, she tripped over the corner of a bench stored in that section of the room. She fell, making contact with the left corner of the bench. She experienced great pain in her upper left arm. The staff helped her to her feet. Her father was called and she went to the emergency room. Claimant has testified that she did not see the low-seating bench because it was so dimly lit in the Discovery Room.

Elaine Beckman is the associate curator of education for the Illinois State Museum. She was in charge of the museum Halloween program. She testified that the table and benches had been moved toward the right side of the room. She stated that the room was dimly lit and that only one or two track lights were on at the time. The bench

the Claimant tripped over was approximately five feet wide and a foot and a half tall. She did not believe that the lights near the right side of the room were on. Ms. Beckman prepared the accident report submitted into evidence.

The Claimant was treated at the emergency room, where she was diagnosed with a fracture of the proximal humeral head of her left arm as a result of the fall. Claimant returned home, but was unable to work for 12 to 13 weeks. She suffered lost wages of $5,920 and incurred medical bills totalling $4,411.37. Claimant sustained permanent damage to the articular surface of the elbow joint as a result of the fracture, in the form of a limited range of motion of her arm. She regained 75 to 80% of her normal range of motion by the time she left Dr. Clifford's care. She has testified that she has a constant ache, and her injury interferes with lifting heavy objects and working overhead. She does not require any surgery.

Law

The Claimant presents a tort theory of recovery. She claims the State is responsible for her injuries because it breached its duty of reasonable care by inviting persons to the Halloween display where lighting was dim and low-lying furniture was not properly illuminated or stored in the display room.

The Court has recognized that the State is not the insurer of safety of invitees and that it must only exercise reasonable care for their safety. The Claimant has the burden of proving by a preponderance of the evidence that the State was negligent. (*Talbor v. State* (1983), 35 Ill. Ct. Cl. 885, and *Fausch v. University of Illinois* (1989), 42 Ill. Ct. Cl. 175, 180.) In order for the Claimant to prevail on her claim, she must show that the premises were in a

defective condition, that the defective condition was created by the State, or that the defective condition existed for such a period of time as to allow the State to know of the defect and correct it, and that the defect caused the injury. *Rosario v. State* (1991), 43 Ill. Ct. Cl. 282.

As Elaine Beckman testified, the State was fully aware of the positioning of the tables and benches in the right hand corner of the room. The State was fully aware of the dim lighting in the room, and that no lighting was highlighting the position of the tables and benches. In fact, the State was responsible for placing the furniture in the corner and for the lighting conditions in the Discovery Room during the Halloween display. This poor lighting and positioning of the furniture was a defective condition in the room. The visitors to the museum were not aware of the location of the furniture and although they were requested to bring flashlights, this does not obviate the State's duty of reasonable care to the visitors. The State had actual notice of the defect in the room as it had created the defect.

The Respondent has argued that there is no obligation to protect an invitee against dangers which are known or which are so obvious or apparent that the invitee may reasonably be expected to discover them. (*Rosario v. State* (1991), 43 Ill. Ct. Cl. 282.) The evidence clearly shows that the Claimant did not know that the furniture was stored in the corner of the room. She could not have known because the lighting was so dim that she could not see the bench until she tripped over it. The dangerous placement of the furniture was neither obvious nor apparent, therefore the Claimant cannot be reasonably expected to discover it.

The Claimant demonstrated that she did not contribute to the negligence in the accident. She was merely

following her grandson to the corner of the room. She comported herself reasonably and appropriately under the conditions of the room. The museum had invited children to their display to be accompanied by an adult. The Claimant was following and supervising her grandson when the accident occurred. Illinois has adopted a modified comparative negligence jurisdiction. Section 2—1116 of the Code of Civil Procedure (735 ILCS 5/2—1116) provides that if plaintiff is more than 50% responsible for her injuries, recovery is barred. The evidence does not support the contention that the Claimant is more than 50% responsible for her injuries.

The Claimant has met her burden of proof. She has shown by a preponderance of the evidence that the State acted negligently in placing furnishings in a dimly-lit room where visitors could not know of their location. The State did not exercise its duty of reasonable care. For the foregoing reasons, the Claimant is granted an award of $20,000.

(No. 91-CC-3478—Claim denied.)

GARY D. KIRBY, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed October 4, 1994.

HARRIS, LAMBERT, HOWERTON & DORRIS (ERIC W. KIRKPATRICK, of counsel) for Claimant.

ROLAND W. BURRIS, Attorney General (ALIX E. ARMSTEAD, Assistant Attorney General, of counsel), for Respondent.

EMPLOYMENT—*lost wages and benefits—claim based on law of case was without merit.* In a State employee's claim for lost wages and benefits stemming from the suspension of his driver's license due to his involvement in a

fatal traffic accident while driving a State vehicle, the employee's argument that a circuit court's reversal of his license suspension constituted the law of the case and entitled him to damages was without merit, since neither the circuit court nor the hearing officer found that the license suspension was wrongful, and the employee presented no proof that he was ordered by superiors not to obtain his own legal counsel before proceeding to trial on the traffic charge.

SAME—*State did not modify employment contract ex parte—breach of contract claim denied.* The State did not engage in the improper *ex parte* modification of the Claimant's employment contract by taking work hours away from him after his driver's license was suspended due to his involvement in a fatal traffic accident, and his claim for breach of employment contract was denied, since during the period of the Claimant's voluntary leave of absence, he did not possess a valid driver's license which was an essential requirement for his continued employment by the State, and no change of the Claimant's contract was effected by the State.

OPINION

FREDERICK, J.

Claimant, Gary D. Kirby, seeks damages against the Respondent, State of Illinois, for lost wages, vacation and sick days, health insurance premiums, loss of driving privileges, attorney's fees, costs, and interest on back wages. Claimant was an employee of the Illinois Department of Transportation. He started in July of 1984. Claimant was employed as a maintenance laborer working on the highways in Johnson County. Part of his duties required him to drive State trucks for hauling and picking up supplies.

On January 17, 1990, while driving a State truck, Claimant was involved in a serious motor vehicle accident, resulting in the deaths of two people in another vehicle. Claimant was charged with failure to yield by way of a traffic ticket issued by an Illinois State trooper.

Claimant went to court on his traffic ticket without taking a lawyer with him. Claimant testified that he thought he was going to be represented and had been led to believe that he was going to be represented "mostly" by

Bill Corse. Claimant identified Bill Corse as a Department of Transportation person who takes care of accidents "and stuff over at Carbondale." Claimant had talked to Bill Corse several times before his trial. These conversations took place at the Vienna Yards where Claimant reports to work. Claimant testified that he discussed the charges against him on the ticket with Corse and discussed the fact that they would be going to court. Claimant testified that he asked Bill Corse if Corse thought he needed an attorney. Claimant testified that the best he could recall and believed was that the words of Bill Corse were, "I can't see no reason, Gary, of why you would need an attorney." Claimant testified that he relied upon Bill Corse.

When Claimant attended traffic court, he was accompanied by Bill Corse, Bill Owens and Orval Hague. Claimant identified Bob Owens as a technician at the yards and Orval Hague as second in command over there (Department of Transportation at Carbondale), but said "I ain't for sure." Claimant testified that when they arrived at the courtroom and just before they went into the courtroom, Bill Corse told the Claimant that if the judge asked the Claimant to testify, to tell the judge that he had been advised by counsel not to testify. Claimant did not testify at the trial on the traffic ticket, although the judge asked him if he wanted to. He informed the judge that he had been informed by counsel not to testify. An eyewitness to the accident testified, and a reconstruction witness named Roger Walker testified. Claimant was convicted of failure to yield and paid a fine on April 18, 1990.

After the conviction, Claimant had a discussion with Bill Corse and Dennis Mathis, who was identified by Claimant as his supervisor. Claimant testified that Bill Corse "brought a law book down" and read things to Claimant. Claimant had advised Bill Corse that Claimant

was thinking about trying to get a new trial and Bill Corse advised him that he could be fined "a big amount of money." Claimant told Bill Corse that if Claimant lost his driver's license, "they're going to fire me." Corse purportedly told Claimant that he would not be fired and would not lose a day's work. Claimant emphasized that Corse told him "You won't lose a day's work. We'll put you flagging. We'll put you mowing right-of-ways and stuff that you won't have to drive." Claimant testified he relied on what Corse told him. No appeal of the conviction or request for new trial was filed.

Claimant did not know what Bill Corse's duties with the Department of Transportation were in regard to investigating accidents or what his actual job title or job description was. On the date of the accident, the chain of command for the Claimant was as follows: his immediate supervisor or "lead" worker was Dennis Mathis; Bob Owens was the technician supervising Mathis; and Orval Hague supervised Bob Owens. Don Grammer was over Hague, and the district engineer, Mr. Jennings, was the head of district 9. Claimant guessed that Bill Corse was not in that chain of command in any way. Claimant had had prior dealings with Bill Corse when Corse taught a defensive driver's course, and Claimant had seen Corse down at the Vienna Yards two or three times. Claimant did not know Corse's professional background but thought that Corse could represent Claimant in court. Claimant thought Corse was an attorney, although Corse never told Claimant he was an attorney.

Claimant's driver's license was then suspended by the Secretary of State effective June 26, 1990. When Claimant received the notice, Claimant told his superiors that he would be losing his license on June 26, 1990. Two or three days before the suspension date, Claimant testified

he was approached by Bob Owens who handed him a piece of paper and told Claimant, "You're going to have to take 90 days leave of absence," and wanted the Claimant to sign for the leave of absence. Claimant signed the paper. Claimant testified that he figured that if he had not signed the paper, he would be fired. The 90-day suspension was without pay.

Claimant filed for a hearing on his license suspension through the Office of the Secretary of State, assisted by Bill Corse and Bob Owens who took Claimant to the Marion, Illinois, driver's license facility. Prior to the hearing, Claimant hired Gordon Lambert as his attorney, who attended the hearing before the Secretary of State's representative in Mt. Vernon, along with Claimant.

Claimant and his attorney appeared before hearing officer Fred Knoche and participated in the hearing at which Claimant testified along with several others.

The findings and recommendations of the hearing officer were sent to the Claimant. The hearing officer's recommendations were predicated in major part upon proof that Claimant's vision was obstructed at the intersection where the accident occurred. The hearing officer recommended recision of the order of suspension of Claimant's driver's license. Later, in an order dated September 12, 1990, the Secretary of State adopted the findings of the hearing officer, but did not adopt the recommendations of the hearing officer. However, the Secretary of State granted Claimant's petition for the issuance of an employment-restricted driving permit permitting Claimant to operate a vehicle at work from 7:00 a.m. until the conclusion of his employment in the evening.

An appeal of the order of the Secretary of State was perfected by Claimant to the circuit court of Sangamon

County. After Claimant and his attorneys appeared before the Sangamon County circuit court judge, an order was entered December 20, 1990, reversing the order of the Secretary of State.

The State of Illinois took an appeal from the decision of the Sangamon County circuit court judge to the appellate court of Illinois for the fourth judicial district and sought an extension of time within which to file the State's brief. The State ultimately moved to voluntarily dismiss the appeal. An order of dismissal was entered on May 10, 1991.

Claimant's driver's license was suspended for nine months. The suspension was to expire March 26, 1991. After the suspension, Claimant received his driver's license back. Claimant did not drive at all from June 26, 1990, through the latter part of September 1990 and during that period of time was not allowed to work for the Department of Transportation. Claimant received his work permit on September 24, 1990, and returned to work the following Monday to the same job where he has worked ever since. During the suspension, Claimant would have earned $1,279 gross every two weeks through July 1, 1990. Thereafter, a raise went into effect which would have raised Claimant's gross pay to $1,339 every two weeks. Claimant believes that during the summer he would have received overtime, but was not able to testify to the amount of overtime he would have received.

Claimant testified he lost one day short of three month's pay with all but four or five days being at a higher rate. Claimant lost 3.7 vacation days and 3 sick days. Claimant was required to pay for insurance normally covered by the State totaling $1,162.62 from which $493.86 would be deducted as premiums from his paychecks had he received them.

Claimant testified he sustained a hardship during the time he was not allowed to drive and necessarily incurred attorney's fees and expenses. Claimant's evidence established the following monetary losses:

(a) Claimant's gross lost wages totaled $8,607.86;

(b) Claimant lost 6.8 paid sick and vacation days which should be valued at a gross loss of employment benefits at the rate of $133.97 per day for a total of $911;

(c) Claimant was required to pay $443.38 for family insurance benefits which would otherwise have been paid by Respondent but for Claimant's absence;

(d) Claimant suffered emotional trauma and inconvenience by not being able to drive during the suspension of his license;

(e) Claimant incurred attorney fees and expenses in the sum of $3,625 as fees and $142.75 as costs for a total of $3,767.75.

Claimant further testified that after the accident, he was made party to a civil action for money damages. He was served with papers in the civil action before he returned to work for the Department of Transportation during the time that he was off work. Claimant requested representation be provided to him through the State of Illinois and he was represented by an assistant Attorney General. The case went to trial and a verdict was rendered against the Claimant.

A week or two after Claimant was convicted on the traffic ticket, he hired Gordon Lambert as his attorney. Claimant incurred the responsibility to pay attorney fees in the sum of $3,625 and out-of-pocket costs in the amount of $142.75.

Claimant advances two theories of recovery. First, he argues the law of the case, and second, he argues a breach of employment contract. Claimant argues that the ruling of the Sangamon County circuit court is the law of the case. He argues that the circuit court has ruled that the Claimant's driver's license should never have been suspended and that the suspension was unjustifiable, causing Claimant to lose wages and benefits because he was not allowed to work without a driver's license. Implicit in Claimant's argument are the propositions that Respondent advised Claimant not to seek an attorney to defend the traffic ticket in the first instance and that Respondent lulled Claimant into a false sense of security by representing to Claimant that he would never lose a day's work if he lost his driver's license.

In response to Claimant's first theory of recovery, Respondent suggests that Claimant knew his job was conditioned upon maintaining a valid driver's license and Respondent acted in accordance with Claimant's best interest in suggesting a leave of absence from his employment rather than other more severe options, such as loss of employment. Respondent also argues that it could not foresee that the suspension of Claimant's driver's license would be overturned by the circuit court of Sangamon County and believed it acted in the best interest of the Claimant. Finally, Claimant was not forced to request a leave of absence but simply and correctly followed the advice of fellow employees. Respondent's brief is as bereft of the citation of authority on this theory of recovery as is the brief of the Claimant.

Claimant was charged and convicted of a traffic offense in the Williamson County circuit court. That conviction has not been appealed or overturned. There is no evidence before the Court to suggest the conviction was

not proper. Pursuant to State law and the authority vested in the Secretary of State pursuant to State law, the driving privileges of the Claimant were suspended. (625 ILCS 5/6—206.) Also, pursuant to State law, that suspension was reviewed both administratively and by the Sangamon County circuit court and was rescinded. The January 10, 1991, circuit court order reversing the Secretary of State's position does not state that the suspension was wrongful or that it never should have been entered. The decision indicates the hearing officer's findings were supported by the evidence and the law. The hearing officer found the evidence presented sufficient grounds to rescind the suspension. The hearing officer made no finding that the suspension was wrongful or never should have been entered. Claimant's license was suspended on June 26, 1990. The hearing officer's decision was mailed September 12, 1990. The Secretary of State's order granting a work permit was entered September 12, 1990. The Department of Transportation, as the employer of Claimant, was not a party to the proceedings in the Williamson County circuit court, nor was the Department of Transportation, as an employer of Claimant, a party to the proceedings before the Secretary of State or the Sangamon County circuit court. Claimant cannot seek a recovery against Respondent under a theory predicated upon the advice given to the Claimant by persons whom Claimant perceived to be his superiors in the Department of Transportation, nor can the Claimant properly assert Respondent's liability on the basis that an apparent employee of the Department of Transportation did not affirmatively advise Claimant that he was not an attorney.

This Court has long held that those who deal with the State are presumed to know the law and deal with the State at their own peril. It was the duty of Claimant to establish the actual authority of the agents of the State.

(*Melvin v. State* (1989), 41 Ill. Ct. Cl. 88.) Claimant presented no proof as to the authority of Mr. Corse, Mr. Owens or Mr. Hague. Claimant was charged with a traffic offense which resulted in the death of two people. Claimant presented no evidence or testimony that he was ordered not to obtain legal counsel of his own choosing. Claimant hired an attorney within the time to file a motion for new trial or appeal but apparently did not seek a new trial or appeal. Claimant's argument, without authority or evidentiary support, appears to be that the State was determined to wrongfully suspend the Claimant's driver's license, and that accordingly, Respondent is liable for Claimant's damages sustained, including lost wages as a result of his leave of absence and other damages. No authority is found to support this argument. Indeed, if this argument were to prevail, then any State employee who lost employment or employment benefits upon conviction of criminal or traffic offenses could, upon reversal of the conviction or dismissal of the charges, be in a position to sue the State for losses so sustained as an indirect result of such charges and proceedings. This is not the law and the argument must fail.

Claimant's second theory of recovery is based upon breach of an express employment contract. Claimant asserts that the terms of a contract cannot be modified *ex parte* by one party, without the knowledge of the other party, including employment contracts. He cites *People, ex rel. Sterba v. Blaser* (1975), 33 Ill. App. 3d 1. *Sterba, supra*, arises from a situation where an employee of the Illinois Environmental Protection Agency filed a suit for mandamus against the director and others seeking reinstatement to his position with the agency on the theory that he had been wrongfully dismissed without written charges and a hearing as required by his civil service status. Defendant

filed a motion to dismiss which was denied. Defendant elected to stand on their motion to dismiss. Judgment was entered for the plaintiff and the appeal followed. Factually, the defendants sought to deny plaintiff's civil service status which would require a hearing and opportunity to be heard before the Civil Service Commission as a result of unilateral notations made by the defendants in plaintiff's personnel file. There was a notation that plaintiff's employment was an "emergency appointment." Further, there was a notation that plaintiff's "probationary appointment" did not commence until 12 days after he began his actual employment. Plaintiff was not made aware of these notations. The court held, in essence, that the "notations" in plaintiff's personnel file, made without his knowledge, constituted an attempt on the part of the defendants to modify plaintiff's employment contract in an *ex parte* fashion, without the knowledge and consent of the plaintiff. The holding in the *Sterba* case is not compelling in the case at bar.

Claimant does not dispute that a class "C" driver's license was an essential requirement for his continued employment. The need for a driver's license was not a condition imposed on Claimant's employment in an *ex parte* fashion by the Respondent. Claimant argues that the State unilaterally modified the Claimant's employment contract by taking work hours away from him that he otherwise would have been entitled to work because he did not possess a valid driver's license. During the period of Claimant's leave of absence, Claimant did not have a valid driver's license which, admittedly, was a requisite to Claimant's employment in the first instance, and to continued employment by the State at all other times. No change of Claimant's contract was effected by Respondent. Claimant voluntarily took a leave of absence for 90 days. He was actually off work for less than 90 days.

The Court also finds that Claimant failed to exhaust his administrative remedies by failing to file a grievance pursuant to section 4—13 of the personnel policies and procedures manual.

For the foregoing reasons, the claim of Claimant is denied.

(No. 92-CC-0222—Claim dismissed.)

ROBERT LANG, Claimant, *v.* ILLINOIS SPORTS FACILITIES AUTHORITY, Respondent.

Order filed January 30, 1995.

GOLDSTEIN, FISHMAN, BENDER & ROMANOFF (PATRICK REDA, of counsel) for Claimant.

QUERREY & HARROW, LTD. (KEVIN J. CAPLIS, of counsel), for Respondent.

JURISDICTION—*claim against Illinois Sports Facilities Authority dismissed for lack of jurisdiction.* The jurisdiction of the Court of Claims is limited by statute to claims against the State or an agency of the State; and therefore a claim against the Illinois Sports Facilities Authority required dismissal, since the Authority is a unit of local government not subject to the jurisdiction of the Court of Claims as a respondent.

ORDER

EPSTEIN, J.

This cause coming on to be heard on the Respondent's motion for summary judgment and motion to dismiss, the Court being fully advised in the premises, the Court finds:

(1) The Respondent seeks summary judgment on the grounds that its agents were sued in the Circuit Court of Cook County and were granted summary judgment. Alternatively, Respondent seeks dismissal on the grounds

that Claimant failed to allege that the claim had been presented to the circuit court, and that notice of the injury was not given pursuant to section 22.1 of the Court of Claims Act. 705 ILCS 505/22.1.

(2) We decline to rule on either motion for the reason that we do not have jurisdiction of claims against the Illinois Sports Facilities Authority. Our jurisdiction is limited by the provisions of section 8 of the Court of Claims Act (705 ILCS 505/8) to claims against the State of Illinois, and in personal injury cases, against the Medical Center Commission, the Board of Trustees of the University of Illinois, the Board of Regents of the Regency Universities System and the Board of Governors of State Colleges and Universities. The Illinois Sports Facilities Authority is *not* an agency of the State of Illinois, but is a unit of local government. (70 ILCS 3205/4.) In that regard, it is the same as a municipality which is not subject to the jurisdiction of this Court as a respondent. We are constrained to dismiss this action for lack of jurisdiction.

It is therefore ordered that this action is dismissed and forever barred.

(No. 92-CC-0448—Claim denied; petition for rehearing denied.)

GUY LENNY HAYES, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed September 30, 1994.

Order on petition for rehearing filed January 30, 1995.

GUY LENNY HAYES, *pro se*, for Claimant.

JIM RYAN, Attorney General (WENDELL DEREK HAYES, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*inmate assault—duty owed by State—Claimant must prove foreseeability.* Although the State is not an insurer as to the safety of an inmate in its custody, it has a duty to exercise reasonable care under the circumstances to prevent its inmates from suffering harm at the hands of other inmates, and to prevail in an inmate assault claim, the Claimant must prove foreseeability of potential for harm by showing that the State's agents anticipated, or should have anticipated, that third persons would commit criminal acts against the Claimant.

SAME—*hot water thrown by fellow inmate—no evidence that assault was foreseeable—claim denied.* A claim brought by an inmate who suffered burns when another inmate threw hot water on him as the Claimant delivered food to the inmate's cell was denied, where the Claimant testified that he had not had a prior confrontation or problem with his assailant, had done nothing to provoke the attack, and the Claimant presented no evidence showing that he warned the State of his imminent assault or that the State knew or should have known he would be singled out for an attack.

OPINION

SOMMER, C.J.

Claimant, an inmate with the Illinois Department of Corrections, seeks a $25,000 judgment against the Respondent, State of Illinois, for personal injuries sustained by Claimant when he was burned by hot water thrown on him while he was working in the protective custody unit. Claimant alleges that an inmate in protective custody threw hot water on him, causing him to sustain varying degrees of burns.

It was Claimant's job to feed the inmates locked in protective custody in X-house at Stateville Correctional Center. Claimant had this job for approximately one month and performed his duties with another inmate. Claimant delivered food to inmates through a hole in the cell by pushing a tray into the cell.

On the date in question, an inmate asked the Claimant for extra food. The inmate threw hot water on Claimant that hit him from his chest to his stomach. After being injured, Claimant went straight to the sergeant's office

and was taken to the hospital that same day. Claimant contends that the correctional officers failed to do their job because there was no correctional officer available in the cell house to accompany the Claimant and his co-worker; thus, preventing the incident. Claimant stated that guards accompanied the food servers on some shifts, but on some they did not.

Claimant contended that he never had a problem or involvement with the inmate who threw hot water on him. Claimant knew of no reason for the inmate to throw hot water on him, except that the inmate was angry because Claimant would not give him extra food "then and there." Claimant denied that he did anything to cause his assailant to throw hot water on him. His assailant did nothing threatening toward Claimant prior to the throwing of the hot water.

In *Petrusak v. State* (1987), 39 Ill. Ct. Cl. 113, 114, this Court stated:

> "The State is not an insurer as to the safety of an inmate in its custody. It does however have a duty to exercise reasonable care under the circumstances to prevent its inmates from suffering harm at the hands of other inmates. * * *
>
> Foreseeability of potential for harm is a necessary element which must be proven by the preponderance of the evidence in this type of case. What is foreseeable necessarily must be judged by the facts in each case and by taking judicial notice of the prison environment."

In *Phipps v. State* (1991), 44 Ill. Ct. Cl. 105, 110, this Court stated:

> "In cases where inmates have been assaulted by other inmates this Court has determined that to prove foreseeability of potential for harm it must be shown that Respondent's agents anticipated, or should have anticipated, that third persons would commit criminal acts against the particular inmate who was attacked. See *Carev v. State* (1981), 35 Ill. Ct. Cl. 96; *Childs v. State* (1985), 38 Ill. Ct. Cl. 196."

As in the *Phipps* case, *supra*, a claim of this nature cannot be successful if Claimant fails to show Respondent's

agents knew or should have known that Claimant would be singled out for an attack. No evidence was presented indicating Claimant warned Respondent's agents or that Respondent's agents otherwise knew he was in danger of attack. Claimant has failed to prove Respondent's agents had sufficient notice, or any notice, so that the attack upon Claimant could have been foreseen.

Wherefore, it is hereby ordered that Claimant's claim is denied.

ORDER

PATCHETT, J.

This case was originally a claim for personal injury suffered by an inmate of the Illinois Department of Corrections. Mr. Hayes was injured when hot water was thrown on him while he was working under protective custody.

This claim was denied in an opinion issued by this Court on September 30, 1994. Mr. Hayes subsequently filed a petition for rehearing.

The basis of the opinion denying the claim was that there was no proof that the State knew or should have known that Mr. Hayes would be the subject of an attack. Nothing in Mr. Hayes' petition for rehearing alleges that such proof could be produced. Instead Mr. Hayes relies on the theory that inmates in protective custody are more prone to violence than other inmates.

The State is not the insurer of safety of inmates. Only when the State knows or should know that the inmate has been singled out, or likely to be subject to violence, and takes insufficient steps to protect that inmate,

can liability be established. Here there was a total failure of proof on those issues.

Therefore, the petition for rehearing is denied.

(No. 92-CC-0646—Claim denied.)

ERIC CAINE, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed May 23, 1995.

ERIC CAINE, *pro se*, for Claimant.

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

PRISONERS AND INMATES—*inmate placed in segregation—claim denied.* There was insufficient evidence in the record to support an inmate's claim that he was entitled to damages as a result of being placed in segregation in a prison psychiatric unit, where the record did not reflect when, why, or how long the inmate was confined so as to allow a determination regarding the propriety of the confinement; and, with respect to the inmate's complaint concerning a prior incident at a separate institution, the evidence showed that he had successfully pursued a grievance in that regard.

JURISDICTION—*Court of Claims could not consider constitutional due process issue.* Since issues of constitutionality are outside the jurisdiction of the Court of Claims, the Court could not consider an inmate's claim that the State's failure to provide him with adequate notice of, and a timely hearing on, disciplinary charges against him resulting in his confinement in a segregation unit deprived him of due process.

OPINION

PATCHETT, J.

The Claimant is serving a natural life sentence in the Department of Corrections. Mr. Caine had been a resident of the Stateville Correctional Center when he received a disciplinary report alleging that he violated certain rules of the Department of Corrections. The Claimant alleged that

the Respondent failed to provide him with adequate notice of the charges against him or failed to conduct a timely disciplinary hearing on the charges. He claims that he suffered 120 days in segregation as a result and was denied due process. He seeks $2,600 in compensation.

The incident for which Mr. Caine originally received discipline occurred on December 7, 1990. The circumstances surrounding the incident were disputed. The department admitted, in a May 17, 1991, letter to the Claimant, that it did not conduct a hearing within eight days of the incident. This letter was made a part of the record as Claimant's Exhibit 1. The eight-day requirement is contained in departmental rule 504.

The department's letter of May 17, 1990, specified that on the day of the incident, Mr. Caine left Stateville Correctional Center on a medical furlough and was returned on December 14, 1990. On December 18, 1990, he was transferred to the Menard Psychiatric Center. Approximately a month after arriving at Menard Psychiatric Center, Mr. Caine was placed in segregation.

The disciplinary report from Stateville Correctional Center regarding the incident of December 7, 1990, was received by Menard Psychiatric Center on January 7, 1991. It was served the same day on Mr. Caine. Mr. Caine was afforded a hearing by the Menard Psychiatric Center adjustment committee on January 9, 1991. The Administrative Review Board considered the matter on February 5, 1991.

In the letter dated May 17, 1991, and referred to above, the Administrative Review Board recommended that the disciplinary report be expunged. The board also recommended that the "C" grade demotion (which was given to the Claimant) be deleted because it was not

processed in a timely manner. Finally, the board recommended that the Claimant receive unassigned State pay for the time spent in segregation.

Mr. Caine admitted he filed a grievance and admitted that he received $5.24 for the days he spent in segregation. He understood the $5.24 to be for the 11 days spent in segregation at Stateville Correctional Center. He did not receive any unassigned pay for time spent in segregation in Menard Psychiatric Center. He arrived at the $2,600 sum of damages sought arbitrarily.

The record does not reflect the date when Mr. Caine was placed in segregation at Menard Psychiatric Center, nor does the record indicate why he was placed in segregation. The record is also silent as to how long Mr. Caine was in segregation at Menard Psychiatric Center. There is insufficient information, therefore, as to whether Mr. Caine could have pursued a grievance regarding his being placed in segregation by Menard Psychiatric Center.

The Claimant has the burden of proof to establish a claim against the State of Illinois in the Illinois Court of Claims. To the extent that this claim is for damages resulting from being placed in segregation at Menard Psychiatric Center, he has totally failed to meet his burden of proof.

The proof elicited at the hearing in this case indicates, on the other hand, that Mr. Caine was completely successful in pursuing his grievance regarding the incidents which occurred at Stateville Correctional Center. No further damages would therefore be due.

Finally, to the extent that Mr. Caine's claim is a cause of action for alleged deprivation of due process, this Court lacks the jurisdiction to consider it. Issues of constitutionality are outside the jurisdiction of the Court of

Claims. See *Reyes v. State* (1979), 35 Ill. Ct. Cl. 498 and *Winzeler Trucking Co. v. State* (1978), 32 Ill. Ct. Cl. 191.

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

(No. 92-CC-1059—Claimant awarded $50,000.)

VADA BERNIECE TULEY, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed February 6, 1995.

MIKE MCELVAIN, for Claimant.

JIM RYAN, Attorney General (LAWRENCE RIPPE, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*landowner's duty to warn and keep premises reasonably safe.* The duty to warn arises when unequal knowledge of danger exists between a landowner and an invitee, and this is especially true when the landowner knows harm might occur if no warning is given, and a landowner also owes a duty to people lawfully on the premises to use ordinary care to see that the property is reasonably safe.

SAME—*slip and fall on mopped floor—failure to warn—State liable.* The State was liable to an independent contractor working on prison premises for injuries sustained when she slipped and fell on a freshly mopped floor, where prison officials failed to warn people working along the hallway in question that the floor was wet, and the Claimant, in exiting her supervisor's office, was exercising due care and caution under the circumstances.

OPINION

MITCHELL, J.

On September 24, 1990, the Claimant, Vada Berniece Tuley, was injured when she fell on a "still wet," slippery floor in a hallway at the Pontiac prison in Pontiac, Illinois.

The Claimant worked within the confines of the Pontiac correctional facility. However, she was not a State employee. She was an independent contractor.

The Claimant's office and that of her supervisor were located next to each other in the basement of what was known as the Clinical Services Building. This area was shared with a part of the prison administration known as the B of I. The Claimant and her supervisor's offices shared a common wall with no door. To reach the supervisor's office, she had to leave her office and walk briefly in the hallway to her supervisor's door. The hallway was maintained and cleaned under the supervision of Thomas Heenan, an employee of the State of Illinois. Normally, Mr. Heenan would have an inmate clean, mop or wax the floor. On September 24, 1990, inmate Earl Johnson mopped the floor. To do this, Mr. Heenan had to unlock a gate to allow him into the hallway, unlock a closet so that he could have the equipment to do the work, and then replace the equipment and unlock the gate so he could return to other duties.

There is no clear indication in the record as to when the mopping occurred, although the water had not evaporated off of the floor when Vada Berniece Tuley exited her supervisor's office and fell. No warnings of any form were used by Mr. Heenan to tell the people working along this hallway that the floor was wet.

While in her supervisor's office, Vada Berniece Tuley had her back to the hallway, did not hear the inmate mopping the floor, and did not observe anything unusual as she exited Betty Towal's office door. She took one or two steps into the hallway and would have seen any warnings, if any had been present, telling of the wet floor. Not knowing that the floor was wet, Vada Berniece Tuley fell, sustaining significant injury.

The Claimant was elderly, was not wearing high heels or in any other way acting in a negligent manner, and from the record appeared to be exercising due care and caution under the circumstances.

There was no warning to the Claimant that the floor was wet. The State owed the Claimant a duty to inform her of such for her own personal safety. She was an invitee on the State's premises. The duty to warn arises when unequal knowledge of danger exists between the landowner and the person on the land. This is especially true when the landlord knows harm might occur if no warning is given. (*McColgan v. Environmental Control Systems* (1991), 212 Ill. App. 3d 696, 571 N.E.2d 815, 156 Ill. Dec. 835.) Here, the unequal knowledge exists. Tom Heenan is in charge of the inmate mopping the floor and is fully aware of when the mopping began and when it ended. It is obvious that a wet floor is slick and that a person certainly can fall when walking on a wet concrete floor. Under the circumstances, the knowledge of the landlord, or the State of Illinois, far exceeds the knowledge that the Claimant had of the danger the concrete floor presents shortly after being mopped. Clearly, there is a duty to warn, and by failing to warn, the State is negligent.

The State of Illinois, as a landowner, owes the same duty that other landowners owe to people lawfully upon their premises. There is an obligation to see that the property is reasonably safe. (IPI Civil 120.02.01.) Further, the manner in which they conduct any activity must also be done with ordinary care. (IPI 3d Civil 120.03.01.) When a landlord mops a floor, it has the obligation of ordinary care for the safety of anyone that is rightfully present. *Minters v. Mid-City Management Corp.* (1947), 331 Ill. App. 64, 72 N.E.2d 729.

The evidence deposition of Dr. Alain Menguy is brief and provides, in detail, the medical significance of the injury suffered by Vada Berniece Tuley. The injury is called a scaphoid-lunate separation. It was treated by fusing three bones in her left hand. That resulted in significant decreases of motion in the left hand as compared to the right hand. The medical care cost $7,868.11. Because of this injury, the Claimant lost the opportunity to earn $5,090.20. The medical bills and lost wages total approximately $13,000.

The Claimant returned to work, but found she was unable to perform the task of her employment. It was not until approximately two years later that she was able to begin working performing tasks that she was comfortable doing. Because her job was that of a clerical and secretarial worker, the weakness in her left hand was such that she was unable to make any significant employee contribution. At the time of her termination in February of 1991, the Claimant was making an annual salary of $16,692. It could be contended that the Claimant could have held a minimum wage job and earned approximately $8,500 per year. Therefore, the injury caused an additional wage loss of the difference between what she was making and a minimum wage job over the past two years, or approximately $16,500.

The Claimant's testimony is clear on the pain that this injury caused. Her testimony is supported by her husband's recollection of the discomfort that the pins created when they rubbed against the cast. The disability that the Claimant encountered during her recuperation, along with the disability that she continues to encounter, is a significant limitation in her daily activities.

The Claimant has proved her case by a preponderance of the evidence. It is determined that she be awarded

the sum of $50,000 for compensation for her actual damages as well as for pain and suffering. The matter of setoff and restitution is between the Claimant and the insurance company, but setoff to the State of Illinois has been duly considered in the recommended award.

(No. 92-CC-1060—Claim dismissed; petition for rehearing denied.)

JOHN P. TULLY, Claimant, *v.* THE STATE OF ILLINOIS, STATE BOARD OF ELECTIONS, OFFICE OF THE SECRETARY OF STATE OF ILLINOIS, and OFFICE OF THE ATTORNEY GENERAL OF ILLINOIS, Respondents.

Opinion filed August 25, 1994.

Order on petition for rehearing filed December 29, 1994.

ALBERT BROOKS FRIEDMAN, LTD., for Claimant.

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

ATTORNEY FEES—*attorney fees and costs not recoverable absent statutory authorization.* One cannot recover for attorney fees and court costs unless provided under specific statutory authorization.

INTEREST—*State not liable for interest absent statute*. Interest is only recoverable against the State if it is specifically provided in a statute.

ELECTIONS—*contested judicial election—claim for attorney fees, costs and interest dismissed.* Where the Claimant sought recovery of attorney fees, costs, and interest incurred in litigation arising out of a contested judicial election which he ultimately won, the claim was dismissed, since there was no statutory authority for such an award, the Attorney General was not obligated to represent the Claimant because his case arose from his status as a judicial candidate and not from an act arising out of his official duties, and the State was not a "person" subject to liability under 42 U.S.C. section 1983 for a deprivation of due process.

OPINION

JANN, J.

This cause came before the Court on Respondent's motion to dismiss the complaint of Claimant, John P. Tully. Claimant Tully filed an amended complaint on December 15, 1992. Respondents' counsel did not receive a copy of said amended complaint until oral argument was held on July 22, 1993, in Chicago, Illinois. Respondent was granted leave to file a reply in support of its motion to dismiss at the oral argument. Claimant was granted leave to file a memorandum in support of his claim on the same date. The aforementioned documents were subsequently filed by the respective parties.

Claimant seeks recovery of attorney fees, costs and interest incurred in litigation arising out of his election to the Illinois Appellate Court, 1st judicial district.

Facts

On or about October 4, 1989, William S. White submitted a judicial declaration of candidacy to the Secretary of State and requested certification of his candidacy pursuant to article VI section 12(d) of the Illinois constitution for retention to the Illinois Appellate Court. On July 29, 1989, Justice White had attained the age of 75, the age of mandatory retirement under the Illinois Compulsory Retirement of Judges Act. Justice White's declaration of intent to succeed himself was acknowledged by the Secretary of State and transmitted to the State Board of Elections. The State Board of Elections recorded and certified Justice White's certificate in December, 1989. Justice White had included a letter with his declaration of candidacy to the Secretary of State that he would challenge the constitutionality of the Illinois Compulsory Retirement of Judges Act claiming that said statute constituted unlawful age discrimination.

In November 1989 Claimant filed four separate sets of petitions, containing the signatures of the requisite number of registered voters, in order to qualify as a candidate for the position of Illinois Appellate Court Justice, in the March 1990 Democratic primary. In December 1989 Claimant withdrew his name from the candidacy of three of the original vacancies chosen and chose to remain as a qualified candidate for the "vacancy of William S. White." (The Secretary of State's office listed White's office as a vacancy at this time.) On December 5, 1989, the Secretary of State mailed copies of the certification of all judges seeking retention to the State Board of Elections as required. Justice White's certification was included in this mailing.

Claimant won the March 1990 Democratic primary election. The State Board of Elections certified Claimant and the winner of the Republican primary, Lester Bonaguro, as candidates to be placed on the general election ballot to fill the vacancy of William S. White in the November 6, 1990, general election.

On August 31, 1990, the State Board of Elections, having received no objections from any parties, certified Justice White's name on the judicial retention ballot. Ergo, Claimant and his Republican counterpart were placed on the ballot to fill the vacancy of Justice White and Justice White was placed on the ballot for retention. Claimant stated he had contacted the Secretary of State's office on several occasions after the primary election and before the date Justice White was certified for retention. He was not informed that Justice White's name was to be placed on the ballot until two months before the November 1990 general election.

On October 1, 1990, Claimant's attorney sent out emergency letters to Respondents objecting to the appearance

of Justice White's name on the ballot. On October 4, 1990, Claimant filed an emergency petition for an order of mandamus in the circuit court of Cook County, approximately one month prior to the general election. Claimant requested various forms of emergency relief including: an order of mandamus commanding Respondents to declare Justice White ineligible; an order enjoining further printing and distribution of the ballots containing White's name; costs and any other relief deemed just and proper. White responded to the complaint, alleging the affirmative defense that the Compulsory Retirement of Judges Act was unconstitutional. The Secretary of State, the State Board of Elections and the Cook County clerk all filed answers stating they would abide by the decision of the circuit court. The Attorney General was not a party to the suit. The circuit court entered an order maintaining the status quo and retaining White's name on the retention ballot as the ballots had been printed and absentee ballots had been sent out and received. Claimant Tully and his Republican opponent remained on the ballot to fill White's vacancy.

On November 6, 1990, Justice White was elected to succeed himself and simultaneously, Claimant was elected to fill the vacancy of Justice White.

On November 27, 1990, the circuit court held the Mandatory Retirement of Judges Act to be unconstitutional, declared the retention of Justice White valid, and declared the election of Claimant null and void.

On June 4, 1991, the Illinois Supreme Court reversed the decision of the circuit court and declared that White was bound by the doctrine of laches from asserting any challenge, constitutional or otherwise, to the retirement statute. Justice White had never made a legal challenge to the constitutionality of the Retirement Act until filing an affirmative defense in *Tully v. Illinois*. White's election was

vacated and the Supreme Court mandated that the Board of Elections declare Claimant the valid winner. (See *Tully v. Illinois* (1991), 143 Ill. 2d 425, 574 N.E.2d 659.) On August 1, 1991, Claimant was seated on the appellate court, first district, with full back pay for the eight months he was barred from sitting by the adverse lower court ruling.

Claimant seeks attorney fees in the amount of $16,450, interest expense of $2,400 for monies borrowed during the circuit court and supreme court cases and costs of $1,000 in the lower court case. Claimant seeks relief under 42 U.S.C. section 1983 for all actual damages sustained as a result of alleged infringements of his constitutional rights and under 42 U.S.C. section 1988 for attorneys' fees. Claimant also alleges that his injuries were the direct and proximate result of the intentional acts of officers, employees or authorized agents of Respondents while acting within the scope of their employment. Claimant contends that when White filed for retention as an appellate court justice, contrary to the Retirement Act, it was the duty of the Attorney General to challenge the merits of White's actions on behalf of the people of the State of Illinois. Claimant further asserts that after his election on November 6, 1990, it was the Attorney General's duty to represent Claimant as a duly elected official of the State and that the Attorney General's failure to represent Claimant resulted in the costs previously enumerated. Claimant also asserts that Respondents acted to deprive him of first and fourteenth amendment rights.

The Law

Respondent argues that the first amended complaint, like the original complaint, fails to allege the existence of specific statutory authority which would allow Claimant to recover costs and attorney fees. Claimant argues he is entitled to recover under a tort theory claiming

Respondents breached their duty to Claimant in allowing White's name on the ballot. We find Respondent breached no duty to Claimant. The circuit court, in fact, ordered the status quo maintained. The supreme court in its reversal of the circuit court's decision to seat White rather than Tully recognized the expense and prejudice to Tully but did not see fit to award costs. (*Tully v. Illinois, supra.*) Count I states no statutory basis for the recovery of attorneys' fees or costs. We have consistently held that the law in Illinois is clear that one cannot recover for attorneys' fees and court costs unless provided under specific statutory authorization. (*Kadlec v. Illinois Department of Public Aid* (1987), 508 N.E.2d 342 (Ill. App. 1st Dist.)) The Illinois Supreme Court has further held that interest is only recoverable against the State if it is specifically provided in a statute. (*I&D Pharmacy v. State* (1984), 37 Ill. Ct. Cl. 37, 42.) Count I fails to state a claim upon which relief can be granted and is hereby dismissed.

Count II asserts that Claimant was owed representation by the Attorney General in his litigation against White or that in the alternative, the Attorney General should have paid his costs of litigation. Claimant relies upon *Ware v. State* (1985), 37 Ill. Ct. Cl. 43. The *Ware* case is easily differentiated and is not apposite to the case at bar. *Ware* stated that the Attorney General's statutory duty arises when the action involved is premised upon an act resulting from the performance of an official act. (*Ware* at 49.) Claimant Tully's case arose from his status as a candidate, not as a result of an act arising out of his judicial duties. When Claimant filed his suit in circuit court, his status as an elected official was not settled; further, the circuit court ordered the status quo maintained and thereby no duty arose on the part of the Attorney General. Tully's election on November 6, 1990, at which time Justice White was simultaneously elected to succeed himself, did not put Tully in the circumstances outlined

by *Ware, supra*. Although both White and Tully were elected, Tully was not seated on the Appellate Court until August 1, 1991, and did not undertake judicial duties until said time. We find count II fails to state a cause of action upon which relief may be granted and is hereby dismissed.

Count III asserts deprivation of due process under 42 U.S.C. section 1983 by Respondents' various actions in certifying White on the retention ballot. The U.S. Supreme Court has held in *Will v. Michigan Department of State Police* (1989), 109 S. Ct. 2304 that "neither a State nor its officials acting in their official capacities are persons under §1983." As Claimant fails to state a claim under section 1983, count III must be dismissed.

This cause is hereby dismissed.

ORDER

JANN, J.

This cause comes on to be heard on Claimant's petition for rehearing. The Court having reviewed the record and Claimant's petition finds:

Claimant's petition is hereby denied. Despite Claimant's swearing in, and eventual recoupment of back pay to the date thereof, Claimant's cause of action arose out of circumstances of his contested election, not the performance of official duties.

This cause is hereby dismissed with prejudice.

(No. 92-CC-3100—Claim denied; petition for rehearing denied.)

KENNETH BAKER, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed April 12, 1994.

Order on petition for rehearing filed July 14, 1994.

KENNETH BAKER, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (PHILLIP ROBERTSON, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*medical malpractice—what inmate must prove.* An inmate who files a claim against the State alleging medical malpractice must establish a breach of duty through expert testimony, the State's deviation from the standard of care, and that the deviation was the proximate cause of the inmate's injury, and the standard of care is that which is provided to a patient by reasonably well-trained medical providers in the same circumstances in a similar locality.

SAME—*medical malpractice—establishing proximate cause.* The Claimant must prove by a preponderance of the evidence that the State's conduct was the proximate cause of his injury, but proximate cause is not established where the causal connection is contingent, speculative, or merely possible, and failure of the Claimant to prove that an act of medical negligence is more probably true than not the cause of his injury will defeat the claim.

SAME—*weightlifting injury to finger—standard of care and proximate cause not established—medical malpractice claim denied.* An inmate was denied recovery in his medical malpractice claim alleging that a prison physician negligently delayed x-raying and treating his finger after he injured it while lifting weights, where the Claimant failed to present any expert testimony to establish the applicable standard of care, the State's deviation therefrom, or that the alleged deviation proximately caused his injury.

OPINION

FREDERICK, J.

Claimant, Kenneth Baker, an inmate in the Illinois Department of Corrections, filed his complaint in the Court of Claims on May 21, 1992. Claimant seeks $10,000 in damages for the alleged negligence of the State in failing to provide proper medical care and treatment for his injured left index finger. The cause was tried by Commissioner Fryzel.

The evidence adduced at trial indicated that Claimant injured his left index finger while lifting weights in the prison yard on May 28, 1991. Claimant had 340 pounds smash his finger. Claimant went to the prison hospital and talked with Dr. Patel. Claimant testified that Dr. Patel stated that he would not be able to take x-rays because of the time. Claimant testified he requested immediate x-rays. Claimant was given aspirin and returned to his cell house. Claimant testified he protested being returned to his cell house. Later, in the middle of the night, Claimant returned to see Dr. Patel because of pain and was given Tylenol with codeine. Claimant took the Tylenol with the other medications. On the morning of May 29, 1991, Claimant had continued pain and returned to the prison hospital. Claimant's hand was x-rayed and a broken finger was diagnosed. Claimant was taken to St. James Hospital and had surgery where pins were put in his finger. He was returned to the prison hospital where he stayed until the next day. A partial cast was placed on the finger. The cast was removed in a few weeks. He had no physical therapy. The pins were left in the finger about a month when they were removed at the prison hospital. The doctor had problems removing one of the pins which caused Claimant pain. Claimant indicated he could not move his finger and could not close the finger. Claimant believes he should have been x-rayed and treated immediately by Dr. Patel and indicated he should be compensated for his suffering.

Claimant's medical records which were introduced into evidence indicate that Claimant presented to Dr. Patel at 3:40 p.m. on May 28, 1991. The description of injury was that Claimant was unable to move his left index finger, slight swelling to knuckle, and no bruising. Claimant was treated with a wrap to his hand, an analgesic and

a sling. A return visit was indicated for an x-ray in the morning as soon as possible. The diagnosis was blunt trauma to left hand with a possible fracture. The injury was listed as a sports injury and Claimant was advised not to lift weights for four to six weeks. The medical records further indicate that Claimant was given Tylenol 3 on May 29, 1991, had x-rays at 10:30 a.m., and at 3:35 p.m. was sent to St. James Hospital for reduction of a fracture of his left index finger. The fracture was an oblique fracture of the proximal phalanx near the distal end. Claimant denied any history of tingling or numbness. The reports also indicate that when Claimant was seen by Dr. Pankaj on May 29, 1991, he was not in acute distress but had marked tenderness at the pip joint area. The pins were removed on June 19, 1991.

On cross-examination, Claimant testified that on May 28, 1991, a nurse told him she did not understand why the doctor did not send him to an outside hospital at that time. Claimant testified he had permanent injury to his finger as he cannot close his finger. He believes Dr. Patel was negligent in that he did not treat the fracture immediately but instead sent him back to his cell house. The Claimant called no expert witnesses and the Respondent called no witnesses.

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 strikingly 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. The patient was seen at 3:45 p.m., had some swelling, was given pain medication, and x-rayed at 10:30

a.m. the next morning. 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 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 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 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, there is no competent evidence that the prison physician deviated from the standard of care or that any actions of the doctor 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 court file and the Court's opinion, and the Court being fully advised in the premises, wherefore, the Court finds:

(1) That the Court properly understood the evidence adduced at trial.

(2) That the medical reports adduced to not establish a standard of care.

(3) That the medical reports were considered by the Court but they do not establish the standard of care.

(4) That following different procedures do not necessarily establish a standard of care and a deviation therefrom.

(5) That the Court was correct that Claimant failed to produce competent evidence of the standard of care, that Respondent deviated therefrom, and that such deviation was a proximate cause of Claimant's injury.

(6) That the issues raised pursuant to Court of Claims Regulations 790.150 are not grounds for a rehearing. The issue here is standard of care and proximate cause which would not require a physical examination.

(7) That to prevail, Claimant would have to provide proof by way of expert testimony.

(8) That the Court placed no burden on Claimant except the proper burden of proof. *Informa pauperis* applies only to Claimant's inability to pay court costs. There is no provision for or requirement that the Court provide any claimant expert witnesses.

(9) That there is no authority to hold this Claimant to a lesser burden of proof than every other claimant.

(10) That Claimant had a fair trial.

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

(No. 93-CC-0238—Claim dismissed.)

LARRY BRUCE RUBIN, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed November 5, 1992.

Order on petition for rehearing filed July 14, 1993.

Order filed September 27, 1993.

Opinion filed March 3, 1995.

Opinion filed May 5, 1995.

Order filed May 22, 1995.

Order filed May 22, 1995.

LARRY BRUCE RUBIN, *pro se*, for Claimant.

DUNN, ULBRICH, HUNDMAN, SANCZAK & OGAR (HELEN OGAR, of counsel), for Respondent.

LIMITATIONS—*tort claims—tolling of limitations period.* Pursuant to the Court of Claims Act, a tort claim for personal injuries must be filed within two years after it first accrues, except minors and persons under legal disability at the time the claim accrues must file their claim within two years from the time the disability ceases, and all time limitations under the Act are jurisdictional.

SAME—*action filed after limitations period expired—claim dismissed—case closed.* In a tort action seeking damages for injuries allegedly sustained by the Claimant between 1977 and 1980, although the Claimant filed repeated motions requesting that the Court of Claims reopen, rehear, or reconsider the claim which was dismissed based on the running of the statute of limitations, the Court found that, even accepting as true the Claimant's argument that he was under a legal disability until 1988, his complaint which was filed in 1992 was not within the statute of limitations, and therefore his claim was dismissed with prejudice and the case was closed.

ORDER

MONTANA, C.J.

This cause comes on to be heard on the Respondent's motion to dismiss and the Claimant's response thereto, due notice having been given, and the Court being advised, it is hereby ordered that the Respondent's motion is granted and this claim is dismissed for the reasons stated in the motion.

ORDER

FREDERICK, J.

This cause coming on Claimant's motion for rehearing, and the Court being fully advised in the premises, wherefore, the Court finds:

(1) That Claimant filed his complaint against the board of governors on August 7, 1982, claiming damages for alleged actions occurring in 1977 through 1980 at Western Illinois University.

(2) That the Court entered an order dismissing the cause on November 5, 1992.

(3) That Claimant has failed to provide to the court any documentation to show the Court that Claimant was adjudicated an incompetent for any period from 1980 until August 7, 1992, sufficient to toll the statute of limitations in regard to the applicable notice and filing provisions of the law.

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

ORDER

FREDERICK, J.

This cause coming on for hearing on Claimant's motion to reopen case due to "Significant" evidence, and the Court being fully advised in the premises, wherefore, the Court finds:

(1) That Claimant's complaint alleges that the acts complained of occurred from 1977 to 1980.

(2) That from Claimant's allegations, it is impossible to tell when the two-year statute of limitations would

have run but it appears it would have been some time between January 1, 1982, and January 31, 1982.

(3) That section 13—211 of the Code of Civil Procedure (735 ILCS 5/13—211) controls the tolling of the statute of limitations for persons under legal disability. *Estate of Rika v. Christ Hospital* (1989), 187 Ill. App. 3d 752.

(4) That on July 1, 1982, the legislature changed the language of the tolling provision from persons who are "incompetent" to persons "under legal disability." (Pub. Act 92-280, eff. July 1, 1982.) See *Peach v. Peach* (1966), 73 Ill. App. 2d 72.

(5) That Claimant's pending motion raises an issue of whether he was under a legal disability beginning in 1980 through 1982.

(6) That depending on when Claimant's alleged claim began, the standard for tolling the statute may differ because of the amendment to the statute.

Therefore, it is ordered:

(A) That the Commissioner assigned to the case shall hold a hearing solely on the issue of whether the statute of limitations has been tolled.

(B) The Claimant has the burden of proving when the statute of limitations began running, when it began to be tolled, when any "incompetency" or "legal disability" ended, and that he filed his claim within the statute of limitations or within a period when the statute of limitations was properly tolled.

(C) The Commissioner shall report to the Court as to the issues herein sought to be resolved.

OPINION

FREDERICK, J.

The Claimant filed his complaint sounding in tort on August 7, 1992. On September 27, 1993, the Court entered an order requiring the Commissioner to hold a hearing solely on the issue of whether the statute of limitations had been tolled. The Claimant had the burden of proving when the statute of limitations began running, when it began to be tolled, when any incompetency or legal disability ended, and that he filed his claim within the statute of limitations or within a period when the statute had been tolled. The inartfulness of the allegations of the complaint made it difficult for the Court to determine when the statute of limitations started and ended.

The allegations indicate the alleged occurrence happened at some point between 1977 and 1980. The complaint was filed on August 7, 1992. The cause was heard before the Commissioner. The medical records of Dr. Buchanan presented by Claimant were admitted into evidence. The Commissioner also heard testimony from the Claimant. Because this is a tort claim, without tolling the latest the statute of limitations would have run would have been January 31, 1982. See section 8(d), 22(g), Court of Claims Act, 705 ILCS 505/1, *et seq*.

Therefore, the only issue before the Court is whether Claimant was under a legal disability that prevented the statute of limitations from running. Section 22(g) also indicates that tort claims must be filed within two years after it first accrues saving to minors and persons under legal disability at the time the claim accrues, in which case the claim must be filed within two years from when the disability ceases.

We have scrupulously reviewed the medical records of Dr. Robert W. Buchanan and the testimony of Claimant. Dr. Buchanan's records indicate he saw Claimant on August 22, 1984. At that time, Claimant presented "himself in a clean manner, dressed appropriately, and is somewhat hyperactive in his motor activity." Dr. Buchanan also related that Claimant had no history of psychiatric hospitalizations. His diagnosis was severe borderline personality with paranoid ideation. Dr. Buchanan also gave an opinion that Claimant was disabled and unable to work during the years 1980 through 1982. Claimant testified that he became better in 1988. Claimant believed he had five years from 1988 to file his claim. He testified his disability ceased in 1988.

There was no medical evidence that Claimant was disabled after August 22, 1984. However, even if the Court were to accept Claimant's version of when his alleged disability ended, the statute of limitations expired on January 2, 1991. As Claimant filed his claim beyond the expiration date of the latest statute of limitations date, the Court is without jurisdiction to hear his claim. See section 22(h) of Court of Claims Act. 705 ILCS 705/22(h).

For the foregoing reasons, the Claimant's motion to reopen case due to significant evidence is denied and this cause is dismissed with prejudice.

OPINION

FREDERICK, J.

On September 27, 1993, this Court entered an order directing the Commissioner to hold a hearing in regard to whether the statute of limitations had been tolled and when any incompetency or legal disability ended. The

Commissioner held the required hearing on August 8, 1994. In reviewing all of the evidence and testimony, we find as follows:

(a) This is a claim sounding in tort.

(b) The Claimant never filed a notice of intent to sue pursuant to section 22—1 of the Court of Claims Act. 705 ILCS 505/1, *et seq*.

(c) That Claimant was admitted to the McDonough District Hospital on September 11, 1980, complaining of a multitude of strange persecutory delusions. He was discharged on September 15, 1980.

(d) That in September of 1980 Claimant was diagnosed with paranoid schizophrenia.

(e) That Claimant had been previously admitted to McDonough District Hospital on October 27, 1979, for an acute psychotic reaction and was discharged on October 31, 1979.

(f) Claimant was hospitalized at McDonough District Hospital on December 12, 1977, for a seizure disorder and thoracic kyphoscoliosis and released on December 12, 1977.

(g) Claimant was hospitalized at Grant Hospital from January 30, 1988, to February 9, 1988, and from April 21, 1988, through May 6, 1988, for delusional disorder and seizure disorder.

(h) Claimant was treated by a Dr. Robert Buchanan intermittently between December 16, 1976, and December 2, 1986. Claimant's diagnosis was DSM III-R 301.83.

(i) Claimant has had treatment at the counseling center from December 17, 1988, through August 5, 1993.

(j) Dr. Robert W. Buchanan, a psychiatrist, gave the opinion that for the years 1980 through 1982, Claimant was disabled and unable to work during that period.

(k) The complaint seeks damages for "injury" and "medical services" from a period of 1977 through 1980.

(l) Claimant testified he became better in 1988.

(m) Claimant filed his complaint on August 7, 1992.

The statute of limitations would normally have run at the very latest on January 2, 1983. We gave the Claimant the opportunity to present evidence that he was disabled during a sufficient time between January 2, 1980, and August 7, 1992, to toll the statute of limitations. The only evidence presented by Claimant which indicated Claimant was disabled in any way was the document from Robert W. Buchanan, a psychiatrist, who indicated that for the years 1980 through 1982, Claimant was disabled and unable to work during that period. There is no other evidence before the Court that even comes close to establishing a legal disability. The statute of limitations would, therefore, have run on January 2, 1984. Even if the Court were to accept Claimant's testimony that he became better in 1988, the statute of limitations would run no later than January 2, 1990.

Claimant misapprehends the applicable statute of limitations. This is a tort claim. The Court's tort claim jurisdiction falls under section 8(d) of the Court of Claims Act. (705 ILCS 505/8(d).) The statute of limitations for all claims arising under section 8(d) is found in section 22(h) of the Act. Subsection (h) states: "All other claims must be filed within 2 years after it first accrues, saving to minors, and persons under legal disability at the time the claim accrues, in which case the claim must be filed within 2 years from the time the disability ceases." All

time limitations under the Act are binding on the Court as jurisdictional. 705 ILCS 505/22(h).

As Claimant failed to file his claim within the statute of limitations, the cause must be dismissed for want of jurisdiction. For the foregoing reasons, it is the order of the Court that this claim be and hereby is dismissed.

ORDER

FREDERICK, J.

This cause comes before the Court on Claimant's motion to appeal the decision to reopen cause due to significant evidence, which the Court will consider as a motion for rehearing, and the Court having reviewed this cause and the pleadings and evidence, and the Court being fully advised in the premises, wherefore, the Court finds:

(1) That Claimant filed his complaint on August 7, 1992.

(2) That Claimant had a hearing with the opportunity to prove the statute of limitations was tolled sufficiently to file his claim on August 7, 1992, while alleging a possible tort claim occurring some time between 1977 and 1980.

(3) That Claimant failed to meet his burden of proof to prove that he was legally disabled from filing a claim for a sufficient period to allow the August 1992 filing.

(4) That the Court's decision was correct and nothing in Claimant's motion to reconsider leads the Court to reconsider its decision.

Wherefore, it is ordered that Claimant's motion filed March 29, 1995, is denied.

ORDER

FREDERICK, J.

The Court has previously dismissed the claim of Claimant, Larry Bruce Rubin, as the claim was filed beyond the applicable statute of limitations. Claimant's motion to reconsider was denied.

On April 6, 1995, Claimant filed in this cause an inch-thick stack of papers which are copies of pleadings in lawsuit filed by Claimant in the circuit court of Cook County, Illinois entitled: *Larry Bruce Rubin v. Thresholds, et al.*, No. 86-L-19451. As the Court has found that Claimant failed to prove that he had a legal disability after 1988, none of the documents filed on April 6, 1995, involving a 1986 lawsuit are relevant.

We also find that a claim must have finality at some point and that point has been reached in the instant case.

Therefore, it is ordered:

(A) That the documents filed by Claimant on April 6, 1995, are stricken.

(B) That the clerk is directed not to accept any more filings from Claimant in this case, 93-CC-0238.

(C) That this case is closed.

(No. 93-CC-0318—Claim dismissed.)

FIRST BAPTIST CHURCH OF LOMBARD, Claimant, *v.*
THE STATE OF ILLINOIS, DEPARTMENT OF TRANSPORTATION,
Respondent.

Order filed January 4, 1995.

JOHNSON, WESTRA, WITTAKER & AUSTIN, P.C. (JOHN J. WESTRA, of counsel), for Claimant.

ROLAND W. BURRIS, ATTORNEY GENERAL (ROBERT S. GRAETTINGER, Assistant Attorney General, of counsel), for Respondent.

JURISDICTION—*State improperly named as party respondent—claim dismissed for lack of jurisdiction.* In a claim against the Department of Transportation arising out of the construction of a highway, where the Claimant moved for a change of venue to the circuit court, and the State moved to dismiss the claim because the Department was not involved in constructing the roadway in question, the Claimant's motion was denied because the Court of Claims is the appropriate forum for claims against the State, while the State's motion was granted and the claim was dismissed for lack of jurisdiction based upon the motion's uncontested allegations that the State had no involvement in the project and was not the proper party respondent.

ORDER

RAUCCI, J.

This cause coming on to be heard on the Respondent's motion to dismiss, and the Claimant's motion for change of venue, the Court being fully advised in the premises finds:

(1) The Respondent has moved to dismiss on the grounds that the Illinois Department of Transportation had no involvement in the construction of Interstate 355 in the Village of Lombard, Du Page County, Illinois, and that Claimant's claim should be directed against the Illinois State Toll Highway Authority. The Claimant has not responded to the motion to dismiss, but in its motion for change of venue, Claimant asserts that the Illinois Department of Transportation:

"was incorrectly named in said complaint in that the real party in interest is the State Toll Highway Authority, Illinois which entity is immune from liability in the Court of Claims."

(2) Claimant's motion for change of venue seeks an order transferring venue to the circuit court of the 18th judicial circuit. No authority is cited for such an action, and we are not aware of any such authority.

(3) The complaint names only one Respondent, namely "State of Illinois, Department of Transportation (I.D.O.T.)." Jurisdiction of claims against the Illinois Department of Transportation resides in the Court of Claims and not the circuit court. Accordingly, there is nothing to transfer to the circuit court.

(4) Based on the uncontested allegations of the motion to dismiss, we find that we do not have jurisdiction of this matter.

It is therefore ordered that

(1) The Claimant's motion for change of venue is denied.

(2) The Defendant's motion to dismiss is granted, and this claim is dismissed with prejudice for lack of jurisdiction.

(No. 93-CC-0958—Claim denied.)

JOSE OLIVARES, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 4, 1995.

JOSE OLIVARES, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (CHAD FORNOFF, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*soccer injury—State fulfilled duty to provide inmate with reasonable and timely medical care.* Although the State owes a duty to provide inmates with reasonable medical care in a timely fashion, the State did not breach that duty owed to an inmate who broke his leg while playing soccer, where prison officials transported the inmate to a hospital for treatment the same day that the accident occurred.

SAME—*negligence—proof required in claim for substandard medical care.* In order to sustain a claim against the State for substandard medical care, the Claimant must prove by a preponderance of the evidence the standard of care, that the State deviated from the standard of care, and that the deviation from the standard of care was the proximate cause of the Claimant's injury, and these matters usually must be proven by medical evidence.

SAME—*broken leg—lack of proof—claim for inadequate medical care denied.* In an inmate's claim alleging that he received inadequate medical care after breaking his leg in a soccer game and being transported to a hospital for treatment, the claim was denied, where the inmate failed to present any expert testimony or other evidence as to the standard of care or the State's deviation from the standard of care, and the only proof offered regarding the State's alleged negligence was the inmate's own conclusory testimony.

OPINION

FREDERICK, J.

Claimant filed his claim in the Court of Claims on November 13, 1992. This is a claim for personal injury pursuant to section 8(c) of the Illinois Court of Claims Act. (705 ILCS 505/8(c).) Claimant alleged that he was injured as a result of negligence in the treatment of a broken leg from May 4, 1992, through August 11, 1992, at St. Mary's Hospital in Centralia, Illinois, where employees of the Illinois Department of Corrections transported him after a soccer accident at the Centralia Correctional Center on May 4, 1992.

Claimant contends that after he was transported to St. Mary's Hospital for emergency medical treatment, the hospital staff failed to perform an operation on his left leg until 18 days later, when the leg became infected and swollen.

Claimant alleged in his complaint that as a result of the delay in treatment, he experienced severe pain, sleeplessness, and a loss of appetite. His complaint also states that Claimant can no longer use his leg, preventing him from returning to his occupation as a construction worker, resulting in a loss of earnings of $18,200 per year.

The only evidence produced at the trial before the Commissioner on May 25, 1994, was the testimony of Claimant that the hospital failed to treat his injury properly by delaying treatment. Claimant also stated that he now can walk but has a limp and no longer can play soccer. Claimant contends he is entitled to damages of $100,000 from Respondent for negligence.

This Court has held that the State owes a duty to provide inmates with reasonable medical care to its prisoners. (*Bynum v. State* (1992), 44 Ill. Ct. Cl. 1.) The Court also has held that failure to provide timely medical attention may constitute negligence. (*Davidson v. State* (1983), 35 Ill. Ct. Cl. 825.) In the instant case, the Respondent has complied with both mandates. Respondent transported Claimant to St. Mary's Hospital for treatment on the same day as his accident and therefore fulfilled its duty to procure reasonable medical treatment for Claimant in a timely fashion. There is no evidence that Respondent delayed procuring medical care for Claimant.

In order to sustain a negligence claim against Respondent for substandard medical care, Claimant must prove by a preponderance of the evidence the standard of care, that Respondent deviated from the standard of care, and that the deviation from the standard of care was the proximate cause of the Claimant's injury. These matters usually must be proven by medical evidence. Claimant has failed to prove the standard of care and that Respondent deviated from the standard of care. (*Davis v. State*

(1987), 39 Ill. Ct. Cl. 185.) As in *Davis, supra*, the Claimant herein has adduced no proof of the State's alleged negligence other than the Claimant's own conclusory testimony. No expert testimony was presented. *Pink v. State* (1991), 44 Ill. Ct. Cl. 295.

Although there is mention in Claimant's complaint that his broken leg was caused by poor construction of the yard in which he was playing soccer, Claimant has not produced any evidence to establish that such a dangerous condition existed, that it was the proximate cause of his injury, or that Respondent had notice of such dangerous condition. In fact, at the hearing held in this matter, this claim was not mentioned.

Claimant has failed to prove his case by a preponderance of the evidence. For the foregoing reasons, it is the order of this Court that Claimant's claim is hereby denied.

(No. 94-CC-0454—Claimant awarded $50,000.)

In re APPLICATION OF JOANNE E. CONKLIN

Opinion filed May 10, 1995.

CLARK & DEGRAND, for Claimant.

JIM RYAN, Attorney General (ROBERT J. SKLAMBERG, Assistant Attorney General, of counsel), for Respondent.

LAW ENFORCEMENT OFFICERS AND FIREMEN COMPENSATION—*definition of "killed in the line of duty."* 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 fireman if the death occurs within one year from the date of injury and if the injury arose from violence or other accidental cause.

SAME—*heart attack—determination of whether award will be granted.* In deciding whether an award will be granted where the fatal injury suffered by a fireman is heart attack, if the decedent was performing strenuous physical

activities at the time the attack was suffered, the Court of Claims has consistently allowed compensation, but where the decedent was not performing strenuous physical activities, the Court examines whether the circumstances surrounding the decedent's performance of duties prior to the heart attack may have precipitated the attack.

SAME—*fireman suffered fatal heart attack while testifying in arson trial—award granted.* Based upon uncontradicted medical evidence indicating that the decedent fireman, who suffered a fatal heart attack while testifying in a Federal arson trial, had no prior signs of significant heart disease but had experienced a high level of stress associated with traveling to Chicago to give testimony, and that such stress contributed to the heart attack, the Court determined that the decedent was killed in the line of duty and awarded compensation to the decedent's widow.

OPINION

FREDERICK, J.

This claim is before the Court by reason of the death of Edwin R. Conklin, who was a firefighter with the Earlville Fire Protection District. The decedent's widow, Joanne E. Conklin, seeks compensation pursuant to the terms and provisions of the Law Enforcement Officers and Firemen Compensation Act. 820 ILCS 315/1, *et seq*.

On November 16, 1993, the Court delivered an opinion finding that the Court could not determine if firefighter Conklin was "killed in the line of duty" as contemplated by the Act and directed that the issue be tried before a Commissioner of the Court. The Court made findings in its November 16, 1993, opinion as follows which we confirm:

(a) Firefighter Edwin R. Conklin died on July 1, 1993, while testifying in a Federal arson trial;

(b) The cause of death as stated on the certificate of death was listed as cardiac arrhythmia, due to or as a consequence of coronary artery disease;

(c) The decedent is survived by his wife, Joanne E. Conklin, the Claimant herein and she was designated by

the decedent as the sole beneficiary of any benefits under the Act;

(d) There is nothing in the circumstances to indicate firefighter Conklin's death was caused by willful misconduct or intoxication.

The Court found all the requirements for an award under the Act except the required finding that the decedent died in the line of duty.

The parties, in lieu of a trial, have filed with the Court Stipulation No. 1, Stipulation No. 2, and related materials. The Court has reviewed the report of the Attorney General, the application for benefits, the statement of supervising officer Fire Chief Larry O. Simpson, the letter of Frederick Mende, president of the Earlville Community Fire Protection District, the letter of assistant U.S. Attorney Susan E. Cox, the medical certificate of death, the letter of Frank Lefevre, M.D., the autopsy report, the designation of beneficiary, Stipulation No. 1, Stipulation No. 2, and all of the materials attached to the stipulations. The facts appear to be uncontradicted. On June 29, 1993, fireman Conklin was called to testify at an arson trial regarding a resident of Earlville who was accused of setting fire to his own restaurant in order to collect insurance proceeds. Firefighter Conklin rarely traveled to Chicago and appeared to be under stress regarding his testimony and role in the trial. Within one half hour of being called to the witness stand, he had a heart attack. He never regained consciousness and died two days later on July 1, 1993, at Northwestern Memorial Hospital.

The issue before the Court then is whether or not this death, under these circumstances, constitutes being "killed in the line of duty" as contemplated by the Act. The Court hears many cases regarding this issue and the

issue is perhaps the most difficult for the Court. There is always considerable sympathy for the claimants in such cases because these cases generally involve an untimely death of a loved one who has died in the service of the public. As sympathetic as the claimants may be in these cases, the Court has always remained strict in its determination of whether a decedent was killed in the line of duty.

Section 2(e) of the Act (820 ILCS 315/2(e)) provides, in relevant part: "'killed in the line of duty' means losing one's life as a result of injury received in the active performance of duties as a * * * or fireman if the death occurs within one year from the date the injury was received and if the injury arose from violence or other accidental cause." (*In re Application of O'Gara* (1991), 44 Ill. Ct. Cl. 288.) When determining whether an officer was killed in the line of duty where the fatal injury suffered is a heart attack, the standard of review of the evidence was established by this Court in *In re Application of Smith* (1990), 43 Ill. Ct. Cl. 183. The *Smith* decision states at page 186:

> "Cases involving heart attacks are among the most difficult presented to this Court. The Court recognizes that police work involves stress and strain which can lead to heart attacks. In deciding whether an award should be granted an effort is made to determine whether the activities the decedent was performing precipitated the heart attack. In cases where a decedent is performing strenuous physical activities at the time the attack is suffered, the Court has consistently granted awards. However, in cases where the decedent was not performing strenuous physical activities when the heart attack was suffered, the Court must closely examine whether the circumstances surrounding the decedent's performance of duties prior to the time the fatal heart attack was suffered may have precipitated the attack."

We realize that the work of firefighters involves stress and strain which can lead to heart attacks. We must also note that in this case, firefighter Conklin was not involved in strenuous physical activity at the time the heart attack was suffered. We must, therefore, look very closely

at the circumstances surrounding the decedent's performance of duties prior to the fatal heart attack to determine whether the activities the decedent was performing precipitated the heart attack. The uncontradicted evidence before the Court is the medical opinion of Dr. Frank Lefevre, a board certified medical examiner and doctor of internal medicine. In Dr. Lefevre's letter of September 26, 1994, the doctor states "It is further my opinion, again based upon a reasonable degree of medical certainty, that the stress associated with appearing in Federal court in Chicago and giving testimony at that trial contributed to the onset of cardiac arrhythmia that led to Mr. Conklin's death." Dr. Lefevre's opinion was based on the fact that there was no evidence or prior signs of significant cardiac disease present that would account for the cardiopulmonary arrest that Mr. Conklin had even though there was some evidence of underlying heart disease in this 65-year-old man; that firefighter Conklin was under a high level of stress at having to testify in Chicago in Federal court with that stress releasing large amounts of stress hormones in the blood system thereby predisposing a person to cardiac arrhythmias; that such stress has a deleterious effect on one's health; and the total absence of any prior significant medical problems for firefighter Conklin.

Based on the unique facts of this case where testifying would be a very unusual event, we find that the stress of testifying in the arson trial in Chicago precipitated the heart arrhythmia in firefighter Conklin thereby leading to his death. Based on this finding, we further find that Edwin A. Conklin was killed in the line of duty and the claim of Claimant is therefore compensable.

It is therefore hereby ordered that Claimant, Joanne E. Conklin, is hereby awarded fifty thousand dollars

($50,000) pursuant to the provisions of the Law Enforcement Officers and Firemen Compensation Act.

(No. 94-CC-0579—Claim dismissed; petition for rehearing denied.)

WILLIAM MCNEIL, Claimant, *v.* THE STATE OF ILLINOIS and JUDGE VINCENT J. CERRI, Respondents.

Order filed February 1, 1995.

Order on petition for rehearing filed April 12, 1995.

WILLIAM MCNEIL, *pro se*, for Claimant.

JIM RYAN, Attorney General (ANNELIESE B. FIERTOS, Assistant Attorney General, of counsel), for Respondents.

IMMUNITY—*doctrine of judicial immunity.* As long as a judge is acting within his jurisdiction, he enjoys absolute immunity for acts performed in his judicial capacity irrespective of whether the act was done mistakenly, maliciously, or in excess of authority.

SAME—*allegations of judicial misconduct—immunity applied—res judicata—claim dismissed.* On motion of the State to dismiss a claim brought against a judge for judicial misconduct, the Court determined that the judge was acting within his jurisdiction and therefore enjoyed absolute immunity for his acts, and in dismissing the claim, the Court noted that the action was also barred by the doctrine of *res judicata* based on a prior circuit court action arising from the same acts.

ORDER

RAUCCI, J.

This cause coming on to be heard on the Respondent State of Illinois' motion to dismiss, the Court having considered the memoranda of both parties and the Court being fully advised in the premises, the Court finds:

(1) Claimant filed a complaint against Respondents alleging judicial misconduct by Judge Vincent J. Cerri. The Respondent State of Illinois has filed a motion to dismiss

asserting that the actions of Judge Cerri are not cognizable by virtue of the doctrine of judicial immunity. Claimant maintains that since the General Assembly has passed an indemnification statute (5 ILCS 350/2), therefore the doctrine of judicial immunity does not apply.

(2) Claimant also filed an action against Judge Cerri in the circuit court of the 12th judicial circuit, Will County arising from the same acts. That action was dismissed, and the dismissal affirmed by the appellate court for the 3rd judicial district in *McNeil v. Cerri*, No. 3-93-0719 (unpublished opinion, July 25, 1994). As stated by Justice Breslin:

> "As long as a judge is acting within his jurisdiction, he enjoys absolute immunity for acts performed in his judicial capacity irrespective of whether the act was done mistakenly, maliciously or in excess of authority. (*Illinois Traffic Court Driver Improvement Educational Foundation v. Peoria Journal Star, Inc.* (1986), 144 Ill. App. 3d 555, 494 N.E.2d 939; *Stump v. Starkman* (1978), 435 U.S. 349, 55 L. Ed. 2d 331, 98 S. Ct. 1099.) Since the trial judge in the present case was acting within his jurisdiction, we affirm the judgment of the circuit court of Will County * * *."

The issue of indemnification of the judge is not raised in a case in which there is no liability.

(3) While not urged by Respondent in its motion to dismiss, we also note that this claim would be barred by the doctrine of *res judicata*.

It is therefore ordered that the motion to dismiss is granted, and this claim is dismissed and forever barred.

ORDER

RAUCCI, J.

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

The petition for rehearing is without merit and should be denied.

It is therefore ordered that the petition for rehearing is denied.

(No. 94-CC-1273—Claim dismissed.)

EDWARD HALL, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed February 1, 1995.

Order filed May 9, 1995.

KROHN JENKINS & ANDERSON (ROBERT J. JENKINS, of counsel), for Claimant.

JIM RYAN, Attorney General (DAVID S. RODRIGUEZ, Assistant Attorney General, of counsel), for Respondent.

EXHAUSTION OF REMEDIES—*wrongful suspension of employment—failure to exhaust remedies.* A State employee who was suspended for ten days from his job with a mental health facility could not bring a claim for lost wages where he failed to exhaust his remedies by submitting a grievance or appeal pursuant to the Illinois Administrative Code or filing an action in circuit court.

EMPLOYMENT—*disciplinary action was not tantamount to defamation per se—claim dismissed.* Notwithstanding allegations by a State mental health facility employee that his suspension by his employer for alleged mistreatment of the facility's clients was tantamount to allegations of criminal misconduct and malfeasance in job performance, his complaint failed to state a cause of action for defamation *per se* and his claim was dismissed, since he did not allege specific defamatory statements, who made them, that there was an unprivileged publication to a third party, or how he was specifically damaged.

ORDER

RAUCCI, J.

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

(1) Respondent has moved to dismiss this action on two grounds, namely (1) failure to exhaust remedies and (2) failure to state a cause of action for defamation *per se*. We find that Respondent's motion to dismiss should be granted.

(2) Claimant was employed by the Department of Mental Health and Developmental Disabilities at the Madden Mental Health Center as a lieutenant in the security service. He claims that he was improperly suspended for 10 days. Count I claims $1,100 for lost wages, and Count II is for damages of $500,000 or more for alleged "defamation *per se*" wherein Claimant alleges that the mere fact of suspending Claimant for these charges was "willful, malicious and wanton."

An administrative grievance procedure applicable to this employment action is provided for by law. The procedure is described in 80 Ill. Adm. Code section 303.20. A predisciplinary hearing was held. Claimant failed to submit a grievance or appeal within the time provided although Claimant states he unsuccessfully attempted to have an appeal heard.

The complaint does not allege with specificity what administrative steps he took, and he did not file an action in the circuit court pursuant to the Administrative Review Law. He failed to exhaust his remedies.

(3) Claimant alleges that "disciplining him for alleged mistreatment of service recipients was tantamount to allegations of criminal misconduct and malfeasance in job performance." He alleges no specific defamatory statements, who made them, that there was an unprivileged publication to a third party, and how he was specifically damaged. The complaint fails to state a cause of action.

It is therefore ordered that the Respondent's motion to dismiss is granted, and this action is dismissed, and forever barred.

ORDER

RAUCCI, J.

This cause coming on to be heard on the Claimant's motion for new trial, the Court being fully advised in the premises, it is ordered that the motion for new trial is denied.

(No. 94-CC-1769—Claim dismissed.)

WILLIAM FELLION, Claimant, *v.* ILLINOIS STATE TOLL HIGHWAY AUTHORITY, ILLINOIS STATE TOLL HIGHWAY AUTHORITY DEFINED BENEFIT PENSION PLAN, and JOHN W. KIEP, ROBERT L. HICKMAN, RICHARD W. DEROBERTIS and NICHOLAS W. JANNITE Individually and as members of the Pension Plan Committee, Respondents.

Order filed February 24, 1995.

COTIGUALA & MENNES (JAC A. COTIGUALA, of counsel), for Claimant.

JIM RYAN, Attorney General (ROBERT SKLAMBERG, Assistant Attorney General, of counsel), for Respondents.

JURISDICTION—*claim against Illinois State Toll Highway Authority dismissed for lack of jurisdiction.* A claim against the Illinois State Toll Highway Authority, alleging wrongful denial of the Claimant's pension benefits, was dismissed because the Authority is an entity which is not amenable to suit in the Court of Claims and over which the Court has no jurisdiction.

ORDER

MITCHELL, J.

This cause coming on to be heard on the motion of the State of Illinois 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 Claimant herein has filed a multiple-count complaint for, essentially, alleged wrongful denial of his pension benefits by the Illinois State Toll Highway Authority, the Illinois State Toll Highway Authority Defined Benefit Pension Plan, and certain individuals as members of the committee of that pension plan.

The Illinois State Toll Highway Authority, including its subdivisions and its employees, is an entity which is not amenable to suit in the Court of Claims and over which this Court has no jurisdiction. This Court has consistently dismissed all such cases properly lying against the Illinois State Toll Highway Authority, and we hold that the instant claim should likewise be dismissed.

It is therefore ordered that the motion of the State of Illinois be, and the same is, hereby granted, and the claim herein is dismissed, with prejudice.

(No. 94-CC-3085—Claimant awarded $50,000.)

In re APPLICATION OF JANET DRURY

Opinion filed August 16, 1994.

GALLAGHER, KLEIN & BRADY (DANIEL J. BERENS, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (CHAD D. FORNOFF, Assistant Attorney General, of counsel), for Respondent.

LAW ENFORCEMENT OFFICERS AND FIREMEN COMPENSATION—*asthma attack—officer died after responding to domestic disturbance—compensation awarded.* Where a police chief, who had a history of asthma attacks after exposure to cats, suffered an acute asthma attack and died in his physician's driveway within minutes after responding to a domestic disturbance at a home where he was exposed to cats, the officer was killed in the line of duty and his widow was awarded compensation.

OPINION

FREDERICK, J.

This claim is before the Court by reason of the death of James D. Drury, who was chief of police of the Village of Shabbona, Illinois. Chief Drury's widow, Janet Drury, seeks compensation pursuant to the terms and provisions of the Law Enforcement Officers and Firemen Compensation Act. 820 ILCS 315/1, *et seq*.

The Court has carefully considered the claim for death benefits submitted herein, together with the written statements of the mayor of Shabbona, Illinois, Dr. Robert Purdy, the family physician of Chief Drury and the documentation submitted therein, the autopsy report, the order of heirship, the coroner's certificate of death, the police report, and the report of the Attorney General. Pursuant to the order of heirship, the applicant, Janet Drury is entitled to benefits as the only other heir is an adult daughter.

The record reveals that on December 10, 1993, in the late evening and the early morning of December 11, 1993, the decedent, James D. Drury, responded to a call concerning a domestic dispute in progress within the Village of Shabbona. When Chief Drury arrived at the scene, the husband and wife engaged in a verbal confrontation with him. When county deputies arrived, Chief Drury was informed of an outstanding warrant on the husband, and the husband was arrested. When Chief Drury returned to his squad car, he began having difficulty breathing. One of the deputies recommended calling an ambulance, but Chief Drury requested that he be taken to the residence of Dr. Purdy, who lived only a few blocks away. Chief Drury had suffered asthma attacks in the past when exposed to cats, and Dr. Purdy had successfully treated him for these attacks in emergency situations. Chief Drury

was exposed to cats only minutes earlier when making the arrests at the domestic disturbance.

Before Dr. Purdy could retrieve medication from his house, Chief Drury collapsed on the driveway and rescue attempts to revive him were not successful. Chief Drury was pronounced dead at 1:00 a.m. on December 11, 1993. The decedent died within one year of the injuries he sustained from an accidental cause. The certificate of death indicates that the cause of death was respiratory failure due to an acute asthma attack.

Chief Drury is survived by his wife, Janet Drury, and an adult daughter so that the Claimant herein is the sole beneficiary of any benefits payable under the Law Enforcement Officers and Firemen Compensation Act. 820 ILCS 315/1, *et seq*.

We find that there is nothing in the circumstances to indicate that Chief Drury's death was caused by willful misconduct or intoxication. We further find that the foregoing circumstances fall within the terms and provisions of the Law Enforcement Officers and Firemen Compensation Act, *supra*, and the facts reported herein comply with the requirements for an award under the Act. Chief James D. Drury was killed in the line of duty. Because of the listed cause of death, the Attorney General did an extensive investigation and concluded the decedent was killed in the line of duty. We concur.

It is therefore ordered that the claim of Janet Drury, the surviving spouse of Chief James D. Drury, be, and the same is hereby allowed, and Claimant is hereby awarded the amount of $50,000, pursuant to the Law Enforcement Officers and Firemen Compensation Act.

(No. 95-CC-0610—Claimant awarded $108,451.49;
request for payment of interest denied.)

LUCKY STORES, INC., Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed December 16, 1994.

Opinion filed April 14, 1995.

FREDERICK J. CZERWIONKA, for Claimant.

ROLAND W. BURRIS, Attorney General (MICHAEL F. ROCKS, Assistant Attorney General, of counsel), for Respondent.

STIPULATIONS—*unnegotiated warrant escheated to State—claim seeking payment timely filed—award granted.* Although the Claimant's failure to present a warrant for payment within six months after it was issued caused the warrant to escheat to the State, the Claimant's action seeking replacement of the warrant was timely filed within the five-year statute of limitations, and pursuant to the State's stipulation, an award was entered for the Claimant.

INTEREST—*no statutory authorization for interest on Court of Claims awards—request for interest denied.* Interest on an award is only available if the original agency had an ability to pay, and since there is no statute expressly subjecting the State to liability for interest on Court of Claims awards, the Claimant's request for interest on an award granted in its claim seeking replacement of a warrant was denied.

ORDER

SOMMER, C.J.

This matter coming before the Court on the stipulation of the Respondent, due notice having been given the Claimant, and the Court being fully advised in the premises; the Court finds: that warrant number TB0865320 was issued to Lucky Stores, Inc. in the amount of $108,451.49 and escheated by operation of law because it was held more than six months before it was presented for payment.

We further find that the Court of Claims can only replace warrants if suit is filed within the five-year statute of limitations set forth in section 22 of the Court of Claims

Act. (705 ILCS 505/22.) Claimant filed suit on October 11, 1994, and was thus within such statute.

It is hereby ordered that this claim be and the same is hereby granted, and Claimant is awarded $108,451.49.

OPINION

SOMMER, C.J.

This matter arises upon the Claimant's request for the payment of interest on an award entered by this Court on December 16, 1994.

The Claimant in this matter sought replacement of a warrant dated July 5, 1990, that was not negotiated and ultimately escheated to the State. The request to replace this warrant was made on October 11, 1994, and the award was made in a timely manner on December 16, 1994.

The long-standing precedent in this Court is that interest is available only so long as the original agency had a legal ability to pay. (*OK Electric v. State* (1984), 39 Ill. Ct. Cl. 155.) However, absent a statute expressly subjecting the State to liability, there is no liability for interest.

Though the general interest statute on late payments may have caused the original warrant to bear interest, there is no statute expressly subjecting the State to liability for interest on Court of Claims awards. *Branch-Nicoloff Co. v. State* (1988), 40 Ill. Ct. Cl. 253, 254; *Centola v. State* (1988), 41 Ill. Ct. Cl. 121, 122.

It is therefore ordered that the Claimant's request for interest 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.

OPINIONS PUBLISHED IN FULL
FY 1995

(No. Unassigned—Claim denied.)

In re APPLICATION OF PAMELA J. CURRY

Order filed January 26, 1990.

Opinion filed August 26, 1994.

PAMELA J. CURRY, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General, for Respondent.

CRIME VICTIMS COMPENSATION ACT—*deadline for filing claim.* Pursuant to the Crime Victims Compensation Act, the absolute filing deadline, including an extension for good cause, is 18 months from the date of the crime.

SAME—*when statute of limitations may be extended.* A statute of limitations can only be extended if the claimant is under the age of 18 or under a legal disability, and generally the limitations period will be tolled during a party's infancy, mental incapacity, or incompetency.

SAME—*strict construction of limitations period.* Since the Court of Claims has strictly construed the statute of limitations in crime victims compensation cases, where the claimant seeks an extension of time to file a claim based on an alleged legal disability, the filing period will not be extended where no disability is proven, and a claimant must prove the claim by a preponderance of the evidence.

SAME—*Claimant was not minor or under legal disability—claim denied as time-barred.* Where the evidence presented by the Claimant showed that she was not a minor at the time her claim under the Crime Victims Compensation Act arose in 1986, nor was she suffering from a mental disease or disorder as alleged in her pleading which would have tolled the 18-month limitations period, her notice of intent to file a claim filed in 1989 was untimely, and the claim was denied.

ORDER

SOMMER, C.J.

This cause coming on to be heard on the petition of applicant, Pamela Jean Curry, for an extension of time to file necessary documents in submission of application for benefits under the Crime Victims Compensation Act.

Based upon the information contained in said petition and by the Crime Victims Compensation Act, we find that the crime in question occurred more than 18 months before the filing of the application, and as Crime Victims Compensation Act requires filing of notice within six months which can be extended for one year on good cause, we find that we are unable to extend the filing deadline under the law.

Wherefore, it is hereby ordered that said petition be denied.

OPINION

FREDERICK, J.

The Claimant, Pamela J. Curry, filed her notice of intent to file a claim pursuant to the Crime Victims Compensation Act on December 14, 1989. (740 ILCS 45/1 *et seq.*) On its face, the application indicated the Claimant was an adult (date of birth: 1/4/56) and that the alleged crime had occurred on June 28, 1986. On January 26, 1990, the Court properly denied Claimant's petition for

an extension of time to file necessary documents in submission of her application for benefits under the Crime Victims Compensation Act. Pursuant to statute, the absolute filing deadline, including an extension for good cause, was 18 months from the date of the crime. The application of the Claimant was filed more than two years and five months from the date of the alleged crime.

The Claimant was notified of the Court's decision on January 30, 1990, and advised of her right to a hearing. Claimant timely filed a request for hearing on February 16, 1990. The case was assigned to a Commissioner to take evidence on the sole issue of whether Claimant had a legal disability which would excuse the filing of the application within the limitation period which expired on December 29, 1988. The Claimant was unable to attend the scheduled hearing and requested that she be allowed to submit her evidence by written evidence. We grant that request and accept the filing of Claimant's exhibits in support of her assertion for an extension of time to file the claim for evidentiary purposes. We also waive Claimant's appearance as requested. We accept all of Claimant's exhibits as evidence to be considered in deciding this case.

The Court has revised the entire file, including all of Claimant's exhibits and all of Claimant's pleadings and motions. The Court is duty-bound to follow the statute of limitations. A statute of limitations can only be extended if the Claimant is under the age of 18 or under a legal disability. (735 ILCS 5/13—211.) The record is clear that Claimant was over the age of 18 on June 28, 1986. The only other issue is whether Claimant was under a legal disability from June 28, 1986, until December 14, 1989, or any time during that period for a sufficient period to extend the limitations period to December 14, 1989. This statute has generally been construed to toll a statute of

limitations during a party's infancy or mental incapacity or incompetency. (*Girman v. Cook County* (1981), 103 Ill. App. 3d 897.) A formal legal adjudication is not required to show that a person is under a "legal disability." *Estate of Riha v. Christ Hospital* (1989), 187 Ill. App. 3d 752.

The evidence presented by Claimant was that she was detained for three days in a mental health facility. She was discharged on June 30, 1986, without any diagnosis of a mental disease. The affidavit of Patricia Jean Curry of July 17, 1989, indicates Claimant had not previously been counseled at Peace River. The Federal court order of December 31, 1990, is also important in that the Court denied a motion for a mental exam of Claimant in unrelated litigation as such exam was not warranted.

The record is therefore devoid of any evidence that Claimant was suffering from any legal disability from at least July 1, 1986, until December 14, 1989. Claimant has made it clear that she is not suffering from any mental disease or disorder in her pleadings.

This Court has consistently strictly construed the statute of limitations in crime victims compensation cases. The Crime Victims Compensation Act does not grant an exception to the limitations period as an excuse that the Claimant lacked information from police or hospitals regarding the Act. (*Schenk v. State* (1991), 43 Ill. Ct. Cl. 437.) We have consistently refused to extend the filing period where no disability is proven. (*In re Application of Geraghty* (1989), 42 Ill. Ct. Cl. 388.) The Crime Victims Compensation Act is a secondary source of compensation. A claimant must prove the claim by a preponderance of the evidence. *In re Application of Bavido* (1992), 44 Ill. Ct. Cl. 449.

The Court of Claims is bound by the acts of the legislature and all procedures set forth by the legislature must

be followed by the Court before benefits can be awarded. *In re Application of Hutcheson* (1985), 37 Ill. Ct. Cl. 491.

The facts are clear that Claimant failed to file her claim within the time limits established by law. While we are sympathetic to the traumatic experience alleged by Claimant, we are constrained by law to deny her petition for extension of time to file. The claim is therefore denied as time barred.

(No. 89-CV-0027—Claimant and medical providers awarded $811.59.)

In re APPLICATION OF SADIE STEWART

Opinion filed October 19, 1993.

Opinion filed January 30, 1995.

SADIE STEWART, *pro se*, for Claimant.

JIM RYAN, Attorney General (JAMES MAHER, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*aggravated battery victim—wheelchair ramp not specifically enumerated pecuniary loss—other medical expenses awarded.* Although the victim of an aggravated battery was awarded compensation for certain medical and hospital expenses, she was not entitled to reimbursement for funds expended to install a wheelchair ramp at her home, since the ramp was not a specifically enumerated pecuniary loss as defined by section 2(h) of the Crime Victims Compensation Act.

OPINION

PER CURIAM

This claim arises out of an incident that occurred on October 28, 1987. The Claimant, Sadie Stewart, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. 740 ILCS 45/1, *et seq.*

This Court has carefully considered the application for benefits submitted on July 6, 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 October 28, 1987, the Claimant, Sadie Stewart, age 65, was a victim of a violent crime as defined in section 72(c) of the Act, to wit: aggravated battery. 720 ILCS 5/12—4.

(2) That the crime occurred in Chicago, Illinois, and the Claimant has complied with all of the eligibility requirements of section 6.1 of the Act.

(3) That the Claimant seeks compensation for medical/hospital expenses.

(4) That after considering insurance and other sources of recovery, the Claimant's net compensable loss for medical/hospital expenses is based on the following:

	Compensable Amount
Associates In Rehabilitation Medicine, S.C.	$460.00
Friedell Clinic	313.00
Jackson Park Hospital	38.59
Total	$811.59

(5) That the Claimant has received no reimbursements that can be counted as applicable deductions under section 80.1(e) of the Act.

(6) That the Claimant has complied with pertinent provisions of the Act and qualifies for compensation thereunder.

(7) That pursuant to section 88(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.

(8) That the claim for $3,134 appears to be for a ramp to accommodate a wheelchair which is not a specifically-enumerated pecuniary loss pursuant to sections 72(h) and 80.1 of the Act.

(9) That this issue of wheelchair ramps is an issue of first impression for the Court and we invite the Claimant to request a trial and a hearing before the full Court to consider this issue.

It is hereby ordered that the sum of $460 be and is hereby awarded to Sadie Stewart and Associates in Rehabilitation Medicine, S.C.

It is further ordered that the sum of $313 be and is hereby awarded to Sadie Stewart and Friedell Clinic.

It is further ordered that the sum of $38.59 be and is hereby awarded to Sadie Stewart and Jackson Park Hospital.

OPINION

FREDERICK, J.

This claim arises out of a violent crime against Ray A. Drake which was committed on October 28, 1987. Claimant, Sadie Stewart, seeks compensation pursuant to the Crime Victims Compensation Act (hereinafter referred to as the "Act"). 740 ILCS 45/1, *et seq.*

This Court issued an initial opinion in this case on October 19, 1993, ordering that $811.59 be awarded for medical and hospital payments. We denied the portion of

the claim totaling $3,134 which appeared to be for a ramp to accommodate a wheelchair. A ramp to accommodate a wheelchair is not a specifically-enunciated pecuniary loss pursuant to section 2(h) of the Act. Claimant requested a hearing on the issue of payment for the ramp.

At the hearing, the Claimant's daughter testified that Claimant did not have access through the front or back of her home. A door was constructed on the side and a ramp and railing were installed.

The Law

This is the second time this Court has had to address the issue of home improvements in regard to crime victims compensation claims. (See *In re Application of Drake* (1994), 47 Ill. Ct. Cl. 563.) These are very difficult, heartrending decisions. We would gladly order awards if we had the authority to do so. Section 2(h) of the Act defines pecuniary loss as:

> "* * * appropriate medical expenses and hospital expenses including expenses of a medical examination, medically required nursing care expenses, appropriate psychiatric care or psychiatric counseling expenses, expenses for care or counseling by a licensed clinical psychologist or licensed clinical social worker and expenses for treatment by Christian Science practitioners and nursing care appropriate thereto; prosthetic appliances, eyeglasses, and hearing aids necessary or damaged as a result of the crime; replacement services loss, to a maximum of $1,000 per month; dependents replacement services loss, to a maximum of $1,000 per month; * * *."

As defined by the legislature, pecuniary loss does not include a ramp for a wheelchair. The Court can award no more compensation than the Act allows. *In re Application of Johnson* (1992), 45 Ill. Ct. Cl. 562.

For the foregoing reasons, the claim for the wheelchair ramp is denied.

(No. 89-CV-0179—Claimant awarded $875.49.)

In re APPLICATION OF YOLANDA D. RICHARDSON

Order filed May 14, 1992.
Order filed April 28, 1995.

YOLANDA D. RICHARDSON, *pro se*, for Claimant.

JIM RYAN, Attorney General (PAUL CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*notification requirements.* Section 6.1(b) of the Crime Victims Compensation Act requires a person otherwise entitled to compensation under the Act to notify appropriate law enforcement officials of the perpetration of the crime within 72 hours, or to show that notice subsequent to 72 hours was timely under the circumstances.

SAME—*anonymous report of sexual assault—notice timely under circumstances—award granted pursuant to stipulation.* In a claim by a sexual assault victim seeking compensation for medical expenses and lost wages, the Court of Claims reversed the initial denial of the claim for failure to timely report the incident, finding that documented evidence of the victim's anonymous call to police the day after she was sexually assaulted by a co-worker, coupled with testimony from a rape crisis worker who counseled the Claimant in the days following the attack, indicated that notice to law enforcement officials was timely under the circumstances, and an award was subsequently entered for the Claimant pursuant to the parties' stipulation.

ORDER

PATCHETT, J.

This crime victim's compensation claim arises out of an incident that occurred on August 25, 1987. The Claimant, Yolanda D. Richardson, was then a victim of criminal sexual assault, and now seeks compensation pursuant to the provisions of the Crime Victims Compensation Act.

This Court issued an earlier order denying her claim. That order was based on the fact that the Claimant did not report this incident to the appropriate law enforcement officials until October 5, 1987. The Claimant requested an opportunity to present evidence on this issue.

A hearing was then conducted at which the Claimant appeared and testified. Ms. Richardson testified that she made a telephone call on August 26, 1987, to the De Kalb city police department. She testified that she reported the crime at that time, but did not give her name. She was not in the proper state of mind to discuss the crime with police at that time, and knew several people on the police department. In addition, Ms. Richardson testified that the offender was an acquaintance and co-worker. She also produced an affidavit at the hearing stating that she reported the crime within 72 hours.

In addition, the Claimant presented a signed affidavit by Michael P. Coghlan, State's attorney of De Kalb County, which stated that an anonymous report of sexual assault had been made to the De Kalb police department on or about the time of the incident in question. She also provided a letter by the State's attorney of De Kalb County stating that the crime was reported on August 26, 1987. Claimant stated that she also reported the incident to the De Kalb County sheriff's office on August 30, 1987.

The Claimant then called Ms. Danise Habun, who has a degree in psychology from the University of Wisconsin, Plattville. She is employed by the Community Crisis Center as a legal advocate for sexual assault and domestic violence victims and also does counseling with sexual assault victims.

Ms. Habun testified that she met Ms. Richardson at the emergency room of Sherman Hospital in Elgin on the 27th or 28th of August 1987. Ms. Habun testified that Ms. Richardson was extremely distraught and in pain. Ms. Habun testified that she spent approximately four hours with the Claimant at the hospital, and did some counseling over the telephone the next day. She testified that Ms. Richardson told her at the time that she was feeling very

confused about what to do since the offender was a friend and co-worker. Ms. Habun suggested three different ways of reporting the crime, one of which was to make an anonymous police report. Ms. Habun also testified as to the degree of stress and trauma associated with this type of crime.

Section 6.1(b) of the Crime Victims Compensation Act (740 ILCS 45/6.1(b)) requires a person otherwise entitled to compensation under the Act to notify appropriate law enforcement officials of the perpetration of the crime within 72 hours, or show that notice subsequent to 72 hours was timely under the circumstances. There is in the record an August 30, 1990, letter from the De Kalb County State's attorney indicating that the offender was convicted in the criminal case which arose out of this incident. Therefore, Claimant is a victim of a crime covered by this Act, and is entitled to compensation if the notice provision has been complied with.

We do not hold that anonymous reports within 72 hours are necessarily sufficient to comply with section 6.1(b), but we do hold that Ms. Richardson has presented evidence to show that her notice was timely under the circumstances surrounding this crime.

Therefore, the previous order of this Court denying her claim is hereby reversed, and this matter is remanded to a Commissioner for further proceedings consistent with this opinion.

ORDER

PATCHETT, J.

The parties to this proceeding have entered into a stipulation whereby the Attorney General's office has recommended that a payment of $875.49 be paid to the

Claimant, Yolanda Richardson, for paid medical expenses and for loss of earnings.

Wherefore, it is hereby ordered that a payment of $875.49 be paid to the Claimant, Yolanda Richardson, for paid medical expenses and for loss of earnings.

It is further ordered that this case be closed but Claimant may request to reopen her claim if additional expenses are incurred.

(No. 89-CV-1402—Claimant and medical providers awarded $2,474.)

In re APPLICATION OF CHERYL ROSS

Order filed October 28, 1991.

CHERYL ROSS, *pro se*, for Claimant.

ROLAND W. BURRIS, Attorney General (JAMES MAHER, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*admissibility of police reports containing hearsay.* Police reports containing hearsay evidence by individuals involved in and charged with a crime are admissible in claims under the Crime Victims Compensation Act, but the Court will only give such reports the weight they deserve under the circumstances and with knowledge of their technical deficiencies.

SAME—*denial of compensation reversed—Claimant not knowing participant in drug transaction—award granted.* Where the Claimant's corroborated and uncontradicted testimony showed that she was not a knowing participant in a narcotics transaction which was allegedly in progress when she was shot in the head, and her conduct did not contribute to her injuries, an order denying her request for benefits was reversed, and an award for medical expenses was entered for the Claimant and her medical providers, but the Court referred the claim to the Attorney General for further investigation as to the Claimant's lost wages and expenses covered by public aid, as the record was inconclusive as to those matters.

ORDER

MONTANA, C.J.

This claim arises out of an incident that occurred on June 30, 1988. Cheryl Ross, applicant, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. 740 ILCS 45/1, *et seq.*

On January 26, 1990, based on an investigatory report from the office of the Attorney General, this Court denied compensation on the grounds that applicant was a knowing participant in a cocaine transaction with her boyfriend on June 30, 1988. During the alleged cocaine transportation, she was shot in the head and suffered partial blindness. Applicant filed a timely petition for a hearing, objecting to the conclusions in the order.

At the hearing on November 16, 1990, applicant testified that she was not a knowing participant in any narcotics transportation on the day she was shot. In addition, applicant's testimony was corroborated by a witness, Deborah Bates, who testified that she had known applicant for 20 years and that she had never known her to be involved in the sale of narcotics.

The State of Illinois did not present any testimony to contradict the testimony of Ross and her witness. The State introduced police reports on the incident to which the applicant voiced no objection. The reports contained hearsay evidence of individuals involved in and charged with the shooting. Such reports are admissible in claims under the Act in the discretion of the Commissioner hearing the case. (740 ILCS 45/13.1.) However, the Court will only give such reports the weight they deserve under the circumstances and with knowledge of their technical legal deficiencies.

Having weighed the evidence in this case, it is hereby ordered that the order of January 26, 1990, is reversed with a finding that the applicant's conduct did not contribute to her injuries.

Applicant also presented information regarding her losses which include medical expenses and possible lost wages. As the primary focus of the hearing was the grounds for the initial denial of benefits, this issue was not fully litigated. The record does indicate that $1,071 is owed to Michael Reese Hospital, that $1,200 is owed to an ocularist, Robert B. Scott, and that $203 is owed the City of Chicago for ambulance services. The record is inconclusive as to expenses covered by public aid and lost wages.

It is hereby ordered that awards are made to the applicant and the providers noted above and co-payable in said amounts. It is further ordered that the claim is referred to the office of the Attorney General for further investigation and report on the issues of public aid coverage and lost wages. This order will not become final for 30 days during which time any objections hereto on this issue of public aid coverage must be raised.

(No. 90-CV-0367—Claim denied.)

In re APPLICATION OF BIRDIE DRAKE

Opinion filed October 19, 1993.
Opinion filed November 7, 1994.

BRICK, GENTRY, BOWERS, SWARTZ, STOLTZE, SCHULING & LEVIS (THOMAS J. LEVIS, of counsel) and WILDMAN, HARROLD, ALLEN & DIXON (LOUIS P. VITULLO and RICHARD P. GLOVKA, of counsel), for Claimant.

NEIL F. HARTIGAN and ROLAND W. BURRIS, Attorneys General (JAMES MAHER and PAUL H. CHO, Assistant Attorneys General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*compensable pecuniary loss.* Under the Crime Victims Compensation Act, a victim of violent crime may be compensated for his pecuniary loss, including medical and hospital expenses, prosthetic appliances, paid tuition and loss of earnings, while a person related to the victim may only be compensated for reasonable funeral, medical and hospital expenses of the victim to the extent to which she has paid or become obligated to pay such expenses.

SAME—*wheelchair lift and home alterations for quadriplegic son—no statutory basis for compensating parent.* A claim by the mother of a crime victim requesting compensation for the installation of a wheelchair lift on her van and a number of home alterations for the safety and convenience of her quadriplegic son was denied, since even if such expenses were considered "medically necessary," they did not fall within the statutorily enumerated funeral, medical, or hospital expenses for which a person related to a crime victim may be compensated.

SAME—*prosthetic appliances—wheelchair accessories and home alterations not compensable under Act—claim denied.* A prosthetic appliance is one which replaces a missing part of the body such as a limb, eye, or tooth, by artificial substitute, or a fabricated substitute for a diseased or missing part of the body, and a claim brought on behalf of a quadriplegic crime victim for the cost of wheelchair accessories and work performed on his parents' home to make his life safer and more convenient was denied, since none of the work performed or items obtained constituted a "prosthetic appliance" or other statutorily compensable loss by a crime victim.

OPINION

PER CURIAM

This claim arises out of an incident that occurred on August 7, 1989. The Claimant, Birdie Drake, mother of the victim, Ray A. Drake, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. 740 ILCS 45/1, *et seq*.

This Court has carefully considered the application for benefits submitted on September 19, 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 August 7, 1989, the Claimant's son, Ray A. Drake, age 20, was a victim of a violent crime as defined in section 2(c) of the Act, to wit: aggravated battery.

(2) That the crime occurred in Maywood, Illinois, and all of the eligibility requirements of section 6.1 of the Act have been met.

(3) That the victim is permanently disabled as a result of the incident and is confined to a wheelchair.

(4) That the Claimant seeks compensation on behalf of the victim for wheelchair accessories and for adaptions/ additions to her residence for wheelchair accessibility.

(5) That the expenses for which Claimant seeks compensation are not specifically enumerated as a pecuniary loss under section 2(h) of the Act.

(6) That section 10.1 of the Act states that a victim may be compensated for his pecuniary loss.

(7) That the wheelchair accessories may possibly be considered prosthetic appliances pursuant to section 2(h) of the Act, but the Court is not advised as to the amount of or nature of the accessories and requires such information to substantiate the claim.

(8) That Claimant has indicated that she may incur medical/hospital expenses in the future as a result of the incident. Should the Claimant incur these expenses, she may petition the Court to reopen consideration of this claim for additional compensation, pursuant to section 16 of the Act.

(9) That this is a case of first impression in this Court as to adaptions of a residence.

(10) That the Court has consistently strictly construed the Act.

(11) That the Court invites the Claimant to properly substantiate the wheelchair accessories portion of the claim for the Court and to request a trial so that the full Court can consider these issues.

It is therefore ordered that this claim is denied.

OPINION

FREDERICK, J.

This claim arises out of a violent crime that was committed on August 7, 1989. The victim, Ray A. Drake, was 20 years of age at the time of the incident. The Claimant, Birdie Drake, is the victim's mother and is seeking compensation pursuant to the Crime Victims Compensation Act (hereinafter the "Act"). 740 ILCS 45/1, *et seq*.

Claimant, a resident of the State of Iowa, has made an application for a total of $22,348.80 in compensation for two major expenditures incurred on behalf of the victim. Claimant seeks: (a) the sum of $19,000 for remodeling and structural adaptions made to the house owned by her and her husband, Earl Drake; and (b) the sum of $3,348.80 for the installation of a wheelchair lift and strap-down accessories for a 1978 van owned by her and her husband.

Procedural Background

The office of the Attorney General filed an investigatory report with the Court, recommending payment of the sums requested. Paragraph 6 of the recommendation states that the expenses incurred are not specifically enumerated as a pecuniary loss under section 2 of the Act. The paragraph supports the recommendation by concluding

that the expenses were incurred directly as a result of the victim's injuries and are necessary for the victim's welfare.

On October 19, 1993, the Court issued an opinion finding that Ray A. Drake was a victim of a violent crime, but denied the claim. The Court stated that it has consistently strictly construed the Act and the expenses are not specifically enumerated as a pecuniary loss in section 2(h) of the Act, pars. 5 and 10 of opinion. The Court indicated that wheelchair accessories may possibly be considered prosthetic appliances pursuant to section 2(h) but no information was available in regard to the amount of, or nature of, the accessories, par. 7 of opinion. The Court found the case to be one of the first impression and invited the Claimant to request a trial to enable the Court to consider these issues.

Claimant filed a six-page request for hearing, together with four exhibits, detailing the basis of her claim. A hearing was conducted on October 14, 1994, at which Claimant appeared and testified. Claimant was represented by her counsel from the State of Iowa and two co-counsel from the State of Illinois. Claimant presented four exhibits and all four were admitted into the record. The exhibits are as follows:

(a) an affidavit by Deb Mau, social worker at Des Moines General Hospital. Claimant's Exhibit No. 1;

(b) an affidavit by Daniel Bruflodt, social worker at Younker Rehabilitation Center in Des Moines. Claimant's Exhibit No. 2;

(c) an affidavit by Charles W. Ruperto, owner of Complete Line Remodeling, Inc. Claimant's Exhibit No. 3;

(d) an affidavit by Leonard Stevenson, owner of Thomas Bus Sales of Iowa, Inc. Claimant's Exhibit No. 4.

The office of the Attorney General called David Ubell, deputy chief of the crime victims office, as a witness. At the conclusion of the hearing, the office of the Attorney General recommended that the award not be made because the expenses were not expressly covered by the Act.

Upon request by Claimant, the Commissioner indicated that the record would remain open for one week to allow submission of further documents. Claimant's counsel forwarded four additional exhibits. On October 24, the Commissioner called Mr. Cho, assistant Attorney General, to determine whether he received copies and whether he objected to their admission into the record. Mr. Cho stated that he received the exhibits and did not object to them being made a part of the record. The Court considers the following exhibits as part of the record:

(a) an affidavit by Ronnie Hawkins, M.D., a doctor for Ray Drake. Claimant's Exhibit No. 5;

(b) A copy of the Iowa crime victim's statute. Claimant's Exhibit No. 6;

(c) a copy of the relevant portion of Iowa Policy Index. Claimant's Exhibit No. 7;

(d) a copy of the relevant portions of the Federal Victim Compensation Grant Statute. Claimant's Exhibit No. 8; and

(e) a copy of the decree of foreclosure on the Drake's house. Claimant's Exhibit No. 9.

Testimony of Claimant

At the hearing, Claimant testified that she resides at 1613 West 12th Street, Des Moines, Iowa. (R. 2.) Her son was going to college in Illinois. On August 7, 1989, he was shot in the head in Maywood, Illinois. After staying at Loyola Hospital for two weeks he was flown to Des Moines General Hospital (hereinafter "DMGH") in Iowa. He was in DMGH for seven to eight months. (R. 8.) Ray Drake is a quadriplegic, and confined to a wheelchair. R. 11.

Deb Mau, the social worker at DMGH, contacted Lisa Smith, of the Illinois Attorney General's office, and was "assured" that Ray Drake had $25,000 available. (R. 8-9.) See Claimant's Exhibit No. 1, par. 4.

Ray Drake was moved from DMGH to Iowa Methodist Medical Center in Des Moines for rehabilitation. Dan Bruflodt, a social worker, contacted Lisa Smith and she "assured" him that the funds were available for Ray Drake. (See Claimant's Exhibit No. 2, par. 11.) The social workers contacted Charles Ruperto to construct adaptions to the Drake's house. Ruperto told Claimant that he had the approval to build the bathroom for Ray Drake. R. 9.

Ruperto "put in a real expensive shower" to protect Ray Drake from changes in water temperature. R. 10.

Claimant talked to Lisa Smith and she told Claimant that the funds were available for both the hydraulic lift on the 1978 van and the adaptations to the house. R. 12 and 17.

At the time of Ray Drake's injury, Claimant was employed at Younker's department store in Des Moines. Her husband, Earl, was retired. (R. 13.) She and her husband do not have the ability to pay Complete Line Remodeling and Thomas Bus Sales. Claimant stated that she would

not have agreed to allow Mr. Ruperto to do the work had the Attorney General's office indicated that there was a chance that she might have to pay for the work by Complete Line Remodeling and Thomas Bus Sales. R. 14-5.

Claimant's house is a two-story structure without bathroom facilities on the main floor or an elevator. (R. 15.) If the bathroom was not added, Claimant stated that her son would be in DMGH or Iowa Methodist. (R. 15-6.) Ray Drake is incapable of caring for himself, and would be hospitalized and incurring medical bills. Without the lift, there would be no other way to transport her son. He needed the lift to travel for additional rehabilitation. (R. 16.) The bathroom and lift were medically required by the doctors. R. 17.

Claimant stated that her house has been foreclosed upon to satisfy the debt owed to Complete Line Remodeling, and an Iowa court has ordered the house sold at a sheriff's sale. (R. 18.) See Claimant's Exhibit No. 9.

On cross-examination, Claimant agreed that no one from Thomas Bus Sales told her that she would not be responsible for payment. She also said that no one from Thomas Bus Sales told her that the responsibility would fall on her if the bill was not paid by the State of Illinois. (R. 22.) Although Claimant agreed that she saw the proposal by Complete Line Remodeling before any work was commenced on her home, she maintained that she was verbally told that the State of Illinois was going to pay the costs. R. 23.

On redirect examination, Claimant stated that she did not participate in the selection of the contractor who did the work on her house. R. 25.

Although Claimant indicated that the work was medically required by doctors, she did not recall the name of

the doctor and stated that she was unaware whether the requirement was put in writing. R. 27.

Claimant signed the contract with Complete Line Remodeling but did not sign the contract with Thomas Bus Lines. R. 27-8.

Testimony of David Ubell

The office of the Attorney General called David Ubell, assistant division chief of the crime victims division of the Attorney General's office, as a witness. He oversees the daily operations of the division. (R. 36.) He was not aware of Lisa Smith, a claims analyst, making any promises to the Drake family. (R. 38-9.) A claims analyst does not have the authority to promise payment. (R. 40.) He acknowledges that the Drake claim did not meet all of the statutory guidelines, but indicated that the recommendation was made because the Attorney General's office was "moved by their plight." He believed wheelchairs might be considered prosthetic devices. R. 41-2.

Ubell recalled speaking to Deb Mau and telling her the procedures for filing an application. He specifically rejected her statement included in her affidavit (par. 4 of Claimant's Exhibit No. 1), denying that he assured her that up to $25,000 was available to assist the Drakes. (R. 44-5.) He explained to Deb Mau that the role of the Attorney General's office is to make a recommendation and the Court of Claims makes the final decision. (R. 46.) He did not recall having a conversation with Daniel Bruflodt, Charles Ruperto, Leonard Stevenson or anyone from the Drake family. R. 46-7.

Ubell was not aware of any case in which an award was made for making homes handicapped-accessible or for making vans wheelchair-accessible. R. 48.

On cross-examination, Ubell acknowledged that he did not know what Lisa Smith said to the individuals involved. (R. 51.) Although speculative in nature, he agreed that a claims analyst might make promises of awards. (R. 51-2.) Lisa Smith told him that she did not guarantee anything. R. 52.

Additional Facts

The work performed on the house was to construct a wheelchair-accessible bathroom, widen the door, and build a ramp. (R. 57.) The work included the conversion of a porch into a bathroom and added a special rolling toilet and a scald-proof shower device. Although the first floor dining room was converted into a bedroom, the cost is not included in the claim. (R. 58-9.) The contract does not provide a detailed itemization of cost for labor, supplies or equipment. Claimant's Exhibit no. 2.

The bill for the work on the van does not include the cost of the wheelchair and no claim is made for the wheelchair. (R. 59.) Claimant is not seeking any compensation for medical or hospital bills. R. 60.

The Iowa court acting on the mechanic's lien by Complete Line Remodeling did not question the dollar amount sought and found that $19,000 was owed to the contractor. Neither the contractor nor Thomas Bus Sales filed a lawsuit against anyone other than the Drakes. The Drakes have not filed a lawsuit against anyone. R. 60.

Bids were not sought from any contractor other than Ruperto (Complete Line Remodeling). The hospital staff met with Ruperto and made a determination as to the cost. R. 61.

No bids were sought for work on the van other than the one from Thomas Bus Sales. Des Moines does have

taxi service and a mass transportation district. Claimant's counsel stated that the taxi service did not provide transportation for persons with disabilities, but he did not know whether the mass transit district provided such service. R. 62-3.

Claimant's counsel indicated that the State of Iowa has a Crime Victim Compensation Act. He stated that the Iowa Act provides for the type of compensation which is claimed in this case. He discussed the instant claim with Kelly Brody, director of Iowa Crime Victims Fund, and was told that the claim would not be covered by the Iowa Act. R. 67-8.

Claimant's Argument

Claimant prayed for compassion. Deb Mau, Dan Bruflodt and Charles Ruperto were assured of payments by Lisa Smith for making the house and van handicapped accessible. (R. 30-2 and 69; see Claimant's exhibits nos. 1, 2 and 3.) Ruperto wrote to Smith indicating that he would not begin work until he was assured of payment. Smith called Ruperto and told him to go ahead. (R. 70.) See Claimant's Exhibit No. 3.

Claimant argues that the work falls within the definition of pecuniary loss because it is a medical necessity for Ray Drake. (R. 70.) See Claimant's Exhibit No. 5.

If the work was not performed, Ray Drake would be in a hospital and the State of Illinois would pay $25,000 for doctor bills. The purpose of the Act is to help victims with medical problems. R. 70-1.

Claimant provided a copy of a document apparently produced by the U.S. Department of Justice in 1991, entitled *Voca Victim Compensation Grant Program Technical Assistance Document*. (Claimant's Exhibit No. 8.)

Claimant highlighted two provisions. The first provision specifies that state crime victim compensation programs must make awards to non-residents on the same basis awards are made to resident victims. (Claimant's Exhibit No. 8, pg. 3.) The second highlighted provision indicates that some states award compensation for expenses that are not required by Federal law including, "building adaption for those disabled by a compensable crime." (Claimant's Exhibit No. 8, pg. 5.) Neither of the provisions impact the statutory interpretation of the Illinois Act.

Assistant Attorney General's Argument

The assistant Attorney General argues that there was never a contract established between the contractors and the State of Illinois. Dan Bruflodt made all of the arrangements with the contractors. (R. 72.) The question of whether compensation should be paid for making the home and van handicapped accessible should be taken up by the Illinois Legislature and not decided in this proceeding. The assistant Attorney General stated that the Court's decision should be affirmed. R. 74.

Issues

Neither Claimant or the Attorney General's office filed a memorandum in support of their positions. No cases have been cited in support of either's position.

There are several issues raised by this claim. Although the office of the Attorney General argues that no contract was made between the State of Illinois and the contractors (or the Drakes) that does not appear to be one of the issues. Neither the Drakes or the contractors have filed an action to enforce a contract. Therefore, the issue central to a decision revolves around the interpretation of certain language in the Act.

Section 10.1(a) of the Act provides that, "a victim may be compensated for his pecuniary loss." Pecuniary loss is defined in section 2(h) and includes a wide range of expenses including medical/hospital expenses; prosthetic appliances; paid tuition; and loss of earnings. Prior to addressing whether the expenses are a recoverable pecuniary loss pursuant to section 2(h) of the Act, we point out that there is an issue as to whether Claimant has standing pursuant to the Act to recover any expenses. This issue was not raised in the Attorney General's investigatory report. Ray Drake was 20 years of age and not a minor, under Illinois or Iowa law, at the time of the incident. (R. 65.) (See 755 ILCS 5/11—1.) He was not suffering from any disability prior to the incident. (R. 66.) Although the Crime Victims Compensation application is signed as follows: "Ray A. Drake by Birdie M. Drake (mother)," it lists Birdie Drake as the applicant. In this case the victim is not seeking any compensation. The expenses claimed are expenses apparently incurred or owed by Birdie Drake. Because Birdie Drake is not a victim, as defined by section 2(d) of the Act, the authority for her to recover is provided by section 10.1(c). Section 10.1(c) states that any person related to the victim may be compensated for reasonable funeral, medical, and hospital expenses of the victim to the extent to which he has paid or become obligated to pay such expenses. Subparagraph (c) does not specify recovery for the broader "pecuniary loss" but instead limits recovery to three items: funeral, hospital, and medical expenses.

Claimant argues that the expenses claimed are medically necessary. The affidavit of Dr. Hawkins states that Ray Drake has been and continues to be a patient of his. He states that the handicapped bathroom and the wheelchair lift were "medically necessary in the care and treatment of Ray Drake's post-gunshot condition." (Par. 4 of

Claimant's Exhibit No. 5.) Dr. Hawkins does not state that such adaptions were prescribed by him or any other doctor. There is no statement that such adaptions were made as a condition of Ray Drake's release from any hospital.

A functional analysis may be applied to the issue of whether to compensate for work performed on the house. Regardless of the distinctions made in the analysis below, which are only logical assumptions and are not argued by the Claimant or specifically supported by the record, the expenses for these adaptions to the house are not expressly contained in the definition of pecuniary loss in the Act. Part of the expenses incurred in the remodeling of the residence was to construct a bathroom on the first floor, where one did not previously exist, including the cost of the special rolling toilet and the scald-proof shower. The other portion of the expenses is for the construction of a ramp and the widening of the door. Both expenses appear to make the quadriplegic's life, and the family's, more convenient. The record does not reflect whether these expenses enable the victim to become more self sufficient. The ramp and widened doorway presumptively allow the victim to have ingress and egress to his residence, which may be important on the issue of his safety in cases of an emergency and potentially help make the victim more self sufficient.

The expenses incurred in the installation of a wheelchair lift and strap-down accessories for the van are not specifically included in the Act. The work performed assumptively makes transportation more convenient for Ray Drake and his family, but it does not make him more self sufficient.

In the event the work was not performed, the record does not indicate that Ray Drake would be deprived of a

shower, bathroom facilities, shelter or transportation. The lack of statutory authority supports a denial of the claim by the victim's mother because the work performed is not a funeral, medical or hospital expense. The Act does not allow compensation for expenses that are "medically necessary." Claimant's counsel expressly stated that Claimant was not seeking medical or hospital expenses. (R. 60.)

If Claimant had standing to claim "pecuniary loss" pursuant to this application, then a determination whether this Claimant qualifies should be made. Section 2(h) of the Act authorizes victims to receive compensation for prosthetic appliances. It is not clear whether any of the adaptions or accessories could be considered a prosthetic appliance. The general definition of prosthetic, or prosthesis, is the replacement of a missing part of the body, such as a limb, eye, or tooth by artificial substitute (*Webster's New World Dictionary*), or a fabricated substitute for a diseased or missing part of the body (*Stedman's Medical Dictionary*).

The Court's opinion raised the issue of whether wheelchair accessories qualify as prosthetic appliances. The contract provides limited detail on what accessories were provided. It appears that a total net cost of $250 was charged for "Aeroquip 4 point tie down" and "Cam lock tie down and labor." ($400 in charges minus a credit of $150 for a net charge of $250.)

Strictly construing the Act, we conclude that no compensation should be awarded. None of the work performed involved the replacement of any limb, eye, tooth or other body part. We cannot find that the items for which compensation is sought are prosthetic appliances. Not only would such a construction make it extremely difficult to draw the line in this and future cases, we find that consideration of such an expansion of the coverage of

the Act should only be undertaken by the General Assembly.

It is clear that Claimant is not eligible for compensation pursuant to the Act. Although counsel for Claimant has indicated that Claimant would not be eligible for compensation under the Iowa Act, that question is not clear. Section 912.5(4) of the Iowa Act specifies that an Iowa resident injured in another state may file for compensation in Iowa if the other state, "does not have an eligible crime victim compensation program as such is defined in the Federal Victims of Crime Act of 1984." Illinois has such a program, but its program does not allow compensation for these expenses. Apparently, the Iowa Act has been interpreted to allow recovery for these expenses. (Claimant's Exhibit No. 6.) The Iowa Act does not specifically state that adaptions to a house or a van are compensable, but the Iowa policy index provided by Claimant's counsel would appear to allow compensation for expenses incurred for work performed which is medically necessary equipment and property alterations. The language is as follows:

"The program will pay for 'medically necessary' equipment and property alteration which is prescribed by the victim's physician. Medically necessary is defined as items necessary to facilitate the physical recovery and well-being of the victim. Reimbursement is allowed for, but not limited to the following: wheelchairs, wheelchair ramp, life line support system, TENS unit, crutches, telephone equipped for the hearing impaired or physically disabled if the handicap is the result of the crime. All requests for medical equipment and property alteration must be reviewed and approved by the Deputy Director." (Claimant's Exhibit No. 7.)

A reasonable interpretation of section 912.5 of the Iowa Act would lead to the conclusion that compensation in the State of Iowa could not be awarded because Illinois has a victim compensation program as defined by Federal law. The language in the Illinois Act, section 2(d), pertaining to Illinois residents who are victims in other states

is different and may be interpreted to allow coverage even if the other states' laws did not. However, that issue is not before us now and we do not make that holding here. The fact that Claimant, her counsel or the director of the Iowa program assumed that the State of Illinois would cover the expenses, regardless of what anyone from the Attorney General's office might have said, is not relevant.

This is an unfortunate set of circumstances. It is one that should be addressed by the legislature. The Illinois General Assembly may determine whether the Act should expressly cover the type of compensation sought in this claim. The assistance of the General Assembly could be requested by Claimant by either seeking a pecuniary award or by having the language of the Act revised to permit recovery. We will advise the appropriate members of this decision. We will, however, not make a recommendation.

The Court also finds the manner in which the scope and costs of the work performed was determined to be questionable. The record indicates that third parties determined who the contractors would be, and together with the contractors decided on the scope and costs of the work to be performed. The applicant's participation in the process appears to be minimal and limited to only consenting to the work. In the event public funds are utilized in work performed on real property, it is generally accepted, and required, that agents of the public entity responsible for expending the funds perform a role in the selection of contractors, determination of scope and costs of work, and supervision of the project. This role is recognized in the Iowa Policy Index. (Claimant's Exhibit No. 7.) These safeguards do not exist in this case. Because the Illinois Act does not recognize these expenses, no such

safeguards are established in Illinois. Until the Illinois General Assembly determines that property alterations are permitted, and establishes safeguards for the protection of public funds, awards for property alterations will not be made.

We are mindful of the extremely tragic circumstances and are very sympathetic but we are constrained to follow the law. It is hereby ordered that this claim is denied.

(No. 91-CV-0827—Claimant awarded $2,063.)

FANNIE FORD, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed June 3, 1992.

Opinion on reconsideration filed June 9, 1995.

FANNIE FORD, *pro se*, for Claimant.

ROLAND W. BURRIS and JIM RYAN, Attorneys General (CHARLES A. DAVIS, JR. and PAUL H. CHO, Assistant Attorneys General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*reduction or denial of award—victim's contributory acts or prior criminal conduct.* Under section 10.1(d) of the Crime Victims Compensation Act, a victim's award shall be reduced or denied according to the extent to which his conduct provoked or contributed to his injury or death, or the extent to which any prior criminal conviction or conduct may have directly or indirectly contributed to his injury or death.

SAME—*shooting related to past drug debt—rehabilitated crime victim—award reduced by 25%.* In reconsidering the denial of the Claimant's request for funeral expenses for her son who was shot by a man attempting to collect on a past drug debt, the Court of Claims found that, because the victim had abandoned his prior involvement with drugs at the time of the shooting and his conduct at the time of the crime did not contribute to his death, his mother was entitled to compensation for his funeral expenses, but the award was reduced by 25% to reflect the extent to which the victim's prior dealings contributed to his death.

ORDER

PER CURIAM

This claim arises out of an incident that occurred on August 19, 1990. Fannie Ford, mother of the deceased victim, Ellery R. Ford, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereby referred to as the Act. 740 ILCS 45/1, *et seq.*

This Court has carefully considered the application for benefits submitted on October 18, 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 August 19, 1990, the victim was shot by the alleged offender. The incident occurred near 842 North Springfield, Chicago, Illinois. Police investigation revealed that the alleged offender was selling narcotics for the victim, who had a history of drug-related offenses, and that the victim owed the alleged offender money as a result of their transactions. The alleged offender confronted the victim about this debt and during an ensuing argument, shot the victim. There is currently a warrant for the arrest of the alleged offender.

(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 was shot as a result of his involvement in the illegal sale of narcotics. Further, the victim had a history of drug-related offenses.

(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 ON RECONSIDERATION

EPSTEIN, J.

This claim under the Crime Victims Compensation Act (the "Act") is before this Court for the third time. The Court denied this claim in 1992 on the papers filed and the recommendation of the Attorney General, finding that the claim was barred under the Act because the victim was murdered as a result of his involvement in illegal narcotics dealings such that his own conduct substantially contributed to his death. At the Claimant's request, the court in 1994 ordered reconsideration and a hearing, which was held before Commissioner Michael D. Fryzel on April 8, 1994. This claim is now before us for reconsideration on the hearing record and the report of our Commissioner.

The victim, Ellery R. Ford, was shot to death on August 19, 1990, on North Springfield Street in Chicago, Illinois, by a man named Desi Smith. The victim's mother, Fannie Ford, filed this $2,750.80 claim for funeral expenses under the Act on October 18, 1990.

The facts and the immediate circumstances of the victim's death are undisputed. The causal connections between his death and his own conduct, based on the evidence and on inferences drawn from the evidenced facts, are less clear. The backdrop to this tragedy, also undisputed, is that the victim had a history of drug-related offenses, had been convicted, and had served time in prison. His killing followed his release from prison, at a time when the Claimant and several witnesses contend the victim had abandoned his involvement with drugs and had undergone "rehabilitation."

The police investigation report indicated that the killer, Desi Smith, had sold narcotics for the victim. The victim reportedly owed Smith money as a result of prior drug dealings. On the critical occasion, Smith confronted the victim about the debt. The victim left his companion and went to talk to Smith privately. An argument ensued. Smith shot the victim. An arrest warrant was issued for Smith. (The Court is not advised of the disposition, if any, of the charges against Smith, which in any event is irrelevant to our determination under the Act.)

In the hearing before Commissioner Fryzel, Ms. Caprice Morales, a friend of the victim and a witness to the shooting, testified that the victim appeared to be rehabilitated after his release from prison and that he was substantially a changed person. She testified that he had stopped using drugs, was engaged to be married, that he spent time motivating kids and engaging in other salutary activities, and was no longer involved with drugs. Ms. Morales also testified that the argument that led to the shooting was about a drug debt that the victim owed his killer from previous drug deals. She testified that the two men asked her to leave so that they could have privacy while they talked.

Other testimony and several written submissions support the view, articulated most strongly by the Claimant, Mrs. Ford, that the victim was genuinely rehabilitated and had abandoned his prior involvement with the drug trade. This evidence was uncontradicted.

Given the undisputed facts, it is clear that this claim meets the threshold requirements of the Act for an award for losses caused by a qualified violent crime, and murder is clearly a covered crime under the Act. The focus of the inquiry in this case is the victim's contributory guilt or causation to his own death. This issue derives from section 10.1(d) of the Act, which provides as follows:

> "(d) 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 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;"

Under this statutory standard, the dispositive issue before us is the extent, if any, that the victim's "acts or conduct" or his "prior criminal * * * conduct" contributed, directly or indirectly, to his death. As applied to the facts of this case, the statute requires us to determine the extent to which two factors may have "provoked or contributed" to the argument and shooting that caused the victim's death: (1) the victim's prior involvement in illegal drug sales, and (2) his own conduct at the time of the shooting.

Because the argument and shooting arose out of a drug debt, we must conclude that the victim's prior illegal activities were a causative factor. On the other hand, because it was the killer rather than the victim who invoked (and plainly sought to collect) the illegal drug debt, because there is no evidence that the victim provoked the argument with his murderer or that he was involved in illegal activities at the time of his death or after his release from prison, and because the court is persuaded that the

victim was in some measure rehabilitated, we find that the victim's conduct at the time of the violent crime did not contribute to his death.

Accordingly, the award must be reduced by a factor reflecting the contributory involvement of the victim's *prior* involvement in the drug traffic. After due consideration of the facts presented, in light of the victim's later apparent rehabilitation, we conclude that the award should be reduced by 25%. Our determination is supported and influenced by our view that the public policy underlying the Act's contributory reduction requirement is to discourage, and to avoid State support for, illegal and violence-provoking conduct. That policy has reduced application in the case of a victim like Mr. Ford who appears to have surmounted his illegal past or at least to have been in the process of doing so. Such rehabilitation, in the words of the Claimant, is to be encouraged not discouraged. Nevertheless, the statute requires a measured reduction, and we have settled on 25% as the appropriate measure to reflect and balance the foregoing considerations.

The prior order of this Court is reversed, and the claim of Fannie Ford is allowed in the amount of $2,750.80, reduced by 25%. Claimant Fannie Ford is awarded the sum of $2,063.

Claim allowed. Claimant awarded $2,063.

(No. 91-CV-2003—Claimant Darlene Cox awarded $17,079.18;
Claimant Darnice Crump awarded $1,028.)

In re APPLICATION OF DARLENE COX and DARNICE CRUMP

Order filed May 5, 1993.

Opinion filed May 5, 1993.

Opinion filed December 12, 1994.

DEVEREUX BOWLY, for Claimants.

ROLAND W. BURRIS, Attorney General (CHARLES A. DAVIS, JR. and PAUL H. CHO, Assistant Attorneys General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*violent crime—claim for victim's funeral expenses allowed.* According to section 10.1(c) of the Crime Victims Compensation Act, a person related to a victim of violent crime is eligible for funeral expenses of the victim to the extent to which she has paid or become obligated to pay such expenses, and pursuant thereto, the wife and the sister of a deceased crime victim were awarded compensation for amounts which they expended for the victim's funeral and burial.

SAME—*loss of support—proof required.* An applicant for benefits under the Crime Victims Compensation Act has the burden of proving loss of support by a preponderance of the evidence, and must also prove that the victim earned money during the six months prior to his death, and loss of support is determined on the basis of the victim's average monthly earnings for the six months immediately preceding the date of the injury, or on $500 per month, whichever is less.

SAME—*dependent daughter of crime victim—award for loss of support granted.* Although a claim seeking compensation for loss of support for the minor child of a deceased crime victim was initially denied because the mother failed to submit adequate proof that the girl was dependent upon the victim for support, at a subsequent hearing the mother produced testimony of witnesses as well as income tax and employment records to substantiate her claim, and an award for loss of support was granted for the use and benefit of the child.

ORDER

PER CURIAM

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, this Court hereby finds:

(1) That the Claimant is now deceased.

(2) That the Attorney General's office has notified the Court of the Claimant's death.

It is, therefore, hereby ordered that the motion to dismiss Claimant, Lafayette Cox, is cause number 91-CV-2003 be, and is hereby granted.

OPINION

PER CURIAM

This claim arises out of an incident that occurred on February 15, 1991. Darlene Cox and Darnice Crump, wife and sister, respectively, of the deceased victim, Rohn Cox, seek compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. 740 ILCS 45/1, *et seq.*

This Court has carefully considered the applications for benefits submitted on March 21, 1991, and December 31, 1991, 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 application. Based upon these documents and other evidence submitted to the Court, the Court finds:

(1) That on February 15, 1991, Rohn Cox, age 36, was a victim of a violent crime as defined in section 2(c) of the Act (740 ILCS 45/2(c)), to wit: first degree murder. 720 ILCS 5/9—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, Darlene Cox, seeks compensation for funeral expenses and for loss of support for the victim's minor child, Krystal Cox. The Claimant, Darnice

Crump, seeks compensation for funeral and burial expenses.

(4) That according to section 10.1(c) of the Act, a person related to the victim is eligible for compensation for funeral expenses of the victim to the extent to which he has paid or become obligated to pay such expenses.

(5) That funeral and burial expenses were incurred as a result of the victim's death in the amount of $2,094.60, $1,000 of which was paid by the victim's now-deceased father, leaving a balance of $1,094.60. The Claimant, Darnice Crump, has paid $1,028 toward this amount, and the Claimant, Darlene Cox, has paid the remaining balance of $66.60.

(6) That section 8.1 of the Act states that no award of compensation shall be made for any portion of the applicant's claim that is not substantiated by the applicant.

(7) That the Claimant, Darlene Cox, has not submitted adequate documentation to substantiate her claim that the victim's minor daughter, Krystal Cox, was dependent upon the victim for support.

(8) That the Claimants have not received any reimbursements that can be counted as an applicable deduction under the Act.

(9) That the Claimants have complied with pertinent provisions of the Act and qualify for compensation thereunder.

(10) That the Claimant, Darlene Cox, is entitled to an award based on the following:

Paid funeral expenses	$66.60

(11) That the Claimant, Darnice Crump, is entitled to an award based on the following:

Paid funeral expenses	$1,028.00

It is hereby ordered that the sum of $66.60 (sixty-six dollars and sixty cents) be and is hereby awarded to Darlene Cox, wife of Rohn Cox, an innocent victim of a violent crime.

It is further ordered that the sum of $1,028 be and is hereby awarded to Darnice Crump, sister of the deceased victim, Rohn Cox.

OPINION

FREDERICK, J.

This claim arises out of an incident that occurred on February 15, 1991. Darlene Cox, wife of the deceased victim, Rohn Cox, and Darnice Crump, his sister, seek compensation for funeral and burial expenses. Darlene Cox also seeks compensation for loss of support for the victim's minor child, Krystal Cox, pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the "Act." 740 ILCS 45/1, *et seq*.

On May 5, 1993, this Court issued an order finding that Rohn Cox was the victim of a violent crime. However, the Court denied the claim for loss of support on the basis that Claimant, Darlene Cox, did not submit adequate documentation to substantiate her claim that the victim's minor daughter, Krystal Cox, was dependent upon the victim for support. The Court did order that Darlene Cox be awarded $66.60 and that Darnice Crump be awarded $1,028 for funeral expenses.

On June 3, 1993, within 30 days of the denial order, Claimant, Darlene Cox, requested in writing that this case be heard before a Commissioner pursuant to section 13.1(a) of the Act.

On April 8, 1994, a hearing was conducted before the Commissioner. Claimant, Darlene Cox, appeared and testified. Also present at the hearing were the minor child's grandmothers, Carrie Smith and Arlena Cox, who testified on behalf of Claimant.

Claimant, Darlene Cox, testified that Krystal Cox was the daughter of Rohn Cox. In support, she offered into evidence a copy of a birth certificate indicating that Krystal Ki'ana Cox was born to Darlene Denise Smith and Rohn Cox on November 19, 1985.

Darlene Cox testified that she was familiar with Rohn Cox's business practices and where he worked at the time of his death. Claimant's Exhibit No. 1, which is an application for employment dated February 5, 1990, indicates that Mr. Cox had one child.

To support her claim that Rohn Cox supported Krystal, Claimant submitted into evidence a copy of a W-4 form indicating that Mr. Cox had one other dependent including himself. Darlene Cox further testified that the other dependent was their daughter, Krystal Cox. Also presented was Rohn Cox's 1988 tax return, wherein he claimed Krystal Cox as his dependent.

When asked how Rohn Cox supported Krystal Cox, Claimant, Darlene Cox, testified that, "he would buy her clothes. And he would give me money to go shopping and buy whatever she needed." Ms. Cox testified that during a period when Rohn had a job, he would give her money on a regular basis, with a regular basis being every two weeks. At the time of his death, Rohn Cox was working and regularly supporting the child. Darlene Cox testified that a week before his death, he made a payment to her.

Ms. Carrie Smith, Claimant's mother, testified that she worked with Mr. Cox at J & S Professional Associates

prior to his death. Admitted into evidence was Rohn Cox's 1990 W-2 statement from J & S Professional Associates. Rohn Cox worked at J & S for about one year.

Ms. Arlena Cox testified that she was aware that her son, Rohn Cox, was supporting Krystal. She testified that on several occasions when she was with Rohn, he would cash his check and spend money on Krystal and give money to his wife. Arlena Cox testified that on a regular basis, her son would give money to buy clothes and food to Darlene every time he got paid, which was every two weeks.

Mrs. Cox stated that her son, Rohn, had a very good relationship with his daughter.

Mrs. Carrie Smith testified that during the five years that Krystal was alive before her father died, she was aware that Rohn Cox supported his daughter. On several occasions if Rohn Cox was unable to see his daughter, he would give money to Mrs. Smith to give to Darlene for his child. Mrs. Smith stated that Rohn bought his child clothes and food and would send her money every pay day.

Darlene Cox stated that there was no set figure as to how much money Rohn gave her to support Krystal but on the average it was around $75 every two weeks. Mrs. Smith agreed with the $75.

Claimant presented an employer report indicating the net bi-weekly earnings of the decedent for the six months prior to decedent's death as follows:

September 4, 1990	$142.57
September 18, 1990	249.79
October 2, 1990	276.14
October 16, 1990	231.00
October 30, 1990	319.82

November 13, 1990	269.20
November 27, 1990	281.53
December 11, 1990	278.91
December 25, 1990	258.72
January 8, 1991	230.07
January 22, 1991	300.02
February 5, 1991	326.27
February 19, 1991	173.84

The applicant for benefits under the Crime Victims Compensation Act has the burden of proving loss of support by a preponderance of the evidence. (*In re Application of DeBartolo* (1984), 36 Ill. Ct. Cl. 442.) Dependency must be proved by a preponderance of the evidence. (*In re Application of Sole* (1976), 31 Ill. Ct. Cl. 713.) From the evidence in the record, we infer that it was more probable than not that the victim was contributing to the support of his daughter, Krystal Cox, at the time of the crime.

This Court has also held that a claimant must prove by a preponderance of the evidence that the victim earned money during the six months prior to his death. (*In re Application of Sole, supra*.) Having reviewed the record, we find there is sufficient evidence presented to prove it was more probably true than not true that the victim had earnings during the six-month period prior to his death.

The evidence is less clear on the amount contributed by the victim for the support of Krystal Cox. (*In re Application of Crissie* (1992), 44 Ill. Ct. Cl. 443.) The Act provides for loss of support compensation for dependents of the victim. Krystal Cox is the dependent of the victim. The Act further states that loss of support shall be determined on the basis of the victim's average monthly earnings for the six months immediately preceding the date of the injury or on $500 per month, whichever is less. *In re Application of Nancy* (1983), 36 Ill. Ct. Cl. 437.

We find that using the average monthly earnings of the victim for the six months prior to his death and applying the statutory guidelines for child support of 20% of net income for one child that the victim's child support obligation would have been $111.20 per month. 750 ILCS 5/505.

Krystal was dependent upon Rohn Cox for support. According to the testimony, the sums provided for support of Krystal may have averaged $75 every two weeks. Claimant's exhibit would indicate that $75 from Rohn's fluctuating net earnings for the six months preceding his death would be between 25% to 50% of his net earnings. The Court finds it is not reasonable to believe he paid 25% to 50% of his net income for support.

Krystal will become an adult on November 19, 2003. She was five years and three months old when her father died. She would have been legally dependent on him for 12 years and nine months (663 weeks). The Court finds that Rohn Cox was providing support to his daughter in the sum of $25.66 per week.

The lost support by Krystal for 663 weeks would be $17,012.58. The Court has previously awarded $66.60 to Darlene Cox and $1,028 to Darnice Crump.

It is the order of the Court that Krystal Cox, the dependent daughter of the victim, be awarded $17,012.58 for loss of support.

The Claimant's interest would be best served if the award hereunder would be paid pursuant to the installment provision of section 11.1 of the Act. *In re Application of Shepherd* (1984), 36 Ill. Ct. Cl. 515.

It is therefore hereby ordered that the sum of $17,012.58 be and the same is hereby awarded to Darlene

Cox, mother of Krystal Cox, minor child of Rohn Cox, an innocent victim of a violent crime, to be paid and disbursed as follows:

(a) $5,012.58 to be paid to Darlene Cox in a lump sum for the use and benefit of Krystal Cox;

(b) Eighty equal monthly payments of $150 to be paid to Darlene Cox for the use and benefit of Krystal Cox;

(c) In the event of the death or marriage of the Claimant or the Claimant's child, it is the duty of the Claimant or her personal representative to inform this Court in writing of such marriage or death for the purpose of the possible modification of the award.

(No. 92-CV-0426—Claim denied; petition for rehearing denied.)

In re APPLICATION OF BRENDA LANHAM

Opinion filed April 27, 1994.

Order on petition for rehearing filed August 9, 1994.

GARY L. PETERLIN, for Claimant.

ROLAND W. BURRIS, Attorney General (PAUL H. CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*statutory deductions from award.* An award under the Crime Victims Compensation Act shall be reduced by the amount of benefits, payments, or awards, except the first $25,000 of life insurance, received by, or that would inure to the benefit of, the applicant or any other person dependent for the support of a deceased victim.

SAME—*loss of support—life insurance proceeds deducted from award.* Although the Claimant wife's untimely filing of her application for benefits resulted in her being excluded from an award for loss of support which was granted to the deceased crime victim's three minor children, the wife, along with the children, was dependent on support by the victim, and therefore life insurance proceeds payable to the wife were deducted from the Court's award, and the wife's request for additional compensation was denied.

SAME—*no waiver of lien on dram shop recovery allowed.* Where a circuit court award does not compensate a Claimant fully as defined by the Crime Victims Compensation Act, the lien created by the circuit court award may be waived by the Court of Claims, but where the Claimant and the decedent's three minor children received life insurance proceeds in excess of their loss of support as measured under the Act, they were fully compensated, and the Court could not waive the lien created by the Claimant's dram shop recovery.

SAME—*attorney fees—reasonable expenses to attend hearing awarded.* Pursuant to section 12 of the Crime Victims Compensation Act which provides that attorney fees may be charged to the Claimant when the attorney attends a hearing and the Court determines such fees as reasonable, the Court approved an award for the reasonable expenses of the Claimant's attorney to attend a hearing, but the attorney was required to make application for such expenses.

OPINION

SOMMER, C.J.

This cause arises from the Claimant's request for review of this Court's decision of April 30, 1993, under the Crime Victims Compensation Act (hereinafter referred to as the Act), and the Claimant's motion for waiver of the lien created by section 17 of the Act and attorney fees.

In this claim, the deceased victim left surviving a wife, Brenda Lanham, and three minor children. Due to the fact that the filing was beyond the statute of limitations, Brenda Lanham was excluded from any award, but the minor children remained eligible. 740 ILCS 45/6.1.

As the victim had an income in excess of $1,000 per month, the loss of support as measured by the Act was determined to be $1,000 multiplied by the 153 months of dependency remaining to the youngest minor. (740 ILCS 45/2.) Therefore, the loss of support as determined under the Act was $153,000.

The victim's wife, Brenda Lanham, received the proceeds of a life insurance policy in the amount of $160,000. Under the terms of the Act the amount of the life insurance

policy, minus $25,000, was treated as an applicable deduction under the Act. (740 ILCS 45/10.1.) After making this deduction ($153,000-$135,000), the Court determined the amount of the award to be $18,000.

In her request for review, the Claimant argues that since she did not receive any award under the Act, the life insurance, which was payable to her, is hers and may not be used as a deduction from the loss of support experienced by the minor children.

Section 10.1(e) of the Act provides that:

"An award shall be reduced by the amount of the benefits, payments or awards * * * except * * * the net proceeds of the first $25,000 of life insurance that would inure to the benefit of the applicant * * * or any other person dependent for the support of a deceased victim * * * has received * * *."

The above section of the Act essentially states that life insurance shall be deducted from an award where the benefits would go to the applicant or other persons dependent for support by the deceased victim.

Brenda Lanham is the applicant in this claim, though it could be argued that she was acting only as a representative of the minor children, who are the true applicants. However, had she not filed late, she would have been found to be dependent for support on the deceased. As evidence of such dependency, Brenda Lanham was found as a dependent in the dram shop action filed as a result of the victim's death. Therefore, we find that the proceeds of the life insurance went to the benefit of Brenda Lanham who was the applicant and also dependent for the support on the deceased victim, and such proceeds may be deducted from the award. Though dependent upon the deceased victim, Brenda Lanham was found ineligible on other grounds.

Had Brenda Lanham qualified under the Act, the maximum award of $25,000 would have been received

due to her potential of many years of dependency. The children's dependency is limited to the time that they are minors, in this case 153 months.

A dram shop action was instituted as a result of the victim's death, and awards were made to Brenda Lanham and the three minor children. Though the dram shop action was settled by an order entered on April 8, 1991, there seems to be no notification of such in the Court's file, or in the application by the Claimant. The application for benefits under the Act was filed on September 3, 1991.

The Claimant is requesting the Court to waive the lien created by the dram shop recovery under the authority of *In re Application of Setuko Cobb* (1992), 44 Ill. Ct. Cl. 438. The holding in *Cobb* is that when the circuit court award does not compensate the Claimant fully, as *defined by the Act*, the lien created by the circuit court award may be waived. In this claim, because of the life insurance, the Claimants were fully compensated as defined by the Act. The Act measured the loss of support to the children at $153,000. Thus, this claim is more similar to *In re Application of Lavorini* (1989), 42 Ill. Ct. Cl. 390, where the applicant was fully compensated by the circuit court and the Court of Claims award for the loss as defined by the Act. Therefore, we cannot waive the lien in the present claim.

The matter of the waiver of the lien is more well understood, if the situation is reversed. That is, the situation where recoveries from third-party sources are made before the crime victim's award is made. In that situation, the third-party recoveries are deducted in full or part against the amount of loss as determined by the Act. The lien simply recovers these deductions when the crime victim's award is made first.

The fact that a Claimant may have actual damages exceeding those compensable under the Act is not material, as this Court is empowered to grant only those awards as authorized by the language of the Act.

The Court notes that the dram shop recovery was not reported on the application filed in this Court; therefore, no adjustment of the award was made due to the dram shop award, some of which accrued to the children, and would be deductible under section 10—1(e) of the Act. This, however, is a matter for the Attorney General to consider.

Finally, section 12 states that fees may be charged to the Claimant when the attorney attends a hearing and the Court determines such fees as reasonable. The Claimant's attorney did attend the oral argument. However, in light of the situation in this claim, this Court will only approve actual reasonable expenses to attend the hearing, if the Claimant's attorney petitions therefore.

It is therefore ordered that the Claimant's request for additional compensation and to discharge the lien is denied and the request for attorney fees is granted in the form of actual reasonable expenses to attend the hearing only, provided the Claimant's attorney wishes to apply for same.

ORDER

SOMMER, C.J.

This cause coming to be heard on the Claimant's motion to reconsider, which we will consider to be a petition for rehearing of an opinion issued April 27, 1994, due notice having been given, and this Court being fully advised, finds that Court of Claims Regulations section 790.220 requires that petitions for rehearing "shall state briefly the points supposed to have been overlooked or

misapprehended by the Court, with authorities and suggestions concisely stated in support of the points."

The Claimant in her motion states:

"1. The Opinion is erroneous based on law.

2. The Opinion is erroneous based on fact."

Such conclusory statements as made by the Claimant are not sufficient under rule 22.

It is therefore ordered that the Claimant's motion to reconsider is denied.

(No. 92-CV-0761—Claim denied.)

In re APPLICATION OF CATHERINE DIXON

Order filed July 22, 1992.

Opinion filed December 2, 1994.

LEGAL ASST. FOUNDATION OF CHICAGO (DEVEREUX BOWLY, of counsel), for Claimant.

ROLAND W. BURRIS, Attorney General (CHARLES A. DAVIS, JR., Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*reduction or denial of award—victim's contributory acts or prior criminal conduct.* Under section 10.1(d) of the Crime Victims Compensation Act, a victim's award shall be reduced or denied according to the extent to which his conduct provoked or contributed to his injury or death, or the extent to which any prior criminal conviction or conduct may have directly or indirectly contributed to his injury or death.

SAME—*admissibility of police reports.* At hearings under the Crime Victims Compensation Act before the Court of Claims, all documents and information which would contribute to a determination of the claim are to be considered by the Court, even if such evidence would not be admissible in a court of law, and police reports, while not generally admissible in the circuit court or in general claims cases in the Court of Claims, are admissible in Crime Victims Compensation Act cases.

SAME—*fatal gunshot wound—petition untimely filed—victim's contributory conduct—claim denied.* In a claim by a mother seeking compensation as a result of her son's fatal shooting during an altercation at a traffic light, while the Court of Claims could have denied the Claimant's request for compensation solely because it was not filed within 30 days of the denial of her claim, the Court further noted that the Claimant failed to present evidence to refute the Court's initial finding that the victim's contributory conduct in swinging a baseball bat at his assailant's vehicle warranted the denial of compensation.

ORDER

PER CURIAM

This claim arises out of an incident that occurred on September 19, 1991. Catherine Dixon, mother of the deceased victim, Kevin Dixon, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. 740 ILCS 45/1, *et seq*.

This Court has carefully considered the application for benefits submitted on October 18, 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 September 19, 1991, the victim was shot by an unknown offender. The incident occurred near 1559 East 76th Street, Chicago, Illinois. Police investigation revealed that as the victim was waiting for the traffic light to change, he became involved in a verbal altercation with the occupants of the vehicle that had stopped next to his automobile. The victim then exited from his vehicle, armed with a baseball bat, and swung the bat in the direction of the window of the automobile in which the offender was a passenger. The offender then shot the victim. The offender has not been apprehended.

(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 during a verbal altercation, the victim swung a baseball bat in the direction of the passenger window of an automobile in which the offender was a passenger. The offender then shot 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 September 19, 1991. Catherine Dixon, mother of the deceased victim, Kevin Dixon, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the "Act." 740 ILCS 45/1, *et seq*.

This Court originally considered the investigatory report filed by the office of the Attorney General and preliminarily denied the claim pursuant to an order dated

July 22, 1992. The Claimant requested a hearing and an opportunity to present evidence.

The cause was tried before Commissioner Turner on January 22, 1993. Neither party filed a brief, although the Commissioner entered a docket entry on January 22, 1993, that "Parties will file briefs 60 days from the date they receive a hearing transcript." Commissioner Turner did not file a Commissioner's report prior to his resignation as a Commissioner.

The Court originally denied the claim as the Court found, based on the investigatory report and police report, that the victim swung a baseball bat in the direction of the passenger window of the vehicle in which the offender was a passenger. The offender then shot the victim. The Court, relying on section 10.1(d) of the Act, denied the award as the victim's acts or conduct provoked or contributed to his death.

As a preliminary matter, we find that police reports are admissible in Crime Victims Compensation Act cases. The statute makes it clear that all documents and information are to be considered by the Court even if that evidence would not be admissible in a court of law. Police reports, while not generally admissible in the circuit court or in the Court of Claims in general claims cases, nonetheless are admissible in Crime Victims Compensation Act cases because of the statutory language. Therefore, while the Commissioner found the reports inadmissible, we can rule in this case because the Commissioner made the police reports part of the record. We will consider the police reports in making our decision.

Claimant, Catherine Dixon, testified she was the mother of the victim, Kevin Dixon. She was called to the hospital on the afternoon of September 19, 1991. Her son

was dead from an apparent gunshot wound to the head from a small handgun. The police told her that her son had been shot in a drive-by shooting. Mrs. Dixon was not present at the shooting. She did not know her son to keep a baseball bat in his car and had never seen him threaten anyone with a baseball bat. The gunshot to her son that she saw was by the eyebrow.

The Claimant also called Reverend Joseph J. Rainey to testify on her behalf. On September 19, 1991, a member of the church came to him and told him that Kevin Dixon had been killed over on 76th Street. Reverend Rainey went to the scene of the shooting. When he arrived, the body had been moved. There were people standing around. Reverend Rainey saw Kevin's car and a couple of police officers around it. The car was parked against the curb. He saw no baseball bats. He was not present when Kevin was killed. The police report lists the offense as homicide/1st degree murder. The report also indicates the victim sustained a single gunshot wound to the right side of the head. The victim was shot while standing between the two cars and fell to the ground outside his driver's door. A baseball bat was recovered at the scene. The report lists witnesses as Sharon L. Jones and Robert A. Warmack, Johnny Smith, Michelle Davis-Balfour, and Johnny Kenniel. Sharon Jones told the police investigator that on September 19, 1991, Kevin Dixon drove up and asked her and her boyfriend, Johnny Smith, if they would follow him so he could drop his car off to be fixed and they would then give him a ride home. They agreed and followed Kevin Dixon. They were headed east on 76th Street and stopped at a stoplight. To the left of Kevin was a green Chevrolet. She saw Dixon reach into the back seat and then get out of the car. Kevin was looking toward Sharon Jones. She heard a shot and saw Kevin

fall on his face alongside of his car. Just prior to the shooting, she saw the passenger of the offender's vehicle lean toward the driver. She saw the passenger shoot Kevin. Robert Warmack was sitting in his car approximately four cars behind Kevin's car. He heard a shot. He saw the victim fall to the ground. The offender's vehicle then fled south on Stony Island. Neither witness Jones nor witness Warmack could recall seeing the victim with a bat in his hand.

Michelle Davis Balfour was Kevin Dixon's girlfriend. She apparently was not present during the incident. The police evidently were not able to locate Johnny Smith [Kenniel] on September 19, 1991. The report indicates a baseball bat was recovered on the scene alongside the victim. The reports also indicate that the victim sustained a gunshot wound to the right side of the head approximately three inches above the right ear.

Johnny Kenniel, who was referred to as Johnny Smith previously herein, was interviewed on September 20, 1991. He indicated he was a passenger in the Sharon Jones vehicle. He observed Kevin's vehicle stopped at the stoplight with the offender's vehicle next to it. Their vehicle was right behind Kevin's vehicle. He observed a verbal altercation between the people in front of him. He saw Kevin reach into his rear seat and then exit from his vehicle with a baseball bat in his hands. The victim then swung the bat in the direction of the front passenger window of the vehicle stopped to the north of the victim. The passenger in the vehicle then leaned toward the driver and fired one shot from a handgun at Kevin. Kevin then fell to the ground. Kenniel then chased the other vehicle but lost it. He went to the hospital and then a liquor store to calm his nerves.

The Crime Victims Compensation Act is a secondary source of compensation. (*In re Application of Lavorini*

(1989), 42 Ill. Ct. Cl. 390.) Section 4.1 of the Act requires the Attorney General to investigate all claims and prepare and present a report of each applicant's claim to the Court of Claims prior to the issuance of an order by the Court. The Attorney General is also charged with the duty to represent the interests of the State of Illinois in any hearing before the Court of Claims. Section 8.1 of the Act indicates that no award of compensation shall be made for any portion of the applicant's claim that is not substantiated by the applicant.

Section 9.1 of the Act states that in determining whether an applicant is entitled to compensation, the Court of Claims shall consider the facts stated in the application, other material and information submitted, and the report of the Attorney General. Section 12.1 allows for awards without hearing and such procedure disposes of the vast majority of these crime victims claims.

As applicable to the present case, section 13.1 of the Act states:

"a) A hearing before the Commissioner of the Court of Claims shall be held for those claims in which:

* * *

(3) a claim has been disposed of without a hearing and an applicant has been denied compensation or has been awarded compensation which he thinks is inadequate and he petitions the Court of Claims for a hearing within 30 days of the date of issuance of the order sought to be reviewed. The petition shall set forth the reasons for which review is sought and a recitation of any additional evidence the applicant desires to present to the Court. * * *

b) At hearings held under this Act before Commissioners of the Court of Claims, any statement, document, information or matter may be received in evidence if in the opinion of the Court or its Commissioner such evidence would contribute to a determination of the claim, regardless of whether such evidence would be admissible in a court of law."

We could dispose of this claim solely on the basis that Claimant failed to file her petition within 30 days of the issuance of the Court's order denying the claim. The

Court's order denying the claim was entered on July 22, 1992. The petition for hearing was filed August 26, 1992. However, because of the arguments raised by counsel in the arguments before the Commissioner, we choose to make some additional observations. The late-filed petition filed by Claimant indicated a request for a hearing. It further indicated that Claimant felt the decision was based on hearsay and that there was evidence the victim was shot in the back of the head and therefore not a threat to anyone.

On July 22, 1992, the Court made certain findings based on the police reports and investigatory reports. The only issues before the Commissioner were whether the victim's conduct contributed to his death to such an extent that the Claimant be denied entitlement to compensation for failure to meet a condition precedent for compensation under the Act and the amount of the funeral bill. The Claimant failed to present any evidence which touched on these issues even though several eyewitnesses were listed in the police reports. The Claimant was granted the opportunity to present medical evidence, forensic evidence or personal witnesses to offer any evidence contrary to the findings made by the Court. Claimant offered no such evidence. *In re Application of Lavorini* (1989), 42 Ill. Ct. Cl. 390.

The Claimant had the burden of proof to prove her claim and failed to do so. (*In re Application of Bavido* (1992), 44 Ill. Ct. Cl. 449.) Wherefore, the petition having been untimely filed and Claimant having offered no evidence contrary to the record herein which supports the conclusion that the victim's conduct contributed to his death as previously found by this Court, this claim is denied.

(No. 93-CV-0449—Claim dismissed; attorney fees of $750 awarded; petition for reconsideration denied.)

In re APPLICATION OF EDGAR J. DONES

Order filed March 26, 1993.

Opinion filed January 12, 1995.

Order on petition for reconsideration filed May 3, 1995.

CHERYL B. DWORKIN, for Claimant.

ROLAND W. BURRIS and JIM RYAN, Attorneys General (CHARLES A. DAVIS, JR., and PAUL H. CHO, Assistant Attorneys General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*condition precedent to compensation—cooperation with law enforcement officials.* In order to be entitled to compensation under the Crime Victims Compensation Act an applicant must have cooperated fully with law enforcement officials in the apprehension and prosecution of the assailant.

SAME—*Claimant cooperated with law enforcement officials—failure to present evidence of statutorily enumerated crime—claim dismissed.* Despite the Court's initial determination that the Claimant failed to fully cooperate with law enforcement officials after he was shot in a motorcycle clubhouse, the evidence presented by the Claimant at a hearing showed that, given his medical condition, and confusion created by the misspelling of the Claimant's name in the police report, the Claimant had made reasonable attempts to cooperate, but the claim was denied because the Claimant failed to present competent evidence that a statutorily-enumerated violent crime was committed.

SAME—*availability of attorney fees—reasonable fee awarded.* Pursuant to section 12 of the Crime Victims Compensation Act, although an attorney may not receive fees for his services in preparing or presenting an application before the Court of Claims, he may charge fees for representing the applicant at a hearing, but only in such amount as the Court determines to be reasonable, and based upon that statutory authority the Claimant's attorney was awarded $750 in fees for his representation of the Claimant.

ORDER

PER CURIAM

This claim arises out of an incident that occurred on September 21, 1991. The Claimant, Edgar J. Dones, seeks compensation pursuant to the provisions of the Crime

Victims Compensation Act, hereafter referred to as the Act. 740 ILCS 45/1, *et seq.*

This Court has carefully considered the application for benefits submitted on August 18, 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 September 21, 1991, the Claimant was shot. The incident occurred at a vacant warehouse located at 701 North Kilpatrick, Chicago, Illinois. The Claimant refused to provide any information about the incident to the investigating officer. As a result, the Chicago police department closed its investigation.

(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 it appears from the police report that the Claimant declined to cooperate fully with law enforcement officials in the apprehension and prosecution of the assailant, in that he refused to provide any information about the incident to the investigating officer.

(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.

(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

JANN, J.

Claimant seeks to recover medical expenses under the Crime Victims Compensation Act, hereinafter referred to as the "Act." (740 ILCS 45/1, *et seq*.) Claimant's application was denied by order of the Court on March 26, 1993. The denial of the claim was based upon Claimant's failure to fully cooperate with law enforcement officials in the apprehension and prosecution of the assailant who shot Claimant.

Claimant requested a hearing in a timely manner and a hearing was held before Commissioner Phillip M. Turner on March 11, 1994.

Claimant testified that on November 9, 1981, he had been out drinking in several bars until closing time sometime between 2:00 a.m. and 4:00 a.m. and proceeded to a motorcycle "clubhouse" at 600 N. Kilpatrick, Chicago, Illinois. (Note the actual date of the incident per police report and hospital records was September 21, 1991.) Claimant was a member of the "D.C. Eagles" motorcycle club. The clubhouse belonged to another motorcycle club where Claimant did not actually know anyone. Claimant continued drinking for an unspecified amount of time and a number of persons unknown to Claimant came into the clubhouse after bars in the area closed.

As Claimant stood in a group of people he heard one or two shots and collapsed. He was wounded in the abdomen. His memory of the incident was unclear but he recalled hearing someone say "better take this guy to the hospital." A person unknown to Claimant helped him up and out of the club into a car. He was taken to Our Lady of the Resurrection Hospital where surgery was performed and he remained in intensive care for three days.

Claimant was unarmed at the time of the shooting and stated there had been no argument or altercation prior to the shooting.

Claimant was heavily medicated following surgery and had tubing in his nose and mouth, making communication virtually impossible. Claimant's mother and sister both testified that Claimant was unable to recognize them or speak for several days after surgery.

Claimant's attorney elicited testimony from Claimant, his mother and sister which clearly indicated Claimant was unable to discuss the incident with police officers who came to the hospital to investigate the case.

The police report and supplement report were introduced and admitted into evidence. Claimant's attorney disputed several aspects of the reports. Claimant's name was misspelled on two parts of the report, which resulted in considerable confusion when Claimant's attorney subpoenaed the report. It appears from testimony that this spelling error may have also resulted in problems Claimant's parents had in contacting the police to follow up on the investigation. We find Claimant made reasonable attempts to cooperate with the investigation in this matter.

The police reports indicate that an emergency medical technician at the hospital observed Claimant's arrival at the hospital and took down the license number of the car which had dropped him off. A computer check disclosed that the car was owned by Martin Joyce. Mr. Joyce was interviewed by police.

The police report indicates that "Mr. Joyce was at a party in a vacant warehouse at 701 N. Kilpatrick. The warehouse was being used as a clubhouse for the D.C. Eagles Motorcycle Gang. The warehouse was divided into three rooms. Joyce was in the bar area and the victim

was in the backroom where there was a pool table. Joyce heard a gunshot and then saw a male white walk from the backroom with an automatic handgun in his hand." Joyce drove the victim to the hospital.

Joyce, unfortunately, was not called by Claimant or the State to testify at the hearing. His testimony would have been most helpful in ascertaining the events of the morning in question. Claimant did not know Joyce and had never met him until the incident. Claimant never spoke to Joyce after the incident. Joyce did not know the person who shot Claimant.

Although Claimant's injuries are most regrettable, we must deny his claim. Claimant has failed to present competent evidence that a violent crime as defined by section 2(c) of the Act was committed. Claimant admitted he did not know what happened when he was shot. No other witnesses testified to support the contention that Claimant was intentionally shot. We have no evidence to determine whether the offender's actions constituted reckless conduct under 720 ILCS 5/12—5.

Claimant has also failed to substantiate his medical expenses. He testified that the bills totaled "around $30,000" but no bills were introduced into evidence or appear as part of the Court's file.

Claimant's attorney has also petitioned the Court for fees in the amount of $2,500. Pursuant to section 12 of the Act, counsel may not receive fees for his services in preparing or presenting the application before the Court of Claims. He may however, charge fees for representing the applicant at a hearing but only in such amount as the Court determines to be reasonable. Claimant's attorney appeared twice for hearings in this matter. We find Claimant's attorney is entitled to $750 in fees.

This claim is hereby denied and dismissed with prejudice.

ORDER

JANN, J.

This cause comes on to be heard on Claimant's motion to reconsider, styled as "Motion to Vacate Order and for New Trial and Oral Argument." Respondent has not filed a response.

Claimant sought compensation pursuant to the Crime Victim's Compensation Act (the Act), 740 ILCS 45/1, *et seq*. Claimant's claim was denied by order of March 26, 1993. Claimant requested a hearing which was held on March 11, 1994. At said hearing Claimant provided evidence that he had, in fact, cooperated with law enforcement in the investigation and apprehension of his assailant to the best of his abilities. However, Claimant was unable to provide evidence that a violent crime as defined by the Act occurred. His testimony also raised questions as to whether Claimant was engaged in lawful activity (*i.e.,* possible trespass in an abandoned warehouse), at the time of his injury.

Claimant's testimony indicated that he did not know his assailant or anyone else at the scene of the incident. The person who took Claimant to the hospital, Martin Joyce, was unknown to Claimant. Mr. Joyce told police investigators he did not see what happened as he was in another room. Joyce did not know the person who shot Claimant. Claimant's claim was denied by opinion of January 12, 1995, for failure to meet a condition precedent under the Act.

Claimant objects to the Court's denial of the claim based upon failure to meet an additional condition precedent under the Act. Claimant has misinterpreted the Act. Each and every condition precedent must be met and

substantiated by Claimant in order to recover. Claimant is responsible for proving each element of his case and failure to prove any element is grounds for denial. Claimant's argument of surprise is further disingenous as the hearing transcript indicates that the Commissioner and Claimant's counsel, Claimant and the assistant Attorney General engaged in a discussion of the question of whether there was competent evidence of the commission of a violent crime as defined by the Act. Claimant offered no evidence in the discussion at hearing or in his petition for reconsideration which could substantiate his claim other than a vague statement that "testimony" would show reckless conduct was committed. No person was identified to provide said testimony nor was there any offer of proof by affidavit or otherwise.

Section 16 of the Act, "Modification of dispositions—Newly discovered facts" provides:

"* * * No hearing need be held, however, unless the written request states facts which were not known to the applicant or by the exercise of reasonable diligence could not have been ascertained by him at the time of the entry of the order sought to be modified and which would have directly affected the determination of whether or not compensation should be awarded and, if so, the amount of that compensation."

Based upon the foregoing, Claimant's petition for reconsideration is hereby denied.

(No. 93-CV-1843—Claim denied.)

In re APPLICATION OF MARY MANDLEY

Order filed April 30, 1993.
Opinion filed January 30, 1995.

MARY MANDLEY, *pro se*, for Claimant.

ROLAND W. BURRIS and JIM RYAN, Attorneys General (CHARLES A. DAVIS, JR. and PAUL H. CHO, Assistant Attorneys General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*condition precedent to compensation—cooperation with law enforcement officials.* In order to be entitled to compensation under the Crime Victims Compensation Act an applicant must have cooperated fully with law enforcement officials in the apprehension and prosecution of the assailant.

SAME—*intent of Act.* The Crime Victims Compensation Act is intended to aid and assist crime victims under certain circumstances to receive compensation for the damages they have sustained, but the rules and procedures applicable to such claims must be followed before the Court can award benefits.

SAME—*battery charge against assailant dismissed when Claimant failed to appear in court—claim denied.* Although the Court of Claims could have denied a battery victim's request for benefits solely on the basis of her untimely request for review, the Court considered the Claimant's testimony concerning her failure to make multiple court appearances, which resulted in the dismissal of charges against her assailant, and the Court determined that despite the hardship, expense, and inconvenience occasioned by the court appearances, the Claimant's failure to fully cooperate in her assailant's prosecution precluded her recovery.

ORDER

PER CURIAM

This claim arises out of an incident that occurred on August 8, 1992. The Claimant, Mary Mandley, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. 740 ILCS 45/1, *et seq*.

This Court has carefully considered the application for benefits submitted on January 15, 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 August 8, 1992, the Claimant was assaulted by two offenders who were not known to her. The incident occurred at 6436 North Greenview, Chicago, Illinois. Police investigation revealed that the Claimant went to the offender's home after her dog had bitten the offender's daughter. While attempting to discuss the incident, the Claimant became involved in an argument with the offender. During this argument, the offender and her son assaulted the Claimant, which resulted in her falling down the offender's front porch stairs. The Claimant sustained a broken wrist and left the offender's home. Charges of battery were placed against the offender and her son, but were later dismissed when the Claimant failed to make court appearances.

(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 it appears from an investigation by the Attorney General's office that the Claimant declined to cooperate fully with law enforcement officials in the apprehension and prosecution of the assailant, in that she failed to pursue the criminal prosecution of the offenders by not appearing in court. As a result of these actions, the criminal charges against the offenders were 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, she is not eligible for compensation thereunder.

(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.

Claimant, Mary Mandley, seeks compensation for medical expenses pursuant to the Crime Victims Compensation Act (740 ILCS 45/1, *et seq.*), hereinafter referred to as the "Act." The claim arises out of an incident wherein Claimant has alleged that she was the victim of a battery that occurred on August 8, 1992. This court initially issued an order on April 30, 1993, denying the claim. The Court, relying on the investigatory report, denied the claim because the Claimant decided not to cooperate fully with law enforcement officials in the apprehension and prosecution of the assailant, in noncompliance with the requirement of section 6.1(c) of the Act. 740 ILCS 45/6.1(c).

On June 7, 1993, more than 30 days after the Court order denying the claim, Claimant requested a review by way of letter. Her letter states that she dropped the charges because she, "did not have the money to keep going to court." She wrote that she could not keep closing her day care and that she was also going to the doctor and therapy five times a week. She was also having domestic problems. While we could deny the claim solely on the basis that the request for review was not timely filed, we will discuss the testimony of Claimant.

A hearing was conducted on April 8, 1994, before the Commissioner, at which Claimant appeared and testified. Claimant testified that the circumstances of her life kept her from pursuing the prosecution of the offender. The circumstances she raises are as follows:

(a) Claimant was self-employed, taking care of children and could not afford paying someone to cover for her;

(b) Claimant was going through a divorce and had an order of protection in place (not against the offender on this battery);

(c) Claimant was going through therapy for her broken wrist;

(d) Claimant went to two court dates and she was exhausted; and

(e) Claimant was afraid the offender, a 16- to 17-year-old male living two doors from her, might take revenge on her son.

The incident which led to the battery arose because of a dispute over a dog. Claimant's wrist was broken and she was in a cast. Claimant operates a day care service (of three or four children) and does not have any employees. She pressed charges but when she went to court, the case was continued.

Claimant did not have health insurance and was not receiving Medicaid or other public aid. She presented two bills from Dr. Dennis B. Drennan in the sum of $700 and $125. Claimant is also still seeking the five expenses itemized in her application. She also had her glasses crushed. None of the bills have been paid.

On cross-examination, Claimant stated that when she told the "public defender" (an attorney she described as her attorney) that she could no longer make the court appearances, he went before the judge and said Claimant was dropping the charges. The charges were dropped.

Section 6.1(c) of the Act specifies that a person is entitled to compensation if the applicant has cooperated fully with law enforcement officials in the apprehension and prosecution of the assailant. It is obvious that the attendance of multiple court appearances in a criminal proceeding present hardship, and inconvenience, to numerous victims or complaining witnesses. It may detrimentally impact one person more than others. However,

the Act requires a person to cooperate fully and does not recognize any exceptions based upon circumstances. In this case it appears that Claimant not only allowed the charges to be dropped, but agreed to the charges being dropped at one of the court proceedings.

The Crime Victims Compensation Act is intended to aid and assist crime victims under certain circumstances to receive compensation to help pay for the damages they have sustained but the rules and procedures applicable to such claims must be followed before the Court can award benefits. (*In re Application of Geraghty* (1989), 42 Ill. Ct. Cl. 388.) The Legislature provided the rules and this Court is bound by the acts and all procedures set forth by the Legislature before the Court can award any benefits under the Act. (*Geraghty* at 390.) The legislature has provided the rule that a claimant must cooperate fully with law enforcement officials in the apprehension and prosecution of the assailant. (*In re Application of Dymon* (1992), 45 Ill. Ct. Cl. 460.) This Court cannot amend or modify the requirement of full cooperation in the prosecution of the assailant. It is up to the Legislature to create exceptions, not this Court.

It is clear from the testimony there was not full cooperation in the prosecution of the offender by the Claimant in this case. While we are sympathetic to the plight of Claimant, we are constrained to strictly follow the law. The Claimant has failed to prove by a preponderance of the evidence that she has met all conditions precedent for an award under the Act. For the foregoing reasons, it is the order of this Court that the claim be and hereby is denied.

(No. 94-CV-2026—Claim denied.)

LEON REAMS, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed May 5, 1995.

LEON REAMS, *pro se*, for Claimant.

JIM RYAN, Attorney General, for Respondent.

CRIME VICTIMS COMPENSATION ACT—*victim of violent crime—filing deadline.* In order to receive compensation under the Crime Victims Compensation Act, a person must file an application with the Court of Claims within one year of the occurrence of the crime, and although the Court may grant extensions, they have been denied where the claimants have stated that they were unaware of the Act until after the deadline for filing expired, since lack of knowledge on the part of a claimant is not an exception provided for under the Act.

SAME—*victim shot while driving on highway—failure to timely file claim—claim denied.* Although the Claimant, who was shot on a highway while driving home from work, may have been eligible for an extension of time to file his claim for compensation because he went on active military duty 11 months after the incident, his failure to file a claim until 2½ years after being released from duty and nearly four years after the shooting occurred resulted in the denial of his claim, and his lack of awareness of the Act until two years before filing the claim provided no basis for an exception to the statutory deadline.

OPINION

SOMMER, C.J.

This claim is before the Court on a petition for extension of time to file a claim filed by Leon Reams under the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. 740 ILCS 45/1, *et seq*.

An order was entered by this Court assigning this claim to a Commissioner to determine the facts surrounding the Claimant's failure to file a claim within a year of the date of the crime as required by section 6.1(a) of the Act. A hearing was held before Commissioner Clark on December 8, 1994. The evidence consists of the

Claimant's testimony and bills submitted by the Claimant documenting expenses incurred for medical treatment.

The Claimant testified that he was shot on February 13, 1990, on Highland Avenue in Alton, Illinois, while he was driving home from work. He was treated at Alton Memorial Hospital in Alton, Illinois, and later at a veteran's hospital. The bullet is still lodged in the Claimant's shoulder, and the Claimant suffers from numbness in his left arm and limitation of movement. In January 1991, the Claimant's U.S. Army Reserve unit was called up to serve in Operation Desert Storm. The Claimant was stationed in Fort Campbell, Kentucky, and was released from duty on May 27, 1991. The Claimant testified that he was unaware that he may have been eligible for compensation through the Act until he talked to a police officer sometime between May 1991 and January 1992—one to two years after the shooting. The Claimant stated that he spoke with an assistant Attorney General during that time but did not officially file a claim until January 1994, nearly three years after the shooting. The Claimant submitted medical bills from Alton Memorial Hospital, totalling $589.30, which he paid himself. There were no charges for treatment at the veteran's hospital. The Claimant reported no lost wages as a result of his injury.

Section 6.1(a) of the Act states that to receive compensation under the Act, a person must file an application with the Illinois Court of Claims within one year of the occurrence of the crime. The Court may grant extensions, but has turned down requests for extensions and denied claims when the claimants have stated they were unaware of the Act until after the deadline for filing expired. Lack of knowledge on the part of a claimant is not an exception provided for under the rules of the Act. *In re Application of Hutcherson* (1985), 37 Ill. Ct. Cl. 491; *In re Application of Reaves* (1985), 37 Ill. Ct. Cl. 427.

Because of his service in Operation Desert Storm, the Claimant may have been eligible for an extension because he was activated approximately 11 months after the shooting occurred. However, he was released from duty in May 1991 but failed to file a claim until January 1994, nearly four years after the shooting. The Claimant contends that he was informed of the Act sometime between May 1991 and January 1992. It is unclear why the Claimant failed to file a claim until at least two years later. Regardless, the fact that the Claimant may have been unaware of the Act as late as January 1992 provides no basis for an exception to the statutory deadline.

Because the Claimant failed to file a claim until nearly four years after the shooting and because the Claimant has offered no reason that would provide the basis to make an exception in his case, it is hereby ordered by this Court that the Claimant's claim is denied.