

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

VOLUME 50

Containing cases in which opinions were filed and
orders of dismissal entered, without opinion
for: Fiscal Year 1998—July 1, 1997-June 30, 1998

SPRINGFIELD, ILLINOIS
1999

(Printed by authority of the State of Illinois)
(PRT 3078288—300—7/99)

PREFACE

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

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

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

OFFICERS OF THE COURT

JUDGES

ROGER A. SOMMER, Chief Justice
Morton, Illinois

Chief Justice - January 15, 1993—
Judge - February 26, 1987—January 15, 1993

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

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

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

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

FREDERICK J. HESS, Judge
Belleville, Illinois
January 21, 1997—

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

MATTHEW J. FINNELL
Court Administrator
Springfield, Illinois

J. GEOFFREY ANDRES
Deputy Court Administrator
Springfield, Illinois

CHAD D. FORNOFF
Counsel to the Court
Springfield, Illinois

COMMISSIONERS

A. M. COURI
Winnetka, Illinois

STEPHEN CLARK
Belleville, Illinois

CAROL C. DILLARD
Chicago, Illinois

MICHAEL FRYZEL
Chicago, Illinois

J. PATRICK HANLEY
Chicago, Illinois

MICHAEL J. KANE
Chicago, Illinois

EVERETT McLEARY (resigned 1-31-98)
Chicago, Illinois

J. MICHAEL MATHIS, JR.
Peoria, Illinois

NANCY OWEN
Mattoon, Illinois

ROBERT RATH
Harrisburg, Illinois

ELIZABETH M. ROCHFORD
Lincolnwood, Illinois

JAMES E. SHADID
Peoria, Illinois

THOMAS STERNIK
Chicago, Illinois

LEROY UFKES
Carthage, Illinois

JEFFREY WHIPPLE
Lake Forest, Illinois

ORAN F. WHITING
Chicago, Illinois

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

KATHERINE A. PARKER
Deputy Clerk and Director
Springfield, Illinois
rch 1, 1995—

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

FISCAL YEAR 1998

(July 1, 1997 through June 30, 1998)

(No. 81-CC-0053—Claim dismissed.)

DORA B. LARSON, Administrator of the Estate of VICTORIA J.
LARSON, Deceased, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Order filed September 15, 1997.

CORYN, WALKER & MEEHAN (GERALD J. MEEHAN, of
counsel), for Claimant.

JAMES E. RYAN, Attorney General (DEBORAH L.
BARNES, Assistant Attorney General, of counsel), for Re-
spondent.

IMMUNITY—*Local Governmental and Governmental Employees Tort Immunity Act does not apply to State.* The Local Governmental and Governmental Employees Tort Immunity Act applies to local governments and, by its express terms, does not apply to the State or its employees. (overruling *Flaim v. State* (1975), 30 Ill. Ct. Cl. 635.)

SAME—*public official immunity—discretionary acts undertaken in good faith—respondeat superior.* A public official is immune from individual liability for the performance of discretionary duties undertaken in good faith, and when a court of competent jurisdiction finds State employees to be immune from suit, the State is immune under the doctrine of *respondeat superior*.

SAME—*tort claim against State employees arising out of girl's murder by parolee—public immunity applied—claim dismissed.* In a claim against the State arising out of the murder of a 12-year old girl by a parolee, where there

had been a prior civil action against two individual employees of the Department of Corrections in which the court found the employees immune from suit, the State was also immune under the doctrine of *respondeat superior*, and the issue of immunity was *res judicata* in the Claimant's action, thereby requiring dismissal of the claim.

ORDER

RAUCCI, J.

This cause coming to be heard on the Respondent's motion to dismiss and supplemental memorandum thereto, the Court being fully advised in the premises, the Court finds:

1. The instant claim was originally filed in 1980. The Court ordered this claim placed on general continuance in 1985. This claim was removed from general continuance in 1995, and comes now before the Court upon the Respondent's motion to dismiss, together with Respondent's supplemental memorandum to motion to dismiss.

2. The Claimant is the administrator of the estate of Victoria Larson, deceased. The Claimant's complaint alleges that the Respondent is liable for damages resulting from Scott Darnell's forcible rape and murder of the decedent, Victoria Larson. Darnell, a minor, had been paroled two weeks prior to the brutal attack on Victoria Larson.

3. The Claimant alleges that this Court has jurisdiction of her claims arising under the Wrongful Death Act (740 ILCS 180/0.01 *et seq*) and the Survival Act (330 ILCS 100/0.01 *et seq*) pursuant to section 8(a) of the Court of Claims Act, and over her claims alleging liability in tort pursuant to section 8(d) of the Court of Claims Act. 705 ILCS 505/8(a), (d).

4. At the time of the alleged occurrence, the Local Governmental and Governmental Employees Tort Immunity Act (Ill. Rev. Stat., ch. 85, par. 4—106) provided that:

“Neither a local public entity nor a public employee is liable for:

(a) Any injury resulting from determining to parole or release a prisoner, to revoke his parole or release, or the terms and conditions of his parole.

(b) Any injury inflicted by an escaped or escaping prisoner.” Currently codified as 745 ILCS 10/4—106.

5. We have previously held that section 4—106 of the Local Governmental and Governmental Employees Tort Immunity Act applies equally to units of local government and to the State:

“The State’s liability certainly is no greater, and its immunity is certainly no less, under existing law, than that of local governmental units which are creatures of the State. To hold the State liable for any errors in judgment by its officials, in the exercise of their discretionary decision making powers and duties, would be contrary to the public policy established by the General Assembly. This is particularly true of a decision to parole or release a prisoner, “one of the most difficult, sensitive and complicated decisions that must be made in the criminal justice system.” *Flaim v. State* (1975), 30 Ill. Ct. Cl. 635, 639.

We have reexamined the *Flaim* decision and now overrule it. The Local Governmental and Governmental Employees Tort Immunity Act by its express terms does not include the State of Illinois or its employees. Additionally, the Court of Claims Act (705 ILCS 505/1 *et seq*) expressly provides that the Court of Claims has jurisdiction to consider “[A]ll claims against the State for damages sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit * * *.” (705 ILCS 505/8(d).) For these reasons, *Flaim* is overruled.

6. The Respondent also urges that the State is immune from liability for injuries arising from the determination of its officers and employees to release or parole a prisoner. The instant Claimant’s injuries were a result of the State’s alleged negligence in paroling a mentally disturbed prisoner.

7. In *Larson v. Darnell* (1983), 113 Ill. App. 3d 975, 448 N.E.2d 249, a case brought by Claimant against the

individual officials who released the offender who raped and murdered Claimant's decedent, Victoria J. Larson, a twelve-year old minor, the Court stated:

"It is well established that a public official is immune from individual liability for the performance of discretionary duties undertaken in good faith. (*Mora v. State* (1977), 68 Ill. 2d 223, 12 Ill. Dec. 161, 369 N.E.2d 868; *People ex rel Scott v. Briceland* (1976), 65 Ill. 2d 485, 3 Ill. Dec. 739, 359 N.E.2d 149.) The circuit court entered a finding that the action of Franzen in releasing Darnell and the action of Stanbary in supervising Darnell, were, from a factual standpoint ministerial, but also determined that the conduct of both men was discretionary as a matter of law. We believe these two findings are conflicting, because by definition, a purely ministerial act is one which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own discretion upon the propriety of the act being done. We believe the circuit court was correct when it found that the actions of Stanbary and Franzen required both to exercise their discretion or judgment, and we believe the court was incorrect when it found that the actions of both men were ministerial. We agree with the defendants, who assert in their brief that under the State's Juvenile Release Program, the decisions respecting whom to parole, when to parole, and where to place the parolee and how to help the ex-offender adjust into a free society necessarily involve discretion and balancing the rights of the ex-offender against the rights of the community into which he is placed. Hence, we conclude that Franzen and Stanbary are immune from suit for the official acts complained of by the plaintiff Estate, even if, as alleged, the acts were negligently performed, because in the performance of those acts it was necessary to exercise judgment or discretion. *Mora v. State; People ex rel Scott v. Briceland*.

o o o

Public officials immunity is conditioned on the good faith exercise of discretion and extends to acts undertaken in the exercise of that discretion not resulting from corrupt or malicious motives. (*Thiele v. Kennedy* (1974), 18 Ill. App. 3d 465, 309 N.E.2d 394.) The complaint here in question sets forth no allegation of corrupt motives, malicious motives, or the intentional misuse of power."

Gayle Franzen was then the Director of the Illinois Department of Corrections, and James E. Stanbary was Darnell's parole officer.

8. When a court of competent jurisdiction finds State employees to be immune and dismisses a suit, the State is immune under the doctrine of *respondeat superior*. The issue of immunity is *res judicata* and requires dismissal of this claim.

It is therefore ordered, adjudged and decreed that the motion to dismiss is granted, and this claim is dismissed and forever barred.

(No. 82-CC-0793—Claimant awarded \$4,800.)

ALONZO JONES, Claimant, v. THE STATE OF ILLINOIS,
Respondent.

Opinion filed August 28, 1997.

JAMES P. CHAPMAN, Counsel for Claimant.

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

PRISONERS AND INMATES—*State has duty to provide reasonably safe place for inmates to work.* The State of Illinois has a duty to provide a reasonably safe place for inmate employees to perform their required work duties.

SAME—*plumbing work being performed by inmate when floor gave way—State liable.* The State was liable to an inmate who suffered arm, shoulder, and back injuries in a fall when wooden flooring gave way while he was performing plumbing work, since witnesses testified that the flooring was old, cracked and unsafe, and the State knew of the dangerous condition but failed to correct it; however, the inmate's damages were limited, because he had a prior history of serious back problems and failed to prove with competent medical testimony that the back injury sustained in the fall necessitated the laminectomy surgery for which he sought compensation.

OPINION

SOMMER, C.J.

This matter comes to be heard on the claim of Alonzo Jones (“Jones”) for personal injuries sustained in an incident that occurred while he was an inmate of Stateville Correctional Center on or about January 19, 1981. Specifically, Jones asserts that the State’s failure to adequately maintain an area of the prison wherein Jones was

required, as a prisoner employee (plumber), to perform his work assignments, resulted in serious and permanent injuries to his person.

The transcript of the proceedings and the evidence stipulated to therein reveals the following facts concerning the incident whereby Jones claims his injuries occurred and the nature and extent of the injuries themselves. For some time before January 19, 1981, while incarcerated at Stateville, Jones was employed as a plumber and was under the supervision of a civilian employee of the State. Jones testified that the job of a plumber is considered a well-paying and sought-after position amongst the inmates of Stateville. As a plumber, Jones would be given specific work orders to be completed with his civilian supervisor, ranging from repairing leaks, to shutting off water sources, to unclogging pipes. In general, most of these work orders related to jobs that took place in a "plumbing chase" area that was situated behind individual cells. The plumbing chase mirrored the cellblocks, meaning that each individual cell had an area of the plumbing chase behind it where all the plumbing pipes that entered the cell were located. Five floors of cells in two galleries (east and west) within the rectangular-shaped cellblock meant five floors of plumbing chase that serviced the individual cells of both the east and west galleries of the cell house. However, instead of concrete or metal floors, testimony of the Claimant and other witnesses established that metal scaffolding with wooden planks as flooring comprised the floors of the plumbing chase. These wooden planks or boards were approximately 12 inches wide by 1½ or 2 inches thick. Two 12-inch planks made up the causeway where Claimant Jones and other plumbing workers were expected to walk in endeavoring to complete their work orders in the plumbing chase.

Claimant Jones testified that, as a routine, he and his supervisor started with the work orders at the top of the chase and worked their way downward using the ladders inside the chase to complete the assigned work. The Claimant testified that, due to the aged condition of the cellblock and its plumbing, he was assigned to complete work in or about the plumbing chase nearly every day since he had started doing plumbing work, or almost every day from 1977 through the date of the alleged accident in 1981.

On January 19, 1981, Claimant Jones was working with his supervisor at the time, Mr. Rocky Guggliemucci, doing routine maintenance in the plumbing chase. On that date, Jones and Mr. Guggliemucci were breaking for lunch and were walking in a northerly direction to exit the plumbing chase along the boards. The Claimant stated that he was carrying a tool box weighing approximately 50 pounds and measuring 3 feet long. Walking single-file with Jones preceding Mr. Guggliemucci by four to five feet, Jones testified that it was not necessary to use a flashlight to see the board where it was necessary to walk.

As he was walking along inside the plumbing chase and upon the aforementioned boards, the board under his left foot broke "all the way through" forcing him to grab a pipe with his left hand to prevent his falling to the bottom of the plumbing chase.

The Claimant stated that he felt a snap in his back as he fell and his body bent awkwardly. In addition, he stated that, although he did not think he was hurt that badly, he could not move his left arm, which had been hurt (dislocated) when he was forced to grab the pipe to stop his fall. The Claimant told his superintendent, "Venegone," of the incident and his injury; and, thereafter, went to the prison hospital. The Claimant did not return to work that afternoon.

For a period of six or seven days, Claimant Jones confined himself to his bed in his cell until he was taken to the prison hospital, where he stayed for approximately seven months. The Claimant testified that he received very little treatment while in the prison hospital, although he claimed to be in excruciating pain. In July of 1981, the Claimant had a laminectomy performed on his lower back at the University of Illinois Hospital. The surgery necessitated a three-week hospitalization. Thereafter, the Claimant was not able to resume his duties as a plumber due to pain, residual numbness and weakness in his back and left leg; and after four months, he was transferred to a light maintenance job. From that point to the date of the hearing, the Claimant held numerous jobs related to light maintenance and refrigeration at Stateville Correctional Center, and then at Danville Correctional Center, and then at Dixon Correctional Center.

The Claimant also asserts that the residual injuries from his accident included his legs “giving out” at certain moments, a progressively worsening loss of sensation in his legs and feet leading to a loss of balance, and an incontinence problem. He attributes all or most of his current, serious physical problems to the accident.

However, prior to this incident, the Claimant had injuries to his back in 1978, necessitating a partial laminectomy, and in 1979, resulting in a short hospitalization. Even with the prior back problems, the Claimant asserts that, despite constant pain and very heavy work, he was able to fulfill his work duties. Medical records of Jones from 1978 and 1979 indicate complaints of numbness in the left foot and leg, and complaints of low back pain.

The Claimant called the following persons to testify at the hearing: Mr. John McSweeney, who was Stateville’s electrical foreman during the relevant period; Mr. Robert

Hodges, a fellow inmate and plumbing worker; Mr. John Corneglio, Jr., a fellow inmate; and, Mr. Philip Manzella, a fellow inmate and plumbing worker.

In brief summary, these witnesses proffered consistent testimony that the planks or boards in the plumbing chase were old, cracked, waterlogged due to various leaks in the area, and generally in poor condition. Furthermore, in testimony that covered the period from 1974 to the period soon after the accident, the above-mentioned witnesses stated that various oral complaints were lodged or discussed with various prison personnel regarding the poor and/or dangerous condition of the plumbing chase's planks. No written grievances appear to have been filed, or at least produced, to support these complaints. Of particular note was testimony that certain civilian employees of the prison would not venture into the plumbing chase due to the condition of the planking and that certain heavier employees would not stand next to each other as they worked.

The Claimant stated that he had complained of the nature and condition of the planks, but did not file a written grievance, as was his right, for fear of losing his advantageous job.

The case law provides that the State of Illinois has a duty to provide a reasonably safe place for inmate employees to perform their required work duties. (*Hammer v. State* (1987), 40 Ill. Ct. Cl. 173; *McGee v. State* (1977), 31 Ill. Ct. Cl. 326.) It is clear from the weight of the testimony offered by the Claimant and his witnesses that the State failed to fulfill that duty with regard to the Claimant. The plumbing chase, particularly the wooden planking upon which workers, by necessity, walked upon to accomplish their work order, was in an unsafe condition; and furthermore, the State, by its agents and employees

knew or should have known of that unsafe condition, but failed to correct the condition. Based upon this finding, the State is liable to Claimant Jones for the injuries he suffered in the accident of January 19, 1981.

However, the precise nature and extent of those injuries sustained by the Claimant are in dispute. It is the duty of the Claimant to prove by a preponderance of the medical evidence that the nature and extent of the injuries for which he claims he deserves compensation, were proximately caused by the State's negligence, as described in the preceding paragraph. Jones claims he suffers from serious and permanent injuries, but he fails to offer evidence that demonstrates, to a reasonable degree of medical certainty, that those injuries were caused by his fall in the plumbing chase in January of 1981. Most serious results of the injuries claimed by Jones are the laminectomy surgical procedure which occurred in July 1981, the failure to be able to return to his normal, pre-accident routine and subsequent associated numbness, weakness and incontinence. The Claimant failed to offer any substantive medical testimony that refuted the Respondent's assertion that the laminectomy was necessitated by a degenerative condition called stenosis and that the January 1981 fall had little or no impact upon the decision to perform the surgery.

Rather, the Claimant asks that the Court infer the injuries by circumstance; *i.e.*, that Jones was fulfilling his obligations as a plumber prior to the accident but could not do so afterward; and, thereafter, also had a surgery. The Claimant asserts that this "proves" that the serious physical problems now afflicting Jones are directly attributable to his January 1981 fall.

The Claimant fails to address the fact that Jones had serious back problems prior to January 1981, and in addition,

admitted that he experienced great pain while working prior to his accident. Medical records also show Jones complained of numbness in his leg and back pain on two occasions prior to 1981. An orthopedic surgeon, Dr. Xamnan Tulyasathien, testified that the laminectomy performed upon Jones in July of 1981 was performed to relieve stenosis, a narrowing of the spinal canal, which was impinging on various nerves, and opined that said stenotic condition was not due to trauma. Neither physician that testified could state that the Claimant's condition, specifically the stenosis of his spine, was "caused" by trauma in general, much less the specific trauma claimed by Jones to have caused the condition which necessitated his undergoing a laminectomy.

Thus, it is speculation as to whether the fall in January 1981 may or may not have caused or contributed to Jones' July 1981, laminectomy and his subsequent physical problems. The Claimant has not sustained his burden of proof with regard to the cause of his injuries and as to the nature and extent of those injuries. The Claimant cannot be compensated for his injuries based upon speculation.

In addition, it is noteworthy that Claimant Jones received very little treatment other than aspirin for the six or seven month duration he was in the prison hospital after his fall and prior to his surgery. This fact supports the Respondent's argument that the back surgery was necessitated by a degenerative condition and undermines the Claimant's position that said surgery was due to a traumatic injury sustained in his fall of January 19, 1981.

It is clear that Claimant Jones sustained some non-specific injuries to his left arm, left shoulder, left wrist and lower back as a result of his fall due to the unsafe condition of the plumbing chase. He suffered some pain

as a result of these injuries. The Claimant admits that the left arm and left shoulder injuries resolved soon after the accident, but that he had a scar on his left wrist. The Claimant asserts that the lower back injury was serious enough to necessitate a laminectomy surgery in July of 1981, but fails to back up said assertion with competent medical testimony. As such, without medical evidence in support, no compensation can be awarded to the extent requested by the Claimant.

For the reasons stated, we award the Claimant \$4,800.

(No. 83-CC-9432—Claim denied.)

ROBERT SANGOSTI, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed November 27, 1996.

Opinion on Rehearing September 4, 1997.

DOUGLAS GRAHAM, Counsel for Claimant.

JAMES E. RYAN, Attorney General (THOMAS L. CIECKO,
Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*dismissal of road defect claim on exhaustion grounds vacated.* Although the Claimant's road defect claim arising out of a one-car accident was initially dismissed for failure to exhaust alternative remedies against the State's contractor, on rehearing it was determined that the site of the accident was not within the contractor's maintenance responsibility, and the dismissal order was vacated.

SAME—*shoulder drop-off—proximate cause of one-car accident not established—claim denied.* Although the Claimant, who was injured when his vehicle rolled over after encountering a shoulder drop-off in a highway construction area, established that the State failed to reasonably warn of the dangerous condition created by the uneven pavement, the claim was denied based on the Claimant's failure to prove that the defective road conditions, rather than his own action in driving onto the shoulder, proximately caused the accident.

OPINION

EPSTEIN, J.

This negligence claim was brought by Robert Sangosti, Claimant, against the Respondent's Department of Transportation ("IDOT") for damages from personal injuries sustained by him while operating his vehicle on a State highway in 1981. Claimant alleges that a dangerous condition—a substantial grade separation at the edge of the roadway—was negligently created or maintained by IDOT and, in addition, that IDOT negligently failed to provide appropriate warning signage of this condition, which caused Claimant to drive off of the roadway and to be unable to control his vehicle after partially leaving the roadway.

The single-vehicle accident case is before us for final decision after trial, which was held before Commissioner Rochford, following our denial of the Respondent's motion to dismiss, which was predicated on our exhaustion of alternative sources of recovery requirement (under section 25 of our Act [705 ILCS 505/25] and section 790.90 of our rules [74 Ill. Admin. Code section 790.90]). The Court denied that motion for lack of adequate supporting factual basis. Now, after trial, we must dismiss this claim on that same basis.

The facts adduced at trial, insofar as pertinent to our decision, are as follows.

The Facts

On October 28, 1981, at approximately 1:30 a.m., Claimant Robert Sangosti was driving his vehicle after having exited Interstate 55 at the Highway 53 truck stop. Claimant attempted to return to I-55, but found that the entrance ramp was closed. Claimant then entered the frontage road eastbound in an attempt to reach the nearest entrance ramp to I-55.

Claimant testified that he was not familiar with the area and that he did not notice anything unusual about the roadway. He stated that the road was initially straight and that he was traveling at approximately 40 miles per hour. Claimant noticed that the road took a sharp turn to the left at approximately 50 to 100 feet in the distance. At the curve, he began turning and braking, slowing slightly, and noticed that the road had a “sharp edge” to it, but no shoulder appeared.

Claimant testified that he felt the two wheels of his vehicle go over the edge of the pavement, but was unsuccessful in his attempts to steer the vehicle back onto the roadway. The vehicle went “into a roll.” Claimant was unable to recall anything else about the accident.

Claimant next remembered being in the grass and unable to stand up due to pain. He crawled to a nearby weigh station for help and the police and an ambulance arrived at the scene approximately ten minutes later. Claimant was transported and admitted to Edward Hospital in Naperville where he was x-rayed and diagnosed, and treated for a concussion, scalp laceration, and a fracture of the vertebra. Following four days at Edward Hospital, Claimant transferred himself to Christ Hospital where he remained for 13 days and was fitted for a back brace.

Claimant called one expert witness, a retired civil engineer, who testified *inter alia* that the accident was caused by the differential in height between the roadway and the shoulder (but in his prior deposition had acknowledged that Claimant may have panicked and attempted to return to the roadway too quickly). The expert, James Breclaw, also testified that the accident was caused by the Respondent’s failure to provide sufficient traffic control devices to warn of the dangerous condition. However, he admitted in his deposition that it would be

the responsibility of a contractor working on the road to provide the appropriate traffic controls.

The Respondent's departmental report established that the roadway in question was within IDOT's maintenance jurisdiction, and acknowledged that there was a "deep" drop-off between the pavement and shoulder at the area where Claimant's vehicle lost control and left the roadway. The report also established that the maintenance of the subject roadway had been assumed by Peter J. Poulos & Sons, Inc., and Plote, Inc. under contract #34008 commencing August 26, 1980, and completing on December 1, 1981.

The terms of the contract specifically provided as follows:

"Maintenance of Roadways:

Beginning on the date when the Contractor begins work on this project he shall assume responsibility for normal maintenance of all existing roadways and shoulders within the limits of the improvement. This normal maintenance shall include all repair work deemed necessary by the engineer but shall *not* include snow removal operations. Traffic control and protection for this work will be provided as required by the Engineer."

Exhaustion of Alternative Recovery Sources

The first, and dispositive, issue before this Court is whether Claimant failed to exhaust his remedies as to other potential sources of recovery, as required of all Claimants against the State by section 25 of our Act (705 ILCS 505/25) and section 790.90 of our rules (74 Ill. Admin. Code section 790.90); failure to do so is grounds for dismissal under section 790.60. Under our precedents, and indeed under the statute, a failure to exhaust an alternative recovery from another tortfeasor, unless excused, requires dismissal of the claim against the State in this Court. Claimants are required to exhaust all remedies; the Court cannot and does not allow discretion by Claimants to pick and

choose whom they wish to sue. *Burns v. State* (1990), 43 Ill. Ct. Cl. 323; *Boe v. State* (1984), 37 Ill. Ct. Cl. 72, 72-76.

In this case, the dispositive facts are clear and uncontradicted. IDOT had entered into a contract with Peter J. Poulos & Sons, Inc. and Plote, Inc. to perform construction work in the subject area during the relevant dates and times. The contract specifically provided that the contractor assumed all maintenance of the subject roadways in addition to all traffic control and protection for the area of construction. Indeed, the contractor had that duty, independent of the terms of the contract, once it assumed control of the public roadway. Thus, the contractor had a tort duty to members of the public driving on—or attempting to drive on—the subject way.

Although it is not dispositive, it is also clear that the Claimant apparently had knowledge of the construction contract, as Claimant's expert referred to the construction in his deposition testimony of August 1, 1990, and was knowledgeable about road construction practice.

Clearly, the Claimant should have sued the contractor who had contracted with the Respondent and assumed responsibility for the maintenance and traffic control necessary at the site of the accident. The Claimant could have and should have sued Peter J. Poulos & Sons, Inc. and Plote, Inc., and had the claim against Respondent placed on general continuance. Claimant failed to do so, and has offered no compelling reasons for his failure to exhaust this obvious source of recovery, which also happens to be the party directly responsible for the two conditions that Claimant alleges to have been the proximate cause of his one-car accident.

For the foregoing reasons, this claim is denied and dismissed with prejudice.

OPINION ON REHEARING

EPSTEIN, J.

This 1983 personal injury claim, arising out of a 1981 one-car accident on the I-55 frontage road, is back before us on the Claimant's petition for rehearing, which asks us to reverse our dismissal of this claim for failure to exhaust relief against a State contractor. Once again we must observe that both parties to this 13-year-old case are before us with unclean procedural hands. We revisit this case primarily because of the parties' failure adequately to present it in the first instance.

The Rehearing Issues

Following trial, we dismissed this claim for failure to exhaust alternative sources of recovery due to the Claimant's nonpursuit of the contractor who had contractual maintenance responsibility over the roadway where the Claimant's accident took place. We had declined to dismiss this claim on that basis before trial, and rejected the Respondent's motion to dismiss because the facts were unclear. (Order of May 17, 1995.) Trial seemingly did not cure that. The dismissal became mandatory under the exhaustion of remedies requirement of our statute and rule (section 25 of the Court of Claims Act [705 ILCS 505/25] and section 790.90, Court of Claims Regulations [74 Ill. Admin. Code section 790.90]), when the contractor's jurisdiction was undisputed and because of the Claimant's theory of liability, which rests on allegedly defective roadway conditions and the absence of appropriate warning signage, which were contractual responsibilities of the contractor within its construction-area responsibility.

Following our decision, the Claimant asked us to reconsider the exhaustion dismissal on the basis that the accident occurred outside, not inside, the construction area

that was the contractor's responsibility. After determining that the record was still unclear on this point, we directed the parties to provide supplemental submissions on this geographical issue. (Order of February 7, 1997.) The Court did so in the interests of justice, and despite the Claimant's failure clearly to address this point or to provide clear evidence even in his petition for rehearing.

In response to our order, and to its credit, the Respondent acknowledged that "the site of the Claimant's accident was not within the area of the State's contractor's maintenance responsibility under the governing contract" (Response to Petition for Rehearing). This admitted fact moots the exhaustion issue as to the contractor. We therefore vacate our opinion and order of November 27, 1996, and now turn to the merits of this claim.

The Facts on the Liability Issue

In the early-morning hours of October 28, 1981, Claimant Robert Sangosti was driving southwest-bound on Interstate 55 ("I-55"). At approximately 1:30 a.m. he exited I-55 to stop at the Highway 53 truck stop. After his stop, Claimant attempted to return to I-55 but found that the entrance ramp was closed due to construction. He was advised to use the frontage road northeast-bound to reach the nearest southwest I-55 entrance. Thus Claimant turned onto the frontage road to reach the next entrance ramp.

Claimant testified that he was not familiar with the area and that he did not notice anything unusual about the roadway, although he acknowledged observing construction conditions in the area of the Highway 53 interchange. Claimant testified that he noticed that the road had a "sharp edge" to it and that he did not see a shoulder. He stated that the frontage road was initially straight

but made a left turn approximately 50-100 feet after his entry. Claimant testified that he was traveling at approximately 40 miles per hour when he reached the curve, that he braked but that he went off the pavement (on the outside of the curve). According to the Claimant, when he felt the two wheels of his vehicle go over the edge of the pavement, he tried but failed to steer the vehicle back onto the roadway. The vehicle went “into a roll” and undisputedly rolled over. The Claimant woke up injured some distance from the roadway.

Claimant was unable to recall anything else about the accident. He next remembered being in the grass and unable to stand up due to pain. He crawled to a nearby weigh station for help. The police and an ambulance arrived at the scene approximately ten minutes later. Claimant was transported and admitted to Edward Hospital in Naperville where he was x-rayed and diagnosed, and treated for a concussion, scalp laceration, and a fracture of the vertebra. Following four days at Edward Hospital, Claimant transferred himself to Christ Hospital where he remained for thirteen days and he was fitted for a back brace.

There were no other occurrence witnesses at trial, and as Claimant was alone in the vehicle at the time of the accident, it appears that no other occurrence witnesses exist.

The Liability Issue

Claimant’s theory of the case, as pleaded, was that the roadway was dangerous due to the “drop between the surface of the road pavement and the level of the shoulder” (Complaint, par. 5(a)), due to holes on the road surface (*id.*, par. 5(c)) and due to IDOT’s failure to warn motorists of the “dangerous condition of the roadway and shoulder” (*id.*, par. 5(d)). At trial, Claimant injected an

additional notion that the Respondent was negligent in failing to provide signage warnings of the left-hand turn on the frontage road, which seems gratuitous in light of his testimony that he saw the curve in any event.

The principal testimony as to liability was Claimant's expert witness, James Breclaw, a retired civil engineer. He testified to the danger of the height differential between the roadway and the shoulder, and noted that a difference in height between the shoulder and the pavement always poses a potential danger, and that a safe, acceptable height difference depends upon the individual driver and the circumstances. Although the witness acknowledged that he is not an expert on traffic control, he relied extensively on a Texas Transportation Institute report, "Pavement Edges and Vehicle Stability: A Basis for Maintenance Guidelines," published in September, 1982, as authoritative on the issue, although he had not read it.

Breclaw testified that the accident was caused by the height differential between the roadway and the shoulder. He was partly impeached by his prior deposition testimony in which he acknowledged that Claimant may have panicked and tried to return to the roadway too quickly. Breclaw further testified that the accident was caused by the Respondent's failure to provide sufficient traffic control devices to warn of the dangerous condition. Although references were made to a six-inch differential between the roadway and a shoulder, no clear testimony as to the differential in height was ever presented by either party.

After detailed review of this record, the Court is persuaded that the Respondent less than fully met its responsibilities to provide reasonable warning of the abnormal and substandard conditions of the frontage road. We are also persuaded by the Claimant's own testimony that at least some of this was known or apparent to the Claimant

when he entered the frontage road in search of the next entrance ramp, or immediately after entering it. He was aware of construction in the immediate area; that was the reason he had to detour to the next upstream entrance in the first place; and he acknowledged seeing that something appeared abnormal about the shoulders, which at a minimum should have put him on notice to be especially careful.

However, we find no evidence in the record to connect the defective conditions—the roadway holes (which are unevenced), the shoulder drop-off (which is evidenced but unquantified), and the lack of warning signs (about which there is ambiguity)—with the occurrence of this one-car accident.

The Claimant's and his expert's testimony attempts to show, and does somewhat show, that the Claimant's vehicle's roll-over was caused at least partly by the shoulder drop-off. That, however, goes to the extent of the accident, and arguably to the degree of damages. But that evidence does not address the threshold issue of why the accident occurred in the first place, i.e., why the Claimant drove his vehicle half off the road and dropped onto the shoulder. That threshold, but crucial, issue is unaddressed by Claimant's evidence. And this is a critical gap.

What does appear—and clearly—in this record is that (i) Claimant entered a left-turn at 40 miles per hour (having necessarily accelerated to this speed in 50-100 feet, according to his own testimony) and (ii) went off the road on the outside of the turn and dropped two wheels off the roadway, and (iii) turned over while attempting to turn back onto the road, i.e., while turning his wheels left towards the road-edge which was receding *away* from his direction of travel.

From this undisputed evidence, we must draw two conclusions: (1) the only cause of the initiation of this accident—the vehicle leaving the roadway—is unexplained except for the Claimant’s speed and his failure to steer within the turn; (2) the rollover was caused in some part by the Claimant’s unsuccessful efforts to turn back onto the roadway.

Although on this record, it is difficult to ascribe proportions of causation to each of these, it is clear to this Court that the Claimant fell far short of meeting his burden of establishing that any of the alleged negligent acts or deficient conditions was the proximate cause of this accident. There is simply no factual basis in this case on which we might conclude, let alone a basis that persuades us, that the Respondent is at all responsible for Claimant’s departure from the safety of the paved roadway. Without satisfying that link in the causal chain, there can be no liability on IDOT—even assuming IDOT’s responsibility and even assuming it was aware of or had notice of these allegedly defective road conditions.

We are constrained to come to this conclusion notwithstanding our sympathy to the Claimant’s argument that the accident was exacerbated by the shoulder drop-off, which may well have turned a simple skid into a serious and near-fatal incident. Our sympathy for Claimant’s injuries, which were serious, and our appreciation for his half-argument against the unacceptable performance of IDOT in this instance, do not provide a legal basis for this Court to make an award to Claimant, which we must deny.

For the foregoing reasons, we must deny liability and deny this claim on the merits. Given our conclusion as to liability on the causation issue, we need not and do not address the other elements of Claimant’s negligence claim.

For the foregoing reasons it is hereby ordered: (1) The opinion and order of November 27, 1996 is vacated; (2) This claim is denied, and forever barred.

(No. 86-CC-0254—Claim denied.)

LUTEE SHERROD, as Special Administratrix of the Estate of JOYCE PACKER, Deceased, and as Guardian of the Estate of ROCHELLE JOY PACKER, a minor, and CHANELLE JOY PACKER, a minor, Claimant, v. THE STATE OF ILLINOIS, Respondent.

Opinion filed May 6, 1997.

Order filed August 28, 1997.

MARVIN A. BRUSTIN (MARK S. SCHWARTZ, of counsel),
for Claimant.

JAMES E. RYAN, Attorney General (JOHN R. BUCKLEY,
Assistant Attorney General, of counsel), for Respondent.

HOSPITALS AND INSTITUTIONS—*duty of care owed to patients in mental health facilities.* The State is not an insurer of the safety of patients under the care of the Department of Mental Health, but it owes patients a duty of protection and must exercise reasonable care toward such patients according to their known condition or the condition which, through reasonable care, ought to be known.

SAME—*elements of medical malpractice claim.* In a medical malpractice claim, the Claimant must prove by a preponderance of the evidence that there was a breach of a duty, the Respondent's deviation from the standard of care, and that the deviation was the proximate cause of the Claimant's injury, and the standard of care is that care which is provided by reasonably well-trained medical providers in the same circumstances in a similar locality.

SAME—*malpractice action based on failure to hospitalize psychiatric patient who later committed suicide—claim denied.* In a medical malpractice claim brought by the estate of a woman who committed suicide by setting fire to her home after she was allowed to leave a psychiatric hospital without being admitted, the claim was denied since, notwithstanding the woman's prior history of mental illness, there was nothing in the testimony of the Claimant's expert indicating that the woman's symptoms and conduct on the day in question should have put the State on notice that she was suicidal.

OPINION

FREDERICK, J.

Claimant filed her second amended complaint sounding in negligence on July 17, 1987. Claimant seeks \$100,000 in damages for the alleged negligence of the Respondent in failing to admit Claimant's decedent to the Illinois State Psychiatric Institute at 1601 W. Taylor Street, Chicago, Illinois.

The Facts

On January 21, 1982, shortly after midnight, the Chicago Police and Fire Departments were called to a fire at 1066 West 14th Street in Chicago, Illinois. Police Officer Marty Gavin, a trained arson investigator, investigated the incident and learned that Claimant's decedent, Joyce Packer, the occupant of apartment 303 at 1066 W. 14th Street, had died in the fire.

Joyce Packer was born on November 27, 1957. She was the stepsister of Johnny Sherrod, Jr., who was born on June 30, 1964; Yvette Sherrod, who was born on September 11, 1961; and Anthony Sherrod, who was born on February 17, 1971. Some years before, Joyce Packer provided care for Johnny B. Sherrod, Jr. while their mother, Claimant Lutee Sherrod, worked. Johnny Sherrod, Jr. and Joyce Packer enjoyed a close relationship. Joyce Packer went to church regularly and was valedictorian of her class at Dunbar High School. Joyce Packer was also the mother of two children, namely Chanelle Joy Packer, born January 15, 1979, and Rochelle Joy Packer, born August 5, 1981.

Joyce Packer had a history of mental problems. She had entered a religious cult after her freshman year in college. She was hospitalized at the Illinois State Psychiatric

Institute (hereafter referred to as "ISPI") a number of times thereafter, including several instances when she neglected to take her medication. In the years between 1979 and 1982, Joyce Packer was hospitalized at ISPI on five occasions. At the time of her death, Joyce Packer was employed by the United States Postal Service earning about \$500 every two weeks.

The medical records indicate that Joyce Packer was initially hospitalized on November 15, 1979, suffering from religious delusions. On that occasion, she was admitted after an acute psychotic episode led her to attack someone at the post office where she worked. The Emergency Services Sheet from that admission indicates that Joyce Packer was suffering from hopelessness and suicidal ideations.

Joyce Packer was again hospitalized from December 10, 1979, through January 7, 1980, after force-feeding her child whom she believed to be possessed by the devil. The records indicate that the precipitating cause of this incident was a problem with a man in her life. The hospital records relate that she attacked her mother, Lutee Sherrod, with a knife on December 10, 1979, because she believed that Mrs. Sherrod was possessed by the devil.

During Joyce Packer's hospitalization of December, 1979, she was placed in full leather restraints on December 10, 11, 12, 14 and 15, 1979, for the protection of herself and others.

The next hospitalization occurred on January 13, 1980. At that time, Joyce Packer had been spitting on strangers. She spit on a stranger in the street who, in turn, struck her in the face. The record shows that this incident occurred after Joyce had failed to take her Lithium. During this hospitalization, Joyce was again placed in full leather restraints on January 14, 15, 16, 17 and 18, 1980. The

records of January 18, 1980, reveal that she was delusional about her medication being poisoned. The record of this hospitalization also shows that she threatened and struck a female staff member in the face. She also refused her medication on January 21, 1980.

The medical records from ISPI indicate that on September 23, 1980, Joyce Packer was brought into ISPI by the police after wandering the streets naked. On that occasion, she was hostile and angry as well as confused upon being brought into ISPI. At the time of her interview with a physician, she had calmed down, was cooperative, and her speech was not pressured. There was no thought disorder revealed and there were no hallucinations, and no suicidal or homicidal ideations noted. The cause for this situation was believed to be the refusal of Joyce Packer to maintain Lithium and, once again, her involvement with a man.

On September 24, 1980, she was placed in full leather restraints for the protection of herself and others.

On August 7, 1981, Joyce Packer was again hospitalized at ISPI. At this hospitalization, she had delusions that she had given birth to two children. Once again, her speech was not pressured, she denied any suicidal ideation, and denied any homicidal ideation. The record showed that she was oriented times three, which means she was oriented as to her identity, the time and the place. Upon admission, she was striking patients and staff members and was again placed in full leather restraints on August 8 and 9, 1981, after attacking a staff member and stabbing a patient with a fork. She had stopped taking her medication two months prior to this hospitalization. In relation to the pending claim, Joyce Packer was brought to ISPI on January 20, 1982, one day before the fire at her home which claimed her life.

On the day before Joyce Packer's death at approximately 10:00 p.m., the Sherrods received a telephone call from the parents of Joyce Packer's boyfriend, Michael Stewart. The Stewarts lived at 116th and Aberdeen, and Mr. Stewart advised Lutee Sherrod that Joyce Packer had walked from the post office to the Stewarts' home.

Johnny Sherrod, Sr. requested that his son, Johnny Sherrod, Jr., go with him to get Joyce at the Stewarts' home. When Johnny and Johnny, Jr. went into the house, Joyce was sitting in the kitchen or dining room wearing a long, thin, linen dress and a light summer jacket. The bottom of her dress was wet and Joyce was saying that she wanted to go home and see her children. At the time, the children were at the Sherrods' house at 1212 W. Washburne. Although it was a cold day and there was snow on the ground, Joyce would not put on dry clothes. Johnny Sr. kept asking her about her medication because Joyce did not have her purse. At that time, Joyce lived at 1066 W. 15th Place, but her children lived with the Sherrods.

Johnny Sr., Johnny Jr. and Joyce Packer then got into Mr. Sherrod's vehicle. Mr. Sherrod took I-57 to the Dan Ryan Expressway and exited at Roosevelt Road, proceeding westbound on Roosevelt. As he got to Throop Street, Joyce Packer grabbed the wheel and tried to make the car turn left towards the house where the children were staying. When Johnny Jr. grabbed her arms, Joyce bit him. In the meantime, Johnny Sr. was able to gain control of the car and pull it over to the side of the road. Mr. Sherrod and his son restrained Joyce Packer and Johnny Jr. moved into the front seat and held her until they got to ISPI. Both men continued to restrain her as they drove to the hospital, and although Joyce continued to struggle for a while, she finally stopped. At the time that Joyce turned the wheel of the car, the Sherrod vehicle went into the

oncoming lanes of traffic. Johnny Sr. and Johnny Jr. continued to hold Joyce's arms at the hospital until the doctor came and talked to Mr. Sherrod.

She was treated by Dr. Leoneen Woodard. Dr. Woodard has no independent recollection of having seen Joyce Packer on this occasion.

Dr. Woodard, a first-year resident, testified that, while she did not recall this patient, Joyce Packer was noted to have been taking Lithium Carbonate four times a day. Dr. Woodard was told that Joyce Packer had walked with light clothes on for four miles and that she did not have her medication with her. In addition, Johnny Sherrod, Jr. testified that Joyce told the doctor that she was not taking her medicine. Joyce Packer was oriented times three at the time of presentation at ISPI. Dr. Woodard acknowledged that Joyce was dressed too lightly for the weather. The doctor also testified she had the authority, pursuant to the existing ISPI procedures, to hospitalize Joyce Packer involuntarily in the event she was determined to be immediately in danger of harming herself or others or was unable to take care of her daily needs.

Dr. Woodard noted in the record that the patient suffered for a manic bipolar disorder consisting of mood swings with high episodes and depressive episodes; however, Dr. Woodard did not know how those mood swings would manifest themselves.

Dr. Woodard had no information about Joyce Packer's prior psychological history nor did she know where she had obtained the information noted in the patient's chart in 1982.

The ISPI admissions procedures provided that to make a history of previous patient contact at ISPI more available to O.D.'s, a supplementary patient contact file

was available in the O.P.D. Records Room 129, with material to be held for two years. The file consisted of admissions notes, telephone intake write-ups, discharge summaries, and similar material filed alphabetically by the patient's last name. No materials were to be retained by the interviewer or sent to a unit. They were to be returned after use to the clinic manager's office for refiling.

Although the records for a period of two years of Joyce Packer's prior hospitalizations were available to Dr. Woodard, Dr. Woodard could not recall ever reviewing any of Joyce Packer's records.

Dr. Woodard testified that if she had been told that the patient walked a long distance in the cold without appropriate dress, she would have tried to gather more information. Johnny Sherrod, Jr., however, testified that his father told the doctor that Joyce had walked a long distance in light clothing and that she did not have her medication with her and that this information was confirmed by Joyce, who said she was not taking her medication. Dr. Woodard found that Joyce appeared to be under control and that the patient was not admitted. Dr. Woodard could not recall whether she had talked to Johnny Sherrod, Sr. regarding Joyce's Lithium intake.

Johnny Sherrod, Jr. testified that although he was not sure if his father told the doctor about the incident in the car, Mr. Sherrod did tell the doctor at ISPI that Joyce had walked a long distance with light clothing on and she didn't have her medication with her. Johnny Sherrod, Jr. also testified that Joyce told the doctor she wasn't taking her medicine. Johnny Sr. was asking that his daughter be admitted to the hospital and asking why they did not admit her. Mr. Sherrod was saying that it wasn't normal to walk 100 blocks in the cold in light clothing. The doctor said that Joyce appeared to be under control and she was not admitted to the hospital.

Dr. Woodard did not note in her intake report the patient's history of refusing to take medication. Although Joyce Packer was under the care of a Dr. Goodnick at the Affective Disorder Clinic, she did not consult with Dr. Goodnick. While the records indicate that a Dr. Powers had talked to the patient on January 20, 1982, Dr. Woodard did not recall if Dr. Powers, her supervisor and a third-year resident, ever saw the patient. It was the procedure at ISPI to consult with one's supervisor in situations such as this. As supervisors did not generally do separate intake evaluations, it is possible that information was relayed to Dr. Powers by members of the patient's family and that such information was not noted in the record.

The records reflect that Joyce Packer indicated to Dr. Woodard that she had had a fight earlier that day with a boyfriend and that she was upset with him and had scratched him. Joyce Packer also told Dr. Woodard that she had called her stepfather after the fight and requested that he bring her to ISPI. Joyce Packer also mentioned an argument that she had with her stepfather on the way to the hospital and her anger at the fact that Johnny Sherrod would not stop at home to let her visit her children.

Dr. Woodard testified that the records did not reflect that a Lithium check was done on the patient on January 20, 1982. It was not the practice at ISPI to do blood work at night as the laboratory facilities were not available and no trained personnel were on hand to do the blood work. If night-time blood work was necessary, the procedure was to transfer the patient to the University of Illinois Hospital where blood work could be done.

On January 21, 1982, Officer Marty Gavin was called to Joyce Packer's apartment at 1066 W. 14th Street, Apt. 303, Chicago, Illinois. His investigation, which occurred

within 24 hours of Joyce Packer's release from ISPI on January 20, 1982, revealed that there were three points of origin of the fatal fire. The fire had been set by hand. A hand-held match and a lit piece of paper had been used to light various pieces of material within the apartment. Officer Gavin excluded any electrical or gas problems having accounted for ignition. He noted the three points of origin of the fire, all of which were located within Joyce Packer's apartment.

One point of origin was on the third floor, at the north wall of the living room. A "V" pattern extended the length of the wall pointing to the source of the fire. A pile of combustibles at that location was the originating source of the fire. He found that a heavy concentration of plastics and clothing at that location had been ignited.

The second point of origin was on the fourth floor at the west wall of the bedroom. He noted that a flaming rag had been stuffed into the cushion of the love seat and that a fire started there went from the sofa cushions to an adjacent bed and started the bed on fire.

The third point of origin of the fire was at the west wall of the hallway outside of the fourth floor bedroom. The wall had been lined and cluttered with clothing and newspapers which had been ignited by a hand-held match or lit piece of paper. The door to Joyce Packer's apartment had been locked from the inside necessitating a forced entry and no one was seen leaving the apartment. Based upon his years of experience as an arson investigator, Officer Gavin opined that Joyce Packer was the only person in the apartment at the time of the fire and it was his belief that Joyce Packer started the fire.

Claimant, individually and as administrator of the estate of Joyce Packer, deceased, argues that the Respondent,

State of Illinois, was negligent for failing to involuntarily admit Joyce Packer on January 20, 1982, to ISPI, and that the failure to admit her constituted negligence and proximately resulted in the death of Joyce Packer.

In support of Claimant's contention, the Claimant introduced the testimony of Dr. Leonard Elkun. Dr. Elkun is a psychiatrist who has been licensed since 1967. He is not board-certified. He did his residency in psychiatry at the University of Chicago Hospitals from 1967 to 1970 and was a graduate of the Chicago Institute of Psychoanalysis, which he attended from 1970 to 1976.

Dr. Elkun reviewed Joyce Packer's medical records from five hospitalizations between 1978 and 1981, the post-mortem, the record of the emergency room visit of January 20, 1982, and the police report. Dr. Elkun testified that the Illinois State Psychiatric Institute had a duty to provide reasonable care in accordance with the standard of care in the community. He further testified that ISPI holds itself out as a facility that provides psychiatric care to patients in the community. Dr. Elkun was familiar with the ISPI in that he worked there for six months and helped to establish a patient program for the treatment of persons suffering from schizophrenia.

Dr. Elkun gave his opinion that ISPI was negligent in its treatment of Joyce Packer. He opined that the doctors at ISPI failed to diagnose an acute psychotic episode. He further opined that the doctors at ISPI failed to take a serum Lithium level at the time of Joyce Packer's presentation at the emergency room to determine if the level of Lithium was within a therapeutic range. If a diminished level of Lithium was found, ISPI could have instituted measures to reverse the process.

Dr. Elkun is of the further opinion that the State of Illinois and ISPI failed to treat Joyce Packer adequately by failing to hospitalize her. The physicians or residents on duty at ISPI failed to consult with other psychiatrists or residents who knew more about the condition of Joyce Packer at the time she was brought to the emergency room on January 20, 1982. He testified that any symptomatology on the part of Joyce Packer could have resulted from a drop of her Lithium level, even within an accepted range, and that drop could be enough to precipitate symptoms of mental illness or disease. Any symptomatology indicates a necessity for some immediate evaluation, particularly where a patient has a history of not taking medication on a regular basis.

Joyce Packer had a history of treatment at ISPI. The history and the records disclosed that she stopped taking Lithium Carbonate just prior to her hospitalization in August, 1981, and that she had suffered an acute psychotic state after failing to take her medication in 1980. Once in a psychotic state, a patient can have hallucinations, delusional thoughts, and an inability to test reality, or know the difference between what is going on inside and outside of one's body.

The police report viewed by Dr. Elkun indicated that just prior to her hospitalization, Joyce Packer was hearing curses from the devil and was in an extremely agitated state. However, Claimant concedes that there is no evidence that the Respondent was made aware of that incident at the time Joyce Packer was brought to the hospital emergency room on January 20, 1982.

Dr. Elkun's opinion was that given her medical history, and the fact that on the same day that Joyce Packer had taken an extremely long walk while inappropriately dressed, physicians at ISPI failed to recognize her disintegrating condition. Joyce Packer was being treated by Dr.

Goodnick at the Affective Disorder Clinic, yet Dr. Goodnick was never consulted. As the treating physician of Joyce Packer, this doctor would have been in a better position than a stranger in the emergency room to evaluate the subtleties, mood or cognitive functioning as they pertained to Joyce Packer. Dr. Elkun testified that a consultation with a patient's psychiatrist is critical and essential in such a situation, especially where the patient's condition has deteriorated to the point where it required hospitalization five times in a three-year period.

Dr. Elkun felt that, although Joyce Packer denied suicidal thoughts at the time of her hospital visit on January 20, 1982, sometimes this status is not well evaluated by simply asking the patient whether he or she is suicidal. The fact that this patient was suffering from an acute psychotic episode was evidenced by her dressing too lightly for the weather and the similarities to the symptomatology exhibited during her prior hospitalizations.

Dr. Elkun believed that even if the physicians at the emergency room were not told of the complete symptomatology engaged in by the decedent within 24 hours of the visit to the emergency room, the emergency room physicians on duty could have asked questions to elicit this information. Dr. Elkun observed that the patient's activities of having walked over 100 blocks on a cold day in summer clothing was indicative of a self-destructive impulse that was out of control. The patient had lost control of these impulses in the car on the way to the hospital. Joyce had had a fight with her boyfriend earlier in the day and an argument with her stepfather on the way to the hospital. The hospital records reflect that on January 20, 1982, Joyce told Dr. Woodard that she had called her stepfather and requested that he bring her directly to the

hospital. She became upset with her stepfather because he would not let her first stop and visit her two children.

Dr. Woodard chose to refer the patient back to the Affective Disorders Clinic instead of involuntarily admitting her or sending her to the University of Illinois Hospital which could have immediately ascertained whether Joyce Packer's Lithium level was at a dangerously low level. Johnny Sherrod, Jr. could not specifically recall whether Joyce Packer's self-destructive behavior of turning the wheel of the car on the way to the hospital was ever conveyed to the doctor at ISPI. He did specifically recall, however, that Johnny Sherrod, Sr. was requesting that his daughter be admitted, that Joyce had walked for 100 blocks in the cold wearing light clothing without her medication, and that Joyce Packer told her doctor that she wasn't taking her medicine.

Finally, Dr. Elkun testified that

"Based upon a reasonable degree of medical and psychiatric certainty and my review of the medical records * * *, it is my opinion that had ISPI and its agents, the physicians that examined the patient on January 20, 1982, made the diagnosis of her disintegrating situation, psychological situation, secondly checked her serum Lithium level and in the event of finding deficiency in her level to have made some adjustment, thirdly to have consulted with a physician close to the patient over a period of time and fourthly, having made the diagnosis, having appreciated the urgency of the situation, and having failed to hospitalize her, those four factors, I believe, strongly and of the opinion contributed to Ms. Packer's death on January 21, 1982."

The Respondent points out that when John Sherrod and John Sherrod, Jr. brought Joyce Packer to ISPI, they were not restraining her and she was acting calm. Numerous notations about the patient's condition at the time of the examination were written on the intake evaluation form which was prepared at about 2:00 a.m. The intake evaluation form notes that Joyce Packer was "oriented times three," which indicates she knew who she was, where she was, and what time it was. Her speech was coherent and not pressured. There was also a notation made

that she did not appear suicidal and denied suicidal or homicidal ideation. She did not show any symptoms of a manic episode. Dr. Woodard also noted that Joyce Packer's eating and sleeping habits were normal. Joyce Packer told Dr. Woodard that she could work things out with her boyfriend and she felt comfortable returning home.

Dr. Woodard spoke with Johnny Sherrod at ISPI. Johnny Sherrod, Jr. did not speak with Dr. Woodard. Johnny Sherrod, Jr. claims that he could not hear the entire conversation. Joyce Packer was not admitted to ISPI that night but a deflection (referral to out-patient clinic) was made. Johnny Sherrod and Johnny Sherrod, Jr. then took Joyce Packer back to the Sherrod house. Once back at the house, no one stayed up to watch and take care of her that night. They did not know Joyce Packer left until the next morning. When Lutee Sherrod, Ms. Packer's mother, noticed Joyce had left, no one went to check on her at her apartment. Mrs. Lutee Sherrod did call Joyce Packer's apartment, but no one answered. Even then, none of the Sherrods went to check on Ms. Packer at her apartment.

Dr. Woodard testified that the most important information a doctor uses in making an assessment of the patient for commitment is the appearance and condition of the patient at the time of examination. It was noted in the intake evaluation that Joyce Packer was taking her medication. Dr. Woodard was told that Joyce Packer's eating and sleeping habits were normal. These signs are key indicators used to diagnose a manic episode. When being interviewed, Joyce Packer was speaking calmly and coherently and her speech was not pressured. Dr. Woodard asked Joyce Packer if she had any suicidal or homicidal ideation. Dr. Woodard noted that Joyce Packer was dressed neatly. The doctor did make a provisional diagnosis of a bipolar

disorder-mania. However, at the time of the examination, there was no evidence of thought disorder, nor of manic episode. Additionally, Joyce Packer was examined by Dr. Woodard's supervisor, Dr. Power, according to hospital procedure.

According to Dr. Woodard, in order to involuntarily commit someone to an institution, it must be found that the individual is an immediate threat to herself or another or unable to take care of her daily needs. Dr. Woodard did not believe that Joyce was an immediate threat in her clinical judgment. Joyce Packer did not exhibit the symptoms required to be committed. The only way she could be committed was if she were assessed as being an immediate threat to herself or to others, or if she was unable to care for her daily needs. Dr. Woodard felt that she was able to care for herself, as her eating and sleeping patterns were normal. She denied suicidal or homicidal ideation, and she was dressed neatly. It was noted that she was taking her medication. Dr. Woodard stated that one of the most important factors in deciding whether to involuntarily commit an individual is their presentation at the time of the treatment and the examination revealed that Joyce Packer did not need to be hospitalized.

Dr. Woodard determined that in her professional judgment there was no evidence of manic episode. Dr. Woodard followed established procedure and applied the proper level of professional skill and care and thus did not breach any duty of care to Ms. Packer.

Dr. Woodard determined that Joyce Packer did not require a blood test for Lithium levels. Dr. Elkun stated that when the Lithium level is acceptable in a patient, that individual will be able to function, act normally, and be coherent and cogent in a conversation. At the time of the evaluation by Dr. Woodard, Joyce Packer exhibited all

of these characteristics. The intake evaluation states that Joyce Packer was cooperative. Her speech was coherent and understandable. Her speech was not pressured and she was calm. In Dr. Woodard's opinion, as the treating physician at the time of the evaluation, there was no reason to do a serum Lithium check. There was no sign of pressured speech, thought disorder, mania, sleep deprivation, or loss of appetite. As a result of these factors, established at the time of the evaluation, Dr. Woodard indicated that the Lithium level test was not warranted.

The Claimant's expert witness, Dr. Elkun, testified that Joyce Packer should have been involuntarily committed. The facts show that Joyce Packer did not exhibit the characteristics necessary to be involuntarily committed. Those characteristics are: the patient must be assessed as an immediate and imminent threat to herself or to others; or she must be unable to care for her daily needs. A subjective evaluation of the patient, done by Dr. Woodard, revealed that her condition was not "disintegrating" or "suicidal." It shows to the contrary that she was calm, coherent and comfortable with going home. She showed no evidence of thought disorder. In Dr. Woodard's opinion, the scope and depth of the conditions present at the time did not require hospitalization.

The Law

The burden of proof in a negligence case is on the Claimant and the Claimant must prove by a preponderance of the evidence that the State was negligent and that such negligence was the proximate cause of Claimant's damage. *Hoekstra v. State* (1985), 38 Ill. Ct. Cl. 156.

Claimant's claim in this cause is a claim of inadequate and improper psychiatric treatment and care for the failure of the State to admit Claimant's decedent to ISPI.

These are allegations of medical malpractice and must be proven by expert testimony. (*Woods v. State* (1985), 38 Ill. Ct. Cl. 9.) In *Woods, supra*, the Court found that the State was not liable because there was nothing in the record to show the Respondent knew or should have known that the patient was suicidal. There was no expert testimony elicited to show that the symptoms exhibited by the patient should have indicated to the Respondent that the patient was suicidal. Because of this lack of proof, the Court found that the decedent's committing suicide was not foreseeable and denied the claim.

In this case, there is no proof before the Court that the State knew or should have known that Joyce Packer was suicidal. There is nothing in the testimony of Claimant's expert which indicates the symptoms displayed by Joyce Packer should have put the State on notice that she was suicidal and would commit suicide within 24 hours.

This Court also denied liability in a mental patient suicide case where the claim was based on the death of a mental patient by suicide subsequent to his escape from a mental health center. The Court held that to prevail, the Claimant must prove there was a lack of proper and reasonable care and that the State knew or should have reasonably been expected to know of or predict the escape. Because there was no proof that the Respondent knew or should have known the individual was contemplating escape or a suicide attempt, the claim was denied. *Calvin v. State* (1982), 35 Ill. Ct. Cl. 611; *Gaiser v. State* (1993), 45 Ill. Ct. Cl. 10.

The State is not an insurer of the safety of patients under the care of the Department of Mental Health but it owes patients a duty of protection and must exercise reasonable care towards such patients according to their

known condition or the condition, which through reasonable care, ought to be known. In *Reynolds v. State* (1983), 35 Ill. Ct. Cl. 647, the Court denied liability in a mental patient suicide case where Claimant failed to prove a negligent act committed by the State and where Claimant failed to prove a causative factor between any alleged negligence and the subsequent death by suicide of Ms. Reynolds. See also *Stevens v. State* (1976), 31 Ill. Ct. Cl. 458.

In a medical malpractice claim, the Claimant must prove by a preponderance of the evidence that there was a breach of a duty, the Respondent's deviation from the standard of care, and that the deviation was a proximate cause of the Claimant's injury. The standard of care is that care which is provided by reasonably well-trained medical providers in the same circumstances in a similar locality. *Williams v. State* (1994), 46 Ill. Ct. Cl. 221.

In this case, the evidence shows conclusively that the Respondent had no reason to believe that the decedent had self-destructive thoughts. The State is not the insurer of mental health patients. In *Ingram v. State* (1979), 33 Ill. Ct. Cl. 134, the Court denied liability where a patient admitted to ISPI committed suicide. The decedent was admitted and later hung himself in the facility. The Court found, based on the evidence and medical records, that there was not sufficient evidence offered to show that the State should have known that the decedent had self-destructive thoughts.

The Claimant has the burden of showing that the Respondent failed to exercise reasonable care for the patient given her known condition. The Claimant has failed to meet that burden. (*Gaiser v. State* (1993), 45 Ill. Ct. Cl. 10.) While the death of Joyce Packer was a tragedy, we are constrained by the law and the facts of the case to deny this claim.

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

ORDER

FREDERICK, J.

This cause has come before the Court on Claimant's motion for rehearing, and the Court having reviewed the testimony, pleadings, the entire court file, and the argument of counsel, and the Court being fully advised in the premises,

Wherefore, the Court finds:

1. That Claimant's counsel has done an admirable job of advocating Claimant's position.
2. That the Court believes its opinion is based on the law and the evidence.
3. That Dr. Elkun's opinions are not as clear as argued by Claimant and are cited in the Court's opinion.
4. That Claimant has failed to meet Claimant's burden of proof.

Therefore, it is ordered that Claimant's motion for rehearing is denied.

(No. 86-CC-0515—Claim denied.)

GORDON MILEY, Claimant, v. THE STATE OF ILLINOIS,
Respondent.

Opinion filed October 2, 1997.

BILL T. WALKER, Granite City, for Claimant.

JAMES E. RYAN, Attorney General (AMY RATTERREE,
Assistant Attorney General), for Respondent.

HIGHWAYS—*State owes duty of reasonable care in maintaining roads—notice.* The State of Illinois is not an insurer of the condition of the highways under its maintenance and control, but it does have a duty to use reasonable care in maintaining them so that defective and dangerous conditions likely to injure persons lawfully on the highways shall not exist, and to be held liable for negligence, the State must have actual or constructive notice of a dangerous condition and permit the condition to exist without warning to the motoring public.

SAME—*negligence—when State has constructive notice of dangerous condition.* To find that the Respondent had constructive notice of a dangerous condition, 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 that warning signs should be posted.

SAME—*downed barricade struck by Claimant's vehicle—no proof that State had notice—claim denied.* Notwithstanding the existence of a dangerous condition created by a downed barricade on a State highway, the Claimant was denied recovery in his negligence claim for injuries sustained when his vehicle struck the object at night, since there was no proof as to how long the barricade had been down, and therefore the State could not be charged with constructive notice of the dangerous condition.

OPINION

RAUCCI, J.

The Claimant, Gordon Miley, brings this action for compensatory damages pursuant to the Illinois Court of Claims Act, 705 ILCS 505/8. The Claimant asserts that he was injured as a direct and proximate result of negligence committed by the State of Illinois in the maintenance of a traffic control barricade at a construction site on Interstate 74 approximately one mile west of Farmer City, in DeWitt County, Illinois.

At approximately 9:05 p.m. on October 17, 1983, the Claimant was driving a 1981 Chevrolet Chevette east on Interstate 74 when he struck a barricade that was lying on its side in the right lane of eastbound Interstate 74. The leg of the barricade punctured the floorboard of the Claimant's car, striking him in the left foot and ankle.

The Claimant was taken to Burnham Hospital in Champaign, Illinois. He later sought treatment from

other doctors, clinics and from St. Elizabeth Hospital in Danville, Illinois. The Claimant suffered a broken left ankle and lacerations to his left foot and leg. The Claimant is seeking \$800.98 for damage to his automobile, \$2,150.27 for medical bills, \$40,000 for lost income, \$200,000 for disability and future lost income, and \$100,000 for pain and suffering. The Claimant contends the Respondent was negligent by failing to use barricades which, after once being struck, would pose no danger to motorists; failing to adequately monitor placement and location of its barricades; failing to remove the barricade before it was struck by the Claimant; and using a steel-legged barricade that had legs that did not collapse flat against the pavement when laid on its side. The Claimant also filed a count under the doctrine of *res ipsa loquitur*.

A hearing was held before Commissioner Stephen R. Clark on February 7, 1996, at which there was testimony from the Claimant and from Douglas White, utility coordinator for the Illinois Department of Transportation (hereinafter "IDOT") and former traffic control supervisor for IDOT. The Commissioner admitted into evidence the depositions of Dr. Mehta and of Nyle Dyer, a patching crew supervisor with IDOT. The Commissioner also admitted into evidence the Claimant's notice of injury; the barricade struck by the Claimant; photographs of the Claimant's automobile following the accident; a request for admissions in which the Respondent admitted that it owned the barricade and placed it at the location on Interstate 74; photographs of the barricade after it was removed from the Claimant's car; traffic control inspection reports from IDOT; an IDOT report stating that the only barricade that was down was the one the Claimant struck; the ledger diary of Nyle Dyer for October 17 and 18, 1983; an IDOT memorandum stating that barricades are

inspected daily; the Respondent's answers to Claimant's request for admissions of fact and documents, which included portions of an IDOT manual entitled Traffic Controls for Streets and Highway Construction and Maintenance Operations; IDOT's Standard 2316-7, which depicts the placement of traffic control devices for highway construction sites in general; and IDOT's original and supplemental IDOT reports. The Commissioner took judicial notice of the fact that October 17, 1983, was a Monday. Only the Respondent submitted a brief.

The Claimant testified that at 9:05 p.m. on October 17, 1983, he was driving from his father's house in Sterling, Illinois, to his home in West Lebanon, Indiana. He saw a warning of road work ahead and a flashing arrow telling motorists to move to the left lane. The Claimant stated that he moved to the left lane and drove past the barricaded area on the right at a speed of 45 miles per hour. He testified that there was traffic behind him, and after it appeared that he had passed the barricaded area, he moved back to the right lane and accelerated to a speed of between 45 and 50 miles per hour. The Claimant stated that about 20 feet ahead of him he saw something in the highway, which turned out to be a barricade lying on its side. He said the legs of the barricade were standing up. The Claimant stated that the light on the barricade was not operating. The Claimant testified that there was a truck passing him on his left and a ditch or incline to his right. He stated that he braked, downshifted and steered to the right to avoid the barricade, but struck it. The barricade penetrated the floorboard of the car under the clutch and struck the Claimant in the left foot. The Claimant stated that he did not see any "end construction" signs, nor did he see any other barricades after the one he struck. The Claimant testified that he still suffers from swelling and stiffness in his left ankle and takes

aspirin once or twice a week for pain. The Claimant, who operates a hair salon, stated that he is unable to service as many customers as he did before the accident. He said a full day normally would consist of cutting 20 heads of hair, but now he can only cut up to 15 heads of hair.

Douglas White, who was a traffic control supervisor at the time of the accident, testified that it was his job to inspect sites to ensure that traffic control measures were properly in place, including checking the condition of the barricades, seeing where they were placed and whether they were upright. He stated that the construction site on Interstate 74 was in place starting October 12, 1983, but he did no inspections until October 26, 1983—nine days after the accident occurred. He testified that the usual procedure for correcting problems with traffic control at a construction site was to write a report and mail it to the engineer in charge of the site. Sometimes he would talk to the engineer on site. White testified that he normally inspected construction sites once a week. He stated that if he saw a barricade lying on the ground, he would not set it back up or put it to the side, but would make a report. White testified that IDOT standards call for barricades to be spaced 50 feet apart in a taper at the beginning of a highway construction site, then 100 feet apart along the work area for the first 500 feet and 200 feet apart for the remainder of the work area. The IDOT report also included a hand-drawn diagram showing that the downed barricade was the third to the last barricade placed before the construction site ended. However, White testified that he could not say that the diagram depicted the site on the day of the accident.

In his deposition, Nyle Dyer testified that he was the supervisor of the road crew performing the patching work at the accident site. He stated that it was IDOT's policy for

road crews to monitor the steel-legged barricades at the construction sites during the night. Dyer testified that a crew member would visit the site every hour or hour and a half to check the lights on the barricades, to make sure the barricades were upright and in their proper positions, and to make sure all warnings signs were in place. He said the crew would stop checking about midnight because there was little traffic in the early morning hours. Dyer stated that on this job, the crew stayed at a nearby motel in Farmer City. When the crew went home on weekends, they would take the barricades down. Dyer said that although he did not recall whether anyone checked the site on the night of the accident, he said the time sheets for the project might reflect if a crew member went to the site at night because overtime would be reported on the time sheets.

A review of the time sheets for October 17 and 18 showed that Dyer's crew did work on those days, but no overtime was recorded that might indicate that crew members checked the barricades at night.

The following portions of IDOT's standards entitled *Traffic Controls for Streets and Highway Construction and Maintenance Operations* were admitted into evidence:

"Channeling devices should be constructed so as not to inflict any undue damage to a vehicle that inadvertently strikes them."

"Barricade rails should be supported in a manner that will allow them to be seen by the motorist, to provide a stable support, not easily blown over by the wind or traffic."

"Barricades are located adjacent to traffic and therefore subject to impact by errant vehicles. Because of the vulnerable position and possible hazard they could create, they should be constructed of lightweight materials and have no rigid stay bracing of A-frame designs."

"As type two barricades have more reflective area, they are intended for use on expressways and freeways or other high speed roadways."

"Special consideration must be given to the modern high speed and usually limited access type of highway to accommodate traffic in a safe and efficient manner and for adequate protection of work forces."

We first consider the Claimant's assertion of the doctrine of *res ipsa loquitur*. We have recognized the doctrine as follows:

"When an injury is caused by an instrumentality under the exclusive control of the party charged with negligence, and is such as would not ordinarily happen if the party having control of the instrumentality had used proper care, an inference or presumption of negligence arises. The burden then rests upon Respondent to rebut the presumption of negligence arising from the facts of the case." *Weigers v. State* (1988), 40 Ill. Ct. Cl. 88, 91.

The first requirement for application of the doctrine of *res ipsa loquitur*—that the instrumentality causing the injury was under the exclusive control of the Respondent—is not present here. Because the barricade was sitting on a public highway, where it is subject to acts of people or acts of God without the knowledge of the Respondent, it could not have been within the exclusive control of the Respondent. This Court has applied the doctrine in such cases as brake failure on a State vehicle, as in the *Weigers* case, and the collapse of a rotten tree, as in *Metzler v. State* (1971), 27 Ill. Ct. Cl. 207, where there was no proof that outside instrumentalities caused the tree to collapse. Therefore, we decline to apply the doctrine of *res ipsa loquitur* in this case.

The State of Illinois is not an insurer of the condition of the highways under its maintenance and control, but it does have a duty to use reasonable care in maintaining roads under its control. (*Baker v. State* (1989), 42 Ill. Ct. Cl. 110, 114-115.) The exercise of reasonable care requires the State to keep its highways reasonably safe. It is the duty of the State to maintain its highways so that defective and dangerous conditions likely to injure persons lawfully on the highway shall not exist. To be in a dangerously defective condition, the highway must be in a condition unfit for the purpose it was intended. To be held liable for negligence, the State must have actual or constructive notice

of a dangerous condition and permit the dangerous condition to exist without warning to the motoring public. *Baker*, 42 Ill. Ct. Cl. at 115.

In the case at bar, it is obvious that a dangerous condition existed that caused the highway to be unfit for the purpose for which it was intended. A fallen barricade with its steel legs sticking upwards is dangerous. The Claimant testified that it appeared that the construction zone had ended and he was free to return to the right lane and resume his normal speed. He saw no barricades after the one he struck. The only evidence to the contrary was a hand-drawn diagram showing that there were more barricades after the one the Claimant struck. However, witnesses admitted that they could not say that this diagram accurately reflected the accident scene at the time. There is no direct evidence to rebut the Claimant's testimony.

It appears that the Claimant exercised reasonable care upon seeing the downed barricade. He attempted to slow down and steered to the right, but the position of the barricade, a truck to his left, and a ditch to his right prevented him from avoiding striking the barricade. Therefore, it is the finding of this Court that a dangerous condition existed that the Claimant could not avoid.

However, we find that the Claimant's claim must fail for lack of proof of actual or constructive notice to the Respondent of this condition. To find that the Respondent had constructive notice of a dangerous condition, 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 be posted. (*Aetna Casualty & Surety Co. v. State* (1984), 37 Ill. Ct. Cl. 179, 181.) The dangerous condition must have existed for such an appreciable length of time that the Respondent

can be charged with negligence in not ascertaining and correcting the condition. *Skinner v. State* (1975), 31 Ill. Ct. Cl. 45, 49-50.

Where there is an absence of proof as to how long a dangerous condition existed, there is no evidence upon which to charge the State with notice of its existence, and, therefore the requirement of notice is not met. (*Baker*, 42 Ill. Ct. Cl. at 115; *Cataldo v. State* (1983), 36 Ill. Ct. Cl. 23, 25.) In cases where this Court has found constructive notice of a dangerous condition, there has been affirmative evidence of the length of time that the condition existed. See *Miholic v. State* (1979), 33 Ill. Ct. Cl. 23; *Palecki v. State* (1971), 27 Ill. Ct. Cl. 108.

In the case at bar, if the Claimant had shown that the barricade had been down for a substantial period there would be no doubt that the Respondent had constructive knowledge of the dangerous condition. According to Mr. Dyer's testimony, it was IDOT's policy to check the barricades routinely before midnight. There is no evidence whether or not these checks were actually made. The burden of proof is the Claimant's, and he has not met his burden.

The Claimant was unable to show whether the barricade had been down for five minutes or five hours.

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

(No. 86-CC-0870—Claimant awarded \$681,819.86.)

FRU-CON CORPORATION and GRANITE CONSTRUCTION, known as the JOINT VENTURE, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 17, 1996.

JENNER & BLOCK (JOHN SIMON), Counsel for Claimant. GREENSFELDER, HEMKER & GALE (LARRY B. LUBER, Add'l of counsel), for Claimant.

JAMES E. RYAN, Attorney General (RONALD A. ECKERT, Special Assistant Attorney General, of counsel), for Respondent.

CONTRACTS—*ambiguity in contract construed against drafter.* Where a contract is clear and unambiguous, the parties' intent is to be drawn only from the words used, but where there is any ambiguity in a contract, it should be construed most strongly against the party who drafted the language.

SAME—*establishing unreasonable delay.* In order to prevail in a breach of contract claim stemming from an unreasonable delay, the Claimant must show a delay of an unreasonable length of time, that the delay was proximately caused by the Respondent's actions, that the delay resulted in some injury to the Claimant, and that the Respondent was the sole proximate cause of the delay.

SAME—*acceleration of contract.* Acceleration occurs when a contractor is forced to perform work in a shorter period of time than is called for in the contract, and a constructive acceleration occurs when the government denies or unreasonably delays in granting the contractor a time extension which is justified, and at the same time holds the contractor to the original completion date.

LAPSED APPROPRIATIONS—*award cannot be entered unless sufficient unexpended funds remain in relevant appropriation.* The Court of Claims cannot enter an award unless sufficient funds remain unexpended in the appropriation made to fund the project, and the appropriation of State funds is the constitutional prerogative of the General Assembly.

SAME—*bridge construction contract—award granted—insufficient funds lapsed to cover all damages.* In a breach of contract claim by two contractors who jointly entered into an agreement with the State for the construction of a bridge substructure, the Court of Claims disallowed a portion of the claim, but found the State liable for damages for extra grinding work required or pier caps that exceeded the scope of the contract, for pier scour losses which constituted a changed condition under the contract, and for combined delay, acceleration and unpaid contract balance damages, but since an insufficient amount of funds lapsed to cover the damages, the contractors' award was limited to the amount of lapsed funds.

OPINION

FREDERICK, J.

In 1965 the Illinois Department of Transportation hired the engineering company of Alfred Benesch & Company of Chicago to perform design and engineer work for a new interstate bridge over the Mississippi River at Jefferson Barracks, Missouri, south of St. Louis. The bridge would connect Interstate 270 between Illinois and Missouri. The planning phase for this bridge had originally begun in 1963 when Missouri and Illinois agreed to the construction of the bridge. Prior to 1963, there existed a bridge at that location which had been constructed in 1941, consisting of two lanes and which was becoming obsolete. In 1968, the Benesch Company prepared engineering drawings which were based on the concept of constructing a new two-lane substructure and bridge for westbound traffic, and utilizing the existing bridge for eastbound traffic. The work on this plan ceased in 1972 when a decision was made to build a completely new six-lane two-span bridge. This decision caused the Benesch Company to change direction and design a completely new bridge structure, the construction of which ultimately forms the basis of this claim. The new bridge was to be a cooperative effort between the Illinois Department of Transportation and the Missouri State Highway Commission. Illinois was to take the lead for the design and construction of the new bridge. On April 26, 1977, the Illinois Department of Transportation (“IDOT”) issued a bulletin notifying potential contractors that IDOT would take bids in June of 1977 for the construction of the substructure for the Jefferson Barracks Bridge. This bulletin indicated that plans and proposal forms were available to contractors upon request.

The Fru-Con Corporation is a St. Louis-based national construction company. It was involved in the construction

of Busch Stadium in St. Louis, the Equitable Building in St. Louis, Interstate 70 in St. Louis, and the I-70 bridge substructure over the Missouri River in St. Charles, to name but a few of the projects on which this company has worked. The Granite Construction Company was a California-based company which has been in existence since 1922. While it does do business across the country, its primary work area is the western region of the United States. On June 13, 1977, Fru-Con contacted Granite to ask for its participation in the bidding process. These two companies constitute what is hereafter referred to as the "Joint Venture" in this litigation. The representatives of these companies entered into an agreement before the bid process for the purpose of jointly bidding and then constructing the Jefferson Barracks Bridge substructure. Fru-Con was to be the sponsoring partner of this venture. Traditionally, the sponsoring partner is primarily responsible for the performance of the work.

Fru-Con's financial portion of this Joint Venture was to be sixty percent and Granite's the remaining forty percent.

In May of 1977, Fru-Con received a set of bid documents for review.¹ The contract documents given to the bidders included the proposed plans and drawings for the bridge itself, the *1976 Standard Specifications for Road and Bridge Construction*, and a document entitled *Notice to Bidders, Specifications, Proposal, Contract and Contract Bond*.² These documents, as one would expect, contain very specific information regarding the location of the

¹ This claim concerns one of seventeen competitively bid public construction contracts required for the complete construction of the Jefferson Barracks Bridge. The work done by the Joint Venture only deals with the substructure of the bridge. The substructure consists of piers upon which the superstructure will eventually rest.

² Within this document were the "Special Provisions" unique to the construction of this bridge. The Special Provisions supplement the standard specifications and if in conflict, take precedence over them.

structure, the soil involved, and the tendencies of the river, including river velocity and various river heights. According to those documents, the bids to be submitted by contractors were to be received by the Illinois Department of Transportation in Springfield by June 28, 1977. The work to be performed under this contract consisted of furnishing all materials, and the complete construction of the substructure for a three-lane bridge carrying the westbound traffic of Interstate 270 over the Mississippi River, and the full construction of piers 4 through 13 and a partial construction of piers 5 and 6 for the three-lane eastbound bridge. The contractor, in its bid, was allowed to set aside monies for the construction of a means-of-access to the sites in the river where their work was to be performed. During the estimating period, Fru-Con considered several different options for such access, including a trestle, a dirt and bay causeway, and construction barges. The Joint Venture selected a temporary trestle as its means of access to the work in the river. The Joint Venture was responsible for the design of the trestle. It did not have to submit any design drawings or specifications relative to the trestle to the Illinois Department of Transportation for review or approval. The trestle was to be removed after the completion of the substructure.

In order to complete the task of constructing piers, the contractors awarded the job would have to install and then remove temporary structures in which the piers could be constructed. These temporary structures are called cofferdams. A cofferdam is a watertight enclosure from which water is pumped out to expose the bottom of the river and permit construction. With contract documents in hand, both Fru-Con and Granite independently prepared a bid estimate of the work, using the same format and costs for both labor and materials. Representatives of both companies visited the site during the preparation

process. However, no one from the Joint Venture viewed the site from the water. Before submitting the bid, the contractors were required to inspect the site and become familiar with the local conditions affecting the work. Also, since the Mississippi is a navigable river, the contractors were informed of the need to be familiar with the regulations and requirements of the U.S. Army Corps of Engineers and the U.S. Coast Guard. Shortly before the bid was due, representatives from both companies met in St. Louis and reviewed the work to be done and their respective estimates. These estimates were prepared independent of each other and then each company reviewed the other's estimate. The conflicts between the estimates were then ironed out by the members of the Joint Venture during meetings in St. Louis and it reached its proposed bid amount. Contractors who sought to bid the job had to first establish their experience and financial ability to perform the immense task of completing a structure of this nature. Both Fru-Con and Granite established that they were experienced in marine construction.

On June 28, 1977, the Joint Venture, along with two other bidders, submitted its bid to IDOT for the construction of the substructure. Their bid amount was Eighteen Million One Hundred Sixty Thousand (\$18,160,000) Dollars. The Joint Venture was the successful low bidder over the other two contractors who bid \$19,724,351 and \$23,460,050 respectively. In July of 1977, IDOT awarded the contract to the Joint Venture. In August of 1977, the Joint Venture and IDOT signed a contract for the construction of the substructure at the bid price. The original contract completion date was to be October 1, 1979. The construction of this substructure began in the summer of 1977 and was eventually completed in December of 1981.

The piers to be constructed by the Joint Venture are numbered 1 through 14, pier number 14 being the westernmost pier located on the Missouri bank. Both the eastbound lanes and the westbound lanes had their own piers. The piers were each designated by number and the lower the number, the closer the pier was located to the Illinois side of the river. Piers 4 through 11 were commonly referred to as the approach piers. Piers 12 and 13 were the main span piers and, as such, were the largest. The bluffs on the Missouri side of the river are limestone and required a different type of construction for those piers than did the piers on the Illinois side of the river.

The design documents provided to the contractors made certain requirements upon the design of the cofferdams. Sheet pilings and bracing and accompanying struts were required to be made of steel. In addition, the drawing specified the width and thickness of the seal coats for the cofferdams and also the depth. The bottom of the seal coat was inferred by the contractor from the drawings which indicated the top elevation and also the thickness of that concrete block. Finally, the depth to which the sheet pilings could safely be driven could be calculated simply from the drawings because of the battering of some of the H-piles.³ Battering is the placement of a pile at an angle to the river bed to widen the area of support and to increase its resistance to the horizontal forces directed against the pile from the direction the top end of the pile is pointing.

The contract which was signed by the Joint Venture required Claimant to begin work by August 21, 1977. At a meeting held on August 3, 1977, the Joint Venture indicated that it would be able to complete the project working a schedule of five days per week, eight hours per day.

³ The term "H-pile" is synonymous with the term pile or piling; it is a long thin structural steel member which is driven on end into the ground or riverbed for the purpose of supporting the loads of the structure.

In addition, the Joint Venture was required to submit a construction schedule to the Department of Transportation. It did so on August 18, 1977.

After construction began, the Joint Venture encountered many difficulties, both anticipated and unanticipated. There are, however, two occurrences which form the basis of the substantial portion of the Joint Venture's claim. Sometime between 4:30 p.m. on Friday, March 24, 1978, and Monday, April 3, 1978, the partially constructed falsework at pier 12 was lost. It disappeared into the river. During that period, there were no employees on the job site to observe what exactly happened to the falsework. Falsework is a temporary structure erected to support permanent work in the process of construction.

Secondly, in the spring of 1979, the cofferdams for piers 9 and 10 and a trestle section connecting those piers collapsed during a high water period. This loss was actually observed by the personnel on the scene as it occurred, fortunately with no loss of life. These losses caused the Joint Venture to incur substantial sums to salvage and reconstruct the piers 9 and 10 westbound cofferdams and to recover the damaged work trestle section. The Joint Venture was forced to dredge the river for the trestle sections and cofferdams, to employ temporary measures allowing it to salvage on a more expeditious basis, to hire a diving firm which had not been anticipated, and to utilize equipment for which monies had not been budgeted. The Joint Venture had to literally begin again with regards to these cofferdams and the labor equipment and services necessary to do so caused the Joint Venture considerable increase in expense.

These losses were separate and independent of each other, but their combination effectively destroyed the timetable and budget of the Joint Venture.

Categories of Claims

The Joint Venture makes claims in this cause for the following items:

- A. The Joint Venture's pier 12 falsework loss, its salvage and the construction of a nose cell which was subsequently constructed to protect the new falsework;
- B. The spring 1979 loss of piers 9 and 10 and the trestle sections between those piers allegedly due to scour;
- C. Financial damages due to delay attributable to causes other than contract error. These include delay damages, which were directly connected to the pier 12 falsework loss, and the loss of the work trestle and piers 9 and 10;
- D. An award for costs incurred as a result of the acceleration of work for IDOT's actions in denying or failing to grant in a timely fashion the Joint Venture's legitimate time extension requests;
- E. Damages for the additional costs of performing extra grinding of the pier caps;
- F. An award for the result of the stop work order on the pier 11 westbound foundation;
- G. An amount of money for IDOT's refusal to pay for seal coat concrete which the contract required to be poured;
- H. The unpaid contract balance of \$681,819.86.

In the presentation of its claim, the Joint Venture has broken its losses down into two general areas: time related costs and non-time related costs. Non-time related costs are the direct costs of the items on which the work is done. An example would be the pier 12 nose cell which was a protective device installed after the loss of pier 12 falsework to protect the working structure from boats on the river. The second category of damages sought is the time related costs. When a construction contract is extended, the cost of that contract necessarily increases according to the length of the extension. Different kinds of time related costs presented in this claim include general administrative costs, labor escalation costs, and extended equipment costs, among others.

The total damages sought by the Joint Venture in this case are Sixteen Million One Hundred Seventy-Two

Thousand Sixty-Nine and 86/100 Dollars (\$16,172,069.86) plus the costs of the money since the date of the completion of the contract.

Cofferdams

In order to decide most of Claimant's claims, it is necessary to have an understanding of the process by which cofferdams are constructed and their purpose in the construction process.

Reduced to its simplest form, a cofferdam is a hole which is built into a body of water in order to create a dry and safe work environment. The service life of a cofferdam is much shorter than the service life of a bridge pier. Additionally, while it is in the river, the cofferdam provides a wider obstruction to the flow of water than do the finished piers. In this hole, work is carried out to construct a pier which forms the foundation for the bridge itself. Piers come in various sizes and shapes depending upon the width and depth of the river, the location of the pier itself, and whether or not it is a primary weight bearing pier in the bridge. The size of the pier affects the size of the cofferdam. Initially, with the aid of the drawings provided by the State, the contractors must determine the location of the pier and therefore the cofferdam in the river. When the location is determined, bearing piles are driven in a rectangular pattern and constitute the four corners of the cofferdam. Next a frame of structural steel, also known as a bracing frame, is constructed at a location near the river and floated out to the location of the pier. The bracing frame is slid down horizontally over the bearing piles so that it occupies a correct elevation in the river. Then individual sheet pilings are placed into the bracing frame and driven into the river bottom. These sheet piles are fitted together as closely as possible to simulate a watertight environment. When sheet piles are

completely fitted around the bracing frame, the contractor has now created what, from the air, looks like an open-ended box which has been thrust into the river. At this point, excavation within the four walls of the cofferdam is completed. This process involves removing mud from the riverbed through the water. Soundings are required to determine the depth of the river bottom as the mud is removed. Additional permanent piles are driven at the locations which are depicted on the plans through the riverbed down to the rock. These piles are driven from a large crane which contains a hammer and a "lead." The pile driving starts above the water, but once the pile is driven below the water, the driving must continue until the pile reaches the final condition in the rock beneath the riverbed. Some piles are driven straight up and down and others are driven at an angle. That angle provides additional stability for both the cofferdam and eventually the pier. The angle at which piles are driven controls the depth to which the original sheet pilings can be driven. All during this process, the water from the river is still in the cofferdam itself and surrounding the cofferdam. It is at this juncture that the construction process involves the placement of a "seal coat" or "tremie seal" at the bottom of the cofferdam. This concrete is poured to various depths depending on the river conditions and the size of the river involved.

A pipe capable of carrying concrete is placed in the water and pushed to the bottom of the cofferdam. Concrete is poured down the pipe until the entire bottom of the cofferdam has been filled. This concrete is called the tremie seal. During this phase, the pipe is moved around so that the concrete flows into all the areas of the riverbed within the confines of the cofferdam. The primary purpose of the tremie seal or seal coat is to form support for the cofferdam and to prevent the water forces of the river

from destroying the bottom of the excavation below the tips of the sheet pilings. The seal coat should counterbalance the upward forces created by the hydrostatic pressure preventing the cofferdam from floating. Additionally, any soil around the outside wall of the cofferdam helps to anchor it, but that soil cannot be relied upon to completely handle the pressure. After the tremie seal concrete has hardened, pumps are placed on top of the seal coat and the water is pumped out of the cofferdam to create the hole in the river. When the water is pumped out there is exposed the concrete surface of the tremie seal through which pilings are exposed. Steel reinforcement is then placed on the pilings to act as an anchor for the concrete which will be poured later. At this stage, only the tremie seal has been poured into the cofferdam and the majority of the concrete still remains to be placed above this level to form the pier. It should be noted that not all cofferdams require the placement of a tremie seal and the decision to eliminate that level of concrete is based on the depth of the water at that location and whether water is always at that location in the river. There are riverbeds, including this location on the Mississippi River, where the river sometimes dries up and the stability which is added by the tremie seal is not always required. There are additional levels of the concrete pier which must be poured on top of the tremie seal. They include the pedestal, the column, the web wall, and the pier cap.

The Court will first consider individually the claims for damages for the additional costs of performing extra grinding of the pier caps, the claim for an award for the result of the stop work order on the pier 11 westbound foundation, and the claim for an award of money for IDOT's refusal to pay for seal coat concrete which the contract required to be provided.

The Court will next consider the non-time related damages related to the pier 12 loss, the piers 9 and 10 and trestle loss, and lastly, the time-related losses.

The Joint Venture's Claim for Costs Due to Extra
Grinding of Pier Caps beyond the Scope of the
Contract (Count 15)

Each pier to be constructed in the bridge had a flat area on its top referred to as the pier cap. A pier cap is the horizontal top portion of a bridge pier that receives loads from the horizontal bridge structure and distributes such loads down to the pier stem or column. The plans show that within each cap area there is designated a bearing surface for the structural beams that would lie horizontally across the piers and span those piers. During the course of the work, the Joint Venture and the Illinois Department of Transportation disagreed as to the interpretation of certain language in the Special Provisions concerning the grinding of the bridge seat bearing surfaces. The Special Provisions require that the bearing surfaces of each pier cap shall be ground to a proper elevation. The Joint Venture completed the grinding of the bearing surfaces of each bridge pier in compliance with the specified tolerances as shown on the plans. This grinding was completed prior to any directions by IDOT. However, a dispute then arose due to IDOT's position that the entire cap of each bridge pier must be ground, if necessary, within one-eighth inch of the elevation shown on the plans. IDOT expressed its position to the Joint Venture through correspondence in April of 1980. It is and was the Joint Venture's position that such work would constitute a change order and that the Joint Venture should be compensated for it. After April of 1980, IDOT revised its position by letter and demanded that less of the entire pier cap be grounded but nonetheless required grinding of

more than the bearing surface area. This revised area was still greater than what the Joint Venture believed it was required to grind. The Special Provisions provide in relevant part: "the tops of bridge seats and blocks for bearings shall be trowel finished to a true horizontal plane to the elevation shown on the plans within a tolerance of one-eighth inch. If the bearing surface is high, it shall be ground to the proper elevation." The Joint Venture interpreted the actual size of bearing surfaces to exceed the area of the anchor bolts depicted on the plan by only three or four inches; in other words, three or four inches outside the actual location where the plate would be laid. It was IDOT's position that the entire surface of the bridge pier should be ground to the specified height. Due to a threat by IDOT to withhold further payment and possible termination of the contract under the default provisions, the Joint Venture performed under protest the extra grinding work as demanded and now seeks an amount of Ninety-Four Thousand Nine Hundred Ninety-Eight Dollars (\$94,998) to compensate the Joint Venture for work which was beyond the scope of the contract.

The Illinois Department of Transportation drafted the Special Provisions of the contract. It is axiomatic that where a contract is clear and unambiguous, the parties intent is to be drawn only from the words used. However, where there is any ambiguity in a contract it should be construed most strongly against the party who drafted the language. (*McDonnell Douglas Automation Co. v. State* (1983), 36 Ill. Ct. Cl. 46; *Turner Construction v. Midwest Curtain Walls* (1st Dist., 1989), 187 Ill. App. 3d 417, 135 Ill. Dec. 14, 543 N.E.2d 249.) The Court must determine if there is an ambiguity in the contract provisions. The Joint Venture's original bid reflects that it had planned to grind an area of the blocks for bearing much larger than that testified to by Claimant's witness, Mr. Bartholomew.

A review of the provision leads the Court to find that the language in the contract is ambiguous and therefore the dimensions of surface to be ground could have been reasonably interpreted by individuals to be different amounts. The Department of Transportation basically admitted in an internal meeting that the language of the Special Provisions was ambiguous as written. Further, Richard Hahn, IDOT's resident engineer, essentially agreed with the Joint Venture's interpretation of the term "bearing surface" as it related to the plans and sketches prepared. The actual size of each bearing surface exceeds the area of the anchor bolts depicted on that plan by only three or four inches. While IDOT may interpret this claim as being an attempt to make up for other losses the Joint Venture suffered, the Joint Venture did specifically request an explanation as to why the surface size had to be increased. The Department of Transportation could give the Joint Venture no legitimate answer but still demanded that the additional grinding be done. A memo dated July 28, 1984, prepared by the Illinois Department of Transportation, discusses the issue of the extra grinding of the pier cap. The contents of that memo are capable of different interpretations. The engineers from the Department felt comfortable with the language in the Special Provisions concerning the "bearing surface." However, the Court finds that the language of the Special Provisions which says, "if the bearing surface is high, it shall be ground to the proper elevation" is certainly capable of being interpreted in different fashions. Nowhere in the Special Provisions regarding the bearing plate is the word "complete" used to describe the surface to be ground. It is the Court's finding that this additional work did constitute a change order, that the Joint Venture promptly advised IDOT that the scope of the grinding work demanded was outside of the requirements of the contract, and that such work would

constitute a change order. Therefore, the Joint Venture preserved its right to recover additional monies pursuant to the contract. Based on the evidence adduced at trial as to damages, Claimant would be entitled to Ninety-Four Thousand Nine Hundred Ninety-Eight Dollars (\$94,998) under count 15 for the extra grinding of pier caps.

Stop Work Order—Pier 11 Westbound (Count 16)

In count 16 of the Joint Venture's complaint, Claimant seeks damages for the increased costs and damages after a stop work order was given by the Illinois Department of Transportation on pier 11 westbound.

Pier 11 westbound, as most of the Jefferson Barracks Bridge piers, was built on steel H-piles driven to bedrock. There is rock beneath the riverbed to which the H-piles are driven. After the pier 11 westbound cofferdam was dewatered, it was discovered that the tops of the steel H-piles protruding through the newly poured tremie seal were out of intended position and some were badly deformed. As a result, IDOT issued a stop work order to conduct an investigation. This stoppage of the work took place on June 19, 1980, and was documented in the resident engineer's memorandum some eleven days later.

In July, the Joint Venture notified IDOT that the stop work order was delaying the contract work at a crucial point and, therefore, the Joint Venture was entitled to both an adjustment in a contract sum and an extension of the time for completion of the contract work. On July 11, 1980, the Department demanded that the Joint Venture add four additional piles through the existing eleven feet of seal coat concrete which had previously been placed in the pier 11 westbound cofferdam. The Joint Venture did not understand how that order could be implemented and in a letter asked for an exact instruction from IDOT detailing

how that work was to be done. The letter stated that the Joint Venture could not be responsible for the integrity of the cofferdam in attempting to carry out this directive. In September of 1980, IDOT rescinded the stop work order but ordered the Joint Venture to raise the lower steel reinforcing mat of pier 11 westbound above the pile cutoff elevation and increase the thickness of the footing indicated in the plans by approximately two feet. The Joint Venture informed IDOT that this work was outside the scope of the contract and that any costs to perform this work and all costs caused by the delay were the responsibility of IDOT. Subsequently, the Joint Venture proceeded with and completed the work in accordance with the Department of Transportation directive. IDOT has refused to pay the Joint Venture for such costs. The delay accounted for 78 days. The issues in this court are whether the driving work was being improperly performed and whether the delay arising from the stop order and the resulting costs and damages suffered by the Joint Venture were caused by IDOT.

The Illinois Department of Transportation had an inspector present during the pile driving operation on pier 11 westbound. That inspector checked the layout and location of the H-pile template and the leads prior to driving and also checked the batter or plumbness of each H-pile prior to driving. The plans provided that the contractor would furnish and install 70 steel H-piles as part of the foundation. The plans also specified the location and orientation of each of the H-piles. Unlike the H-piles driven to that point, this pile driving equipment was located on a barge in the river and the State contends that the movement of the barge led to the misplacement of the piles. During the course of the delay, it was determined that 59 of the 70 piles were out of position to the point where they were in violation of the contract. The Department of Transportation concluded that the piles at pier 11 westbound

were not actually overdriven. Eventually IDOT determined that a limited number of corrective actions should be taken and the work would be accepted at pier 11 westbound, although defective in the eyes of the Department.

The Joint Venture maintains that it was not responsible for the damage to the top of the piles or to the misalignment of the piles claiming that the Department of Transportation in reality controlled those items. The Illinois Department of Transportation engineers set and define the point of refusal on rock for inspection as five to ten blows of the pile driving hammer with no movement. At that point, the pile would be driven no further. The type of hammer utilized at all piers was approved by IDOT. During the course of the work on pier 11 westbound, the Joint Venture personnel indicated to IDOT that the piles were being overdriven. However, the pile driving problems that were discovered at pier 11 westbound did not appear at any other pier and the IDOT inspector responsible for pier 11 westbound was also the primary inspector for pile driving on the entire project.

Of the 70 piles required by the plans, 59 of the piles were further out of position than the tolerances and the contract allowed. While it is the Joint Venture's position that this misalignment was caused by the overdriving, many of the piles had no damage to the top and were simply out of alignment. The force utilized was not sufficient to damage those particular piles. While this may be explained on the basis of individual strength characteristics or each H-pile, the number of piles out of alignment is a significant factor in this claim. The Department of Transportation maintains that the placement of the pile driving hammer on a barge affected the Joint Venture's ability to drive the piles correctly. The Department maintains that the movement of the barge resulted in the

movement of pile driving equipment as it pivoted around the template the Joint Venture used to position its piles.

Section 108.08 of the Standard Specifications for Road & Bridge Construction, a part of the contract documents, provides that the resident engineer has certain authority to suspend work wholly or in part as he may deem necessary as a result of conditions which warrant such action. There is no disagreement that at this point, after the cofferdam was dewatered, it was necessary for all parties to take a step back and evaluate the situation. The Joint Venture went as far as hiring an outside expert to investigate this problem and to reach conclusions regarding the cause and effect of the findings.

To prevail, the Joint Venture must prove that the Department of Transportation was the cause of the delay and that no concurrent cause would have equally delayed the contract regardless of the Department's actions or inaction. The Joint Venture must show a delay of an unreasonable length of time, that the delay was proximately caused by the Department's actions, that the delay resulted in some injury to the contractor, and that the government was the sole proximate cause of the delay. (*Avadon Corporation v. United States* (1988), 15 U.S. Ct. Cl. 648; *Illinois Construction Corp. v. State* (1993), 45 Ill. Ct. Cl. 124; *Walsh v. State* (1969), 24 Ill. Ct. Cl. 441.) The Joint Venture has failed to prove that this delay was unreasonable and solely caused by the government. The structural integrity of the pier was in question at the time the cofferdam was dewatered. Not to stop at that stage would have been foolhardy. There were two reasons for the stop work order, namely the misalignment of H-piles and the damage to the H-piles. While the damage to the H-piles may be explained by overdriving, the misalignment of so many H-piles was not likely caused by the overdriving.

Whether it was, in fact, caused by the placement of the driving equipment on a barge is not completely clear. However, what is clear is that the Claimant has failed to prove that the directions of the resident engineer caused the misalignment of the piles. In and of itself, the misalignment of the piles would have caused significant delay and it is not possible to separate that delay from that delay attributable to the damaged piles. For this reason, the suspension of work cannot be attributed to be solely caused by overdriving. Therefore, it is not necessary to consider whether the directions of the resident engineer caused the damage to the H-piles because that could not be the sole proximate cause of the delay. Therefore, we find that Claimant has failed to meet its burden of proof as to this claim and Claimant's claim for damages due to the stop work order—pier 11 westbound should be denied.

Seal Coat Concrete (Count 17)

The Joint Venture's complaint seeks damages for the State's failure to pay for certain amounts of concrete used in the seal coat. During the construction of the piers, the soil inside the cofferdam was excavated down to the approximate bottom of seal coat as depicted in the plans. Since the seal coat must go to a certain depth, the excavation for that seal coat must go marginally below the elevation shown on the plans to assure that the bottom of the seal will, in fact, be at or just below the elevation. It is essential that the seal coat be properly constructed in order to prevent the cofferdam sheets from pulling out of the river bottom due to hydrostatic uplift forces thereby destroying the cofferdam. The plans depict the vertical dimension of each seal coat and the concrete quantities of each seal coat. The language on page 12 of the Special Provisions provides the standard for the measurement of the concrete in the seal coat: "Concrete in the seal coats

will be measured for payment in accordance with Article 503.17 of the Standard Specifications.” Article 503.17 of the Special Provisions provides, “The vertical dimensions used in computing the volume (of the concrete) shall be the average thickness of the bottom of the excavation and the top of the seal.” The engineer for IDOT measured those two items. The Joint Venture claims that the purpose of the preceding article is to pay the contractor for the seal coat concrete actually placed within the cofferdam minus any unsound concrete on the top. The State takes the position that the contract does not give the contractor the right to payment determined by the actual dimensions of concrete placed because that would allow the contractor to set his own compensation. The State believes that the acceptance of the Joint Venture’s position would in effect allow a contractor to convert its overexcavation within the cofferdam to additional work for which it will be paid. The Respondent maintains that the additional concrete which was poured was not required by the contract and therefore compensation should not be paid. In evaluating this issue, the Illinois Department of Transportation resident engineer prepared sketches of each pier seal coat with mathematical computations for concrete quantities using three methods for computing the seal coats. The first used the dimensions actually shown on the plans. The second method used the actual top, minus unsound concrete, and the bottom elevation shown on the plans, and the third method used the actual top and actual bottom of the piers themselves. The IDOT position is the second of the three alternative methods and the Joint Venture position is the third method. Because the Special Provisions use the word “average,” it is clear that the contract is not using the theoretical quantity as depicted in the plans. The rationale behind Article 503.17 of the Special Provisions is that the contractor should only be paid for concrete which is required to be poured

and not that which the contractor actually pours. The Special Provisions provide notice to the contractor that overexcavation, while not harmful, will create a need for additional concrete for which the contractor will not be compensated. Section 503.17 further states that “in computing the yardage of concrete for payment, dimensions used will be those shown on the plans or ordered in writing by the engineer.” These provisions and those cited earlier in the standard specifications are not complicated nor are they given to numerous interpretations. This language places the burden on the contractor not to over-excavate cofferdam locations. It is not the responsibility of the State under the contract to pay the Joint Venture from the actual bottom to the actual top of the seal. By over-excavating and creating a void to be filled with concrete, the Joint Venture could have poured substantially more concrete than is called for in the plans to the detriment of the State. For these reasons, the Claimant’s claim for an amount of money for IDOT’s refusal to pay for seal coat concrete is denied.

Pier 12 Loss—Non-Time Related Damages
(Counts 6-9)

In counts VI through IX of the Joint Venture’s complaint, Claimant alleges alternative theories of liability for the non-time related damages as a result of the loss of the pier 12 falsework. Sometime between March 24 and April 3, 1978, the steel structure which constitutes the falsework disappeared into the river with no witnesses as to what caused the disappearance. The Joint Venture claims that it should be compensated for pier 12 losses for one or more of the following reasons: the contract documents were defective because they failed to disclose an auxiliary channel in the river where pier 12 was to be built; the Illinois Department of Transportation failed to reveal vital knowledge concerning that channel to the Joint Venture during the

bid process; IDOT misrepresented the existence of only one navigational channel in the river even though it knew of an auxiliary channel through the area of the pier 12 cofferdam; and the actual river traffic in the area of pier 12 was materially different than depicted in the contract documents, and therefore constituted a changed condition under Article 104.04 of the Standard Specifications. The Joint Venture maintains that a boat or barge in the auxiliary channel struck the falsework and destroyed it.

In April of 1977, when the Department of Transportation issued the service bulletin notifying contractors that it would take bids in June for the construction of the substructure of the Jefferson Barracks bridge, the plans and proposal forms were made available to the contractor upon request. All bidders were to carefully examine the proposal forms, plans, specifications, Special Provisions and the form of the contract utilized. In addition, the contractors were to inspect the site of the proposed work and familiarize themselves with all the local conditions affecting the contract and the detailed requirements of construction. The contractor, if it received the bid, would be responsible for all errors in its proposal resulting from any failure to comply with these instructions. At the time of its site inspections, the Joint Venture's employees observed river conditions in both low and high water conditions. As shown in the plans, piers 4 through 11 of the bridge were considered approach piers and piers 12 and 13 were the main span piers. The plans provided to the contractors show an 850-foot navigational clearance between the new main piers 12 and 13 and also a 645-foot navigational clearance between piers 5 and 6 of the existing Jefferson Barracks Bridge. Marked navigational channels assure operators of boats, barges and tugs that the river is sufficiently deep in that location for safe passage. Before and

during the bid conference in which the Joint Venture prepared its bid, members of the Joint Venture reviewed, discussed and interpreted the contract documents and came to the conclusion that the contract documents excluded a contractor's risk of loss from a collision from passing river traffic at pier 12. The Joint Venture's pre-bid examination of those plans and specifications and the project site of the work led the Joint Venture to the conclusion that any passing river traffic would be confined to the 645-foot wide corridor of the river designated on plan sheet 17 as the navigational clearance. For this reason, the Joint Venture included no money in its bid to provide protection to pier 12 of the new bridge against the risk of collision from passing river traffic. It did interpret the Special Provisions to require protection against other risks during the construction process. These included an adequate means of protection against damage by scour, high water, the accidental collision of floating equipment, and also protection against wave action from passing river traffic in the construction process. The Joint Venture interpreted the "floating equipment" provision as meaning the contractor's equipment being used at the project site to perform the work.

In early 1978, the Joint Venture began the construction of the falsework for the pier 12 cofferdam. By early March of 1978, the Joint Venture had driven spud piles into the river bottom and installed part of the upper two cofferdam bracing frames to be used as templates against which the sheet pilings would be supported. Additionally, the Joint Venture had placed navigational lighting on top of a single sheet pile on the west side of the falsework in accordance with instructions given to it by the coast guard. That light was located higher than the eventual flood water which would occur in March and April of 1978. The pier 12 cofferdam construction was behind the schedule presented by Claimant, through no fault of Respondent. By

March 24, 1978, the elevation of the Mississippi River had dramatically risen to the top of the pier 12 cofferdam work. The Joint Venture maintains, however, that the water did not go over the top of the one temporary sheet pile which contained the navigational light on the west side of the falsework. Sometime between 4:30 p.m. on March 24, 1978, and 8:00 a.m. on April 3, 1978, the pier 12 falsework disappeared into the river. There were no witnesses to what caused it to disappear. The Joint Venture maintains that pier 12 falsework was destroyed by a runaway tow or barge, in other words, passing river traffic. To justify this claim, the Joint Venture essentially points to two facts as proof of the means by which the pier 12 falsework was destroyed. First, when the 1978 flood waters receded, there was a chip in the concrete at the then existing pier 6 of the old bridge, located adjacent to the location of the pier 12 falsework. The Joint Venture believes that this chip is evidence of a collision with old pier 6 and the new pier 12 falsework adjacent to it. Additionally, salvage operations were performed immediately following the loss and the falsework structural steel and sheet pilings were recovered, including the extended sheet pile from the west side of the falsework. The Joint Venture maintains that the manner in which the sheet pile was bent and twisted towards the Missouri side of the river indicates damage from passing river traffic. Further, the vertical steel members were bent at the mud line which effectively ruled out the possibility of scour failure. Subsequent to the salvage of the falsework, the Joint Venture installed a protective nose cell slightly upstream from the location of pier 12 so that additional work would not be jeopardized. Eventually that structure was removed when work was completed.

Both Claimant and Respondent are now in agreement that pier 12 was to be constructed in a location which

had been considered an auxiliary channel for river traffic. During the pre-bid inspection time, there existed navigation lights on both the upstream and downstream sides of the existing bridge which could be observed during the inspection process. Those lights existed in mid-span between the old bridge piers 6 and 7 and identified the auxiliary navigational channel. While there is some question whether the Joint Venture inspection team observed those navigational lights, witnesses for the Joint Venture acknowledged that those markings existed prior to the time the Joint Venture submitted its bid. No one from the Joint Venture viewed the location from the water.

As depicted in plan sheet 17, pier 12 was to be located approximately 200 feet east of the navigational clearance, such clearance being shown on the plans. In pre-bid meetings, the Joint Venture's project engineer included monies in his estimate for a protective device referred to as a "dolphin." That protective device would have served just north of the pier 12 construction. After a review of all of the contract documents, these monies were deleted when the Joint Venture, through the person of Stuart Bartholomew, concluded that the contract did not require the Joint Venture to assume the risk of damage by passing river traffic. Therefore, the Joint Venture included no money in its bid to provide protection at pier 12 against the risk of collision from such traffic. The alternative theories of liability submitted by the Joint Venture all rely upon one fact: had the Joint Venture known prior to the bidding process of the existence of the auxiliary navigational channel with the accompanying risk of collision from such traffic, the Joint Venture would have provided an adequate means of protection against damages to the pier 12 work from accidental collision from river traffic.

In failing to provide information regarding the auxiliary channel, the State, according to the Joint Venture, breached the warranty that its contracts, plans and specifications were accurate and could be relied upon. Because that warranty was breached, the Joint Venture maintains that its detrimental reliance of acting upon that warranty caused the pier 12 loss and the State should be liable therefor. The law, according to the Joint Venture, places an affirmative duty on parties such as the State to disclose vital information to the performance of the contract and the failure to disclose that information should result in the government being responsible for whatever damage occurs. It was contended that plan sheet 17 was incomplete in that it failed to disclose the presence of the auxiliary channel. Whether such a representation is intentional or simply an omission, the Joint Venture maintains the State's plan sheet represented the existence of only one navigational channel in the river and that the Joint Venture reasonably relied upon that representation to its detriment. Additionally, the Joint Venture maintains, even if the contract documents are not defective or the State is not guilty of misrepresentation, the existence of the channel was a physical condition differing materially from that which was indicated in the contract plans and, therefore, falls within the meaning of the changed conditions provision.⁴

⁴ Article 104.04 of the Standard Specifications for Road and Bridge Construction provides in relevant portion, "Should the contractor encounter or the department discover during the progress of the work *subsurface* or *latent* physical conditions at the site differing materially from those indicated in this contract, or unknown physical conditions at the site of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract, the engineers shall be promptly notified in writing of such conditions before they are disturbed. The engineer will thereupon promptly investigate the conditions and if he finds they do so materially differ and cause an increase or decrease in the cost of, or the time required for performance of the contract, an equitable adjustment will be made and the contract modified in writing accordingly.

Any adjustment in compensation * * * will be made in accordance with the provisions of Article 109.03."

The Claimant maintains that the existence of river traffic was materially different than the conditions depicted in the contract documents and that the additional work, including the salvage and reconstruction of the work destroyed and the construction and eventual removal of a protective nose cell, constituted a substantial modification of the work to come within the changed conditions provision. The Joint Venture site investigation disclosed no evidence of this changed condition, or that the plan sheet was incomplete. Claimant's site investigation revealed no river traffic in the area where pier 12 was to be constructed.

The actual existence of the auxiliary navigational channel is not in issue. In issue, however, is the question as to when the Joint Venture first became aware of the existence of such a clearance. In 1972, there were plans and specifications developed for a two-lane bridge to run adjacent to the 1941 structure. While those plans were eventually shelved, plan sheet 3 from those plans showed both the main navigational channel and an auxiliary channel. The Joint Venture maintains that it was only after seeing this plan sheet, long after the loss of pier 12, that it became aware of the auxiliary channel.

The State maintains that the Joint Venture failed to establish that the falsework loss was caused by the collision with river traffic, but even if it had, the Joint Venture failed to establish its right to recover under any of its theories.

The Jefferson Barracks Bridge spans the Mississippi River at a location where the river is approximately 3,600 feet wide from shore to shore. The navigational clearance is established in the plans as 645 feet wide. However, the navigational clearance is a warning to mariners that this portion of the river will grant safe passage for traffic because of its depth for virtually the whole year. The Joint

Venture's conscious decision to not include a protective cell, deflector, or other protective device was to assume that no circumstances would exist where a runaway barge would leave the navigational channel or an inexperienced operator of a water craft might make a mistake about the location of safe waters. The contract documents only warranted that the navigational clearance existed at the location depicted on the plans. It did not warrant nor could it warrant that river traffic would not pass at or near pier 12 during the construction process or even further east of pier 12. The State was never in a position to completely confine river traffic to the navigational clearance, nor did it promise that it would do so in the contract documents. Therefore, the conclusion that the river traffic would necessarily be confined to the 645-foot corridor was not justified. Depending upon the season of the year, the river waters rise and fall. The spring, because it brings rains, also brings a higher river. When the river elevation increases, passage outside of the navigational clearance becomes more likely. The Joint Venture placed a light on top of its pier 12 falsework for the very reason that river traffic might creep into this area.

Additionally, the State presented evidence that the Joint Venture was caught with an unstable structure in the water during the flooding period and that the strong flow forces of the river caused the collapse of the pier 12 falsework. The Claimant contrasts that evidence with the two facts which the Joint Venture maintains are proof that a passing vessel destroyed the falsework, namely, the chip at old pier 6 in the concrete pier, and the damage done to the falsework. As there were no eyewitnesses and with the evidence conflicting, it is difficult to reach a conclusion by a preponderance of the evidence as to which cause is most likely. However, it is simply not necessary to reach that decision because the law does not justify compensating the

Joint Venture even if passing river traffic destroyed the pier 12 falsework. The plans provided to the Joint Venture do not make any representation that the navigational clearance is the only place where river traffic will travel. While it is reasonable to assume that most of the larger vessels will attempt to pass this location in the navigational clearance, it is unreasonable to assume that all river traffic will be confined to that clearance. Pier 12 is and was one of the main river piers. As such, it constituted a major investment for the Joint Venture because of its size. Whether there existed an auxiliary clearance or channel, the fact remains that there is no direct evidence as to how the falsework was lost. Even if a boat, barge or tow destroyed the pier 12 falsework, there is no evidence that the operator of that craft was in the vicinity simply because he or she knew of the existence of the auxiliary channel. A runaway barge or floating craft would not necessarily have occupied that position because of the channel. It is more likely that such a vessel, because of its lack of control, would stray from the main navigational channel regardless of how the rest of the river is characterized. This is especially true in a period of high water. While it is true that a contractor will not be responsible for the consequences of defects in the plans and specifications and that the responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, check the plans, and inform themselves of the requirements of the work, the State in this case made no representation that all river traffic would be confined to the navigational clearance. In that respect, this case differs from the cases cited by the Claimant. In *United States v. Spearin* (1913), 248 U.S. 132, 39 S. Ct. 59, a contractor brought suit for work done under a contract to construct a dry dock. The contractor had entered into an agreement to build a dry dock at a naval yard. The plans and specifications which

had been prepared by the government revealed that the site was intersected by a six-foot brick sewer and it was necessary to divert and relocate a section thereof before the work of constructing the dry dock could begin. The plans and specifications provided that the contractor should do the work and provide the dimensions, materials and location of the section to be substituted. However, approximately a year after the relocation of the six-foot sewer, there occurred a sudden downpour of rain coincidental with a high tide. The increase in pressure broke the six-foot sewer as it had been relocated and the excavation of the dry dock was flooded. Upon investigation, the contractor discovered that there was a dam approximately five feet high in a seven-foot sewer causing an accumulation of water and the eventual destruction of the sewer. Although the sewer was part of the city sewage system, the dam was not shown on either the city's plans or on the government's plans or blueprints, the only documents which were received by the contractor. It was revealed that the site selected for the dry dock was low ground and the sewers had, from time to time, overflowed to the knowledge of the government officials and others because of this dam. These facts had not been communicated to the contractor. In order to complete the project, other contractors had to discontinue the use of this intersecting sewer and then reconstruct it with a different size, shape and material so as to remove the internal pressure and, therefore, the flooding. The Court found that the sewer, as well as other structures, were to be built in accordance with the plans and specifications furnished by the government. The construction of the sewer constituted as much an integral part of the contract as did the construction of the dry dock itself. The Court further found that the risk of the existing system proving adequate might have rested upon the contractor if the contract for the dry dock had not contained

the provision for relocation of the sewer. With the insertion of the articles prescribing the character, dimensions and location of the sewer, the contract warranted that if the specifications were complied with, then the sewer would be adequate. The Court affirmed the judgment of the Court of Claims in favor of the contractor.

The case at hand is distinguishable from *Spearin, supra*, for the obvious reason that the State did not and could not warrant that no river traffic would pass outside the navigational clearance at any time during the construction process. At the time of the inspection process in the instant case, there were navigational lights over the pier 12 area on the old Jefferson Barracks Bridge. Unfortunately for the Claimant, the Joint Venture did not observe them during the course of their inspection. Further, the passing river traffic does not fall into the category of subsurface or latent physical conditions as used in the Special Provisions of the contract. Passing river traffic is neither hidden from view nor in the water or soil. Therefore, the changed condition provision of the contract does not apply in this instance. For these reasons, the Claimant's claim for the pier 12 falsework damage is denied.

Piers 9 and 10, Scour Losses (Counts 10-13)

In counts 10 through 13, the Joint Venture seeks recovery for the costs of salvage and reconstruction of its piers 9 and 10 cofferdams and the section of the connecting work trestle, all of which collapsed in March of 1979 allegedly due to the scour⁵ which occurred in the riverbed. Scour is the removal of riverbed material from the bottom or banks of a river by the erosive action of flowing water.

⁵ By agreement of the parties, the following definitions have been placed in the record. (A) local scour—the erosion of river bed material resulting from the local increases in flow velocity and turbulence around a structure (In this case, the cofferdams placed in the river), (B) general bed scour—the erosion of river bed material caused by an increase in water velocity and other factors, other than local scour around a structure.

In these counts, the Joint Venture alleges alternative theories of liability against the State. Claimant's theories of liability are based on the following matters:

- (a) the susceptibility of the riverbed to develop severe scour in the location of piers 9 and 10 was a physical condition differing materially from that indicated in the contract and within the meaning of the contract's changed conditions provision;
- (b) the Illinois Department of Transportation breached the implied warranty that its plans and specifications were adequate, accurate, not defective and could be relied upon regarding the susceptibility of the riverbed to develop severe scour in the locations of piers 9 and 10;
- (c) the Illinois Department of Transportation's failure to disclose its superior knowledge of the susceptibility of the riverbed to develop severe scour in the locations of piers 9 and 10 constituted a breach of contract;
- (d) the Illinois Department of Transportation is liable to the Joint Venture for breach of contract based on the Department's misrepresentation concerning the susceptibility of the riverbed to develop severe scour in the locations of piers 9 and 10.

The Joint Venture claims that it was unaware of the risk of scour at these locations and that, if properly informed, it would have afforded scour protection for the piers 9 and 10 cofferdams.

The Department of Transportation contends that the Joint Venture was aware of the risk of scour and planned to monitor and protect its work against the risk of scour during the construction process. Therefore, since the premise upon which all of the Joint Venture's scour loss is built is false, the Joint Venture is not entitled to any recovery for piers 9 and 10 and the relevant section of the work trestle. Additionally, it is the contention of the State that the scour which contributed to the loss of the Joint Venture's cofferdams and trestle was caused by the accumulation of a field of debris against the trestle.

As indicated earlier in this opinion, the trestle was chosen as a means of access to the work site by the Joint Venture during the pre-bid process. The trestle was designed and built by the Joint Venture. The design of the

trestle was not viewed or approved by the State and it was built on pipe pilings spaced 30 feet apart with the trestle deck placed at an elevation of 400 feet. The bottom of the trestle deck was at an elevation of 396.5 feet. During periods of high water, a river such as the Mississippi carries large amounts of debris. Such debris includes trees and logs washed away from the shore during the spring rains. These materials tend to accumulate against structures in the water, including a structure such as a temporary trestle. The plans indicated that the ordinary high water for the Mississippi River was at an elevation of 405.9 feet, five feet higher than the trestle deck. The State contends that the Joint Venture should have placed the trestle deck at an elevation of at least 410 feet, thereby reducing the risk of debris accumulation. The State offered evidence that the debris placed a tremendous lateral load on the trestle and eventually, on March 21, 1979, it collapsed as a result of that load and scour. Whether it collapsed due to scouring and that load or simply the scour is a question of much debate between the parties. However, it is evident that the scour played a significant role in the collapse. The scouring process which takes place in a riverbed is caused by the narrowing or removal of a channel through which the water may flow. The narrowing causes the velocity of the flow to increase in other locations. The increase in velocity increases the stress on the riverbed thus causing it to move. The larger the blockage, the greater the increase in stress and therefore the more likely that scour will take place. The largest amount of scour occurred with the debris field present around piers 9 and 10.

At trial, numerous witnesses testified to the issue of scour and its effect on this project. The hundreds of exhibits included each side's moving model with water, riverbed material and obstructions. Three facts emerged

which are much clearer than the waters of the Mississippi. The first is that the accumulation of debris around piers 9 and 10 was a factor which contributed to the amount of scour which occurred. Secondly, scour was a significant problem in the Mississippi River prior to the construction of the Jefferson Barracks Bridge. Finally, the State had some knowledge of the scour problem but the contract documents alluded to scour only as a problem near the main navigational clearance and not near piers 9 and 10.

The Claimant maintains that there existed certain contract indications that scour would not be a problem at or near piers 9 and 10. The Special Provisions of the contract referenced the work to be done on the pier 12 cofferdam for both east and westbound bridges. The Special Provisions read as follows:

“The work under this item includes the furnishing, driving, installing and later removal of all temporary steel sheet piling and bracing required for construction of the temporary cofferdam at pier 12 for the eastbound and westbound roadways and the furnishing, installing, maintaining and later removal of an adequate means of protection during the construction period against damage by scour, high water, ice or accidental collision of floating equipment.”

Similar language is utilized with regards to scour in the Special Provisions regarding the cofferdam at pier 13. The contractors were specifically told that it was their responsibility to provide an adequate means of protection against scour during the construction period for these two piers. The Special Provisions make no such statement regarding piers 4 through 11 and the accompanying cofferdams. Further, at pier 12 which was a larger pier, 384 H-piles are called for in the drawings. At piers 9 and 10 westbound, the drawings called for only 50 H-piles. Importantly, none of the piers 9 and 10 westbound H-piles were to be battered in an upstream/downstream direction. In addition, in the original drawings, the orientation of the H-piles was in a cross-river fashion. Subsequent to the scour losses, the orientation of the H-piles was changed so that its

strong direction of bending resistance was in an upstream/downstream direction. Also, after the scour losses, piers 9 and 10 were rebuilt with 20 battered piles at each pier.

The Joint Venture did protect the pier 12 cofferdam pursuant to the language in the Special Provisions. Although such protection can take different forms, the Joint Venture chose a rip rap blanket which is a blanket of large stones or broken rock placed around the cofferdam in the water as protection against erosion from the flow. No rip rap blanket or other means to prevent or protect against the development of scour was employed at the piers 9 and 10 westbound cofferdams. No money was placed in the bid by the Joint Venture for such protection. During the pre-bid stage, representatives of the Joint Venture determined that the pier 11 cofferdams were close enough to the main channel that scour was possible at that locale and, therefore, the Joint Venture elected to include some monies in its pier 11 estimate for rip rap in case scour should develop. The facts that piers 9 and 10 were further east of the main channel led the Joint Venture to take no steps with regards to scour protection. As a result of the 1979 scour losses, the Joint Venture did install a rip rap blanket as scour protection for the pier 10 westbound replacement cofferdam. Also in reconstructing the trestle sections after the scour loss, the legs of the trestle were battered in the downstream direction, thus providing more strength to the base. Additionally, the Claimant used a bolted-type trestle in reconstruction.

The State argues that the custom and practice in the construction industry entitled the Joint Venture to take certain risks regarding the means and methods of performing the work in the contract. Which risks the Joint Venture was willing to assume affected the bid it submitted. The State contends that if the risks that the contractor took did

not work to the benefit of the contractor, the State should not be liable for those failures. The State believes it was the risk of the contractor to protect or not protect piers 9 and 10 from scour. While that is clearly true, the contractor must be able to rely upon the contract documents, including the specifications and Special Provisions, in preparation of its bid and the execution of the contract. The construction bidders are to compute their bids not upon the basis of their own investigation of the scene, but upon the basis of what is indicated in the specifications and in the drawings. It also is unclear how an examination of the scene, essentially a tour of the river, would reveal the amount of scour which takes place in the Mississippi River. Additionally, it might be added that while it is true the contractor takes certain risks in its bid process, the State also takes certain risk when it fails to disclose information which affects the execution of the contract, whether that disclosure is intentional or not.

The standard specifications contained articles which are commonly referred to as changed conditions provisions. Article 104.04 recognizes two classes of changed conditions. The first type of changed condition is a subsurface or latent physical condition which differs materially from that which is indicated by the contract documents. The second type of changed condition occurs where the contractor encounters a subsurface or latent physical condition which differs materially from that which is ordinarily encountered and generally recognized as inherent in the work of the character provided for in the contract documents. The threshold question under the changed conditions provision has to be whether scour at the location of the Jefferson Barracks Bridge is to be considered a subsurface or latent physical condition. If scour is a subsurface or latent condition then the trier of fact must address the issue of whether or not the scour encountered meets

either of the tests under Article 104.04 of the Special Provisions. An indication may be proven by inferences and implications which need not meet the test for misrepresentation. It is not necessary that a contractor be actively misled or that the State has withheld or concealed information in order to prove a changed condition. (*Foster Construction & William Bros. Co. v. United States* (1970), 435 F.2d 873.) Based on all the evidence, we find that the scour encountered by the Joint Venture during the construction process and which caused piers 9 and 10 to collapse was, in fact, a Type 1 changed condition under Article 104.04.

The American Association of State Highway & Transportation Officials, otherwise known as AASHTO, published standards for designers of roads and bridges. In so doing, the AASHTO specifications do not identify how a designer should go about identifying or quantifying a scour risk to a contractor. The designer is also not told how to protect against the scour. In spite of those standards, the Illinois Department of Transportation and its design firm, the Benesch Company, provided certain information in the plans and specifications which can be considered indications on the issue of scour or the absence of scour.

The Special Provisions contained a notation that one or more of the Illinois approach piers, specifically piers 4 through 11, could have its cofferdam deleted by the State engineer on the job. The seal coat forms part of the cofferdam and a failure to place the cofferdam or to utilize the cofferdam at any of those locations would also mean a footing without the use of the seal coat. One of the purposes of the seal coat is to protect against scour. Secondly, the Special Provisions specifically provided that the contractor was to protect the piers 12 and 13 cofferdams from scour. Piers 12 and 13 are the main support piers for the bridge and are much larger. The bid drawings for piers 9 and 10 called

for the use of 50 H-piles while the bid drawings for pier 12 required the placement of 384 H-piles. These numbers are more disproportionate than the size of those piers.

The plans and specifications provided by the State established some of the criteria and dimensions of the cofferdam designs. IDOT effectively controlled the types of materials to be used, the elevations of the top and bottom of the cofferdam, the dimensions and elevations of the seal coats, and the width of the cofferdam. Additionally, because of the requirement that certain H-piles be placed in a battered position, the sheet pilings can only be driven to a certain depth. The effect of this control exercised by the State left the Claimant with little input as to the cofferdam design. Further, in dealing with scour, the cofferdam design may not be as essential as the manner in which a contractor chooses to protect the cofferdam against that scour. There are various methods to use to protect against scour. Most of them deal with the placement of materials or items around the cofferdam itself or upstream of the cofferdam.

The depth of the bottom of the tremie seals at piers 9 and 10 was relatively shallow compared to the tremie seal depth at pier 12. Also, the size of the pier footings at piers 9 and 10 was significantly smaller than the substantially larger pier 12 footing. Finally, according to the drawings provided to the Joint Venture no H-piles utilized in piers 9 and 10 were to be battered in an upstream/downstream direction. Battering is a common means to provide resistance to the lateral forces resulting from scour.

Most significant of these factors is the State's willingness to indicate to the contractor that scour should be protected against at piers 12 and 13, yet failing to mention the possibility of scour at piers 9 and 10. That omission would certainly lead a reasonable contractor to conclude that money should be provided in the bid for scour protection

only at the piers mentioned. It is important to note that the period from the preliminary study of the construction of this bridge to the issuance of the as-bid drawings in 1977 spanned a period of ten years. The State, its agents, and its bridge designers had that period of time to compile the relevant data regarding the Mississippi River before the service bulletin was issued in this matter. That time period must be compared with the two months between April 26, 1977, and June 28, 1977, the time frame provided to the potential bidders to receive the plans and proposal forms and to submit a bid after evaluating all the available data provided by the State. Evidence was presented which revealed that during the ten-year period, IDOT through its agents had knowledge of a continuing scour problem at various locations. From that knowledge an inference could be drawn that scour could become a significant problem on the eastern portion of the river at Jefferson Barracks.

Under a Type I differing site condition claim, a contractor is entitled to additional expenses and damages resulting from a differing site condition which has been exacerbated by an event neither party is responsible for. (*Glagola Construction Co.*, ASBCA #45579, 93-3BCA26179; also, *D.H. Dave & Gerben Contracting Co.*, ASBCA #6257, 62BCA3492.) This concept becomes relevant when the trier of fact is confronted with the State's contention that while the scour played a role in the destruction of piers 9 and 10, the accumulation of the debris field was, in fact, the primary cause of those losses. The State blames the accumulation of the debris on the height of the trestle which was placed in the river. However, subsequent to the loss, the district engineers recommended and IDOT granted the Joint Venture a time extension for the loss, salvage, and rebuilding of the lost cofferdams and work

trestle.⁶ Clearly, subsequent to the piers 9 and 10 losses, the Department identified the accumulation of the debris field as a culprit in this disaster. Further, virtually all of the experts, engineers and people that had hands-on experience in this type of construction, indicated that the size of the debris accumulation and the speed with which it occurred were unforeseeable and unexpected. While a certain amount of debris could always be expected in the Mississippi, the massive volume of debris which formed had not been anticipated by any of the people involved in the preparation of the design or in the construction of the bridge itself. Additionally, the Court takes note that Pier 11 also experienced problems and was almost lost yet had no substantial debris field.

In order for a plaintiff to prevail on a Type I changed condition theory, it must establish the following: (a) the contract documents must have affirmatively indicated the subsurface conditions which form the basis of the plaintiff's claim; (b) the contractor must have acted as a reasonably prudent contractor in the interpretation of those documents; (c) the contractor must have reasonably relied upon the indications of the subsurface conditions; (d) the subsurface conditions actually encountered within the contract site must have differed materially from the conditions indicated in the same contract area; (e) the conditions encountered must have been reasonably unforeseeable; and (f) the claimed cost must be shown to be solely

⁶ Article 108.09(b) of the Standard Specifications for Road & Bridge Construction states: "When a delay occurs due to unforeseen causes beyond the control and without the fault or negligence of the contractor including, but not restricted to acts of God, acts of the public enemy, governmental acts, fires, epidemics, strikes; extraordinary delays caused by utilities or railroad; extraordinary delays in delivery of materials caused by strikes, lockouts, wrecks, freight embargoes, government acts, inability to procure critical materials and work added to the contract which effects progress on the controlling item, THE TIME OF COMPLETION SHALL BE EXTENDED IN WHATEVER AMOUNT IS DETERMINED BY THE DEPARTMENT TO BE EQUITABLE * * *no extension of time will be granted for any delay or suspension of the work due to the fault of the contractor * * *".

attributable to the materially different subsurface conditions. (*Weeks Dredging & Contracting, Inc. v. United States* (1987), 13 U.S. Ct. Cl. 193.) The Joint Venture has established these six conditions. Scour is a physical condition. It is the tendency or propensity of the riverbed to move. Not all riverbeds perform in the same fashion given identical stresses. The scour encountered was different than what was indicated in the contract by virtue of the facts cited herein. The interpretation of the contract by the Joint Venture was reasonable based on the omission of any scour protection requirement in the contract at the Illinois bank piers. The Joint Venture did rely on the contract documents for a scour assessment evidenced by the fact that it provided significant scour protection at pier 12 and none at 9 and 10. The conditions encountered were not foreseeable in light of what was in the contract. The scour losses caused the damages suffered by the Joint Venture when the field of debris appeared in an unexpected and unanticipated fashion. The State's reliance on *Massman Contracting v. United States* (1991), 23 U.S. Ct. Cl. 24, is misplaced. In that case, the river flow volume was provided in a table attached to the contract documents as part of the contract specifications. However, the table provided was merely historical data given to the contractor as a general guideline for scheduling operations. The table specifically indicated that the contractor was to use it only as a guide for scheduling purposes. The Court stated that as a matter of common knowledge, weather conditions fluctuate from year to year and, therefore, the rainy season would effect those flows. The Court further held that no reasonable contractor would presume that this information constituted indications of river flow conditions for the specific years the contract was to be performed as the defendant could not be expected to predict weather conditions for the contract period. In reality, that

case was about predicting the weather. This case is not. In this case, the State knew or should have known of the potential for scour.

For these reasons, the Court finds that Claimant is entitled to an award for the damages stemming from the losses at piers 9 and 10 due to the changed conditions which the Joint Venture encountered during the construction process. The Court has very carefully reviewed the evidence in regards to the non-time related damages as a result of the scour losses at piers 9 and 10. Based on the evidence presented, the damages are very difficult for the Court to determine considering that the Claimant delayed the start of the project into the high water period, the Claimant designed and built the trestle, and the Claimant, as an experienced bridge builder, must have had prior experience with scour. We do, however, find that the State's knowledge of the scour potential in this case was vastly superior and that the very high water and the vast debris field were highly unusual. Because of these two facts, we impose liability on the State. The amount we find as compensable damages is Two Million Six Hundred Ninety-Four Thousand Five Hundred Thirteen Dollars (\$2,694,513) for the Joint Venture's non-time related damages as a result of the scour losses at piers 9 and 10. This amount is the total damages minus the work trestle salvage and reconstruction amounts. The Court finds that the work trestle damages should not be awarded because the work trestle was not designed by the Department of Transportation. Additionally, as stated later in this opinion in regard to delay damages, construction damages are difficult to determine because of the inherent variables involved in construction. In computing the damages in this case for this part of the claim, we have considered that Claimant was responsible for the delay of the work into the high water period.

Delay Damages, Acceleration and Unpaid Contract Balance

In addition to the actual damages sought by the Joint Venture for the losses heretofore discussed, the Joint Venture seeks the delay damages for the scour losses, the costs incurred by the Joint Venture in complying with IDOT's constructive order to accelerate the work, and the recovery of the unpaid contract balance of \$681,819.86.⁷

In evaluating the Joint Venture's claim for these damages, we find that the three remaining categories of damages should be considered together due to the intricacies of the construction process.

The Claimant has made a claim for delayed or time-related costs which are associated with the piers 9 and 10 cofferdam losses. In order to prove its damages, the Joint Venture must show that, absent delay attributable to the Department of Transportation, it would have not sustained the damage of this nature. Various categories of damages have been found to be compensable in delay cases and the Joint Venture seeks substantial recovery for certain of those categories. Additionally, since the Joint Venture maintains that it encountered an inexcusable delay at the piers 9 and 10 locations after the scour losses, the Joint Venture seeks acceleration costs which occurred in the summer of 1979. The Joint Venture also sought damages as a result of the pier 12 falsework destruction. Since the findings on liability is against the Joint Venture on that cause of action, those acceleration costs will not be considered.

⁷ The parties have stipulated that the contract sum as adjusted by change orders (exclusive of the Joint Venture's other claimed amounts) equals \$20,596,649.09 and the Department has paid the Joint Venture \$19,914,829.23. It is agreed that IDOT authorized change orders and time extensions which effectively extended the contract completion date to January 2, 1981. The Joint Venture completed its contract work on or about December 8, 1981.

In May of 1979, the Joint Venture asked IDOT for a response to earlier requests for time extensions to the contract completion date as a result of the scour losses suffered in 1979. It indicated that it would have to accelerate the work unless IDOT granted an extension to the completion date. Such acceleration would be accomplished through overtime, multiple shifts, and the addition of equipment and materials. The Joint Venture began such acceleration in June of 1979 by instituting an increased work week for its crews. On June 25, 1979, the Joint Venture was notified by IDOT that it was still considering the extension request. Finally, in a letter dated August 24, 1979, the Department denied responsibility for acceleration costs and informed the Joint Venture that it should take whatever steps were necessary to place the work on a schedule to be completed within the time limits stated in the original contract.

Acceleration occurs when a contractor is forced to perform the work in a shorter period of time than is called for in the contract. Acceleration can take different forms. A constructive acceleration occurs when the government denies or unreasonably delays in granting the contractor a time extension which is justified, and at the same time holds the contractor to the original completion date. (*Norair Engineering Corp. v. United States* (U.S. Ct. Cl., 1981), 666 F.2d 546.) The effect of such a position on a contractor is fairly obvious. If liquidated damages are provided for in the contract, as was the case here, the contractor is under additional pressure because it does not know whether it will be found liable for liquidated damages. In order to prove its entitlement to a recovery for acceleration, the Joint Venture must prove certain facts. The contractor must prove that it has encountered an excusable delay for which it is entitled to a time extension; it specifically requested an extension of time; the Department failed or

refused to grant the extension; that the Department caused the contractor to complete the work within the unextended contract period; and finally that the contractor actually accelerated the performance. *Contracting & Materials Co. v. City of Chicago* (1974), 20 Ill. App. 3d 684.

Excusable delays are dealt with in section 108.09 of the Standard Specifications. In pertinent part, that section reads as follows:

“When a delay occurs due to unforeseen causes beyond the control and without fault or negligence of the contractor, including but not restricted to acts of God, acts of the public enemy, governmental acts, fires, epidemics, strikes; extraordinary delays caused by utilities or railroad; extraordinary delays in delivery of materials caused by strikes, lockouts, wrecks, freight embargoes, governmental acts, inability to procure critical materials and work added to the contract which affects progress on the controlling item, the time of completion shall be extended in whatever amount is determined by the department to be equitable. * * * After a contractor has filed a request for an extension of time, the Department will notify the contractor, in writing, whether or not such extension will be approved. If approved, the extended date of completion shall then be considered as in effect the same as if it were the original date for completion.”

The losses at piers 9 and 10 were of a catastrophic nature in the construction of this bridge. The Joint Venture made it clear to the Department that the impact of such losses required an extension of the contract time. Because a timely response was not forthcoming, the Joint Venture accelerated its efforts through various means. The Department belatedly acknowledged that the accumulation of debris against the work trestle was a fact which justified an extension of the contract time. However, by this time in 1981, the costs incurred as a result of the acceleration had already been indelibly imprinted on this project.

In this case, delay costs are claimed because of the additional time required to reconstruct piers 9 and 10. In order to make a recovery for those delay costs, events must have occurred which were beyond the control of the contractor and which delayed or extended its execution of

that part of the contract and directly affected the other parts of the contract. In some situations, those delays affect the performance time of the contract and in others, they do not. This depends on whether or not the event which is delayed is on the critical path of the project. "Critical path" is defined as the longest chain of events leading through the project and if delayed, delays the entire project. There are events which occur which are non-compensable and only entitle a contractor to an extension in the period of time during which to complete the contract. There are also events which occur and can result in additional funds being paid to the contractor. Delay costs must be considered here because the piers 9 and 10 scour losses result in an award for the non-time related claims.

There are certain requirements under the law before these compensable delay costs can be awarded. It is necessary for the party seeking the damages to first identify the compensable delays. In order to do so, each of the delays must be defined clearly so that it is possible to identify any concurrent delay. Concurrent delays could be noncompensable. This only occurs if it is shown the concurrent delay occurred at the same time as an excusable delay for which neither party is responsible, or it occurs at the same time as a contractor caused delay. In order for the Joint Venture to recover monies for the delay, the Joint Venture must prove the delay was the sole responsibility of the State; the delay occurred on the critical path of the project; and the delay was not concurrent with a contractor delay or excusable delay for which neither party is at fault. Once these delays are identified and isolated, the costs of those delays must be apportioned appropriately. *Pathman Construction v. Highway Electric Co.* (1978), 65 Ill. App. 3d 480.

The Joint Venture's time related damages are based on eight categories. These categories include the general

and administrative costs which were extended as a result of the scour losses, the extended equipment use as a result of those losses, the extended physical plant due to the loss, labor escalations due to the extension of the job time, material escalations due to the extension, the loss of efficiency created by the extensions, the need to move materials and equipment to higher grounds during flood periods as a result of the extensions, and finally ice utilized to cool concrete during the extremely hot summer period in 1981.

In order to prove its delay damages, the Joint Venture hired experts in the field of construction planning to undertake a comprehensive critical path method analysis of the project. Those experts were to determine the effect of the compensable events on the project's costs and on the additional time required for the project performance. The firm hired began its study in 1980, evaluating the as-built performance data provided by the contractor from the job site records, personal diaries kept by the Joint Venture on-site personnel, and a diary of the Illinois Department of Transportation resident engineer. Since they began their analysis while the project was incomplete, updated information was continually provided to them as work was completed on each item. The analysis, therefore, included the final as-built condition of the entire project. This first analysis is the project as it was actually constructed and is referred to as the as-built schedule. In addition, once the project was completed, a second schedule was prepared by that same firm which purports to show how the project would have progressed but for the delays alleged to have been caused by the Department of Transportation. This is a collapsed version of the as-built schedule. The compensable delays were removed from the first schedule to form the second.

In a construction job of this magnitude where there are a number of items being constructed simultaneously,

there are inevitable interdependencies or restraints.⁸ A job such as this which is incredibly complex from the outset contains numerous changes, delays and problems which have a ripple effect on the entire project. For this reason, the schedules as prepared by the consultants hired by the Joint Venture contain a large number of errors which affect the weight of that evidence. Stuart Bartholomew, the man most closely involved with the Joint Venture's claim, who was on the job site a substantial portion of time, who was directly involved in the intimate process of preparing the bid, and who finally put together the claim against the Department of Transportation, testified at length regarding the compilation of Schedules A and B. Mr. Bartholomew had to admit that both schedules were replete with problems and corrections. While he tried to minimize those during the course of his testimony, it is clear that the method used to calculate the delay damages utilized by the Joint Venture was over-simplified and not credible. Further, the State hired construction experts for the purposes of examining the two schedules prepared by the Joint Venture. These witnesses used the original work schedules prepared by the Joint Venture in 1977, 1978 and 1980. Each of these schedules anticipated the progress and timing of the work from the date of its preparation forward. The State's experts evaluated the actual performance against the planned performance with a critical path method format. That evaluation revealed that the progress made by the Joint Venture during the first eight months was nil although experts were not needed to establish that. The construction of the trestle, the method of access into the river, and, therefore, a necessary ingredient to begin the cofferdam construction was delayed from the outset.

⁸ The effect of one activity on a subsequent activity. An activity either has to be completed before the next activity starts or the first activity has to at least be started before the next activity can be done. There are crew restraints, equipment restraints and material restraints.

This delay ultimately caused delay of the entire project. Schedules showed that the Joint Venture had originally planned to have virtually all of its work done at piers 9 and 10 by March of 1978 complete through the columns. In reality, the work had not even begun. Certain revisions had to be made in the sequencing of the pier construction because of the failure to complete the trestle in April of 1978. In May of 1980, the schedule was revised for a third time. As the revisions became more common, the allotment of time for completion of an item increased. No doubt the experience was increasing the Joint Venture's knowledge of what it took to build a bridge in the Mississippi River.

The original contract completion date provided was October 1, 1979. The Joint Venture did not complete its responsibility on the Jefferson Barracks Bridge until December 8, 1981, over two years later. According to a schedule provided by the Joint Venture of how the job would have been built but for the delays attributable to the compensable losses, the date of completion would have been August of 1980.⁹

The pier 12 falsework loss took place in the spring of 1978. Up to that point, the job had proceeded for seven and a half months and the Joint Venture had been unable to comply with their as-planned schedule originally provided to the State. The Joint Venture's new schedule, revised in April of 1978, showed an attempt to recover lost time on the project and it also showed scheduling changes due to the Joint Venture's failure to progress on the trestle construction. A second revised schedule was issued in December of 1978 by the Joint Venture. However, the Joint Venture continued to be unsuccessful in matching its projections. Again,

⁹ The period of time between August of 1980 and December of 1981 is not a fully compensable delay because the pier 12 loss is not a compensable loss. In addition, the Joint Venture dismissed claims regarding an extra trestle section prior to trial. A share of the delay damages attributable to construction and the removal of the original trestle is therefore not considered.

the lack of progress on the trestle caused the Joint Venture to reschedule its sequence of the piers. Piers 5 through 8 were all a number of months late in their construction time. The work on those piers ran concurrent with the new work on pier 12 as a result of the loss in the spring of 1978. The revised schedule issued in December of 1978 showed that the completion date for pier 12 was now July of 1980 which was seven and a half months after the original completion date of the contract. Pier 12 had now become a controlling item on the critical path and, therefore, on the completion of the contract. The delay attributable to pier 12 would therefore prevent the recovery of any delay costs for scour related losses if, in fact, those two were concurrent.

Additionally, the Joint Venture seeks to recover \$681,819.86 that the Department of Transportation offset against the balance as liquidated damages. The Department has refused to pay these additional monies because it maintains that the Joint Venture completed the project 340 calendar days late without legitimate excuse. IDOT was permitted to withhold and offset liquidated damages pursuant to paragraph 12 of the Proposal which states as follows:

"In cases of failure to complete the work on or before the time named herein, or within such extra time as may have been allowed by extensions, the undersigned agrees the Department of Transportation shall withhold from such sums as may be due him under the terms of this contract, the costs, as set forth in the specifications, which costs shall be considered and treated not as a penalty but as damages due to the State from the undersigned by reason of added costs of engineering and supervision incurred by the Department resulting from the failure of the undersigned to complete the work within the time specified in the contract."

The standard specifications provided a schedule for the contractor's failure to complete the work on time and as the calendar days increased for such a failure, the amounts payable to the State gradually increased. As a result of delays for which the Department granted extensions, but not necessarily compensation, the contract completion date was

extended to January 2, 1981. In issue is the amount of delay which should be properly attributable to the scour-related losses and, therefore, what the properly extended contract completion date should be. The liquidated damages withheld represent the amount the State believes it should be compensated for the 340 calendar days between January 2 and December 8, 1981. The issue is whether the Joint Venture's request for extensions of time were dealt with in an appropriate fashion by the Department of Transportation. Naturally, IDOT argues that it did so and that the liquidated damages were withheld appropriately. The State's analysis of the delay attributable to the piers 9 and 10 cofferdams concluded that only 60 days should be added to the completion date as a result of those losses. The Joint Venture maintains that this analysis is defective in many respects. It also maintains that the project would have been completed late in November of 1982 had the Joint Venture stuck to the December, 1978, schedule and not resequenced the work, and that the salvage work at piers 9 and 10 legitimately took eighteen months. The location of that work directly impacted the sequence of work activities at four piers. The Joint Venture maintains that there was nothing in the contract compelling the Joint Venture to resequence the work after the scour losses had occurred, and that if it had resumed construction only after the excusable delaying events had been fully overcome, the project would have been completed months later than December, 1981.

The delay damages, the acceleration damages, and the liquidated damages are intrinsically joined. The Court finds that some delay damages should be paid to the Joint Venture although the Claimant's proof on the amount is not persuasive. The pier 12 loss affects those damages as delays attributable thereto are not compensable. Therefore, only a portion of both the constructive accelerated

costs and the liquidated damage costs should be paid to the Joint Venture. The portion should correlate to the total delay which is not concurrent with the pier 12 loss and that delay caused by the Claimant. The analysis for the determination of all of these damages is very difficult once the Claimant's analysis is rejected as we have done. The evidence on delay damages is conflicting. The Claimant's exhibits and testimony regarding these last three categories of claims are filled with errors. On the other hand, we find that we cannot say the Claimant suffered no delay damages as a result of the piers 9 and 10 scour losses.

The Claimant has the burden of proving its damages. (*McKinney v. State* (1983), 36 Ill. Ct. Cl. 20.) An award of damages cannot be based on conjecture. While the Court has rejected Claimant's analysis of damages, we must still review and weigh all of the evidence to determine if an award of damages can be made. (*Guarantee Electric Co. v. State* (1991), 43 Ill. Ct. Cl. 35.) We have painstakingly reviewed all of the evidence in the case in an attempt to determine if Claimant has presented enough evidence to prove its damages by a preponderance of the evidence. We have concluded that the Joint Venture was behind schedule from the very beginning of the project and that such delay was not caused by the Respondent. This original delay had a substantial effect on the entire project because it changed the sequence of events and the time of year in which the project proceeded. This is important because of the changing nature of the Mississippi River during the different seasons. We have also deleted those delays related to the pier 12 falsework loss, the trestle loss, and all concurrent delays. We are cognizant of the fact that most, if not all, construction projects will have delays of one form or another. For a delay to be tolerated, it must be reasonable under the circumstances.

Based on the foregoing examination of the evidence, and the fact that some delay is inevitable, and the inherently speculative nature of computing loss of efficiency, the Court finds that the delay damages, acceleration damages and unpaid contract balance damages are One Million Four Hundred Seventy-One Thousand Dollars (\$1,471,000).

As is often the case, this figure is admittedly arbitrary but in light of the conflicting evidence, our rejection of Claimant's damage analysis, and the inherent variables in construction damage cases, we believe that the foregoing damage figure represents a fair amount. *Lowery Electric Co. v. State* (1991), 43 Ill. Ct. Cl. 52.

Finally, the question of entering an award remains. This Court cannot enter an award unless sufficient funds remain unexpended in the appropriation made to fund the project. (See discussion in *Loewenburg/Fitch Partnership v. State* (1986), 38 Ill. Ct. Cl. 227, and *Ude, Inc. v. State* (1982), 35 Ill. Ct. Cl. 384.) While there is no evidence in the voluminous record before the Court as to the exact amounts of released and unexpended funds from the project, the Court notes that both parties indicated at oral arguments that neither party was aware of any such funds beyond the \$681,819.46 retainage.

It is this Court's policy in breach of contract claims to limit awards so as not to exceed the amount of funds, appropriated and lapsed, with which payment could have been made. To do otherwise would be the same as granting a deficiency appropriation. The appropriation of State funds is the constitutional prerogative of the Illinois General Assembly. It is the Court's duty to advise the General Assembly. *Thorlief Larsen and Son, Inc. v. State* (1990), 42 Ill. Ct. Cl. 195; *J.F. Inc. v. State* (1988), 41 Ill. Ct. Cl. 5.

The Court finds that Claimant has suffered damages as follows:

(a) Extra grinding	\$ 94,998.00
(b) Piers 9 and 10 scour losses	2,694,513.00
(c) Combined delay damages, acceleration and unpaid contract balance	<u>1,471,000.00</u>
Total	\$4,260,511.00

An insufficient amount of funds lapsed to cover all of the damages.

The Court orders the Respondent to file with the Court the fiscal data on the project, including the balance of released funds which lapsed at the conclusion of the project within fourteen days. We will make a conditional order based on the parties' statements at oral arguments. Should the fiscal data filed by Respondent indicate either more or less lapsed funds, a supplemental order will be entered correcting the conditional order. Should the lapsed funds total \$681,819.86 as indicated by the parties at oral arguments, then the conditional order will stand.

For purposes of potential consideration of this claim by the Illinois General Assembly and in fulfilling our role as an advisory body to the General Assembly, we reiterate our findings herein and point out that but for the insufficient amount of lapsed appropriations on the project, we would have awarded Claimant damages of \$3,578,691.14 over and above the award made herein below.

Accordingly, it is conditionally ordered that Claimant, Fru-Con Corporation and Granite Construction, known as the Joint Venture, be and hereby is awarded the sum of \$681,819.86 and the other claims are denied solely for the reasons stated herein.

(No. 86-CC-2516—Claim denied.)

LILLIAN MINOR, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed August 28, 1996.

Opinion on Rehearing February 18, 1998.

HILFMAN & FOGEL (STEVEN FUOCO), Counsel for
Claimant.

JAMES E. RYAN, Attorney General (CYNTHIA J. WOOD,
Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*elements of claim.* To prevail in a negligence claim, the Claimant must prove by a preponderance of the evidence that the Respondent had a duty toward the Claimant, that Respondent breached that duty, that the negligence of Respondent was a proximate cause of the Claimant's injury and the Claimant's damages, and the Claimant must also prove that the Respondent had actual or constructive knowledge of the dangerous condition.

SAME—*premises liability—duty owed to invitees.* The State has a duty to exercise reasonable care for the safety of invitees using State buildings and property, but the State is not an insurer of the safety of invitees and an invitee assumes all normal, obvious or ordinary risks attendant to the use of the premises.

SAME—*open and obvious doctrine.* Generally, a landowner has no duty to warn of open and obvious conditions, and in determining whether such a duty exists, the Court will consider the likelihood of injury, the potential gravity of the injury, the reasonable foreseeability of the injury, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the Respondent.

SAME—*slip and fall in pile of snow—no duty to warn of obvious danger—claim denied.* Where the Claimant, upon arriving for work at a State building the morning after a heavy snowfall, observed a large pile of ice and snow in front of the entrance but attempted to enter the building in any event by walking through the pile, her claim for injuries sustained when she slipped and fell was denied, because the snow pile was an open and obvious danger of which the State had no duty to warn the Claimant.

OPINION

RAUCCI, J.

On February 29, 1984, before 8:00 a.m., Claimant Lillian Minor slipped and fell when trying to enter the Forbes Building on the grounds of the Manteno Mental

Health Center operated by the Illinois Department of Mental Health.

She was employed by the Regional Office of Education for the Kankakee School District as a social worker. She was assigned to work in the Forbes Building, and had been so assigned for almost two years.

She had arrived early on February 29, 1984. While it was not then snowing, she noticed that the back entrance that she normally used was blocked by a pile of snow. The pile, almost two feet high and knee deep to her, covered almost the entire width of the sidewalk in front of the back entrance. It was evident to her that the pile was not wind-blown snow because it was clumpy and similar to clumps that form after snow and ice have been shoveled. Since it was not possible to walk around or jump over the pile, and she did not want to walk through the pile, she got back into her car and drove to the front entrance. The area adjacent to the front entrance had not been shoveled at all, was covered with ice and snow, and appeared worse than the area at the back entrance. She returned to the back entrance. Upon closer examination, she noticed some footprints in the pile so she decided to step into the existing footprints in order to enter the building. She stepped gingerly and watched where she stepped in order not to fall. However, she fell on her third step because there was a clump of ice buried in the pile. She fell on her outstretched hands and knees.

After she fell, she felt as though her hands and fingers were frostbitten. She got up and managed to get into the building. She reported her fall to her supervisor and other coworkers. She later observed swelling in her right hand and she could barely move her fingers. She then sought medical treatment, first at the medical facility at Manteno, where she was refused because she was not a State employee, then at the emergency room at St. Mary's Hospital in Kankakee.

There she received an X-ray, pain pills and a referral to an orthopedist, Dr. Choy. Dr. Choy gave her a short arm splint to wear. She missed one week of work immediately following her fall.

She remained under Dr. Choy's care for several months. Due to a lack of improvement, in April, 1984, she started seeing Dr. Keegan, a neurosurgeon. He determined that her ability to grasp with her right hand had diminished and that muscle atrophy had occurred. An electromyogram and nerve conduction velocity studies supported a diagnosis of ulnar nerve compression of the right elbow. The ulnar nerve provides muscle and sensory function to the hand and fingers. Accordingly, on May 11, 1984, Dr. Keegan operated on her to decompress the ulnar nerve. As a result of the surgery, she was not able to work for approximately 27 days and has a three-inch scar on her right elbow. After the surgery, she healed normally and was released to return to work with no restrictions.

Approximately three years after the fall, she fell down the stairs at her home and hit her right elbow. She suffered the same symptoms as she had after the prior fall. Dr. Keegan testified that he saw her again on March 31, 1985, and determined that she suffers from carpal tunnel syndrome on both sides, more notably on the right side. He directed her to wear a splint at night to alleviate the problem. If this conservative treatment is successful, no further treatment would be necessary. If not successful, surgery may be required.

Dr. Keegan testified that the ulnar nerve depression was "directly related" to the first fall. There is a "good possibility" that the carpal tunnel syndrome was also related to that fall, but he could not be positive.

At the time of the hearing in 1995, Claimant testified that she has a lack of strength in her right hand, that her

fingers get stiff and cramp, and that she suffers pain in her arm at times. She cannot write as much or as long as she did before the accident. She has difficulty with her grip and if she grips too hard, she gets cramps. She cannot drive as she used to and has others drive her. She does not cook because she has dropped things and is fearful of dropping something hot and scalding herself. She cannot bowl or play baseball. Prior to February 29, 1984, she had no problems with her right arm, elbow or hand.

Steve Odom, a former State employee, testified on behalf of Claimant. He had worked at Manteno from 1975 until July, 1984. He observed individuals from the Department of Transportation clearing ice and snow with tractors and big equipment on the big sidewalks, and shovels and hand tools on the entrances and small sidewalks. He did not observe any piles of snow in front of doorways, and had no recollection about the condition of the sidewalks or doorways around the Forbes Building on February 29, 1984.

Alicia Parkinson testified that she worked at the Regional Office of Education of Kankakee County from 1982 to 1985. On February 29, 1984, Claimant told her that she had fallen on a snow pile and was complaining that her arm was hurting. Claimant looked like she was in pain. The witness went outside and looked at the snow pile. It was in front of the doorway that was normally used by employees and covered the area from the building to the edge of the sidewalk. It was about two feet deep and looked like a "heaped pile of snow" and was "lumpy" and "irregular." It was not a drift but was shoveled snow.

Alicia Parkinson had used the same entrance as Claimant on February 29, 1984. She did not fall and has no knowledge of anyone else falling on that day.

In order for Claimant to prevail, she must establish the existence of a duty, a breach of that duty and an injury that was proximately caused by the breach. (*Johnson v. National Super Markets, Inc.* (1994), 257 Ill. App. 3d 1011, 1015, 630 N.E.2d 934, 938.) A property owner has no duty to remove natural accumulations of snow and ice, but if he chooses to do so, he must exercise ordinary care.

Here, the Respondent undertook to remove the snow and ice. The result of the removal left a snow and ice pile that was heaped, lumpy and irregular.

However, Claimant has failed to prove by a preponderance of the evidence that her injury was proximately caused by the pile. She observed the pile, determined that it was not safe to attempt to walk on it, went to the front, and then returned and, notwithstanding her misgivings, she attempted to walk over the pile. Her actions, whether viewed as proximately causing the injury, or as substantially contributing to her injury, resulted in the fall.

In *Johnson, supra*, the plaintiff did not see the patch of ice which caused her fall and it was not obvious. She observed only a puddle. In the instant case, Claimant was not only aware of the unnatural accumulation of snow but also that the pile contained clumps of ice. She was aware of the risk and initially declined to take a risk which she viewed as dangerous. Invitees assume normal, obvious or ordinary risks attendant to the use of the premises. (*Ji Wong v. State* (1983), 45 Ill. Ct. Cl. 180.) The Claimant, by deciding to enter the building by an entrance that she knew was blocked by an unnatural accumulation of shoveled snow and ice, assumed a normal, obvious and ordinary risk.

The Respondent's actions were not the proximate cause of Claimant's injuries. Additionally, Claimant was

guilty of comparative negligence. We have adopted the doctrine of comparative negligence and find it applicable here, notwithstanding the Respondent's failure to plead it as an affirmative defense. Claimant's actions were more responsible for her injuries than the Respondent's actions.

As we stated in *Odom v. State* (1988), 41 Ill. Ct. Cl. 103:

"No claimant has the right to expose himself or herself to possible danger and then recover damages for injuries which could have been avoided by the use of reasonable care, and claims for personal injuries must be analyzed under the doctrine of comparative negligence to determine whether any of the parties exercised less than reasonable care which proximately led to the claimant's injuries."

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

OPINION ON REHEARING

FREDERICK, J.

This cause comes before the Court on Claimant's petition for rehearing. On August 28, 1996, an opinion was filed denying the Claimant's claim. The judge who authored the opinion had previously recused himself from this case back in January, 1988. At the time, the judge had a potential conflict. That judge subsequently left the Court and then later rejoined the Court. At the time the judge authored the August 28, 1996, Opinion, he no longer had an actual or potential conflict in regard to this case. However, in the interests of fairness, the Court has granted Claimant's petition to reconsider the case and we do so reconsider the case and enter this opinion.

The facts are not in dispute. On February 29, 1984, before 8:00 a.m., Claimant slipped and fell when trying to enter the Forbes Building on the grounds of the Manteno Mental Health Center operated by the Illinois Department of Mental Health. Although Claimant was employed

by the Regional Office of Education for the Kankakee School District as a social worker, through an agreement with her employer and the Illinois Department of Mental Health, her assigned work location was in the Forbes Building. Claimant had been assigned to that work location for almost two years as of February 29, 1984. Claimant testified that February 29, 1984, was a very cold, wintry day with precipitation. On February 28, 1984, it had snowed “really bad” and it was the worst snow and coldest day of 1984. This snow had apparently occurred after she left work on February 28, 1984.

According to Claimant, she arrived at work early on February 29, 1984. Claimant testified that she always liked to get to work early so she could get a parking place close to the door. She was the first to arrive to work that day. After parking, Claimant observed that the sidewalk had not been cleared and that the back entrance that she had used to enter the building for approximately two years was blocked by a pile of snow. The pile, which was almost two feet tall and knee deep to the Claimant, covered almost the entire width of the sidewalk in front of the back entrance to the building. It was evident to Claimant that the pile was not wind-drifted snow in that it looked dirty and clumpy and was similar to clumps that form after snow and ice have been shoveled. Since it was impossible for Claimant to walk around or jump over the pile and because she did not want to walk through the pile, she got back into her car and drove to the front entrance. The front entrance appeared to be in worse condition to Claimant because it had not been shoveled at all and was covered with ice and snow. Claimant could see the ice and the walk appeared slippery. Thereafter, Claimant returned to the back entrance. Upon closer inspection, Claimant noticed some footsteps in the pile at

the back entrance so she decided to step into the existing footprints in order to enter the building. According to Claimant's testimony, she used care by stepping gingerly and watching where she stepped in order not to fall. Notwithstanding that care, Claimant fell on her third step. Claimant testified that she fell because there was a clump of ice buried in the pile. Claimant fell on her outstretched hands and knees.

After Claimant fell, she felt as though her hands and fingers were frostbitten. Nevertheless, she continued on and made it into the building. No one was present in the Claimant's office when she went in. Later, Claimant reported her fall to her supervisor and other co-workers when they arrived. Eventually Claimant observed swelling in her right hand and she could barely move her fingers. Claimant then sought medical treatment. She first sought treatment at the medical facility in the Center but she was refused treatment because she was not a State employee or resident of Manteno. She then sought treatment at the emergency room of St. Mary Hospital in Kankakee.

At the emergency room, Claimant received an x-ray, pain pills, and a referral to an orthopedist, Dr. Choy. Dr. Choy gave Claimant a short arm splint to wear. Claimant also missed one week of work immediately following her fall.

Claimant remained under Dr. Choy's care for several months. However, due to a lack of improvement, in April, 1984, she started seeing Dr. Harold Keegan. Dr. Keegan, a neurosurgeon, determined that Claimant's ability to grasp with her right hand had diminished and that muscle atrophy had occurred. An electromyogram (EMG) and nerve conduction velocity studies supported a diagnosis of ulnar nerve compression of the right elbow. Accordingly, on May 11, 1984, Dr. Keegan operated on Claimant

to decompress the ulnar nerve. As a result of the surgery, Claimant was off work for approximately 27 days and has a three-inch scar on her right elbow. After the surgery, Claimant was deemed to be healing normally and was released to return to work with no restrictions.

Claimant's weekly salary in February, 1984, was approximately \$475. Claimant's total lost wages totaled \$3,040. Additionally, Claimant's total medical expenses totaled \$3,036.75.

Approximately three years after the fall on February 29, 1984, Claimant fell down the stairs at her home and hit her right elbow. As a result of the fall, she suffered the same symptoms as she had suffered on February 29, 1984. According to Dr. Keegan, who saw Claimant on March 31, 1985, Claimant has carpal tunnel syndrome on both sides, more notably on the right side. Dr. Keegan ordered Claimant to wear a splint at night to help alleviate the problem. If that conservative treatment would be successful, no further treatment would be necessary. However, if it is not successful, surgery may be required.

According to Dr. Keegan, the ulnar nerve depression was "directly related" to the fall sustained by Claimant on February 29, 1984. He also indicated that there was a "good possibility" that the carpal tunnel syndrome was also initiated by the fall. However, he could not be positive in that regard. There was no evidence of any degenerative changes in Claimant's right hand in 1984.

As of the date of the hearing, Claimant testified that she had a lack of strength in her right hand, that her fingers get stiff and cramp, and that she had pain in her arm at times. Claimant testified that she cannot write as much or as long as she did before the accident. She has trouble with her grip and if she grips too hard, she gets cramps.

She cannot drive like she used to and has to get someone else to drive her around. She also does not cook because she has dropped things and is afraid that she will drop something hot and scald herself. Also, Claimant testified she cannot bowl or play baseball. Prior to February 29, 1984, Claimant did not have any problems with her right arm, elbow or hand.

Steve Odom, a former State employee, testified on behalf of Claimant. From March, 1975, until July, 1984, Mr. Odom was a laborer in the plumbing department at Manteno. During that time period, he observed individuals from the Transportation Department's ground crew clearing ice and snow around the Forbes building. In cleaning the sidewalks, they would use tractors and big equipment on the big sidewalks and shovels and hand tools on the entrances and small sidewalks. At no time did Mr. Odom observe any piles of ice and snow in front of doorways. Mr. Odom had no recollection about the condition of the sidewalks or doorways around the Forbes Building on February 29, 1984.

Alicia Parkinson testified that she worked at the Regional Office of Education of Kankakee County from 1982 to 1985. On February 29, 1984, Claimant told her that she had fallen on a snow pile and was complaining that her arm was hurting. Ms. Parkinson indicated that Claimant looked like she was in pain. Ms. Parkinson went outside and looked at the snow pile. According to Ms. Parkinson, the snow pile was in front of the doorway that was normally used by employees and covered the area from the building to the edge of the sidewalk. It was about two feet deep and looked like a "heaped pile of snow" and was "lumpy" and "irregular." It was not a snow drift but was shoveled snow. Ms. Parkinson used the same entrance Claimant did to enter the Forbes Building on February 29,

1984. However, she did not fall and had no knowledge that anyone else fell. Claimant observed some plowing the morning of February 29, 1984, at Manteno but not at the two entrances she tried to use. Both Claimant and Ms. Parkinson testified that the snow pile was approximately two feet tall and “heaped,” “lumpy,” “irregular,” and looked like snow that had been shoveled.

The State presented no evidence and raised no affirmative defenses.

To prevail, the Claimant must prove by a preponderance of the evidence that the Respondent had a duty toward Claimant, that Respondent negligently breached that duty, that the negligence of Respondent was a proximate cause of Claimant’s injury and Claimant’s damages. Claimant must also prove that Respondent had actual or constructive knowledge of the dangerous condition. (*Hardeman v. State* (1995), 47 Ill. Ct. Cl. 292; *Lee v. Board of Governors of State Colleges and Universities* (1995), 48 Ill. Ct. Cl. 201.) Our analyses begin and end with the first element of the required proof. The State has a duty to exercise reasonable care for the safety of invitees using State buildings and property, but the State is not an insurer of the safety of invitees. (*McGraw v. State* (1986), 39 Ill. Ct. Cl. 182; *White v. State* (1986), 38 Ill. Ct. Cl. 1.) In a long line of cases, this Court has adopted the doctrine that an invitee assumes all normal, obvious or ordinary risks attendant to the use of the premises. *Sanders v. Board of Governors of State Colleges and Universities* (1995), 48 Ill. Ct. Cl. 177.

The open and obvious doctrine is based on public policy, developed long ago to promote the unfettered use of land. The application of the doctrine contradicts the traditional duty analyses of a negligence case. The doctrine focuses on whether the risk involved is open and obvious.

If the risk is open and obvious, then the duty of care does not exist. The basis of the doctrine is that the owner's duty to invitees arises only to the extent of the owner's superior knowledge of the dangerous condition. The general rule is that a landowner has no duty to warn of open and obvious conditions.

Using traditional duty analyses, the Court considers the likelihood of injury, the potential gravity of the injury, the reasonable foreseeability of the injury, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the Respondent. *Lance v. Senior* (1967), 36 Ill. 2d 516.

The law has always provided that landowners should not be confronted with the impossible burden of rendering their premises injury-proof and that landowners are entitled to expect invitees to exercise care for their own safety. Therefore, a Claimant must establish the Respondent's duty to guard against the injury. The duty analysis focuses on the landowner and not on the Claimant's actions. The key is whether the landowner could reasonably foresee injury to the Claimant. The landowner is not required to anticipate the negligence of the Claimant.

Following the open and obvious doctrine, we find under the facts of this case that Respondent had no duty to warn Claimant, an invitee, of this open and obvious snow pile. According to Claimant, the worst snowfall of the year had occurred. Respondent was still plowing in the area and had not completed snow removal. Claimant arrived very early to work and was the first to arrive in her section. Claimant observed the snow piled in front of the back door. She observed snow and ice and slipper conditions by the front door. Respondent did not have superior knowledge to Claimant regarding this snow pile.

The same considerations under the traditional duty analyses indicate that the Respondent had no duty to Claimant. The magnitude of the snowfall, the fact that Claimant was early for work, and that Respondent was still plowing snow prior to the shoveling of door areas as had been done in the past lead the Court to find that Claimant's injury was not foreseeable and that, therefore, Respondent had no duty of care towards this Claimant under these facts in regard to the snow pile. Walking through a two-foot snow pile is an open and obvious danger. The Respondent had no duty to warn Claimant of this open and obvious danger. Where there is no duty, there is no liability. This is not a defense but a failure of Claimant to prove a duty by a preponderance of the evidence. As Claimant has failed to prove a duty, the Court need not discuss breach of duty, proximate cause and damages.

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

(No. 87-CC-1715—Claims dismissed.)

KEITH SCOTT and DONALD LAWRENCE, Claimants, *v.*
THE STATE OF ILLINOIS, Respondent.

Opinion filed June 29, 1998.

MOEHLE, SMITH & NIEMAN (TIMOTHY NIEMAN, of counsel), for Claimants.

JAMES E. RYAN, Attorney General (LAWRENCE C. RIPPE, Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*State not insurer against all accidents due to condition of highways—duty owed to highway users.* The State of Illinois is not an insurer against all accidents which may occur by reason of the condition of its

highways, but the State does owe a duty to all users of highways to maintain them in a reasonably safe condition and to give warning by the erection of adequate and proper signs when there is an unreasonably dangerous condition of which the State has notice, either actual or constructive.

SAME—*negligent highway maintenance claim—notice*. A Claimant must show that the State had actual or constructive notice of an alleged defect in order to recover on a negligent highway maintenance claim, and the State may breach its duty to maintain a highway in reasonably safe condition if it had notice of the defect which caused the accident and took no action to correct or warn of the defect.

SAME—*comparative negligence—proximate cause*. The adoption of comparative negligence in Illinois did not extinguish the requirement that a Claimant must establish proximate cause on the part of the Respondent, and the failure of the Claimant to so establish proximate cause precludes a finding of liability and negates the need to compare fault.

SAME—*exercise of due care for one's own safety*. A person approaching a place of danger has a duty to do so cautiously and with a proper degree of care for their own safety, and drivers utilizing highways of the State are charged with the duty of looking and seeing things which are obviously visible.

SAME—*car accident in blizzard—injuries caused by Claimants' disregard of obvious danger—claims dismissed*. Where a tow truck operator and a passenger in another vehicle which struck the tow truck operator as he attempted to retrieve a car in a blizzard filed claims alleging that the State failed to properly advise them of a road closure during the snowstorm, the claims were dismissed, based on evidence indicating that the State had acted reasonably in trying to warn and protect the public, while the Claimants' conscious disregard of the open and obvious danger by proceeding to drive in spite of the blizzard proximately caused their injuries.

OPINION

JANN, J.

Claimants Keith Scott (hereinafter “Scott”) and Donald Lawrence (hereinafter “Lawrence”) filed these consolidated causes of action in the Court of Claims against the Respondent, State of Illinois, Department of Transportation. The Claimants allege that the Respondent's negligence was the proximate cause of their accident. Claimants allege they sustained personal injuries as a result of negligence and a breach of duty by the State in failing to properly advise of the closure of Route 251. The

Claimants seek compensation from the State for these injuries. Counsel for both parties appeared before the Court on March 11, 1997 in Chicago, Illinois, to give oral arguments and have filed briefs.

Facts

The parties are in substantial agreement as to the facts of the occurrence and have so stipulated.

On or about January 21, 1985, a blizzard had begun in the northern part of Illinois including the area surrounding the city of Rochelle. On January 25, 1985, visibility was virtually zero because of falling and blowing snow in the area surrounding the city of Rochelle, including Illinois State Route 251 (formerly known as Route 51) between State Routes 64 and 38, Ogle County.

Scott, at the time of the accident, owned a body shop and wrecker service. On January 25, 1985, at approximately 9:00 a.m., Scott was in the process of answering a service call for towing and proceeded north on Route 251 about two miles. Scott never at any time observed any barricades or warnings signaling the closure of Route 251. About a mile north of town on Route 251, Scott experienced a "white out." Scott decided to continue on to retrieve the stalled vehicle because, due to the weather conditions, he did not believe he could turn safely around until he reached the intersection of Routes 251 and 64. When Scott approached the stalled vehicle he got out of his wrecker and determined he could pull the disabled vehicle with a chain rather than using a winch. At that moment, Scott was struck by another vehicle driven by Gordon Bradford in which the other Claimant, Lawrence, was a passenger. Scott sustained a broken arm, broken jaw, broken right leg and amputation of his left leg. Scott's damages were stipulated to be a minimum of \$200,000. It

is also stipulated that a set off in the amount of \$16,000 is applicable to any award.

Lawrence was a passenger in the backseat of Bradford's vehicle. He intended to travel to Rockford and spend the day there. As Bradford's vehicle proceeded north on Route 251, Lawrence did not see any signs or barricades of any kind indicating the closure of Route 251 and he testified that he observed cars traveling south-bound.

After reaching a curve in the road at Hillcrest, a village about one mile north of Rochelle, Bradford's vehicle encountered blizzard conditions. The party, according to Lawrence, wanted to turn around but they could not find a safe place as the driveways were blocked with snow. The collision occurred before they could safely turn around. As a result of the accident, Lawrence sustained a black eye and a fracture of the fourth lumbar vertebrae in his back. He testified that he still has back pain. Lawrence incurred medical expenses in the amount of \$5,174.44 and lost wages of \$3,900. Lawrence is seeking in excess of \$25,000 for damages including pain and suffering. The State is entitled to a set-off of \$8,750 by stipulation.

The Law

The Claimants allege in their brief that the weather on January 25, 1985, at 9:00 a.m. created an unreasonable/dangerous condition on Route 251 between Routes 38 and 64; that the State had both actual and constructive notice, and thus had a duty to provide the public with adequate warning. The State allegedly breached that duty by failing to warn at all, or at best, failing to provide adequate warning and to do so in a reasonable amount of time. Claimants argue that with adequate warning, neither Scott nor Lawrence would have traveled on Route 251 that morning.

Claimants allege their injuries can be directly and proximately linked to the failure of the State to provide an adequate warning of the hazardous road condition.

The Respondent alleged in its brief and reply brief that the road was closed; and even if it weren't closed, the State is not liable for a dangerous condition of the road created by an act of God. The condition of the road was not the cause of the accident per Respondent, but the negligent acts by Claimants were the proximate cause of the accident as they failed to properly act for their own safety in the face of open and obvious danger.

A well-established rule of law is 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.) However, "the State owes a duty to all the users of highways to maintain them in a reasonably safe condition." (*Berry v. State* (1968), 26 Ill. Ct. Cl. 377.) The State is also under a duty to give warning by the erection of adequate and proper signs when there is an unreasonably dangerous condition, of which the State has notice, either actual or constructive. *Hout v. State* (1966), 25 Ill. Ct. Cl. 301.

A Claimant must show that the State had actual or constructive notice of an alleged defect in order to recover on a negligent highway maintenance claim. The State may breach its duty to maintain a highway in a reasonably safe condition if the Claimant establishes that the State had actual notice of the defect which caused the accident and takes no action to correct the defect or warn of the defect. *Pigott v. State* (1968), 26 Ill. Ct. Cl. 263.

A determination of whether the State had constructive notice depends on the facts of each case. Constructive notice is imputed to the State where a condition by its evident

nature, duration and potential for harm should necessarily have come to the attention of the State, so that the State should have taken some action. *Stills v. State* (1989), 41 Ill. Ct. Cl. 60.

The record is quite clear that Respondent was possessed of actual knowledge of the hazardous condition of the roadway and took action to remedy said condition. The primary question before us is the adequacy of the State's response as to providing warning to the motoring public and whether acts or omissions by the State constituted a breach of duty which proximately caused injury to the Claimants. We must additionally determine whether the Claimants' acts were a proximate cause of their injuries and if so, to what extent. This occurrence is governed by pure comparative negligence, as it arose after *Alvis v. Ribar* (1981), 85 Ill. 2d 1, but before the enactment of statutory limitation of awards to Claimants who were found to be more than 50 percent negligent. Ill. Rev. Stat. (1985), ch. 110, pars. 2—116, 2—1107.1.

We note that the record herein does not address most of the evidence with great specificity other than the economic damages and injuries suffered by Claimants. The circumstances preceding the accident and grievous nature of Scott's injury coupled with the passage of some nine years before hearing make the fading of recollections by witnesses understandable if problematic. The parties' briefs are well reasoned and ably argued. Both parties rely on conclusions and speculation to reach ultimate issues of fact which are not necessarily of record. Ergo, we shall begin our analysis with a simple timeline in an attempt to organize and fairly weigh the evidence before us.

1. *12 a.m.-7:30 a.m.* The parties agree that a storm or series of storms with snow, high winds and severe cold struck the area in question on January 21, 1985, and

continued on and off through at least the afternoon of January 25, 1985. The evidence further indicates that both the city of Rochelle and IDOT were engaged in ongoing snowplowing and snow removal due to high winds and snowfall between 12 a.m. and 7 a.m. on January 25, 1985, within their respective jurisdictions.

The evidence as a whole also indicates that the severity of the storm was rather extraordinary from 12 a.m. to at least 12 p.m. on January 25, 1985. Claimant's witness, Mr. John Gross, superintendent of streets in Rochelle from 1971-1993, was called in before his normal starting time of 7 a.m. He was unable to state the exact time of arrival, but testified that he and the full city crews under his supervision were summoned between 1 a.m. and 6 a.m. to clear snow from the city streets. The record does not indicate that Rochelle's crews had completed their plowing-clearing efforts at or before 9 a.m. and Mr. Gross' testimony indicated their efforts continued well into the afternoon.

The record indicates IDOT crews attempted to plow and clear State roadways in Ogle County and several adjoining counties from at least 12 a.m. on January 25, 1985. Before 7:30 a.m., the various IDOT plows encountered such dangerous conditions that they were instructed to cease operations until the weather improved to allow safe plowing in various locations in the four-county district. The testimony indicates the drivers were unable to ascertain the margins of the roadways and, thus, unable to safely operate the snowplows on Route 251 and other nearby north-south State routes at various times and locations within the IDOT District.

We are not advised as to meteorological data of the explicit conditions between 7:30 a.m. and 9 a.m. in the area in question just north of Rochelle.

Scott testified that he went to his place of business at approximately 6 a.m. His home in Rochelle was approximately one mile from his shop, also in Rochelle. He stated that it was snowing and very cold and that some areas in town were bad due to blowing snow. He described visibility as “good for a snowstorm” and “not so bad that you couldn’t see in town.” Scott also stated he had answered a number of calls that morning related to the storm such as starting stalled vehicles.

Lawrence testified that he had worked the third shift at a Rochelle factory and left work at 7 a.m. after completing his shift. Lawrence and his co-worker, Mr. Bradford, drove some five blocks to the home of a friend, also located in Rochelle, arriving at about 7:30 a.m. Lawrence and his two companions intended to travel to Rockford to spend the day in celebration of Lawrence’s new job and first big paycheck.

2. *7:30 a.m.-9:30 a.m.* IDOT employees, Eugene Steder, Connie McQuearry and Charles Lockard testified that they were instructed to begin erecting barricades on Route 251 at various intersections including Route 72 (about 12 miles north of Rochelle) and Route 38 which is actually within the city limits of Rochelle. The IDOT employees stated that they had erected barricades at Route 251 and Cairie Avenue in Rochelle between 8:30 and 9:00 a.m. This fact is disputed, but it appears clear that IDOT was attempting to erect barricades to close Route 251 in the Rochelle area between 7:30 and 9:30 a.m. and continued said efforts thereafter.

Mr. Gross, the superintendent of streets of Rochelle, testified that a maintenance agreement existed between IDOT and Rochelle for the erection of barricades and maintenance of State routes within the city ending at the north line of the junction of Route 38 and Route 251.

(Mr. Gross added that the city limits actually extended some one mile north to the village of Hillcrest but were not included in the agreement.) Under the agreement, IDOT provided two types of barricades to the city for use upon IDOT directive or order of the Illinois State Police. The city was not empowered to erect the barricades on State routes at its own discretion per Mr. Gross' testimony.

At approximately 9 a.m., Mr. Gross testified he was at a McDonald's restaurant in Rochelle just north of the intersection of Routes 251 and 38. Gross stated he could see approximately 100 feet to the south, the center line of Route 38 at its intersection with Route 251 "between gusts of wind." He stated visibility north was far less as it was an open area and he could not see beyond the "north border of McDonald's" at times.

Mr. Gross received a call over his walkie-talkie at about 9:30 a.m. while at the McDonald's requesting assistance from the fire department to respond to Claimants' accident. Mr. Gross met emergency personnel at Routes 251 and 38 and proceeded to the accident scene. He did not observe any barricades as he headed north on Route 251. Mr. Gross was driving a city pickup with a snow plow and was followed by an ambulance and a second city truck with a snow plow. A third city truck and second ambulance also followed some 10 to 15 minutes later.

Scott received a call that a motorist requested her vehicle towed from a snow drift at about 9 a.m. He was contacted by pager to go to the Minuteman convenience store at Routes 251 and 38 in Rochelle where a woman and her daughter requested that their car be towed from a ditch or snowbank north of Rochelle on Route 251 as they had left personal belongings in the car. Scott proceeded north on Route 251 to retrieve the abandoned vehicle and saw no barricades or signs indicating closure of Route 251. As

he proceeded about a half mile north, due to the rural nature of the area, there was blowing snow which became a sudden white-out near Hillcrest which was about one mile further north.

Scott testified he did not know if the car could be found and whether his own wrecker would get stuck due to blowing and drifting snow. He also stated that he was planning to proceed north to Route 64 where there was a large parking lot in order to safely turn around and return to Rochelle. Scott testified that the towing customer was from out of town and he did not know the location of the car nor which side of the road it rested upon before leaving to retrieve the vehicle. We lack evidence of when the patron's car was stuck. Scott did not listen to weather reports or otherwise attempt to check the road conditions before departing the Minuteman or at anytime that morning.

Lawrence and his two companions drove in Mr. Bradford's car to a bank in downtown Rochelle just before 9 a.m. to cash their checks. Lawrence stated they cashed their checks and headed north on Route 251 about a half to three-quarters of a mile south of its intersection with Route 38. He observed no barricades or signs indicating closure of Route 251 shortly after 9 a.m. However, Lawrence's complaint at paragraph 2(e) admits that Route 251 was closed to travel. Neither Lawrence nor his companions checked the radio for weather reports or sought information from other media sources as to road conditions prior to departure from Rochelle. Lawrence had no recollection of the weather conditions for the two preceding days but was somehow sure it was not snowing very hard nor blowing in town when he departed the bank. Lawrence was a passenger in the rear seat of a small sports car as they proceeded north on Route 251 and was looking between the front seats to observe the roadway and chatting with his

companions. He testified that the blowing snow got worse at the city limits and became a blizzard at Hillcrest, totally obscuring visibility. The driver and passengers had agreed to try to go to Route 64 and return to Rochelle when conditions appeared dangerous. The vehicle passed through a snowdrift and struck Scott. We are not advised as to the speed at which the car driven by Mr. Bradford was traveling just prior to impact. However, the testimony indicates they left the bank at 9:05 a.m. and traveled approximately five miles before the collision at about 9:30 a.m.

Although denying knowledge of poor road conditions, Lawrence stated that the weather the week preceding the accident was the worst he had seen in a long time. He also stated that he was aware that roads outside developed areas sheltered by buildings were generally worse than in town during snowstorms due to blowing and drifting.

3. *9:30 a.m.-2:00 p.m.* Mr. Gross testified that he had requested a backup truck to assist emergency vehicles to reach the accident scene at about 9:30 a.m. En route to the accident scene, he observed a number of vehicles either in the ditch or on the roadway, and he stopped to pick up an injured person walking on the road before reaching the Claimants' accident scene. Mr. Gross further testified that conditions were so poor that he feared for his own safety and that of city and emergency personnel. He further opined that there was no reason for anyone other than emergency personnel to be out on the roads that morning.

Between 9:40 and 10:00 a.m., State Trooper Mike Pearson arrived at the accident scene. Pearson testified there was a single barricade at Route 251 and Cairie Avenue in Rochelle as he exited town. Cairie Avenue is just south of Route 38.

Emergency aid was given to both Claimants and they were transported to the hospital for further treatment by approximately 10:10 a.m.

At approximately 9:45 a.m., IDOT requested assistance in barricading Route 251 according to Mr. Gross' phone log. (We note the log was not introduced as a business record and was not particularly detailed, *i.e.*, Mr. Gross could not determine the time he arrived at work on January 25, 1985.) Mr. Gross stated the log indicated Charles Lockhard of IDOT had requested the assistance of Rochelle's crews in erecting barricades and had asked to use their facilities to repair his windshield wipers and wait for an IDOT mechanic. Mr. Gross did not personally converse with IDOT at this time as he was either approaching or present at the accident scene. Mr. Gross was asked when Rochelle's crews responded to the request by IDOT. Although he could not be explicitly specific, his testimony as a whole indicates that his crew was unable to respond until returning from the accident scene as all three snowplows were assisting in the emergency traffic control and escort of ambulances to and from the scene.

Mr. Gross testified that he and his crew had erected all barricades at their disposal between approximately 10:10 a.m. and 2:00 p.m. He further stated that the city police had made several calls to report that the barricades were being knocked down by motorists or weather during the afternoon. In some areas, snow was plowed up in an effort to completely block roadways.

Mr. Frank Schotka, IDOT's District Maintenance Engineer at the time, testified in a telephonic evidence deposition. Mr. Schotka's office was in Dixon, Illinois, some 20 miles from Rochelle. Mr. Schotka did not have independent recollection of the day or events at issue. He testified as to normal IDOT procedures for road closures

in similar circumstances and notification of other agencies. He also testified that during snow storms, all available manpower was devoted to snowplowing unless the roads became impassable at which point, the drivers would go to the nearest main road if possible, and erect a single barricade. Schotka had no reason to believe these procedures were not followed on January 25, 1985, but also had no personal knowledge of the events that day.

Claimants argue that Respondents failed to follow procedure in notifying various departments or agencies of road closure. As Claimants stated at oral argument, “the evidence does not indicate that all of those people were notified despite the unusually hazardous conditions that day.” However, the evidence does not indicate that said procedures were not followed nor that the alleged failure to follow procedure caused the incident complained of herein. There is also no proof that the efforts of the State were untimely under the circumstances; that either Claimant would have heard broadcast messages of road closures; or that the city could have erected barricades and warnings prior to the accident which would have averted Claimants’ injuries.

The State’s duty is to maintain its highways in reasonably safe condition by using reasonable diligence in such maintenance (*Scroggins v. State* (1991), 43 Ill. Ct. Cl. 225.) The State also has a duty to warn users of its roadways of unreasonably dangerous conditions of which the State has actual or constructive knowledge. (*Hout v. State* (1966), 25 Ill. Ct. Cl. 301.) There is clear and convincing evidence that the State had notice of the road conditions herein as its employees were engaged in maintenance activities at the time of the incident. The reasonableness of the State’s actions in maintaining the roadway and giving notice are at issue along with proximate cause of the injuries to Claimants. The adoption of comparative

negligence in Illinois did not extinguish the requirement that a Claimant must establish proximate cause on the part of Respondent and the failure of Claimant to so establish proximate cause precludes a finding of liability and negates the need to compare fault. (*Harris v. State* (1986), 39 Ill. Ct. Cl. 176.) The cause of an injury is that which actually produces it, while the occasion is that which provides an opportunity for the causal agencies to act. (*Briske v. Village of Burnham* (1942), 279 Ill. 193, 39 N.E.2d 976; see also *Vest v. City of Granite* (5th Dist. 1982), 435 N.E.2d 755, 757.) If the negligence charged does nothing more than furnish a condition by which the injury is made possible and that condition causes an injury by the subsequent, independent act of a third person, the creation of the condition is not the proximate cause of the injury where the subsequent act is an intervening efficient cause which breaks the causal connection between the original wrong and the injury, and itself becomes the proximate or immediate cause. *Thompson v. County of Cook* (1993), 154 Ill. 2d 374, 609 N.E.2d 290.

Illinois law is well settled that a person approaching a place of danger has a duty to do so cautiously, and with a proper degree of care for their own safety. A person has no right to knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of care for his own safety. *Ames v. Terminal Railroad Assn.* (1947), 322 Ill. App. 187, 75 N.E.2d 42.

In *Witt v. State* (1969), 26 Ill. Ct. Cl. 318, this Court held that Claimant had not acted with due care and caution when he drove into dense smoke which was visible from a distance, and by proceeding at 25 to 30 miles per hour without being able to see what was in front of him. The *Witt* case was cited by this Court in *Coulson v. State* (1993), 46 Ill. Ct. Cl. 149 at 157, in which the Court

observed that “this Court has repeatedly held that drivers utilizing highways of the State are charged with the duty of looking and seeing things which are obviously visible.” *Adams v. State* (1981), 35 Ill. Ct. Cl. 216.

If we view the facts in a light most favorable to Claimants, that is assuming Claimants had no knowledge of the extreme weather conditions within one mile of Rochelle, notice of the condition ultimately rendering the roadway unfit for travel is vitiated to *all* parties including the State. There was no evidence offered to support a claim that the State knew or could know of the supposedly isolated white-out which occurred just prior to the accident. Both Claimants described the storm as “freakish,” implying an anomaly not reasonably anticipated by a person acting with due regard for his own safety or that of others. We further note that contrary to arguments by counsel, neither Claimant testified of record that they would have taken other routes or chosen not to travel if informed of the conditions on Route 251 just prior to the accident. In fact, Scott’s testimony was refreshingly candid and indicated that he was well aware of the jeopardy he encountered and that he had regretted his actions in hindsight. The very nature of Scott’s business at the time as a tow-truck operator implies acknowledgment of risks inherent to recovery of vehicles in potentially dangerous circumstances occasioned by weather or emergencies of man-made origin.

The preponderance of the evidence of record indicates that the proximate cause of both Claimants’ injuries was as a result of their own conscious disregard of open and obvious danger. Both Claimants had resided in the area for some years and knew that rural areas were more severely affected by blowing and drifting snow than urban areas. Both Claimants acknowledged that weather conditions were poor prior to leaving Rochelle and had

been severe for some days. Neither Claimant made any attempt to listen to the radio or otherwise obtain travel information prior to departing Rochelle despite a series of storms in the same week and extremely cold temperatures.

The arguments regarding substantial changes in conditions between Rochelle and Hillcrest, though not unheard of in Midwestern winters, are not supported by the record. The testimony of Mr. Gross indicates that between 9:00 a.m. and 9:30 a.m., visibility within the city limits was subject to constant change and severe impairment. Claimants did not introduce persuasive evidence of a time frame which would impute a breach of duty by IDOT. The weight of the evidence indicates that both IDOT and Rochelle acted reasonably and responsibly in the circumstances. The record supports a finding that IDOT and the city made reasonable efforts to warn and protect the public given the manpower and resources available. The geographical scope and duration of the storm(s) must be considered in imposing a duty upon the State. Claimants have not persuasively proved the availability or efficacy of additional or alternate measures by introduction of expert testimony or the testimony of their other witnesses.

The assertion that Claimants were unable to ascertain severe weather conditions which had, by stipulation, prevailed for at least two days is not credible. We have previously held that when Claimant may clearly perceive an obvious danger, the failure of the State to take additional measures argued or proposed by Claimant is not an automatic imputation of a breach of duty by the State. (*Slagel v. State* (1990), 42 Ill. Ct. Cl. 28; *Ruffcom v. State* (1981), 35 Ill. Ct. Cl. 27; and *Toliver v. State* (1994), 47 Ill. Ct. Cl. 55.) While the comparative negligence standard applicable to Claimants in Illinois Courts has been amended several times, the underlying duty of a Claimant to prove

the exercise of due care for his own safety has remained a condition of recovery in conjunction with the necessity of proving proximate cause. (*Coulson v. State* (1993), 46 Ill. Ct. Cl. 149.) The preponderance of the evidence of record indicates both Claimants were aware of substantial risks attendant to travel on the day in question and chose to not only ignore said risks, but made no attempts to obtain travel information or take measures to otherwise avoid jeopardy until they were injured.

While we deeply regret the grievous injuries suffered by Claimants and extend our empathy in the tragic consequences of this accident, we find it is both unreasonable and legally impossible to impose a duty of immediate response upon the State herein. Absent a clear showing by Claimants that the State acted with conscious disregard of a known hazard or imputed hazard for an unreasonable period of time in an ongoing emergency of significant duration and scope, we must deny these claims. Neither breach of duty nor proximate cause has been proven.

These claims are hereby denied and dismissed with prejudice.

(No. 87-CC-3501—Claims dismissed.)

LOUISE ANN SCHMIDT, as Executor of the Estate of PETER S. SCHMIDT, Deceased and LOUISE SCHMIDT, CHRISTOPHER SCHMIDT, and ANDREA SCHMIDT, Claimants, *v.*
THE STATE OF ILLINOIS, Respondent.

Opinion filed March 27, 1998.

Order filed June 29, 1998.

PIGNATELLI & PIGNATELLI (PATRICK J. LISTON, of counsel), for Claimants.

JAMES E. RYAN, Attorney General (LAIN D. JOHNSTON & LIMO T. CHERIAN, Assistant Attorneys General, of counsel), for Respondent.

HIGHWAYS—*duty owed by State to users of highways*. The State has a duty to all users of its highways to maintain them in a reasonably safe condition, and that duty includes adequately warning motorists of hazardous conditions of which the State has notice.

SAME—*liability for negligent highway maintenance—notice of defect required*. To recover in a claim of negligent highway maintenance, the Claimant must prove that the State had actual or constructive notice of the defect in question, and to be in a dangerously defective condition, a highway must be unfit for the purpose for which it was intended.

SAME—*proof of negligence—causation*. Negligence can be proven by either direct or circumstantial evidence but, in a negligent highway maintenance claim, it must be proven by a preponderance of the evidence that the defect complained of was a proximate cause of the injury complained of.

SAME—*fatal motorcycle accident—proximate cause not established—claims dismissed*. Claims brought by the widow and children of a man who was killed when his motorcycle allegedly struck a pothole were dismissed and their petition for rehearing was denied because, despite the State's knowledge of a rough road surface and the likely need for warning signs in the vicinity of the accident, there was no direct proof or objective circumstantial evidence to establish either the actual cause of the accident or the State's notice of the alleged defect.

OPINION

JANN, J.

This cause is brought by Louise A. Schmidt, as executor of the estate of Peter S. Schmidt, decedent, and arises out of a motorcycle accident which occurred July 20, 1986, on Illinois Route 10 between Easton and Mason City, in Mason County, Illinois.

Claimant's complaint at count I seeks recovery under a negligence theory. Count I alleges that Respondent: negligently failed to remedy a dangerous condition on its roadway, *i.e.*, a defective road surface; allowed said dangerous condition to exist for a long period of time; failed to keep the roadway in reasonably good repair and safe condition for public travel; and failed to warn the motoring

public of a known dangerous condition. Claimant alleges that decedent's fatal injuries were a direct and proximate result of Respondent's negligence. Claimant's letters of administration as executor of decedent's estate are attached to and made an exhibit to the complaint.

Count I seeks property damage in the amount of \$4,107.25 for decedent's motorcycle; funeral expenses in the amount of \$4,347.50; \$350,000 for mental anguish; \$350,000 for pain and suffering; and \$1,280,000 for loss of support pursuant to the Illinois Survival Statute. Ill. Rev. Stat. (1985), ch. 1101—2, 755 ILCS 527—6.

Count II of the complaint is brought pursuant to the Wrongful Death Act (Ill. Rev. Stat. (1985), ch. 70, *et seq.*, 740 ILCS 180/0.01 *et seq.*) on behalf of Louise A. Schmidt, Christopher Schmidt, son of decedent, and Andrea Schmidt, daughter of decedent. Count II realleges the acts of negligence asserted in count I and further states that the decedent's dependents as named above have been deprived of decedent's support, consortium and service as a result of his wrongful death. Count II seeks damages for loss of support in the amount of \$1,280,000 and for loss of services and consortium in the amount of \$1,500,000.

Mr. Larry Henry of Route 1, Mason City, Illinois testified as to the events immediately preceding and following the accident. Mr. Henry is Louise A. Schmidt's brother. Mr. Henry stated he had been riding motorcycles for approximately 16 years prior to the date of the accident. Mr. Henry recalled that July 20, 1986, was a warm, dry summer day and that he and Peter Schmidt had decided to go for a motorcycle ride. Mr. Schmidt had ridden his motorcycle to rural Mason City from his home in Lyndon, Illinois on Saturday, July 19, 1986. Mr. Schmidt and his family were frequent visitors to Mason City as both Mr. Henry and his mother lived nearby. Mr. Henry testified that he had had

ample opportunity to observe Peter Schmidt ride his motorcycle and that Schmidt was a careful, defensive driver.

On July 20, 1986, Mr. Henry and Peter Schmidt went for a motorcycle ride around 11:00 a.m. They rode in a staggered formation and Mr. Henry testified that the posted speed limit was 55 miles per hour and the riders were traveling at or below the speed limit. Mr. Henry was the lead driver with Mr. Schmidt trailing. Mr. Henry observed no "rough road" or other warning signs between Easton and Mason City.

Mr. Henry testified that he was checking on Peter Schmidt two to three times per minute. As they drove east from Easton toward Mason City, he did not notice Mr. Schmidt having any difficulties. He saw Mr. Schmidt traveling on the far right side of the lane whenever he checked, and testified that they both held the same line of travel as they proceeded toward their destination.

According to Mr. Henry, the bike Mr. Schmidt was riding was relatively new and Mr. Schmidt had mentioned no mechanical problems with the bike. There were no weather problems encountered during the trip. There were no animals in the area alongside the roadway at the time of the accident.

Mr. Henry noticed an oncoming car begin to "nose-dive" as the car and Mr. Henry met. According to Mr. Henry, in his opinion, this meant the car was braking. Mr. Henry then checked behind him and saw something shiny flying through the air. He saw the car rise up as if it were running over something.

Mr. Henry brought his motorcycle to a stop and turned around. As he went back toward the car, he observed Peter Schmidt lying on the south side of the roadway. The car was in the westbound lane. Peter Schmidt's motorcycle was in a field on the north side of the roadway.

Mr. Henry testified that he found skid marks on the road which he believed were caused by a motorcycle sliding sideways and gouge marks he presumed were made by metal scraping the road.

Mr. Henry also found a hole in the roadway. He identified this hole in Claimant's exhibits 1 and 2 by circling the hole depicted in the photographs introduced into evidence. The hole was on the southern-most part of the traveled roadway. Mr. Henry indicated the hole could have been in an almost straight line with the other gouge marks on the road by using Deputy Smith's diagram and indicating that the hole would have been where the motorcycle was first drawn on the diagram. Mr. Henry testified that there was a skid mark going into and out of the hole the width of a motorcycle tire which indicated the tire went over the inside edge of the hole in his opinion.

Plaintiff's exhibit number 13 which was admitted into evidence, was a photograph of the pothole with a measuring tape over it which when viewed closely, indicates the pothole had a length of approximately 24 inches and a width of approximately 14 to 16 inches.

The testimony of Robert Arnold was submitted via an evidence deposition as an expert witness. His current employment includes providing engineering services for a variety of clients. Mr. Arnold testified that in his opinion, the pothole depicted in Claimant's exhibits 2 and 3 could cause a motorcycle to lose control. He described the hole depicted in the photographs as significant in size and stated that a motorcycle rider could be surprised by coming upon such a hole.

The evidence deposition of Arlan Shoemaker was also admitted into evidence. Mr. Shoemaker was a lead worker for the Illinois Department of Transportation in July of 1986. His immediate supervisor was Vernon Reichle.

Mr. Shoemaker testified that when he inspected the roads in his jurisdiction that he would stop and get out of his car if he saw something that needed repair. He would not stop and get out of his car if he just saw a pothole. He would only stop his car and inspect the road if there was something more significant than a pothole. Mr. Shoemaker testified that Route 10 between Easton and Mason City was in a rougher condition than the other roads in his jurisdiction. He also stated that Route 10 probably required more attention than any other road in his jurisdiction. The asphalt on Route 10, for some reason, did not hold and most of the breakage occurred on the outer edge of the roadway.

Vernon Reichle also testified about the condition of the road. Mr. Reichle was a field technician and responsible for the maintenance of Illinois Route 10 where the accident occurred. His duties included inspecting the roads. Mr. Reichle testified that a pothole two to three inches deep and a couple of feet in diameter was something that he would probably want taken care of right away. He also testified that if he knew a stretch of road was in particularly bad shape, that area should be paid closer attention to than other areas on the road.

Mr. Reichle was aware in July of 1986 that Route 10 in the area of the accident was a particularly rough or bad piece of road. His subordinates and superiors were also aware of that fact. The problem with the road breaking up in the area of the accident had been going on for many years prior to the accident.

Mr. Reichle testified that his duties included making recommendations for the placement of warning signs. During questioning by the Attorney General, Mr. Reichle was asked if the roadway in the area of the accident was in such a condition that he should have recommended a

warning sign. Mr. Reichle's answer was "Yes, I should have."

It was stipulated that Peter Schmidt was 37 years old at the time of his death. It was further stipulated that he was earning \$25,307.05 at the time of his death, and would have continued to earn at least that amount until retirement at age 65, a period of 38 years. The loss of income over that period would be \$708,597.

Louise Schmidt, wife of the deceased, testified that they were married almost 18 years when Peter was killed. Louise also testified about the loving, involved relationship Peter had with his children.

Louise described the close and loving relationship she had with Peter as her husband, lover, and friend. Louise described the effect that Peter's death had on the children emotionally and financially.

Christopher Schmidt, Peter's son, was 14 years old when his father was killed. He described his relationship with his father as "awesome." He described the many activities he enjoyed with his father and the many ways his father influenced his life. Christopher testified that not a day or minute goes by that he doesn't wish his father was here.

Andrea, Peter's daughter, was nine years old when her father died. She also testified about the close relationship she had with her father and the impact of his loss on her life.

The State has a duty to all users of its highways to maintain them in a reasonably safe condition. (*Pigott v. State* (1968), 26 Ill. Ct. Cl. 262.) That duty includes adequately warning motorists of hazardous conditions of which the State has notice. *Hout v. State* (1966), 25 Ill. Ct. Cl. 301; *Gatlin v. State* (1985), 39 Ill. Ct. Cl. 51.

The Claimant in this case has alleged that the State was negligent in that the State allowed a dangerous condition, a defective road surface, to exist in a roadway for a long period of time; allowed a pothole to exist in the roadway for a long period of time; failed to keep the road in reasonably good repair for ordinary travel; allowed a hazard, a pothole, to exist in the roadway; and failed to warn traveling motorists about the dangerous condition.

To recover in a claim of negligent highway maintenance, the Claimant must prove that the State had actual or constructive notice of the defect in question. *Kirby v. State* (1990), 42 Ill. Ct. Cl. 77.

The main issues in this case are whether a dangerous condition existed on the State's highway, whether this condition was the proximate cause of Peter Schmidt's death and whether the State had actual or constructive notice of the defect.

The dangerous condition complained of in this case was the rough road and, in particular, a pothole in Illinois Route 10 in the eastbound lane of traffic approximately seven tenths of a mile east of Road 2950E. There is no dispute about this stretch of road being under the jurisdiction and maintenance responsibility of the Illinois Department of Transportation as the Department has admitted these facts.

Arlan Shoemaker, lead worker at the time of the accident was aware that the road was in bad shape and had been aware of that for a long time before the accident. He testified that the road in question was in a rougher condition than other roads in his jurisdiction and probably required more attention than other roads in his jurisdiction. He knew there were only a couple inches of asphalt on the road and it just did not hold for some reason.

He also knew the road had been breaking up on the outer edges of the roadway. He knew the breakage had been going on for some time prior to the accident. In fact, he knew the road had been deteriorating from 1975 until the time of the accident in 1986.

Mr. Shoemaker's immediate supervisor, Vernon Reichle, was also aware of the rough condition of the road before the accident according to Mr. Shoemaker. Mr. Reichle testified at trial that as of July, 1986, he was aware that Route 10 between Easton and Mason City was a particularly rough or bad piece of road. Mr. Reichle's superiors and subordinates were also aware that the stretch of road was particularly rough or bad. Mr. Reichle acknowledged that problems with the stretch of road breaking up had been going on for many years prior to the accident in question. No evidence of actual notice of the pothole complained of appears of record. No evidence was introduced regarding complaints or other accidents at this site within a relevant time frame.

Negligence can be proven by either direct or circumstantial evidence. (*Murphy v. Messerschmidt* (1977), 11 Ill. Dec. 5553, 368 N.E.2d 1299.) Circumstantial evidence is sufficient to support a cause of action for negligence and to sustain a verdict provided the inferences drawn from that evidence are reasonable. *McCommons v. Moorman Mfg.* (1980), 81 Ill. App. 3d 708, 301 N.E.2d 1354.

The State made a motion for a directed verdict at hearing. The State's motion for a directed verdict is based on the allegation that the Claimant has not established the existence of the alleged dangerous condition on Highway 10. While the Claimant has not produced any witnesses to specifically state that they saw the deceased hit the pothole there has been circumstantial evidence produced by

the Claimant that shows that the State had actual or constructive notice of the rough condition complained of, and therefore, the motion for a directed verdict is denied. The State's motion in limine to prevent the Claimant's introduction of a departmental report depicting the condition of the highway is granted. The examination of witnesses at trial was not conclusive as to the funding of the proposed improvement project to reconstruct the roadway. The witnesses did not have direct involvement in seeking funding nor explicit knowledge thereof. This funding is essentially moot, as we have found that the evidence supports a finding of Respondent's knowledge of the rough condition of the roadway and failure to erect warning signs per admissions of Respondent's agents.

The Claimant urges a finding that the roadway in general was negligently maintained and constituted a dangerous condition. The evidence does not support such a finding. The photographic evidence indicates patching of the roadway, and testimony was introduced that weekly inspections of the roadway were performed by IDOT. It was also noted that pothole patching was done on July 15, 1986, five days prior to the accident. The State is not an insurer of its highways. (*Walter v. State* (1989), 42 Ill. Ct. Cl. 1, 4 (citing *McAbee v. State* (1963), 24 Ill. Ct. Cl. 374; *Trotter v. State* (1993), 45 Ill. Ct. Cl. 164, 168.)) To be in a dangerously defective condition, a highway must be in a condition unfit for the purpose for which it was intended. (*Trotter* at 169, citing *Baker v. State*, 42 Ill. Ct. Cl. 110; *Allen v. State* (1984), 36 Ill. Ct. Cl. 24.) We have previously held that liability based upon negligent maintenance of a highway can be imposed only if the State had actual or constructive notice of a defect. *Stills v. State* (1989), 41 Ill. Ct. Cl. 60.

Herein, there is no evidence that the roadway was unfit for vehicular travel due to negligent maintenance by

the State. The Court has previously considered accident statistics and citizen complaints in establishing the existence of a defective roadway and in determining the State's actual or constructive notice of such condition. (See *Roach v. State* (1986), 38 Ill. Ct. Cl. 171; *Stills, supra* at 62-63; *Kirby v. State* (1990), 42 Ill. Ct. Cl. 77.) The evidence indicates that no accidents occurred at this location prior to decedent's tragic incident and no complaints were received by IDOT. The photographic evidence also shows that the extreme outer edges of the roadway in both lanes were rougher than the condition of the lanes nearer the centerline.

Claimant argues that the size of the pothole complained of (approximately 24 inches long by 14 to 16 inches wide and 2 to 3 inches deep) is evidence of negligent inspection by Respondent and the existence of the pothole for a time period which would impute constructive notice to Respondent and a commensurate duty to repair the hole or warn of its existence. The facts herein are disputed as to the effect such a pothole would have on a motorcycle operating at the posted speed limit and are distinguishable from Claimant's citations. Most notably, the expert testimony offered by Claimant is neither conclusive nor compelling and we lack occurrence witnesses. We are unwilling to make a finding of notice of the specific pothole complained of based upon the facts herein. As previously noted, Respondent has admitted knowledge of a rough surface and that signage was probably appropriate.

In order to recover, Claimant must prove by a preponderance of the evidence that the defect complained of was a proximate cause of the injury complained of. (*Cotner v. State* (1987), 40 Ill. Ct. Cl. 71.) Claimant has not met the burden of proof to establish proximate cause. As

previously stated, Claimant's expert witness testified that the pothole in question could cause such an accident. The testimony of Mr. Henry, although quite clear, is not conclusive. He speculated as to his observations and assumed the decedent's vehicle made the skid marks and gouges he observed after the accident. Mr. Henry did not see the accident and his relationship with the decedent must be considered in weighing his testimony. The testimony of Deputy Smith is somewhat contradictory as noted by Claimant. However, his testimony taken as a whole indicates that Deputy Smith did not believe the pothole identified by Mr. Henry constituted a defect which would cause such an accident. Testimony by Deputy Smith is also in conflict with Mr. Henry as to the position of skid marks at the scene.

The only eyewitness to the accident did not testify at hearing. Respondent sought to introduce the witness's discovery deposition over Claimant's objections. In the absence of authority for the introduction of the deposition testimony, said testimony shall be excluded from our deliberations.

Claimant's decedent had traveled the same roadway the day before the accident and ergo, was aware of the general condition of the roadway. We have no direct evidence of what he saw or did immediately preceding the accident. Although the State may have been negligent in failing to erect warning signs as to the rough road surface, we cannot conclude that said negligence was the proximate cause of the accident.

Based upon the discussion above, we must regretfully deny the Claimants' claims arising out of this tragic incident.

This cause is hereby dismissed.

ORDER

JANN, J.

This cause comes on to be heard on Claimants' petition for rehearing and prior motion for extension of time to file their petition. The motion for extension of time is hereby granted *instanter*.

We have carefully considered Claimants' petition and the record herein. Claimants have raised no issues which were not previously considered by the Court but argue that the Court erred in its assessment of the testimony and evidence herein as to notice of a dangerous road condition and proximate cause of decedent's injuries.

We find Claimants have not proven either notice of the defect complained of or proximate cause by a preponderance of the evidence. The cases cited by Claimants to support a finding of liability based upon circumstantial evidence are distinguishable, though routinely cited by Claimants under similar fact scenarios. We note that *Elkins v. State*, 85 CC 3001 (unpublished opinion, July 30, 1979) which cited *O'Shea v. Chicago Motor Coach Company* (1946), 328 Ill. App. 457, 66 N.E.2d 482, involved a defect which had existed for some nine months. The award in *O'Shea* involved an injury to a bus passenger at a specific bus stop used many times daily by the bus company and the evidence indicated the defective pavement had been in such condition for a substantial period of time.

Sadly, the evidence herein when taken in a light most favorable to Claimants (*i.e.*, disregard the disputed testimony of Deputy Smith and assume, *arguendo*, notice of the alleged defect by Respondent) still fails to reach a preponderance which would impute liability to Respondent.

As previously noted in our opinion of March 27, 1998, we have no direct, objective evidence of record as

to the actual circumstance which caused decedent to lose control of his motorcycle. The citations relied upon by Claimants which make findings of liability in circumstantial cases rely upon the Claimant's testimony or that of objective occurrence witnesses subject to cross-examination. We wish to note that Mr. Henry's testimony is in no way impugned and that he was a most helpful witness in these proceedings. However, Mr. Henry did not see decedent lose control of his motorcycle and has no direct knowledge that decedent struck the pothole complained of and that the pothole caused decedent's demise.

Mr. Henry's observations and conclusions of causation though credible, are not fact but speculation and the circumstances are not of a nature which support a finding of inferred causation as no other logical premise for causation exists. Claimants seem to ultimately argue *res ipsa loquitur* to reach a finding of liability. As discussed in *Rutledge v. State* (1997), 44 Ill. Ct. Cl. 257, a Claimant alleging *res ipsa loquitur* must prove that his injury is of a nature which does not occur in the absence of negligent acts, was caused by an entity or instrumentality within the exclusive control of the defendant, and was not due to negligence by Claimant. Claimants' witnesses did not adduce evidence that would support a finding of liability absent speculation and conjecture by this Court.

Wherefore, we must affirm our prior opinion denying these claims and Claimants' petition for rehearing reconsideration is hereby denied.

(No. 87-CC-3604—Claim denied.)

DENNIS KELLY, a minor by SUZANNE E. KELLY, his mother
and next friend, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed March 9, 1998.

SHELDON HODES & ASSOC. (DAVID M. SCHRAUTH,
of Counsel), for Claimant.

JAMES E. RYAN, Attorney General (MARINA POPOVIC,
Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*State's duty to maintain roadways is also owed to bicyclists.* The State owes a duty to all users to maintain its roadways in a reasonably safe manner for motorists, and that duty also applies to bicyclists and riders of motorcycles.

SAME—*proof of negligent highway maintenance.* In order to recover in a claim alleging negligent highway maintenance, the Claimant must prove by a preponderance of the evidence that a dangerous condition existed, that the Respondent knew of the condition, and that the condition proximately caused the incident, and the State must also have either actual or constructive notice of the defect.

SAME—*establishing constructive notice.* To establish constructive notice of a road defect, it must be shown that the defect was substantial enough and existed for such a length of time that reasonable persons would conclude that immediate repairs or warning signs were necessary, and each case involving constructive notice must be decided on its own particular facts.

SAME—*bicyclist struck sewer grate—claim denied for lack of notice.* In a bicyclist's claim for injuries suffered when his front tire dropped into a sewer grate, throwing him from the bicycle, there was insufficient evidence to establish that the grating in question was, in fact, defective or not in compliance with applicable safety standards, nor did the Claimant prove that the State had actual or constructive notice of the danger, and the claim was therefore denied.

OPINION

JANN, J.

This matter comes before this Court on Claimant's complaint against the State of Illinois, Department of Transportation seeking recovery for Claimant's damages allegedly resulting from Respondent's negligent maintenance of the roadway. The following facts were adduced at hearing and from the record:

During the pendency of this cause discovery was interrupted and numerous continuances were granted for consideration of a motion to dismiss, motion for summary judgment and motion for leave to file affirmative defenses. Trial was held on May 24, 1995, before Commissioner Elizabeth Rochford at which time additional time was allowed the parties for the taking and submission of evidence depositions. Claimant's trial brief was received some 18 months later. Respondent also filed a post-trial brief.

On June 9, 1986, Claimant, 16-year-old Dennis Kelly, and a friend were riding their bicycles northbound on Arlington Heights Road between Route 83 and Algonquin Road. Prior to the Kennedy Expressway, Claimant was traveling on a pathway that ran alongside Arlington Heights Road. As Claimant approached the Kennedy Expressway underpass, he discovered that rocks covered the pathway preventing further travel. Claimant exited the pathway and continued northbound in the roadway. As Claimant began to accelerate he checked traffic over his shoulder and moved closer to the curb as he saw traffic approaching from behind. As Claimant looked back to the north he saw that a sewer grating was sunken. He testified that he did not have the time to react, and his bicycle tire dropped into the sewer grate. Photo exhibit number 6 shows that the sewer grate was several inches below the street level.

Claimant testified that he was thrown forward and sustained injuries to his face, mouth and ribs. Four photographic exhibits demonstrate his facial injuries. Following the accident Claimant was transported to Northwest Community Hospital where he was treated in the emergency room. Claimant received ten stitches on his upper

left cheek near his eyelid. A slight scar remains near Claimant's left eye and his cheek healed completely.

Claimant also suffered a tooth fracture to his upper front tooth that required removal of four old caps; two gold posts and a bridge were applied. Claimant testified that his left eyetooth was pushed up higher than it had been and that he was unable to complete all the dental work as proposed by the doctor due to financial constraints.

Claimant suffered bruising to his rib area; the discomfort lasted about one week.

Claimant's mother, Suzanne Kelly, also testified that following the incident Claimant complained of a headache and soreness and difficulty breathing from his bruised ribs. In addition to the obvious cuts and scratches and swelling to Claimant's face, she observed him having difficulty moving around and noticed that his teeth were not in the same alignment. Mrs. Kelly observed Claimant's injuries began to heal in the next two weeks.

The total of doctor and medical bills introduced was \$1,305.30.

Claimants submitted the evidence deposition of Dr. Robert B. Malek, D.D.S. (See evidence deposition of Dr. Robert B. Malek dated November 20, 1995.) Dr. Malek first treated Claimant on June 19, 1986. His examination revealed that one tooth was intruded, four others were displaced, four temporary crowns required replacement and a tooth was fractured under the gum line. He opined that the injuries were the result of a trauma sustained in the bicycle fall. Dr. Malek formulated a treatment plan which included crowning of fractured teeth, and extraction and replacement with a fixed bridge. He further planned to refer Claimant to an orthodontist for extrusion of the intruded tooth and a possible crown.

During two visits Dr. Malek prepared the tooth to accept post and cores, a three-unit bridge and a crown. An extraction was performed and the bridge and crowns were permanently bonded.

The cost of Dr. Malek's services was \$95 on June 19, 1986, \$1,885 on September 15, 1986, and \$130 on October 25, 1986, for a total of \$2,111.

Claimant did not receive any of the orthodontic treatment prescribed. However, Dr. Malek testified that the reasonable expectation of cost for the services would be \$5,130.

The Respondent produced their departmental report which concluded that Illinois Department of Transportation was responsible for the maintenance of the roadway and their investigation revealed no prior accidents reported at the subject location.

Respondent produced the sworn affidavit of Joseph J. Kostur, safety and claims manager for IDOT. He testified that the area in question was the maintenance responsibility of IDOT but stated that the area was not intended for bicycle travel or traffic. He cited the Illinois Vehicle Code, chapter 95½, article XV, section 11—1505, requiring bicyclists to travel upon the paved portion of roadway only. Kostur further cited Illinois Revised Statutes, chapter 121, article 2, par. 2—214 and asserted that the duty of IDOT to maintain the section of highway is owed to "vehicular" traffic only. The witness concluded that IDOT does not owe a duty to the Claimant cyclist.

Respondent produced Andrew H. Tudor, an expert engineer for evidence deposition. (See evidence deposition of Andrew H. Tudor, June 22, 1995). Tudor testified that on February 24, 1993, he conducted an inspection and investigation of the incident site. He described a five-

lane concrete street with a curb and a bar sewer grate 23 inches long and 13 inches wide located on the curb apron at street level. The sewer grate consists of four bar slats approximately one and three-eighths inches apart from each other. The bars are parallel to each other and the street, designed for hydraulic efficiency.

Tudor described the traffic pattern as very aggressive and testified that this particular type of grating is preferred in this type of area because they don't "plug up" as easily and they pass much more water more quickly. He noted that efficient disposal of the water is particularly important where, as here, cars are traveling at high rates of speed.

Tudor cited portions of the American Association of State Highway and Transportation Officials "Roadside Design Guide." The authority provides that drainage structures provide hydraulic efficiency while creating a minimum vehicle hazard. In regard to bar orientation the Design Guide directs that special precautions should be taken to assure that bicycle and/or motorcycle tires will not fall through the openings when inlets are placed in urban areas.

Tudor testified that the subject area is hazardous to bicycle traffic and identified a footpath about 100 feet away as an alternative travel path. However, Tudor also acknowledged that his investigation was conducted in the winter months nearly seven years after the incident. He further acknowledged that he did not know the condition of the area at the time of the incident in June, 1986.

The Law

The State owes a duty to all users to maintain its roadways in a reasonably safe manner for motorists. That duty also applies to bicyclists and riders of motorcycles.

The State's duty to the public is to use reasonable, ordinary care to maintain its roads. (*Walter v. State* (1989), 42 Ill. Ct. Cl. 2, 4.) The Court has repeatedly ruled that 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. *Tour Loukis v. State* (1995), 47 Ill. Ct. Cl. 155, 157-8; *Scarzone v. State* (1990), 43 Ill. Ct. Cl. 201.

The State must have either actual or constructive notice of the defect. (*Immordino and Cartage v. State* (1995), 47 Ill. Ct. Cl. 78, 80.) To establish constructive notice it must be shown that the road defect was substantial enough and existed for such a length of time that reasonable persons would conclude that immediate repairs or warning signs were necessary. (*Immordino and Cartage v. State* at 80.) Each and every case involving constructive notice must be decided on its own particular facts. *Stills v. State* (1989), 41 Ill. Ct. Cl. 60, 62.

In the factually similar case of *Schneider v. State*, 47 Ill. Ct. Cl. 268, Claimant's bicycle struck a sewer grate as she attempted to avoid a passing vehicle. The bicycle tire lodged in the sewer grate causing Claimant to flip over the handle bars causing her to suffer facial and teeth injuries. The Court rejected Claimant's assertion that notice is automatic because the parallel grate is open and obvious. The claim was denied for lack of notice.

In *Cole v. City of East Peoria* (3rd Dist.), 201 Ill. App. 3d 756, 559 N.E.2d 769, the Appellate Court found constructive notice where, among other factors, the area was used extensively by bicyclists, another bicyclist had been injured when his wheel had fallen through a similar grate and where the grates had been broken or damaged

and had been replaced with new grates containing safety features. *Cole*, 201 Ill. App. 3d at 761; 559 N.E.2d at 773.

In this case Claimant was riding on a footpath adjacent to the highway. Claimant moved his bike to the roadway when he was unable to proceed any further on the obstructed foot path and continued riding. As Claimant turned to check for traffic the front tire of his bicycle fell into the sewer grate and he was thrown from his bicycle.

The evidence established that the Respondent owned and maintained the highway in question. It has further been determined that the Respondent owes a duty to bicyclists legally traveling upon the roadway. Claimant's complaint is based upon failure to maintain the grating in question. No direct evidence indicates that the grate was, in fact, defective due to damage or age or was not in compliance with applicable IDOT standards. The "Design Guide" referenced by Respondent's witness, Andrew Tutor, and relied upon in Claimant's argument was not proved to be controlling of the maintenance of the grate in question. Claimant stated the grate appeared "sunken" about three inches. We lack evidence as to whether this depression was designed or occurred through wear and tear. The photos introduced are not dispositive of this issue. No evidence was produced which would have mandated replacement of the grate by IDOT in the course of normal maintenance of the roadway.

Claimant did not produce any evidence to establish that Respondent had actual notice of the danger. Further, the evidence presented does not support a finding of constructive notice. There was no evidence to establish that this busy highway was regularly frequented by bicyclists or posed a danger to them. The fact that the parallel grate is open and obvious does not automatically create notice to the Respondent of a dangerous condition.

The Claimant's failure to establish either actual or constructive notice of the dangerous condition precludes recovery in his matter. This claim is hereby denied.

(No. 88-CC-0333, 89-CC-0416 cons.—Claims dismissed.)

JADA JOHNSON, Claimant, v. THE STATE OF ILLINOIS,
DEPARTMENT OF TRANSPORTATION,
Respondent.

Opinion filed June 12, 1997.

Order on petition for rehearing filed December 26, 1997.

BRIAN J. MCMANUS & ASSOCIATES (JADA JOHNSON, of counsel) and WILLIAM K. HEDRICK (BARRY K. FORTNER, of counsel), for Claimants.

JAMES E. RYAN, Attorney General (DAVID RODRIGUEZ, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*what Claimant must establish.* To sustain a claim of negligence, a Claimant must establish a duty owed by the Respondent to the Claimant, a breach of that duty and an injury proximately caused by the breach.

HIGHWAYS—*State's duty in maintenance and care of highways—State not insurer of all persons traveling highways.* The State has a duty 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, as well as a duty to warn travelers of dangerous conditions by erecting proper and adequate signs at a reasonable distance, but the State is not the absolute insurer of all persons traveling upon its highways.

SAME—*duty of vehicle drivers.* Where persons are approaching a place of danger, they have a duty to do so cautiously and with a proper degree of care for their own safety, and the driver of a vehicle has a duty to keep a look-out and see those things which are obviously visible, to drive at reasonable and proper speeds, to decrease speed where necessary to avoid a collision, and to refrain from following vehicles ahead more closely than is reasonable in light of speed, traffic and highway conditions.

SAME—*Claimants' vehicle struck highway maintenance truck—State not negligent—claims dismissed.* The Claimants, who were injured when their vehicle struck a State highway maintenance truck parked partially on

the roadway during a lane-closure procedure, were denied recovery in their claim for personal injuries, since a sign, flashing lights, illuminated arrow and flagman gave proper warning of the roadwork in progress, and the cause of the accident was the Claimant driver's failure to exercise care.

OPINION

JANN, J.

Claimants Jada Johnson and Barry K. Fortner brought claims individually against the Respondent, State of Illinois, Illinois Department of Transportation (IDOT) for personal injuries suffered as a result of a vehicle accident on a State highway. On June 14, 1995, the cases were consolidated by order of Court and trial was held on November 1, 1995, before Commissioner Elizabeth Rochford in Chicago, Illinois.

The facts are as follows:

Claimants Jada Johnson and Barry Fortner worked together at Sages Restaurant on State Street in Chicago. Claimant Johnson reported to work on August 12, 1986, at approximately 3:00 or 4:00 p.m., and on August 13, 1986, the Claimant got off work at approximately 1:30 a.m. and went out with other co-workers to several bars. They arrived at the first bar at approximately 4:30 a.m. Claimant Johnson testified that she had about one beer and then went to another bar where she had about three beers. At approximately 6:30 a.m., Claimant Johnson drove several other co-workers home and attempted to drive Claimant Fortner home. Fortner had fallen asleep and Johnson got lost. Johnson stopped to get directions at a gas station and returned to southbound Interstate 94. At approximately 9:00 a.m., the Claimant's vehicle struck a State truck parked partially on the roadway.

Claimant Johnson has no recollection of the events immediately preceding the accident or of the accident itself

due to a head trauma she suffered in the accident. Claimant Fortner had no recollection of the accident because he was asleep at the time of the collision.

Claimant Johnson presented the independent eyewitness testimony of Jose Castillo. Castillo testified that he was traveling southbound on I-94 near 130th Street at approximately 9:00 a.m. The weather was dry and clear.

Castillo was driving in the middle of three lanes when he observed Claimant's car strike an orange State of Illinois maintenance truck. Castillo testified that the State truck was parked half on the roadway and half on the shoulder of the innermost southbound lane. Castillo did not see any advance warnings of the truck such as flashing lights or signs. Castillo testified that Johnson's vehicle attempted to move into the center lane just prior to the accident. He opined that Johnson's vehicle didn't have enough advance warning to get over in time. Castillo's vehicle was in the center lane, thereby preventing Johnson from merging to avoid the accident.

Claimant Johnson testified that, as a result of the accident, she suffered fractures in her lower back, a punctured lung, broken ribs, a broken right arm and severed tendons and muscles in her left leg.

Claimant Johnson testified that the injury to her right arm and left leg required surgical repair. Johnson complained of chronic tendonitis and weakness in her right arm and left leg, and difficulty in lifting and climbing stairs. Her dancing career was ended. She demonstrated a five-inch scar on her left leg.

Frankie DeFries, Claimant Johnson's mother, testified on behalf of her daughter, Jada Johnson. Mrs. DeFries testified that, prior to the accident, Claimant Johnson was in excellent health; she was a dancer and worked

as a dance teacher. Her dancing included tap, ballet and acrobatics.

Following the accident, Mrs. DeFries was summoned to Christ Hospital where she was advised that Johnson had suffered a ruptured heart, a deflated lung, broken wrist bones, an injured left leg and facial injuries. DeFries testified that she observed her daughter in extreme pain as a result of the injuries from the accident and, since that time, Mrs. DeFries regularly observes Johnson's restricted ability to climb stairs and Johnson's need for assistance in caring for her child.

DeFries further testified that due to her injuries, Johnson was off work from August 13, 1986, to January 12, 1987, and for an additional 19 days in 1988 for additional medical treatment related to the accident.

Claimant Johnson presented medical bills totaling \$43,099.85 and claims \$10,738 in lost wages.

Claimant Fortner testified that, as a result of the accident, he suffered a broken nasal bone, a broken collar bone, a punctured right eyelid, blood in his right eye, a concussion with brain stem injury to the left side of the head, a permanent three- to four-inch scar on the left side of his head, in addition to lacerations and scarring to his legs. Claimant suffered a loss of sensation to his right hand, foot, and the right portion of his lip, which persisted to the date of trial.

Claimant Fortner further testified that he was an accomplished artistic roller-skating champion, acquiring professional status and certification as an instructor. As a result of the injuries sustained in the accident, Claimant has been unable to coach or perform as a skater.

Claimant further incurred hospital expenses in the amount of \$17,456.25 and claims \$6,000 in lost wages.

The Respondent produced Clifton Jones, highway maintainer for IDOT. He testified that on August 13, 1986, at approximately 9:00 a.m., he and other highway maintenance personnel were beginning to establish a lane closure on southbound I-94. The first step was to position the trucks in the lane closure area, then to place the sign which warns “roadwork ahead,” and then the placement of cones to establish the lane closure.

On the morning of the incident however, the crew was in the process of setting up the sign when the accident took place. At the time of the accident, two State trucks were at the scene: the “cone truck” and the “back-up truck.” The cone truck was first and was completely occupying the outside lane, followed by the back-up truck, approximately ten feet behind, which was partially occupying the outside lane and partially occupying the shoulder. Jones was standing between the two trucks at the moment of impact, but stated that the back-up truck had red four-way flashers, a yellow dome light, a “keep right” sign, a yellow arrow directing traffic to the center lane and a flagman positioned behind the back-up truck.

Jones testified that he observed the Claimant’s car approaching the trucks. He stated that the car had its turn signal on and was attempting to merge into the center lane but was unable to merge and struck the back of the back-up truck. Upon impact, the car flipped over. The rear axle of the back-up truck was broken and the truck was pushed between five and seven feet forward.

Jones acknowledged that no signs or cones had been placed in the roadway at the time of the accident, as the workers were in the process of placing the first sign.

Jones testified that the sign placement procedure is a “moving operation,” and that the preliminary purpose of the arrows and signs on the rear of the back-up truck is to slow traffic to allow the crew to place the signs and cones.

Jones further testified that there is a third “warning truck” approximately 2,000 feet behind the back-up truck. He testified that he couldn’t “see” the third truck at the time of the accident, but that all three trucks had left the garage at the same time and that he was sure the third truck was in its assigned position. The purpose of the warning truck is to serve as the first notice to motorists of the upcoming roadwork. The procedures employed were consistent with the applicable IDOT manual.

Trial briefs were prepared and filed by all parties.

The issue is whether the Respondent was negligent in failing to provide reasonably safe conditions for persons using the State highway.

To sustain a claim of negligence, a Claimant must establish a duty owed by the Respondent to the Claimant, a breach of that duty and an injury proximately caused by the breach. *Kraemer v. State* (1990), 42 Ill. Ct. Cl. 236, 245.

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. (*Kraemer v. State, supra* at 245.) The State is under a duty to warn travelers of a dangerous condition by erecting proper and adequate signs at a reasonable distance. The State’s failure to properly warn constitutes negligence. (*Starcher v. State* (1983), 36 Ill. Ct. Cl. 144, 146.) However, the State is not the absolute insurer of all persons traveling upon its highways. (*Kraemer v. State, supra* at 245.) The law further dictates that where persons are approaching a place

of danger, they have a duty to do so cautiously and with a proper degree of care for their own safety. *Coulson v. State* (1993), 46 Ill. Ct. Cl. 149, 160.

In *Garland v. State* (1992), 45 Ill. Ct. Cl. 18, Claimant and her passenger were injured when their vehicle rear ended a State vehicle parked in the roadway. The State vehicle had responded to an accident, the emergency lights on the truck had been activated and flares had been placed on the roadway. In denying the claim, the Court concluded that the injuries resulted from the Claimant's inattentiveness. *Garland v. State, supra* at 18.

In *Harris v. State* (1986), 39 Ill. Ct. Cl. 176, Claimant's two semi-trailer trucks were involved in a rear-end collision with each other as they approached a State snowplow in the process of snow removal. The amber beacon light on the snowplow was operating at the time of the accident. The court concluded that the accident was caused by the negligence of the drivers for failure to watch the traffic, drive more slowly and keep a proper distance between vehicles. *Harris v. State, supra* at 176.

The driver of a vehicle has a duty to keep a look-out and see those things which are obviously visible. (*Harris v. State, supra* at 178; *Kohut v. State* (1980), 33 Ill. Ct. Cl. 6.) Pursuant to the Illinois Vehicle Code (Ill. Rev. Stat., ch. 95½, par. 11—601) drivers have a duty to drive at reasonable and proper speeds so as not to endanger the safety of persons or property, and to decrease speed where necessary to avoid colliding with persons or vehicles. Further, the Vehicle Code prohibits drivers from following vehicles ahead more closely than is reasonable and prudent in light of speed, traffic and highway conditions. Ill. Rev. Stat., ch. 95½, par. 11—710.

The Claimants in this case argue that the Respondent placed a stopped truck partially on and partially off

of the State roadway, thereby creating a potentially dangerous condition. Claimants contend that the Respondent failed to warn the motorists of the danger, thereby causing the accident and the Claimants' resulting injuries.

The Claimant had worked approximately ten hours as a waitress. She proceeded to go out with friends for another five hours, during which time she consumed four beers. For the next two hours, she drove various people home, and ultimately she became lost and involved in the accident.

The cause of the accident appears to have been a combination of factors. Claimant was tired, and she became lost. She obviously saw the State truck in the roadway because she put on her turn signal and attempted to move out of the lane. Claimant was apparently driving too fast, with too little attention to the obvious signs of roadwork, and was unable to stop quickly enough or safely merge into the center lane.

The sign, flashing lights, illuminated arrow and flagman in this case evidence a proper and sufficient warning of the lane closing in progress. There is not sufficient evidence to establish negligence on the part of the Respondent.

Based on the foregoing, the claims of Jada Johnson and Barry K. Fortner are hereby denied.

ORDER

JANN, J.

This cause comes on to be heard on the petitions of Claimants for rehearing. Claimants' claims were denied by order of June 12, 1997.

We have carefully reviewed Claimants' petitions and the record herein. Claimants' petitions assert that the

Court reached an incorrect conclusion as to liability. Claimants contend that the testimony of Jose Castillo, an eyewitness, is both favorable and persuasive as to Claimants' allegations of negligence by Respondent.

Mr. Castillo's testimony indicated he did not have clear recollection of the incident and only saw Claimant when impact occurred. Neither Claimant recalls the accident. No testimony or evidence of record indicated that the Illinois Department of Transportation deviated from its normal procedures or that said procedures were hazardous by nature. The testimony offered does not support a finding of negligence by Respondent.

As Claimants have introduced no new evidence to support their contention, we shall rely upon the record in our review of the findings. The record includes the hearing transcript, all pre-trial pleadings and post-trial briefs.

A thorough review of the record indicates that the Court properly weighed the evidence presented. Claimants' petitions appear to disregard the testimony of Mr. Castillo on cross-examination at hearing. A fair reading of the testimony as a whole does not support a finding in favor of Claimants.

Based upon our review, Claimants' petitions for rehearing are hereby denied. Claimants have failed to meet their burden of proof.

This cause is hereby dismissed with prejudice.

(No. 88-CC-0556—Claim dismissed.)

DELLA KEENE, Guardian for DARRELL W. COPE, Claimant, *v.*
THE STATE OF ILLINOIS, Respondent.

Opinion filed September 18, 1997.

WOMICK & ASSOCIATES (JOHN WOMICK, of counsel),
for Claimant.

JAMES E. RYAN, Attorney General (DEBORAH L.
BARNES, Assistant Attorney General, of counsel), for Re-
spondent.

HIGHWAYS—*passenger injured when car struck tree near park roadway—proximate cause of accident was driver's conduct—negligence claim dismissed.* In a passenger's claim for injuries sustained when the car in which he was riding struck a tree located four feet from a park roadway, the State was not negligent in allowing the presence of large trees close to the traveled road, since it was obvious that the road was constructed with the intent of preserving the park's trees for aesthetic purposes, there was no evidence that a vehicle operating within the posted speed limit could not safely travel the roadway, and the proximate cause of the crash was the driver's operation of the vehicle in which the Claimant was a passenger.

OPINION

RAUCCI, J.

This is a tort case for injuries sustained by a passenger in a vehicle that was being driven through a State park. Claimant is the guardian of the injured Darrell W. Cope. For convenience, Darrell W. Cope is referred to in this opinion as the Claimant.

The vehicle in which the injured Claimant was a passenger left the roadway and struck a tree growing near the edge of the road. Claimant's basic argument is that, in the design and maintenance of the road, Respondent had failed to maintain a proper "free zone" along the edge of the park roadway, so that cars leaving the traveled surface of the roadway would have an opportunity to regain control without striking trees or other obstructions. There is

little doubt that the Claimant suffered catastrophic injuries as a result of this unfortunate accident. Respondent takes the position that the provision of a so-called “free zone” was not applicable to a road through a State park, and that there was no negligence by Respondent in the design of the park road.

The injured Claimant testified that he was 36 years old and one of three passengers in a car being operated through the park on September 1, 1985. He was seated in the front seat on the passenger side. It was about 9:45 p.m. and a raccoon ran across the road. Claimant estimated that the driver was operating the vehicle at 20 or 25 m.p.h. Claimant described the road as a narrow, curvy, two-lane road. Claimant described the horrendous injuries sustained by him in this accident.

Edward Allen Reeder testified by evidence deposition on behalf of the Claimant. Reeder is the Director of Public Works for the City of Carbondale. Reeder’s department is responsible for all roads in the city limits of Carbondale. Reeder’s duties include the design of new streets and improvements to the streets as well as maintenance of the street system within the City of Carbondale. Reeder is a 1972 graduate of Southern Illinois University with a degree in civil engineering technology, and became a registered civil engineer in the State of Illinois after passing two eight-hour examinations in 1981. While he was in school, he worked for the Illinois Department of Transportation in Carbondale in August 1973. In its design and construction of roads and streets, the City of Carbondale uses all of the Illinois Department of Transportation standards in its projects.

At the request of Claimant, Reeder examined a road constructed by the Illinois Department of Conservation at Kincaid Lake. Reeder looked at the drawings by IDOT

and reviewed the materials, plans, and specifications for the design of the roadway. Reeder went to the site and looked at the roadway. Reeder stated that it was his opinion, after reviewing the drawings, cross sections of the drawings, and what's in the field, that there have "been some modifications, possibly, to what's built there." When asked whether the modifications from the design constituted a deviation from the standard of care in the construction of the roadway in question, Reeder stated: "[T]hey deviated from the original standards if you look at the AASHTO standards, the clear zones. I am sure they were trying to save some trees. They tried to restrict their clear zone, and they probably should have been a little further than they are." Reeder testified that the applicable standard for a "clear zone" at the time of the construction of the roadway in question, for speeds of less than 40 m.p.h., "is ten foot from the edge of the pavement." A "clear zone" is to clear anything within that zone to give someone reasonable opportunity to recover if they run off the roadway. When asked if the drawings for the design of the roadway contained a clear zone of ten feet, Reeder replied that "the general note showed that it was toe of slope, top of cut, or five foot from edge of pavement. No, they did not probably have ten feet." Reeder testified as follows:

"Q. They had a five foot clear zone?

A. Or where the toe of slope or the top of cut was. It could be greater than. I didn't look at all the cross sections. The particular area where the tree was hit, they only showed about five feet.

Q. In your opinion, did that deviate from the standard required in the design and construction of such roadway at the time?

A. Yes."

Reeder identified Plaintiff's Exhibit No. 4 as a photograph portraying the roadway in question and the tree in question. The tree shown in Exhibit No. 4 is four-tenths

of a mile north of the intersection of the access road and Route No. 149. Reeder identified Exhibit No. 1 as constituting the plans, drawings, and specifications for the roadway. Exhibit No. 2 is a plan profile of the roadway between stations 19 and 20 that Reeder marked with an "X." The marking may not be exact. The "X" marked on Exhibit No. 2 correlates with the photograph identified as Exhibit No. 4. Reeder testified that the standards in existence "at the time" required a clear zone in the area shown in Exhibit Nos. 2 and 4 of ten feet from the edge of the pavement. These are the AASHTO standards used to design roadways. In Reeder's opinion, building the roadway in question with a clear zone of less than ten feet was a violation of the standards of care for an engineer and for Respondent in constructing the roadway.

The tree that was struck by the vehicle in which the injured Claimant was a passenger was located approximately four feet from the edge of the pavement. Reeder testified that, from the curved configuration of the roadway, if a driver missed the curve, the vehicle would strike the tree as happened in this accident. Reeder testified that the tree should have been removed during road construction. Reeder testified that the failure to remove the tree during construction contributed to cause the accident in this case. If the "clear zone" had been wider, the driver of the vehicle would have had more of an opportunity to recover control of the vehicle.

On cross-examination, Reeder said that the AASHTO book adopted by the Illinois Department of Transportation does not have a section on park roads. The book does have a section on rural local road systems. In Reeder's opinion, the road should have a shoulder "if you look at the standards" of four feet. There were four feet between the edge of the pavement and the tree that was involved

in this accident. A four-foot shoulder is fine according to Reeder's opinion. Reeder testified on cross examination as follows:

Q. "In this situation, a four foot shoulder is fine; is that your opinion?"

A. There should be a four foot shoulder, if that's what you're asking."

Reeder stated: "I think the shoulder should be there. It gives an opportunity to recover. With that tree being so close, she didn't have a chance to recover; she hit it. It was in the area that should have been cleared in the drawings." Reeder further testified on cross-examination as follows:

Q. "The question was, could you say that but for the tree, the accident would not have happened?"

[CLAIMANT'S ATTORNEY OBJECTS]

A. No."

Reeder stated that he doesn't go to many parks and has not designed roads for a State park.

On re-direct examination, Reeder testified that, in his opinion to a reasonable degree of certainty as an engineer, the ten-foot clear zone applied to the roadway in this case. The basis of his opinion was that the roadway in this case is a rural road and no different than a township road even though the road may be in a park. Decisions about the clear zone are based on the location of the road, the anticipated speed that drivers will drive on that roadway and the amount of traffic from the roadway. Applying these factors, Reeder believed that there should be a ten-foot clear zone. The purpose of designing a ten-foot clear zone is to allow drivers to have an opportunity to recover prior to running into something. The clear zone is not designed to have a driver bring the vehicle to a stop. In Reeder's opinion, if a tree was located four feet off the roadway, it would be impossible, in a case like this, for the driver to recover because the tree is too close.

There is no distinction between the term “shoulder” and the term “clear zone”—the shoulder and clear zone run together. Reeder then testified as follows:

Q. “But the shoulder and the clear zone are not the same length?—The same width? You said here the clear zone should be ten feet.

A. The shoulder should be about four feet; ten feet total.

Q. Ten feet for the clear zone and the four foot shoulder?

A. Total of ten.

Q. Four, and six more?

A. Yes.”

In looking at the cross-sections, Reeder testified that the general note said that they should clear to the toe of slope, to the top of the cut, or five feet from the edge of the pavement, whichever is greater. Reeder testified:

“looking at, say, this cross section right here, 21 plus 28; 37 left.”

Reeder affixed a circle on the lower right quadrant of deposition Exhibit No. 3 and stated as follows:

“I’m trying to give you an example. This is the toe of slope. In other words, they’re supposedly building the road above the ground, so you’re going to have to slope down to meet the existing ground. In this particular cross section, they should have cleared out 17 feet to the toe of slope. They should have cleared everything in that zone on the left side of the roadway.”

Reeder then testified as follows:

Q. “You’re talking about from the centerline over?”

A. Yes. 17 feet.

Q. Is that at the point where the accident occurred?

A. It’s down between 19 and 20.

Q. So would those—I think you alluded to this earlier when we were talking. I thought you had said it should be 16 to 17 feet.

A. Somewhere between—I never went out and actually measured the stations on the ground, but I can tell you that the accident happened between stations 19 and 20 and somewhere between 16 and 17 feet, which is the toe of slope in that area. Which the drawings show a toe of slope, but there’s not toe of slope in that area because it’s just flat. They should have cleared out 16 to 17 feet.

Q. So there should have been 16 to 17 feet of clear area from the centerline to the edge of the clear area?

A. Yes.

Q. Okay.

A. By these drawings.”

On further re-direct, Reeder testified that, in his opinion, the road was not built in compliance with AASHTO standards. When the road was constructed, Reeder does not think they cleared out to the toe of slope in this particular case, and that failing to do so was a violation of National Standards, and a violation of the design of this particular roadway.

Robert Catt, the park site superintendent for the Respondent, was called and testified on behalf of Respondent. Catt was present on-site when the road was constructed. Catt sat in on meetings for input with planning people, engineering people and other staff. Several things are taken into consideration in the construction of a park road including use, access to or from a particular area, and natural resources. As little of the natural resource as possible is destroyed. This often means putting more curves in a road to try to make things more natural and as aesthetically pleasing as possible. The speed of vehicles is taken into account. Exhibit No. 1-A was the site of the accident showing the scarring on the tree. At the time the photographs were taken, the tree was larger than it was at the time of the accident. The photographs in Respondent's Group Exhibit No. 1 show different pieces of road within the State park, road surfaces and the proximity of trees to the edge of the road. Photograph 1-D shows a “slow” sign above the accident a couple of hundred feet north. The speed limit at the site was 30 m.p.h. Photograph 1-H depicts an area 300 or 400 feet south of the accident site showing a steep curve or sharp curve to the right which is marked with a 15 m.p.h. posting. The distance from the edge of the road to the tree that was impacted in this case was approximately four feet. It was 16

feet from the centerline of the road to the edge of the tree. There had been no previous accidents at the site where this accident occurred.

Catt has been in, and is familiar with, at least 30 other State parks in the State of Illinois. The road construction at the State park in question is typical of some of the southern Illinois parks as portrayed by the photographs in the group exhibit. The type of road involved in this accident serves an aesthetic function, as many trees as could be were left to serve the beauty of the park and the integrity of the beauty of the park.

On cross-examination, Catt stated he had no background in engineering, and his involvement with the roads put in the park would have dealt with his concern regarding aesthetics. The road was designed with gentle curves following an old roadbed that was originally there rather than creating a new alternate route because of the tremendous amount of destruction that a new alternate route would have caused. It was not Catt's responsibility to make sure that the road was being put in in accordance with State or National road constructions. The photographs of the access road show an estimated 40 or 50 trees that are within ten feet of the roadway.

The access road serves a marina with 300 to 400 boats. On the date of this accident, it was a major holiday weekend and there was a lot of traffic on the access road. Catt estimated that over 1,000 vehicles would travel the road on a typical holiday weekend each day. Catt was not familiar with standards of the American Association of State Highway and Transportation Officials. Prior to this accident, Catt recalls estimating that he has had notice of two vehicle accidents involving vehicles and trees, one of which involved a fatality. The accident involving a fatality involved a tree 35 or 50 feet off of the right-of-way.

Claimant's contentions of liability against Respondent are predicated entirely on the proposition that Respondent owed a duty to Claimant to construct and maintain the Lake Kincaid Marina access road and its appurtenant lands through Lake Murphysboro State Park in accordance with the standards set forth in the road's design specifications and the standards of AASHTO (American Association of State Highway and Transportation Officials). Claimant's expert testified that the design specifications on the road required a clear zone of five feet from the edge of the pavement, and the AASHTO standards required a useable shoulder of at least four feet from the edge of the pavement, and a clear zone of ten feet from the edge of the pavement. There is no dispute that the Respondent allowed mature trees to grow within ten feet of the edge of the roadway and that the Claimant's injuries were sustained when the vehicle in which he was a passenger left the traveled portion of the roadway and collided with a mature tree that was four feet off of the edge of the traveled portion of the road.

In support of his position, Claimant cites *Lucht v. State* (1983), 36 Ill. Ct. Cl. 248. In *Lucht*, the Claimant fell in a State parking lot that was icy. This Court denied the claim, stating that to require the State to remove snow and ice that had accumulated over a period of a few hours before an accident on State parking lots would put the State in a position of being an insurer. Claimant also cites *Harder v. State* (1991), 44 Ill. Ct. Cl. 235. The *Harder* decision denied a claim by an 80-year-old woman who sustained injuries when she fell on a step at the Old State Capitol Building. The decision was based on a failure to show actual or constructive notice of a dangerous or hazardous condition.

Claimant cites *Siefert, et al. v. State* (1989), 42 Ill. Ct. Cl. 8. We held that, where the shoulders of a highway

are in poor repair and unreasonably dangerous and a car is caused to go out of control after having left the main traveled portion of the highway as a result of poor maintenance and repair of the shoulders, and the State has actual or constructive notice of the condition, the State is liable for damages proximately resulting therefrom. The *Siefert* case followed *Welch v. State* (1966), 25 Ill. Ct. Cl. 270, which found liability in a case involving extremely hazardous conditions existing on the shoulder of a road, and involved a truck evidently intentionally attempting to pull onto the shoulder to avoid an accident. The Court stated:

“It is clear that the Respondent is required to maintain the highway and the shoulder in a manner reasonably safe for its intended purposes. Obviously, the standard of care is higher for the highway than the shoulder, since the reasonably intended use of the highway requires a greater level of care than the shoulder.

• • •

We hold that if the facts in a case show that the State has caused a dangerous condition by neglecting to maintain the shoulders of the highway, after having had actual or constructive notice of the defect requiring such maintenance, it is reasonably foreseeable that an injury may result therefrom. If that dangerous condition of the shoulder is a proximate cause of an injury, that is sufficient to establish liability.” 42 Ill. Ct. Cl. at 13, 14.

The *Siefert* opinion, *supra*, observed that an expert witness on behalf of the Claimants had testified that the condition of the shoulder caused the vehicle of the Claimant to come back onto the highway causing the accident from which the injuries arose. 42 Ill. Ct. Cl. at 15.

Additionally, Claimant cites *Protective Insurance Co. v. State* (1994), 46 Ill. Ct. Cl. 86. In that case, there was an award for Claimant arising from a vehicle accident after Claimant’s vehicle was deliberately driven onto a shoulder which was later determined to have a drop-off from the highway pavement six inches deep that extended for approximately one mile on either side of the accident site. The evidence was that the drop-off had existed for at least

three years and possibly ten years. Expert witnesses testified that the six-inch drop-off was an unsafe condition that contributed to the accident. A large award was made to the Claimant.

Claimant cites *Wilson v. State* (1989), 41 Ill. Ct. Cl. 50, a wrongful death case, where it was alleged that the decedent was a passenger in a vehicle that suddenly left the traveled portion of a highway and struck a tree 15 feet from the east edge of the paved portion of the roadway. Evidence was introduced as to the standards for clearance of trees from the right-of-way along the side of the roadway. The evidence was clear that the standard recommended at the scene of the *Wilson* accident on Route No. 37 in Fayette County, was a distance of ten feet off the edge of the roadway. This Court stated as follows:

“Claimant’s second premise [State negligent in not removing tree within 15 feet of edge of roadway] fails because the evidence shows that the standards introduced into evidence recommend a 10 foot clearance zone in the area of Route #37 where the accident occurred. Since the tree was 15 feet from the edge of the roadway, the standard does not apply to that tree. The State was within compliance of recommended standards. There is no duty upon the State to clear every possible source of injury from areas in the more remote proximity of the roadway. A legal duty requires more than the possibility of occurrence, and the State, like any other person, is charged with such a duty only when harm is legally foreseeable. [citing cases.] The issues of “foreseeability” and “duty” involve a myriad of factors, including the magnitude of the risk involved, the burden of requiring the State to guard against the risk, and the consequences of placing such a burden on the State. [citing case.] It is the finding of this Court that a consideration of all these factors leads to the conclusion that the State had no legal duty to remove the tree in question before the accident.” 41 Ill. Ct. Cl. at 55.

Claimant reasons from the opinion in the *Wilson* case that the presence of the tree in the case at bar four feet from the traveled portion of the roadway is evidence of Respondent’s breach of duty to Claimant.

Respondent interprets the evidence to suggest that standards were not violated in this case. Further, Respondent argues that the standards on which Claimant’s expert

relied addressed “rural local road systems” and did not address park roads. Respondent further argues that the evidence showed only that Respondent had created a condition by which injury was made possible, and that the negligence of Respondent was not the proximate cause of the injury, arguing that the independent acts of the driver of Claimant’s vehicle broke the causal connection between the alleged original wrong and the injury. Thus, according to Respondent, it was the action of the driver of Claimant’s vehicle that caused the accident, and not a condition of the lands adjacent to the roadway.

Surprisingly, neither Claimant nor Respondent offered evidence concerning the standards used for roads primarily used as access for recreation in State parks.

From the testimony and the photographs offered and received in evidence, it is perfectly clear that it was intended by those designing and constructing this road to preserve the trees for aesthetic purposes. The close proximity of many large trees within a few feet from the edge of the road would be perfectly obvious to anyone making use of the road. At the site of the accident, speeds of vehicles using the road were limited to 30 m.p.h. There was no evidence that a vehicle at the scene of this accident being operated within the speed limit could not be safely driven on the marina access road. We are asked to hold that Respondent chose aesthetic considerations in allowing trees to remain close to the traveled portion of the road at its peril, and further, that if motorists using the road left the traveled portion of the roadway and struck a nearby tree in the forest, Respondent is liable to answer in damages for injuries sustained. It is obvious that the road in question in this case was not designed or constructed as an all-purpose State highway. Its purpose was to provide access to a State park and lake for recreation and the support services attendant thereon.

Respondent's decision to build the road in such a way as to preserve trees closely adjacent to the road surface was certainly intentional, and not a result of inadvertence or mistake. A driver operating a vehicle through this State park could not be misled or surprised by the presence of a tree within four feet of the edge of the traveled roadway. There were trees close to the edge of the traveled roadway throughout the park road system as demonstrated by the photograph exhibits. Furthermore, it does not seem unreasonable to suggest that a person using reasonable care in the operation of a motor vehicle along this park roadway could expect and anticipate that wild animals may cross the roadway from time to time in such a manner as to interfere with vehicular traffic. The proximate cause of this tragic accident and the horrendous and permanent injuries to the Claimant was not the decision of the State to build a park recreation road with trees close along the sides of the road, but was instead, the manner of operation of the vehicle in which the Claimant was a passenger.

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

(No. 88-CC-1121—Claimant Cynthia Kowasz awarded \$51,733.01;
Claimant Melissa Kowasz awarded \$4,400.)

JOSEPH P. KOWASZ, Individually, and as Administrator of the Estate of KEVIN KOWASZ, Deceased, CYNTHIA KOWASZ and MELISSA KOWASZ, a Minor, by JOSEPH KOWASZ, her Father and Next Friend, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed January 12, 1994.

Opinion filed January 9, 1998.

ALBERT KORETZKY, for Claimant.

JAMES E. RYAN, Attorney General (DAVID S. RODRIGUEZ, Assistant Attorney General, of counsel), for Respondent.

Negligence—elements of claim—notice. In order to recover on a claim of negligence, the Claimant must establish by a preponderance of the evidence that there was negligence on the part of the State, that the negligence was the proximate cause of the injury, and that the Claimant was not contributorily negligent, and the Claimant also has the burden of proving that the State had actual or constructive notice of the dangerous condition.

HIGHWAYS—automobile accident at intersection—State had actual notice of dangerous condition—awards granted. The Claimants, a mother and daughter, were awarded damages in their action arising out of an automobile accident at an intersection which experienced a high volume of traffic and frequent collisions, since the State had actual notice of the dangerous condition existing at the intersection for a significant time prior to the incident, but did not take reasonable steps to reduce the risk by installing a temporary signal, maintaining a police presence at peak hours, or otherwise attempting to lessen the danger.

ORDER

FREDERICK, J.

This matter comes before this Court on Respondent, State of Illinois, Department of Transportation's motion to dismiss the complaint and this Court, being fully advised in the premises, hereby finds as follows:

At the time of the accident, the location at which Claimant alleges negligence occurred was not under the jurisdiction of the State of Illinois. The Court of Claims Act, as well as the administrative rules of the Court of Claims, require that a Claimant exhaust all judicial remedies prior to bringing a claim before this Court.

In the instant case, as noted above, the location of the accident was not under the jurisdiction of the State of Illinois. Thus, Claimants are obligated to initially seek a remedy with respect to the entity which did have jurisdiction. Claimants have not done so.

Therefore it is ordered, adjudged and decreed that the Respondent's motion to dismiss is granted, and that this action is dismissed, with prejudice.

OPINION

FREDERICK, J.

Claimants, Joseph Kowasz, administrator of the estate of Kevin Kowasz, deceased, Cynthia Kowasz and Melissa Kowasz, a minor, by Joseph Kowasz, her father and next friend, filed their claim sounding in tort in the Court of Claims on October 28, 1987. Claimants allege that, on December 13, 1985, Kevin Kowasz was killed and Cynthia Kowasz and Melissa Kowasz were severely injured due to the State's negligent maintenance and operation of Rodenburg Road near its intersection with Irving Park Road in Roselle, Cook County, Illinois. Claimants have alleged that the State knew that said intersection was extra hazardous to the driving public and particularly to vehicles proceeding southerly and northerly on Rodenburg Road at the intersection with Irving Park Road.

The Facts

On December 13, 1985, Cynthia Kowasz, a resident of Hanover Park, drove her car into the intersection of Illinois Route 19 and Rodenburg Road in Schaumburg, Illinois. At that time, her Chevrolet Chevette was struck broadside by an eastbound vehicle on Route 19. Kevin Kowasz, Cynthia's two-year-old son, was sitting in the front passenger seat. Claimant, Melissa Kowasz, an eight-year-old daughter, was seated in the rear seat. As a result of the impact, Kevin Kowasz died of head injuries two days later. Both of the vehicles involved were totally destroyed. This action was brought on behalf of the estate of Kevin Kowasz by his father and by Cynthia and Melissa Kowasz, individually.

At the time of the collision, Route 19 and Rodenburg Road intersected at right angles with one lane of traffic on each road for each direction. There was north-south traffic on Rodenburg Road and east-west traffic on

Route 19. The State admits it was in control of this intersection. There were stop signs for the vehicles on Rodenburg Road and the speed limit for Route 19 was 45 miles per hour. The evidence reveals that the volume of traffic on Route 19 made the intersection dangerous to vehicles in all directions. Furthermore, the Illinois Department of Transportation had known of the problem for years before the Kowasz vehicle was involved in the collision before the Court.

Located adjacent to the intersection on the northwest corner was the Chicago area office of AMP Incorporated, a Pennsylvania company. In August of 1983, the regional office manager of AMP, Mr. John W. Mercer, sent a letter to the district engineer of IDOT expressing a deep concern for the safety of all occupants of vehicles which used that intersection, and, specifically, for the safety of his employees who entered the intersection after exiting the building. Mr. Mercer occupied an office which afforded him a direct view of the intersection and he told the engineer that,

“Daily I hear numerous screeching of tires and see numerous near misses at this intersection. During the past month, four AMP employees, myself included, have come literally within inches of injury or possible death exiting to Irving Park Road * * * I cannot stress my concern in regard to safety of my employees and the public on Irving Park Road enough.”

In response, Mr. Mercer received a letter from IDOT indicating that the intersection should be realigned and channelized, requiring land acquisition. Nothing was done to improve the safety of this intersection after Mr. Mercer’s letter.

As it turned out, this was not the first written warning the State had received regarding the dangers of this intersection. In March of 1983, the Village of Schaumburg director of engineering expressed his concerns for the safety of the public in general and the employees of AMP as they entered that intersection. Obviously, Mr. Mercer had been

contacting other governmental agencies before he wrote the State. In response to this letter, the speed limit on Illinois Route 19 was reduced from 50 miles per hour to 45 miles per hour. Additionally, the State, after reviewing traffic volume at the intersection, concluded that traffic signals were needed at the intersection. On August 26, 1983, a service inquiry was made by an IDOT employee, Robert Murzyn, who lived within blocks of the intersection. In his inquiry, Mr. Murzyn informed IDOT that on the previous evening, he was awakened by an accident at the intersection and he called the local police. Mr. Murzyn also stated that it was the sixth such accident which had awakened him in the previous eight months. He further indicated that this inquiry was not the first time he had mentioned the intersection to IDOT employees, but that no steps had been taken to make the intersection safer.

In October of 1983, the Village of Schaumburg, through its director of engineering, informed the State that the Village did not believe an application for federal matching funds would be appropriate under the circumstances presented. It also pointed out to the State that Schaumburg did not control the complete intersection and that matching funds by the other governmental entity would be highly unlikely. The engineer also suggested that the State and Village continue to monitor this intersection with the hope that safety funding could be approved within the next 12 months. This letter was in response to an IDOT suggestion regarding the pursuit of financing for the intersection. In November of 1983, the State wrote Schaumburg again, requesting it to reconsider its position on funding, suggesting that Schaumburg could prepare the necessary documents in a shorter time than the State.

In the spring of 1984, communications occurred between the local State representative and IDOT. Who

instigated those communications is unclear from the record. It is clear, however, that the previous correspondence relative to the location was provided to the State representative and that a district engineer told her that traffic signals were warranted and needed at that location. In May of 1984, the Department reviewed the accident statistics for that location for a period of five years. In a memo dated May 21, 1984, an IDOT official warned of the large number of right angle collisions and the rising number of total collisions at that intersection. He urged that the State should not wait for the Village of Schaumburg to sponsor an improvement before the Department of Transportation took action, predicting that the likelihood of a serious collision was very great at this intersection with the high speed limit on Irving Park Road. Also in May of 1984, a meeting took place between representatives of AMP Incorporated and representatives of the Village of Schaumburg. Afterwards, Mr. Mercer sent a letter to Schaumburg which memorialized the conversation that took place during that meeting and the IDOT engineering department and the Illinois State Representative were copied on that letter. It is clear from the letter that the discussions which took place included the review of the possibility of installing traffic signals at the intersection. The State's position that geometric improvements would have to be made before the State would consider the installation of a temporary traffic signal was articulated to the representatives of the corporation. The cost of making these changes was discussed and the representatives of AMP Incorporated even considered that the company might be willing to contribute to those costs. While the record is unclear whether the company ever followed through on a specific commitment, the discussion by a private entity to contribute to a State improvement for safety purposes highlights the concern

which these people had for the safety problems at the location. Also by May of 1985, another State Representative was in contact with the Illinois Department of Transportation, requesting information and status on the installation of temporary traffic signals at the location. The district engineer for IDOT, in response to that request, indicated that, without support from the local municipalities, temporary widening of Illinois Route 19 prevented the use of temporary signals and the State could not expect approval for permanent realignment and signals until fiscal year 1988. However, this position evidently changed in the ensuing months. By October of 1985, the same state engineer informed the State Representative that the Department had decided to proceed with the installation of temporary signals without interim widening work, and that such installation would be operational by December 31, 1985. While this was occurring, Illinois State police had started to direct traffic at the intersection during rush hours because of the traffic volume at the intersection. Construction on nearby Roselle Road had forced even more traffic onto Irving Park Road, mandating police intervention at the intersection. As of October 31, 1985, the Department of Transportation recommended continued police presence at the intersection during peak hours until the temporary signals were installed. On the date of the accident, there were no police at the intersection of Illinois 19 and Rodenburg Road. The record contains no explanation for their absence in spite of the IDOT recommendation that police be present during the peak traffic hours.

Kevin Kowasz was killed as a result of the collision. Cynthia Kowasz suffered a fracture of her pelvis, bladder contusions, low back injuries, and psychological difficulties. The total medical bills for Cynthia Kowasz related to this collision totaled \$3,258.01. She also had a loss of

earnings totaling \$2,475, as she was off work for seven weeks. Melissa Kowasz suffered multiple bruises and psychological difficulties as a result of the collision. Her total medical expenses were \$440.

During oral arguments, counsel for Claimants indicated that Kevin Kowasz's case was settled for more than \$100,000 and that his claim was now moot in this Court. Additionally, Claimants' counsel indicated at trial that the death case was settled with Mr. Hodges' insurance company and an underinsured motorist coverage for over \$200,000.

Claimant, Cynthia Kowasz, was going south on Rodenburg Road. She stopped at the stop sign and waited about five minutes for traffic to clear so she could get across Route 19. She looked both ways and eventually saw no traffic to her left and only one car approaching on her right. The car on her right was by a billboard. She believed she had enough time to cross the intersection. However, as she pulled out and looked again to the right, the headlights were right on top of her. She screamed and was then knocked unconscious. She was taken to Alexian Brothers Hospital and later to Lutheran General Hospital. Claimant had four fractures in her pelvic area. She was released on the 16th. She was unable to work. She went from a wheelchair, to crutches, to a cane. She was in a wheelchair for two weeks. Claimant testified to great pain and the inability to sleep during part of her recovery period. It took her two months to walk without the assistance of crutches or a cane. She also attended a group for bereaved parents for seven years. At the time of trial, she complained of occasional problems with her pelvis requiring chiropractic aid.

Claimant, Melissa Kowasz, had to be pulled out of the car. She was knocked unconscious. When she came to, she started crying. She sustained scratches and bruises

on her face and feet. She also saw a psychiatrist to deal with the loss of her brother.

The Law

The Court must first note that the Respondent has failed to file any affirmative defenses and failed to dispute any of the five requests to admit facts filed by Claimants. This Court has repeatedly held that the State is not an insurer of persons traveling upon its highways, but the State does owe persons traveling on its highways the duty of ordinary care in the maintenance of its highways. In order to recover on a claim of negligence, the Claimants must establish by a preponderance of the evidence that there was negligence on the part of the State, that the negligence was the proximate cause of the injury, and that the Claimant was not contributorily negligent. (*Pochis v. State* (1993), 46 Ill. Ct. Cl. 1.) Further, in order to prevail on a claim of negligent highway maintenance, a Claimant has the burden of proving that the State had actual or constructive notice of the dangerous condition. (*Crowell v. State* (1994), 46 Ill. Ct. Cl. 211.) The mere fact that a dangerous condition existed is not sufficient to constitute an act of negligence by the State. *Ott v. State* (1994), 47 Ill. Ct. Cl. 231.

The condition at the intersection at issue in this case was known to a number of IDOT employees for a significant time prior to the date of the accident. Only the State had the ability to effectively reduce the risks of entering the intersection. In the face of numerous and varied warnings that the intersection was dangerous, the State did little to lessen the danger except to reduce the speed limit five miles per hour on Route 19. The statistical data alone provided to the State indicated that the risk was increasing as the expansion of that area of the township increased. Something as simple as a further reduction of the speed limit on Route 19 might have decreased accidents at that

intersection. Temporary signals which had been rejected in 1983 and 1984 were approved in the fall of 1985. On February 7, 1986, those signals, which had been considered inappropriate, were turned on with various State officials present. Unfortunately, for the Kowasz family, those signals were a few days late.

It cannot be said that the State reacted in a reasonable manner and fashion to the alarm raised by numerous individuals regarding the safety of this intersection. This Court has long held that while the State is not an insurer of the safety of the persons and the lawful use of the highways, it nevertheless has certain duties regarding dangerous conditions of which it has notice. The evidence in this case establishes that the intersection of Rodenburg Road and Route 19 was dangerous. The evidence and admissions further establish that the State had actual notice of this condition.

The area of concern for the Court is that there is no evidence before the Court as to just what it was that made the intersection dangerous. The most likely prospect is that because of the increasing amount of traffic on Route 19, those drivers on Rodenburg Road would become impatient trying to enter the intersection after stopping at their stop sign and trying to enter the intersection when it was not safe to do so.

In light of the traffic laws which require a driver at a stop sign to yield to approaching traffic which does not have a stop sign at an intersection, it is very hard to understand why the State did not plead an affirmative defense of the negligence of the driver of the Kowasz vehicle.

Having said this, we again note that Respondent failed to raise an affirmative defense and failed to dispute the five requests to admit which had the effect of establishing Claimants' case. We, therefore, find that the State was negligent.

Based on the evidence presented, we find that the damages proved as to Claimant, Cynthia Kowasz, are as follows:

(a) Medical bills	\$ 3,258.01
(b) Lost earnings	\$ 2,475
(c) Pain & suffering	\$46,000

We find that the damages proved as to Claimant, Melissa Kowasz, are as follows:

(a) Medical bills	\$ 440
(b) Pain & suffering	\$ 4,000

Based on the foregoing, it is hereby ordered:

A. That the claim of Joseph Kowasz, administrator of the estate of Kevin Kowasz, deceased, is dismissed and stricken with prejudice.

B. That Claimant, Cynthia Kowasz, is awarded \$51,733.01 in full satisfaction of her claim.

C. That Claimant, Melissa Kowasz, now an adult, is awarded \$4,440 in full satisfaction of her claim.

(No. 88-CC-3484—Claim dismissed.)

ANDRE ASBURY, Individually and as Administrator of the Estate of ELETICIA ASBURY, Deceased, Claimant, *v.* THE STATE OF ILLINOIS, DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Respondent.

Opinion filed April 6, 1998.

JOHN PATRICK HEALY, for Claimant.

JAMES E. RYAN, Attorney General (SEBASTIAN N. DANZIGER, Assistant Attorney General, of counsel), for Respondent.

EXHAUSTION OF REMEDIES—*claim stemming from daughter's murder dismissed for failure to exhaust remedies.* The Court of Claims has consistently interpreted the exhaustion of remedies rule to be an inescapable requirement for filing an action in the Court of Claims, and therefore, a father's claim stemming from his daughter's murder by her mother and a third party after the State's alleged negligent return of the girl to the mother was dismissed, because of the father's failure to exhaust his remedies against the known tortfeasors.

OPINION

JANN, J.

This matter coming to be heard on the Respondent's motion to dismiss, due notice having been given, and the Court being otherwise duly advised in the premises;

The Court finds:

The Claimant brings this action individually and on behalf of his deceased daughter. The complaint alleges that the Respondents negligently returned the decedent to her natural mother, Violetta Burgas. As a result of the daughter's return to her mother, the decedent was eventually murdered by her mother and another individual named Elijah Staniel. No suit has been filed against either the natural mother or Elijah Staniel.

The Respondent has filed its motion to dismiss this action for the Claimant's failure to sue the child's murderers and for failing to state a cause of action.

As stated in *Boe v. State* (1984), 37 Ill. Ct. Cl. 72 and *Lyons v. State* (1980), 34 Ill. Ct. Cl. 268, this Court has consistently interpreted the exhaustion of remedies rule to be an inescapable requirement for filing an action in the Court of Claims. In *Boe*, this Court stated that it does not recognize any latitude or discretion on the part of Claimants to pick and choose whom they wish to sue. In *Lyons*, 34 Ill. Ct. Cl. at 272, this Court stated that section 25 and rule 6 of the Rules of the Court of Claims, "quite

clearly makes the exhaustion of remedies mandatory rather than optional.”

In the case at bar, the Claimant had a cause of action against the child’s murderers. When the child was returned to her mother, the mother incurred the duty to protect and care for the child. (*Midamerica Trust Co. v. Moffatt* (5th Dist. 1987), 158 Ill. App. 3d 372, 110 Ill. Dec. 787, 793, 511 N.E.2d 964, 970.) The mother murdered the child with the help of a third party, Elijah Staniel. In failing to exhaust obvious remedies against Burgas and Staniel, the Claimant has failed to meet a mandatory requirement of maintaining an action in this Court.

We shall not rule upon Respondent’s second argument for dismissal based upon a theory of lack of duty owed to Claimant’s decedent by Respondents. The record before us does not provide enough evidence to make such a finding at this time.

This cause is hereby dismissed for failure to exhaust remedies against known tortfeasors pursuant to section 790.60 of the Court of Claims Regulations (74 Ill. Adm. Code 790.60) and section 25 of the Court of Claims Act. 705 ILCS 505/25.

(No. 88-CC-3915—Claim denied.)

HARVEY DUERST, CLAIMANT, V. THE STATE OF ILLINOIS,
Respondent.

Opinion filed January 29, 1998.

BEGER, FERGUSON & ASSOCIATES (JERROLD R. BEGER,
of counsel), for Claimant.

JAMES E. RYAN, Attorney General (GARY M. GRIFFIN,
Assistant Attorney General, of counsel), for Respondent.

TORTS—*what Claimant must prove in action based on officer's use of force.* In order to prevail in a tort claim alleging injuries from a police officer's use of force, the Claimant has the burden of proving that the State's agent was negligent or used excessive force.

SAME—*trooper's rights incident to arrest.* Under Illinois law, a trooper has the right to search an arrestee incident to an arrest, and an arrestee has no right to resist or obstruct a police officer making a lawful arrest.

SAME—*intoxicated man injured in scuffle with trooper—no evidence of negligence or excessive use of force—claim denied.* Despite the Claimant's allegation that he suffered a fractured neck when a State trooper used excessive force in effecting his arrest, the claim was denied, based on evidence showing that the trooper had not acted negligently or unreasonably, and that the Claimant, during the course of his DUI arrest, resisted the trooper's pat-down search and failed to obey his orders, thereby causing the scuffle which led to the Claimant's injury.

OPINION

FREDERICK, J.

Claimant filed his complaint sounding in tort on April 28, 1988. The cause proceeded to trial on an amended complaint. Claimant has alleged that Illinois State Trooper Mark Fritz fractured Claimant's neck when he used excessive force to effect the arrest of Claimant on April 30, 1987, in Winnebago County, Illinois.

The Facts

On the evening of April 30, 1987, the paths of Harvey Duerst and Trooper Mark Fritz of the Illinois State Police crossed in an area of southern Winnebago County. When Mr. Duerst left that location, he was under arrest, in the custody of Trooper Fritz, and was suffering from fractured vertebrae in his cervical spine. This claim is brought by Mr. Duerst for those injuries. How Claimant suffered those injuries is the subject of this cause of action, and whether Trooper Fritz violated the standards on the use of force is the pivotal issue in resolving this claim.

In April of 1987, Harvey Duerst was a 43-year-old assembly worker at the Chrysler Corporation plant in

Belvidere, Illinois. He was married to Marcia Duerst, his wife since 1969. He resided in Rockford, Illinois, an area to which he had moved in 1966.

Mark Fritz, on April 30, 1987, was an Illinois State trooper whose responsibilities included the patrol of the southern area of Winnebago County. He had been a cadet with the Illinois State Police between June of 1986 and October of 1986. Prior to that time, he had been a deputy sheriff. On April 29, 1987, Trooper Fritz's shift began sometime after 11:00 p.m. At approximately midnight, Trooper Fritz was driving at the intersection of Blackhawk Road and Mulford Road. Trooper Fritz observed a vehicle partially stopped on Mulford. He also observed Claimant around that motor vehicle. There were no other vehicles or pedestrians in the area, which would most accurately be described as rural. Trooper Fritz activated his emergency light after he turned the corner but before he pulled up behind Mr. Duerst's vehicle. Claimant moved his vehicle off the road at that time.

While there are many conflicts between the testimony of the Claimant and the trooper, there are certain undisputed facts which can be ascertained from the testimony. After a period of observation of Mr. Duerst and a conversation with him, the trooper required Mr. Duerst to do what are commonly referred to as field tests for sobriety. Claimant failed the field tests. Additionally, Trooper Fritz asked for the Claimant's driver's license. After satisfying himself that he possessed probable cause, the trooper informed the Claimant that he was being arrested for driving under the influence of alcohol and then placed the Claimant in the Illinois State Police car. We agree that Trooper Fritz had abundant probable cause to arrest Claimant for driving under the influence of alcohol. Up to that point, the Claimant had cooperated with the officer

and complied with the requests made. After the arrest, the tenor of the conversation was more adversarial and the Claimant became anything but cooperative. In the squad car, the Claimant tried to persuade the officer not to arrest him but failed. In doing so, Claimant mentioned a prior DUI arrest. The officer informed the Claimant that he would have to be searched for weapons and he proceeded to open the passenger door of the squad so that the Claimant could exit. The Claimant decided, however, that the officer did not need to conduct the search since the Claimant had already informed the officer that Claimant possessed no weapons. It was this error in judgment on the part of Claimant which led to the physical altercation between the Claimant and the trooper. The Claimant refused the officer's requests to exit the squad car of his volition. After several requests, the officer finally grabbed the collar of the Claimant's coat and pulled Claimant out of the squad car. The Claimant was forced to lean against the car at the rear passenger door.

From the point that Claimant was leaning against the squad car, the testimony is in conflict. There is conflict as to whether Claimant pushed himself away from the vehicle or if the officer intentionally took the Claimant to the ground. There is conflict in the testimony as to the Claimant's level of cooperation while he was being searched, but the more reasonable conclusion is that his cooperation did not increase once he was forcibly removed from the vehicle. The Claimant admits pushing the officer's arm away during the search and in reaction to the touching of his genitals. The officer testified that the Claimant was so uncooperative that the search had to be discontinued. At this stage, because of the Claimant's attitude and the conditions, either Trooper Fritz made the decision to ground the Claimant, a tactic which makes it easier to handcuff an uncooperative suspect, or the Claimant

pushed off the vehicle and the two fell to the ground. Again, the Claimant's version is contrary to the officer's as to how he ended on the ground. In evaluating the credibility of the Claimant, it is difficult to disregard the conclusion of those medical personnel at Swedish Covenant Hospital who noted that the Claimant was acutely intoxicated when he arrived there. Additionally, the hospital testing revealed that the Claimant had alcohol levels in his blood of 311 milligrams per deciliter. These results were included in the medical records admitted as part of Dr. Ayers' testimony. Regardless of an individual's tolerance, this type of intoxication would impair a person's physical and mental abilities to some extent.

In trying to determine how the Claimant landed on the ground, it is important to remember that the officer was trying to impose physical control over an intoxicated, uncooperative male who would not allow himself to be searched in a rural, desolate location. While intoxication does not render one's legal protections meaningless, the dilemma it creates in the eyes of the arresting officer certainly weighs on the type of force necessary to obtain that control. If the Court adopts Claimant's version of the events, the Claimant urges that less aggressive options were available to Trooper Fritz in this confrontation. He discusses a verbal warning to the Claimant before being taken down, but it is obvious that such a measure might very well be counter-productive with an uncooperative suspect. Under section 7—5 of the Criminal Code (720 ILCS 5/7—5), a peace officer's use of force is codified. How much force an officer can use and when it can be used is delineated. The statute states:

“Peace officer's use of force in making arrest. (a) A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened * * * force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to

defend himself or another from bodily harm while making the arrest. However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or such other person, or when he reasonably believes both that:

(1) Such force is necessary to prevent the arrest from being defeated by resistance or escape; and

[b] * * * justified in using if the warrant were valid, unless he knows that the warrant is invalid.”

It is the Claimant’s position that, since he suffered a fractured cervical vertebrae, the officer’s use of force was excessive since he was only being arrested for misdemeanor offenses. However, that analysis presumes that the force utilized was “likely to cause death or great bodily harm.” Under the circumstances present in this case, that is not true. Force likely to cause death or great bodily harm does not normally include forcing or even throwing a person to the ground in an attempt to control him. The Claimant’s injury no doubt did occur while being thrown, forced or falling to the ground. The mechanics of the injury seem to suggest that the Claimant’s head hit the ground first, but in a struggle, that is not surprising. The Court cannot conclude that the officer intended to cause such a severe injury to the Claimant, nor that it was likely that the take-down, if that is what occurred, would result in such a severe injury. To characterize the fracture of the Claimant’s cervical vertebrae as the unfortunate product of this scenario in no way diminishes the nature of the injury or its consequences. Claimant was forced to endure a long and painful recuperative period which would be compensable under different circumstances. There is, however, no credible evidence from which a trier of fact can conclude that the trooper intentionally abused or battered Mr. Duerst or used force likely to cause great bodily harm during the arrest process or that the trooper was negligent.

Again, even if the Court accepted Claimant’s version of events regarding the fall to the ground, we find that

the force utilized by the officer cannot be said to have been excessive. It was not the type of force which was likely to cause death or great bodily harm, and because of the resistance encountered, it was justified at the time.

The Law

To prevail, the Claimant has the burden of proving by a preponderance of the evidence that the State's agent was negligent or used excessive force. (*Simmons v. State* (1991), 44 Ill. Ct. Cl. 304; *Robinson v. State* (1994), 47 Ill. Ct. Cl. 364.) As heretofore stated, the trooper did not use force likely to cause great bodily harm. The trooper was not negligent and did not use excessive force under the totality of the circumstances.

The Court must also consider the credibility of the witnesses. (*Jones v. State* (1994), 46 Ill. Ct. Cl. 324.) The testimony of the Claimant and trooper are diametrically opposed on most of the crucial evidence in the case. We find the testimony of the trooper to be more credible. The trooper was acting professionally and with restraint. The proximate cause of Claimant's injuries are the Claimant's own conduct in failing to obey the lawful orders of the trooper when asked to exit the car. The trooper's credibility is enhanced by the fact that instead of instituting a costly tow of Claimant's vehicle, he let Claimant choose a friend to come and retrieve the vehicle. Knowing that a private citizen was on the way to obtain Claimant's car keys at the scene, it is more probable than not that the trooper was not going to use excessive force on Claimant.

We find, based on the evidence, that Claimant was intoxicated, that he was upset that he was being arrested for driving under the influence of alcohol, could not talk his way out of it, and refused to step out of the trooper's vehicle when asked several times. Claimant admits he tried to talk his way out of the DUI arrest and that he did

not abide by the trooper's order. Claimant's excuse that he was startled and didn't think the trooper should have to search him is not accepted by the Court as a reason not to follow the officer's lawful order. Claimant must follow all lawful orders of the officer or he is resisting or obstructing the officer. Claimant's conduct started the process that led to his injury.

We further find that Claimant resisted the pat-down search of the trooper. A trooper has the right to search an arrestee incident to an arrest. An arrestee has no right to resist or obstruct a police officer making a lawful arrest. (720 ILCS 5/7—7.) Claimant resisted Trooper Fritz. Under all of the circumstances and in dealing with this intoxicated, resisting arrestee, this trooper acted reasonably.

We find that the trooper did not intend to use, nor did he use, excessive force. The result was unfortunate but was not intended nor the necessary result of the force used. Claimant's conduct was the proximate cause of his injury.

Based on the credible evidence, this Court finds that Claimant has failed to prove by a preponderance of the evidence that the Respondent was negligent or used excessive force during the arrest of Claimant. For the foregoing reasons, it is the order of the Court that Claimant's claim be and hereby is denied.

(No. 88-CC-4169—Claim dismissed.)

RAYMOND VON MOORE, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed March 1998.

RAYMOND VON MOORE, for Claimant.

JAMES E. RYAN, Attorney General (CHAD D. FORNOFF, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*requisite proof.* In order for a Claimant to recover in a negligence claim, he must prove 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 his injuries.

PRISONERS AND INMATES—*electric cell door closed on inmate's neck—comparative fault precluded recovery—claim dismissed.* Where an inmate sought an award for a neck injury sustained when an electronically operated cell door closed on him, the claim was dismissed since, although there was evidence that the inmate's door was mistakenly opened and closed, his own comparative fault in placing his head through the food slot in the door to speak to a guard was the proximate cause of his injury and precluded his recovery.

OPINION

JANN, J.

Claimant, an inmate with the Illinois Department of Corrections, seeks damages in the sum of \$100,000 against Respondent, State of Illinois, arising from an alleged neck injury sustained by Claimant when an electrically operated steel door closed on Claimant's neck. The complaint contends that the incident occurred at Stateville on June 2, 1987. There is little detail set forth in the complaint as to how the alleged accident occurred.

Claimant filed three post-hearing motions for summary judgment and "directed judgment." The same motions were twice denied and our ruling herein makes the three subsequent motions moot. Two hearings were held on October 23, 1992, and June 14, 1995. Claimant filed a

series of motions during the commissioner's consideration of his recommendation to the Court which caused some considerable delay in our consideration of this cause.

The Claimant, now having adopted the name Raymond Von Moore, testified upon hearing that on June 2, 1987, at Stateville Correctional Center, Correctional Officer Kellogg opened an electronic steel door on Claimant's neck when Officer Kellogg was supposed to open cell 1D05 and instead opened cell 1D09, which was Claimant's cell. At the time, Claimant was apparently attempting to speak to another correctional officer concerning a phone call to his attorney. Claimant was apparently standing in his cell with his head stuck out of the "chuck hole." The "chuck hole" is a hole for receiving trays, clothing, or items in and out of the cell without opening the cell door. The chuck hole was a foot long and six inches high. Claimant had his head through the chuck hole. For an inmate to stick his head out of the chuck hole is not a common practice. Inmates do this when they can't contact an officer in the gallery so that they can look and see if there is an officer "going on another wing." There is a rule against sticking any objects like mirrors or anything out of the chuck hole, but Claimant contends that he had no choice "because I couldn't contact no officer." Claimant contends that he had earlier spoken to his attorney's office and had been told to call back at about 1:00. Claimant was trying to get the attention of a correctional officer so that he could obtain approval to make the call when this incident occurred.

The chuck hole is located at about waist level and, in order to stick one's head out of the chuck hole, one would have to bend at the waist or squat down so that one's head would be waist level.

Officer Nash, who was called and testified for Respondent, testified that inmates are told not to stick their

heads or arms out of the chuck hole. The heads of some prisoners wouldn't even fit through the hole and inmates are told not to put their heads out of the hole.

Doors of the cells are opened electronically by pushing a button on a control panel. It takes 15 to 20 seconds for a door to open electronically. The opening is not a jerking motion. It is a smooth, slow, opening motion according to Nash. The food slot is in the center of the door and located in the portion of the door that moves open and closed. Mr. Nash testified that the door opens on a track at the top and bottom. The door slides along the outside of the concrete structure that constitutes the cell wall. The door would have to move approximately 12 inches before it would tend to bind anything protruding out of the slot.

Claimant testified that he sustained major muscle spasm and was taken to outside hospitals from the prison several times between August of 1989 and August of 1990 for treatment. He was admitted at Chester Memorial where he was kept on medication. At the time of the hearing, Claimant was still on medication. Claimant complained that he was having pain in his neck and his neck tended to pull over to the side as a result of his injuries.

Claimant testified originally that he had no choice but to stick his head out the chuck hole because he couldn't contact an officer. Yet, when Mr. Von Moore was cross examining Officer Nash, his questions presupposed that Officer Nash was close enough to his cell to assist in holding the door open so that it would not do further violence to Mr. Von Moore's neck. Claimant was attempting to portray a valid reason for sticking his head out of the chuck hole by attempting to convince the Court that it was necessary for him to do so in order to speak to, or get the attention of, the correctional officer. Out of his own mouth, however,

he suggests that Captain Nash was close enough to his cell that within a matter of a few seconds Nash was restraining the door so that it would not close on Claimant's neck and cause any further injury to Claimant. This anomaly raises serious questions with respect to Claimant's credibility.

Inmates within their prison cells have absolutely no control over the questions of when the door to their cell is opened or closed. This is controlled, in Claimant's case, by an officer in a control booth quite some distance from Claimant's cell. Under these circumstances, sticking an arm or leg or one's head out of a hole in a door that can be opened electronically at any time by someone beyond the control of the inmate is foolhardy at best. The description of the location of the control booth to the wings upon which cells are located makes it obvious that a resident in one of the cells would have to be aware that the control booth operator would not have line of sight identification of a particular single cell door when opening and closing doors at the requests of correctional officers or for other valid purposes.

Claimant's actions in sticking his head out of this opening in the door placed his head and neck in extreme jeopardy. His action was voluntary, although he states it was for the purpose of getting the attention of a guard so that he could call his attorney, his explanation pales in credibility when it is considered that Captain Nash was very close by at the time of this accident.

The evidence is not disputed that the inmates are instructed not to place their arms, legs or heads through the "chuck hole." Simple observation of the chuck hole in the sliding door by an inmate would compel the conclusion that anybody using reasonable care for his own safety would not stick appendages of his body through the hole, thereby risking injury if the officer operating the control

room happened to decide to push a button which would open the inmate's door.

Although there is some suggestion in the evidence that the officer operating the control room buttons made a mistake in opening Claimant's door, instead of another, it would seem under principles of the rules of comparative negligence, that Respondent was more than 50 percent responsible for this accident and proximately caused his own injuries.

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

Claimant has failed to meet his burden of proof as to proximate cause of his injury and, pursuant to section 2—1116 of the Code of Civil Procedure (735 ILCS 5/1—1116) when a Claimant is more than 50 percent at fault, he may not recover damages.

This cause is hereby denied and dismissed.

(No. 88-CC-4292—Claim denied.)

STEVEN SHANNESSY, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed June 12, 1997.

Order filed December 26, 1997.

COONEY & CONWAY, for Claimant.

JAMES E. RYAN, Attorney General (CARA LEFEVOUR SMITH, Assistant Attorney General, of counsel), for Respondent.

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

SAME—*duty owed by landowner to invitees*. A landowner generally has a duty to use reasonable care to keep his premises safe for invitees, but that duty does not include a duty to warn invitees of obvious dangers or risks.

SAME—*bicyclist injured while riding on steep park trail—risk was obvious—claim denied*. A bicyclist, who was injured when he fell from his bike and hit his head on a steep park trail, was denied recovery in his claim alleging that the State negligently failed to warn park invitees that the trails were dangerous for bicycle use, since the risk to bicyclists was obvious given the trail's terrain and inaccessibility, the Claimant knew of the danger because he had suffered a previous injury while bicycling on the trails and, although the posted warning sign did not specifically list bicycling as one of the prohibited trail activities, it cautioned that people had been injured and killed in that area.

OPINION

MITCHELL, J.

This cause comes before the Court on Claimant Steven Shannessy's complaint against Respondent State of Illinois seeking damages for personal injuries suffered on May 9, 1987, while operating a "trail" bicycle at Starved Rock State Park. The Claimant alleged that Respondent was negligent because it failed to properly warn of a dangerous condition or caused a path to be constructed too close to a cliff without constructing a fence or barrier. The bill of particulars, attached to the complaint, stated that medical expenses, disability and disfigurement, pain and suffering, and lost earnings totaled \$1,000,000.

The hearing was conducted on August 1, 1996. Claimant presented three witnesses: Mr. Leo Trainer, an employee of Respondent; Mr. Stephen Shannessy, Claimant; and Mr. Francis Shannessy, father of Claimant. Claimant presented exhibits consisting of an itemized list of medical and health expenses incurred by, and projected for, Claimant; a trail map of Starved Rock Park; a

photograph of the parking lot at Starved Rock Park; and a copy of an advertisement of a trail bike. All exhibits were admitted into the record.

Respondent presented one witness, Mr. Richard Vecchi, an employee of the Respondent. Respondent presented five exhibits consisting of photographs of a certain trail area; and a departmental report including various reports. The exhibits were admitted into the record.

Claimant's Case in Chief

A. Testimony of Leo Trainer

Mr. Leo Trainer testified that he is employed by the State of Illinois and has worked at Starved Rock State Park (hereinafter the "Park") for 23 years. He has personal recall of an accident that occurred on March 28, 1987, in the vicinity of Hennepin Canyon. He received a telephone call from the volunteer fire department indicating that they were responding to a call at the canyon. He assisted in bringing the injured individual up the trail. The injured person was Mr. Shannessy, the Claimant. He remembers seeing a bicycle. He told one of Claimant's companions that this was the first bicycle accident he knew of on the trail. He told the person it was dangerous.

Mr. Trainer stated that, at some point in time after the incident, bicycles were rented from a private concession stand on Park property. He did not believe bicycles should be on any part of the trails because they were not designed for bicycles. The trails are dangerous for bicycles because they were designed for pedestrian use not for bicycle use. He identified the photographs marked as Respondent's Exhibit Nos. 1-4. The photographs show the signage as it existed at the trail on May 9, 1987, the date Claimant was injured. The signs do not prohibit bicycles.

Mr. Trainer identified Claimant's Exhibit No. 2, a trail map of the Park as it existed on May 9, 1987. The trail map states that there is no swimming, wading, rappelling or climbing and advises to stay on marked trails, but does not state anything about trails not being for bicycles. Claimant was injured at Illinois Canyon which is marked as "18" on Claimant's Exhibit No. 2. Respondent's photographs were taken near the letter "J" on the trail map.

On cross-examination, Mr. Trainer stated that a person would have to use a stairway of 104 steps to get up onto the bluff trail near Illinois Canyon. Respondent's Exhibit No. 3 is a photograph of a sign that states, "No camping, climbing or rappelling. People have been injured and killed in this area. Violators will be prosecuted to the maximum extent of the law."

B. Testimony of Claimant Stephen Shannessy

Mr. Stephen Shannessy testified that he is 31 years of age. On the morning of May 9, 1987, he was employed as a millwright carpenter and in good health. He was earning \$8 per hour and working 40 to 45 hours a week.

On May 9, 1987, he was "mountain biking," an activity described as "off-road biking." He was riding a Schwinn High Sierra. The bike was intended for use on rugged trails and steep slopes.

On May 9, he and companions parked at the parking lot marked "J" on the trail map. He identified Claimant's Exhibit No. 3 as a photograph of the trail head.

He was at the Park once before. He had hit his head on that trip and does not remember anybody at the Park telling him the trails were dangerous for bicycles. On May 9, there was not any signage prohibiting bikes on

trails. They went from parking lot J to the stairway and climbed up to the bluff. When they got to the top of the bluff, they began rappelling.

After rappelling, they climbed back up and got on the bikes and went downhill on the trail. He came to a switchback and the back wheel slipped out. He fell into the creek bed and hit his head against a tree. The trail was about two feet wide, muddy, with lots of overgrowth and very short switchbacks. The trail was a foot and a half away from the edge of the bluff. The drop from the edge of the bluff to the bottom was between 30 and 35 feet. There were not any barriers between the trail and the drop-off. There was a slope away from the trail. There were not any signs at the trail indicating that it was dangerous for bicycles.

After he had fallen, he could not feel a thing. He went into shock. He remembers being on the Loyola helicopter. He remembers being at Northwestern Hospital. They put him in a neck brace and a striker frame. Eighteen days later he had surgery and then he went to the Rehabilitation Institute of Chicago for four months of rehabilitation. After the operation he experienced extreme pain. They taught him the activities of daily living and how to use a wheelchair.

He is not able to use his legs. He has limited use of his arms and hands. The middle fingers of both hands are completely paralyzed. He has about 70 percent control over his breathing and lungs. He needs assistance with dressing, eating and cleaning. He uses a Texas catheter and lay-bag for elimination of body fluid. He requires a mini-enema for bowel evacuation. An attendant lives with him. He pays her \$300 per month. Every six or eight weeks he has urinary tract infections. He takes an antibiotic twice a day at \$5 per pill. The infections are getting

worse. He is constantly at risk of having an autonomic reflex, where his bladder does not empty causing his blood pressure to drop and rise rapidly, leading to a possible stroke. He uses leg-backs, a shower tray, a wheelchair, and a catheter. He believes this equipment costs approximately a thousand dollars a month.

On cross-examination, Claimant stated that he did not see the sign at the front of the trail head that prohibited rappelling and warned that people have been injured and killed in that area. When riding his bike, he was aware that there was a drop-off at the side of the trail.

C. Testimony of Frank Shannessy

Mr. Frank Shannessy, the father of Claimant, testified that he and his family were called to the emergency room at the hospital when Claimant was injured. He went to the Park on May 26 and visited the site of the accident. He thought it was a dangerous site. The trail was very narrow with no barriers at the edge. Prior to becoming paralyzed as a result of the accident, Claimant was athletic.

Respondent's Case in Chief

A. Testimony of Richard Vecchi

Mr. Richard Vecchi, an employee of the Park, testified that he was a ranger in 1987. The Park has never charged admission during his 26 years as an employee. He responded to a call on May 9, 1987, because of Claimant's accident at Illinois Canyon. The trail is an average of three feet in width and is designed for hiking.

On cross-examination, Mr. Vecchio stated that after Claimant's first accident, on March 28, 1987, at Hennepin Canyon, the Park put up "no biking" signs, specifically, the international sign (the bicycle with the slash through

it) at Illinois Canyon. The sign is not in any of the photographs included in the departmental report, Respondent's Exhibit No. 5. The Civilian Conservation Corps built the trail in the 1930s. At the point Claimant fell, the trail is approximately four feet from the cliff. The trail is fairly level. He does not believe the trail is safe for bicycles. There are no signs prohibiting biking in the general area of the accident.

Claimant's Argument

In Claimant's argument, the major premise is that the trails at the Park, which were owned and operated by Respondent, were dangerous for use by bicyclists and that, although Respondent had knowledge of this danger, it failed to warn against bicycling. In support of his argument that Respondent's failure to warn the public of the dangerous condition of the trails was the proximate cause of his fall, Claimant cites *Duncan v. State* (1995), 47 Ill. Ct. Cl. 51 and *Suhrbier v. State* (1994), 46 Ill. Ct. Cl. 102.

Claimant argues that the case at bar is similar to the facts in *Oleson v. State* (1994), 46 Ill. Ct. Cl. 252. In *Oleson*, the State was partially liable for injuries to a Claimant because it was aware of the deteriorating condition of a roadway and scenic overlook at a State park, but did not repair the hazard or warn visitors. In *Wilson v. State* (1989), 41 Ill. Ct. Cl. 50, the Court stated that the magnitude of the risk, the burden of requiring the State to guard against the risk, and the consequences of placing such a burden on the State are factors in determining whether a duty exists (or harm is foreseeable). (41 Ill. Ct. Cl. at 55.) In this case the risk is substantial, the burden is minimal and the consequences are limited to posting warnings at trails at this park; therefore, the State did owe a duty to warn the public that bicycling on the trails was dangerous. Claimant does not present an argument that

the test as stated in *Wilson* would result in a conclusion that the State should erect a fence or barriers.

Respondent's Argument

The Respondent argued that the Claimant was the only person who could have prevented the accident. He took it upon himself to ride the bicycle along the top of the cliff. Respondent argued that when Claimant was at the Park on March 28, 1987, he also hurt himself. On May 9, Claimant's accident occurred when he was returning along the same terrain he had traveled to get to the rappelling site. He was aware of the dangerous switch-back or turn where the accident occurred.

The Respondent argues that there is no evidence of a duty.

CONCLUSION

The integral facts surrounding the accident that is the basis of this complaint are not in dispute. On May 9, 1987, Mr. Shannessy fell from his bicycle and struck his head while traveling along a trail at the Park near Illinois Canyon. He suffered serious and permanent injuries including full paralysis of his legs and partial paralysis of other portions of his body. Mr. Shannessy's life has not been, and never will be, the same because of the fall he took. Respondent has not disputed the extent of injuries or the dollar amount of damages claimed.

There are certain facts that may have some bearing on whether the Respondent had a duty to expressly warn Claimant that the trails were dangerous for bicycle use or to ensure that paths are not too close to cliffs without having a fence or barrier. The Respondent's trail maps had warnings about various activities but did not specifically warn about bicycle use. There was a sign posted that

prohibited certain activities, but not specifically bicycle use. The sign did state that, “people have been injured and killed in this area.” Respondent’s employees personally believed the trails to be dangerous for bicycle use. Prior to 1987, there is not any evidence of anyone riding a bicycle on the trails. This changed on March 28, 1987.

On March 28, 1987, Claimant was riding a bicycle on the trails at the Park and was injured. He was injured to the extent that he needed to be assisted by emergency medical personnel and did not remember details of the incident. This incident is a two-sided sword. Claimant refers to the incident to demonstrate that the Respondent knew that people were riding bicycles on the trails and that such activity was dangerous. The sword cuts the opposite direction when the fact is used against Claimant. On May 9, 1987, Claimant knew that riding a bicycle on trails at the Park was dangerous because he had actual notice of such danger. He was personally aware of accidents and injuries resulting from the activity. Claimant is not seeking damages arising from his March 28 incident. This claim is about the May 9 accident.

Mr. Vecchi testified that, after Claimant’s March 28 incident, the Respondent posted signs prohibiting bicycle use on the trails. This statement also appears in the visitor accident report prepared by him in relation to the May 9 accident. (See departmental report, Respondent’s Exhibit No. 5, p. 5.) Claimant argues that Respondent encouraged bicycle use in the Park; however, Mr. Trainer’s testimony indicates that a concessionaire at the Park leased bicycles *subsequent* to May 9, and there is no evidence that the bicycles were intended for use, or actually used, on the trails.

In order for Claimant to recover against the State, he must prove by a preponderance of the evidence that the State owed him a duty, the duty was breached by a

negligent act or omission, and that such negligence was the proximate cause of his injuries. (*Ondes v. State* (1991), 43 Ill. Ct. Cl. 272.) A landowner generally has a duty to use reasonable care to keep his premises safe for invitees, but that duty does not include a duty to warn invitees of obvious dangers or risks. (*Ma on behalf of Ma v. State* (1993), 45 Ill. Ct. Cl. 180.) In this case, the Claimant has failed to sustain his burden of proof. Claimant has not shown that the State's duty of reasonable care included a duty to warn against an obvious risk of riding a bicycle on a narrow hiking trail atop a cliff which is not intended for bicycling.

In the instant case, though the signage did not prohibit bicycling, it did state that:

"No camping, climbing or rappelling. People have been injured and killed in this area. Violators will be prosecuted to the maximum extent of the law."

This, along with the fact that the Claimant, by his own testimony, was aware of the drop-off on said trail, indicates that the trail was obviously designed for hiking, since the Claimant was required to carry his bicycle up 104 steps in order to get to the hiking trail. The danger was obvious to his father who testified that "it was so dangerous that I was crawling on my hands and knees."

Where a danger is obvious, a landowner does not have a duty to warn of the danger. The Illinois Supreme Court recognized limits on a defendant's duty of reasonable care where the risks are obvious:

"Certainly a condition may be so blatantly obvious and in such position on the defendant's premises that he could not reasonably be expected to anticipate that people will fail to protect themselves from any danger posed by the condition." *Ward v. K-Mart Corporation* (1990), 136 Ill.2d 132, 143.

There is no reason that the State should have anticipated that a bicyclist would attempt to ride on a trail about Illinois Canyon. The trail was accessible only by climbing a

steep, 104-step stairway. This certainly was no invitation to Mr. Shannessy to carry his bicycle up the stairway in order to reach the trail.

The Court believes that the actions of the Claimant were the sole proximate cause of his accident and he has failed to establish by a preponderance of the evidence that the State of Illinois has caused the injuries leading to his paralysis. The risk was obvious and the Claimant chose to accept that risk. Therefore, the claim is denied.

ORDER

MITCHELL, J.

This matter comes before the Court on Claimant's motion for rehearing. After having reviewed the entire file and its previous order filed June 12, 1997, the Court finds that the argument of Claimant is not persuasive and denies Claimant's motion for rehearing, and the order entered June 12, 1997, remains in effect.

(No. 89-CC-3482—Claimant awarded \$51,896.)

AMERICAN JANITORIAL SERVICES, INC., Claimant, *v.*
THE STATE OF ILLINOIS, Respondent.

Opinion filed February 27, 1998.

Order filed May 6, 1998.

TERRENCE M. JORDAN, for Claimant.

JAMES E. RYAN, Attorney General (MARINA POPOVIC,
Assistant Attorney General, of counsel), for Respondent.

CONTRACTS—*ambiguity in contract is construed against drafter.* An ambiguous contract is construed against the party who drafted it, since he chose the language and is therefore responsible for the ambiguity.

SAME—termination of janitorial contract—State had unilateral right to cancel with 30 days notice—one month's payment due Claimant. In a janitorial service's claim seeking damages for loss of income and damage to good will because of the State's alleged wrongful termination of a janitorial contract, the Court determined that, although the Claimant was in compliance with the Prevailing Wage Act and the State did not have a right to terminate its contract with the Claimant, the State did have a unilateral right to cancel the contract which it exercised by virtue of a letter sent to the Claimant, and it was further determined that the Claimant was owed one month's income pursuant to the contract but failed to prove any other damages.

LAPSED APPROPRIATIONS—janitorial service contract—sufficient funds lapsed—award granted. Upon a finding that sufficient funds lapsed to cover an award, a janitorial services company was awarded \$51,896, which was the amount the company was owed under its contract with the State.

OPINION

FREDERICK, J.

This cause is before the Court on Claimant, American Janitorial Service, Inc.'s, verified complaint seeking \$3,400,000 from Respondent, State of Illinois, for wrongful termination of a janitorial contract. Claimant seeks \$400,000 for loss of income and \$3,000,000 for damage to good will. Jurisdiction is pursuant to section 8(b) of the Court of Claims Act. 705 ILCS 505/8(b). (formerly Ill. Rev. Stat., ch. 37, sec. 439.8(b) (1987)).

The complaint alleges that on June 30, 1988, Respondent entered into a contract for the provision of janitorial services by Claimant at Respondent's building at 100 West Randolph Street, Chicago, Illinois (hereinafter referred to as the "building"). A condition of the contract was that Claimant was required to pay its employees compensation equal to the prevailing wage. On December 29, 1988, Claimant received a letter from Director Tristano of the Department of Central Management Services (hereinafter referred to as the "Department") informing Claimant that its contract was terminated on January 1, 1989, for failure to pay its employees the required prevailing wage. Claimant alleged that it had always paid all of its employees the

prevailing wage and that it demonstrated this to Respondent by letter and supporting documentation submitted to the Department of Labor in September of 1988.

A trial was conducted on May 9, 1997, before Commissioner Hanley. Claimant presented three witnesses, namely Fernando Ortiz, an officer of Claimant, and Peg Morsch and Thomas Tocalis, employees of the Department. Respondent presented four witnesses, namely Peg Morsch, Thomas Tocalis, Michael Masterson and Scott Miller, employees of the Department of Labor.

Prior to the commencement of the hearing, Respondent presented a five-page written motion in limine. Claimant objected to the motion, based upon lack of notice and surprise, having received the motion the morning of the hearing. Claimant contended that section 790.200 of the Court of Claims Regulations provides for 15 days for the filing of an objection to a motion.

The purpose of Respondent's motion was to prevent Claimant from contesting whether the Department of Labor's purported finding that Claimant was not in compliance with the Prevailing Wage Act was correct. The Commissioner ruled that section 790.200 of the regulations does not apply to a motion in limine. The rationale for the ruling was that these motions are generally brought on the eve of trial and are intricately involved in the parties' trial strategies. The Commissioner believes it critical to determine whether there was a hearing at the Department of Labor and Claimant was afforded an opportunity to participate. Additionally, section 11A of the Prevailing Wage Act (hereinafter referred to as the "Wage Act") provides for a procedure of notifying contractors who, on two separate occasions, have been determined to have violated the Act. (Ill. Rev. Stat. 1991, ch. 48, par. 39s—11A.) The contractor then has ten working days to

request a hearing by the Department of Labor. The Director sets a hearing within 30 days.

The motion in limine was correctly denied by the Commissioner because Respondent did not establish that the procedures for determining a violation were ever instituted. Claimant was not provided notice of two prior violations and was not afforded an opportunity to invoke its right to a hearing before the Department of Labor.

Claimant's Case

Ms. Peg Morsch testified that she was employed as a public service administrator in the Department on all relevant dates. Her duties included the administration of the contract and overseeing the nightly operations of the contract. Ms. Morsch was not involved in the decision to terminate the contract with Claimant. She also received a letter on October 20, 1988, which she understood to mean that Claimant was paying the prevailing wage on a weekly basis, but the fringe benefits were issued on a separate check.

Ms. Morsch was aware that there was a question being raised in 1988 about Claimant not hiring the employees of the previous janitorial service. She did not have any contact with anyone from "Local 25" and was not aware if other State employees had any such contact.

Ms. Morsch orally notified Claimant that it was not required to employ the employees of the previous contract.¹ At the pre-bid conference, Claimant was asked to interview the existing work force as a courtesy; however, their employment was not one of the conditions of the contract. She identified the agreement between the Department and

¹ Respondent made a continuing objection to this line of questioning, however, the objection was overruled. Claimant maintained that the State terminated the contract because Claimant did not hire the employees of the prior contractor.

Claimant commencing July 1, 1988, which was Claimant's Exhibit No. 2.

On cross-examination, Ms. Morsch stated that, on or about October 20, 1988, she became aware that the Department of Labor had determined that Claimant was not in compliance with the Act for a period of time. On redirect examination, she acknowledged that she did not give a copy of the letter she received to Claimant.

Mr. Thomas Tocalis testified that he was employed by Respondent as the building manager of the building in 1988. He identified Claimant's Exhibit No. 3 as a letter dated June 30, 1988, sent by him to Ortiz Fernando, transmitting to Claimant a copy of the signed janitorial service contract. He was not aware of any other notice going to Claimant to advise Claimant that it had been awarded the contract. He identified Claimant's Exhibit No. 2 as the contract between the parties to which the June 30th letter refers. The contract was to commence on July 1, 1988. He could not recall any reason why Claimant was sent notice of the award one day prior to the commencement date.

Mr. Tocalis did not recall receiving a copy of Claimant's Exhibit No. 4 which was a December 23, 1988, letter from the Director of the Respondent stating that the contract was terminated as of January 1, 1989. He did not recall when he first became aware that Claimant's contract was going to be terminated. He did not know whether Claimant was paying prevailing wage in December of 1988.

Mr. Tocalis also did not recall having seen Claimant's Exhibit No. 5 which was a December 21, 1988, Department of Labor letter that indicated Claimant had cured any prevailing wage problem. He was not aware of the

identity of the person that made the determination to terminate the contract. It was not necessarily part of his duties to be consulted concerning the cancellation of the cleaning service contract for the building. Either the Director's office or the Bureau of Management's Springfield office told him that the contract was to be awarded. He believes a decision to terminate the contract would be made by the Director. He also thought that Michael Bartoletti, the Bureau Manager, would be the one to make a recommendation to the Director to terminate the contract.

Mr. Fernando Ortiz testified that he was an officer of Claimant in December of 1988. He identified the following documents:

- (a) Claimant's Exhibit No. 6, Claimant's bank statement from Metropolitan Bank;
- (b) Claimant's Group Exhibit No. 7, a list of copies of payroll checks for employees working in the building for December 9, 1988;
- (c) Claimant's Group Exhibit No. 8, a series of payroll checks dated December 30, 1988, for employees working in the building;
- (d) Claimant's Exhibit No. 9, a payroll journal;
- (e) Claimant's Exhibit No. 9A, a statement of hours worked for each employee in the building;
- (f) Claimant's Exhibit No. 10, a payroll journal, dated December 23, 1988;
- (g) Claimant's Exhibit No. 10A, the hour statement in relation to the December 23, 1988, payroll.

Mr. Ortiz stated that the contract did not require him to hire the employees of the previous contractors. He

was called on the telephone by Tom Tocalis on June 30, 1988, at approximately 4:00 p.m., and told that Claimant was awarded the contract and cleaning service was supposed to begin in the building at 12:00 a.m. on July 1, 1988. During the first week of July, Mr. Tocalis mentioned to Mr. Ortiz that he should hire the same employees as the previous contractor. Mr. Ortiz told Mr. Tocalis that Claimant would only keep some of the good employees from the previous contractor. He recalled having a subsequent conversation with Mr. Tocalis on the subject. He stated that, in December, 1988, Claimant was paying all the employees the fringe benefits.

On cross-examination, Mr. Ortiz stated that Claimant had one other cleaning contract with the Gould Center in Rolling Meadows which expired. Claimant had a collective bargaining agreement with Local 25 in DuPage County. He acknowledged that the Department complained about the cleaning services in July when Claimant was in the process of putting new people to work. He believed the employees from the previous contractor were engaging in sabotage.

Mr. Ortiz stated on cross-examination that he was not aware that Claimant was being investigated by the Department of Labor regarding alleged Prevailing Wage Act violations. He received a letter dated August 25, 1988, from the Department of Labor requesting documents in relation to Claimant paying fringe benefits to employees. He denied that this led him to believe Claimant was being investigated but acknowledged that there was a concern regarding compliance with the Act.

On redirect examination, Mr. Ortiz identified Claimant's Exhibit No. 11, a letter from Claimant responding to the Department of Labor's August 25, 1988, letter. He identified Claimant's Exhibit No. 11A as the enclosures

referenced in Claimant's response. He stated that Claimant could not renew the contract with Gould Center because "there was too much heat from Local 25." Claimant went out of business after December, 1988, because the contract with the state was terminated. Mr. Ortiz testified that Claimant was paying prevailing wage for the entire period of the contract with the State.

On recross-examination, Mr. Ortiz stated that Claimant had no further communications with the Department of Labor after responding to the August 25, 1988, letter requesting documents. He did not call the Department of Labor after the termination notice in December of 1988. He did call Mr. Tocalis who said he had just learned of the termination and did not know anything about it. Mr. Ortiz also identified Claimant's Exhibit No. 4A as an envelope dated December 27, 1988, in which he received the termination letter on December 30, 1988.

Respondent's Case

Ms. Peg Morsch explained the process by which the Department requests bids and awards contracts. A prevailing wage certification form was executed by Fernando Ortiz, a representative of Claimant, and is included in the contract. The prevailing wage for Cook County was \$9 per hour and \$1.15 per hour for fringe benefits.

Claimant was not the lowest responsible bidder and, in fact, it was the fifth bidder. Ms. Morsch recognized Respondent's Exhibit No. 1, a June 3, 1988, letter from the Department of Labor. The Department had requested the Department of Labor to interview bidders to determine whether the companies had paid prevailing wages on other jobs. Claimant was determined to be in compliance with the Act. Respondent's Exhibit No. 1 was not offered into evidence.

On cross-examination, Ms. Morsch stated that the contract does not specify how often the fringe benefits are to be paid, nor does it state how they are to be paid. She did not recall the name of the union with which Claimant was to have a collective bargaining agreement. The determination of whether a bidder has a collective bargaining agreement is a factor the Department considers in its process of awarding a contract.

Mr. Tocalis stated that he did not recall or recognize Respondent's Exhibit No. 2, a September 12, 1988, letter from the Department of Labor addressed to him.

Michael Masterson testified that he has been employed by the Department of Labor since May of 1989, and currently is the manager of the conciliation and mediation division. The division does investigations under the Prevailing Wage Act. He explained the procedures of conducting an investigation of possible violations of the Act which includes requesting payroll documents from the employer, interviewing employees, and conducting an audit. The employer is kept abreast of all findings by the Department of Labor. The contractor is notified in writing if it is not in compliance with the Act. He explained that there are times when the notice of violation is not in writing, such as, when, "you deal directly face to face with the owner" or when "the company is aware of your audit and they would go ahead and pay their workers directly to make up for the differences in wages."

On cross-examination, Mr. Masterson stated that not all investigators kept a log of all oral communications with contractors.

Mr. Scott Miller, the general counsel's chief hearing officer for the Department of Labor (hereinafter referred to as "Labor") was present for the purpose of testifying

about his review of Labor's file and the records produced by Mr. Ortiz. The whereabouts of Mr. Hubbs, the investigator, is unknown and Mr. Hubbs did not testify. Claimant objected to the testimony of Mr. Miller. The objection was overruled and Mr. Miller was allowed to testify but only to matters that he had reviewed in the file.²

Mr. Miller stated that he has worked for Labor since 1990. The file presented to Mr. Miller was marked as Respondent's Group Exhibit No. 3. Mr. Miller looked at the payroll records. Respondent's counsel attempted to have the witness testify as to whether the investigator or Labor made a decision regarding whether Claimant was complying with the Act or whether Mr. Miller believed Claimant was paying prevailing wage during the time period in the file. Claimant objected. It was ruled that the witness could testify under these circumstances as to a decision of another employee if that employee documented his decision and that documentation was objectively available for review.

Mr. Miller stated that, based upon his review of the records, Claimant was not initially paying its employees the prevailing wage. David Hubbs found that, for the period of July and August, 1988, Claimant was not paying the fringe portion of the prevailing wage. It was paying the cash portion only. Subsequent to Hubbs' finding, the company paid the workers directly the fringe portion in checks in September, 1988. Mr. Miller could not ascertain from the file what happened between September and November of 1988.

On cross-examination, Mr. Miller was requested to identify any document in Labor's file that contained a finding by Hubbs. An August 31, 1988, two-page memo

² Although referred to as Labor's file throughout the examination, it became apparent that Labor's actual file no longer existed intact. Respondent's Exhibit No. 3 was ultimately ruled inadmissible.

to David Hayes states, “initial findings indicate contractor has violated.” A September 22, 1988, letter to the building manager states that, “as a result of his investigation, Mr. Hubbs—of alleged noncompliance, he advised that CMS authorize the contract payments not to be withheld any further.” The September 22, 1988, letter does not use the word, “finding.”

Mr. Miller acknowledged that the certified transcript of payroll for July 18 through July 22, 1988, shows payments of \$9 per hour and fringe benefits of \$1.15 per hour for all employees, except for a supervisor, paid \$12 per hour. There appeared to be notes taken by Mr. Hubbs of interviews with employees indicating that they were paid cash only and did not receive fringe benefits. The three pages of handwritten notes were marked as Respondent’s Group Exhibit No. 3A. A handwritten letter explaining when the interviews took place was marked as Respondent’s Group Exhibit No. 3B. It is the same as the September 12, 1988, typed version. The interviews took place on August 8, 1988, prior to the initial findings and prior to the transmittal from Claimant of the certified payroll. The payroll journals from July 15th through the 22nd show:

“that there is no reflection of a fund. The certified payroll denotes notes on the bottom that if fringe benefit rate is paid into a fund, please not a (sic) by placing the letter F behind the fringe benefit rate. If the fringe benefit rate is included on an employee’s payroll check, please note by placing a P behind the fringe benefit rate, but when I look at the current period payroll journal from the [claimant], I don’t see that in their payroll journal.”

There is no requirement that an employee receive only one payroll check for a particular period. Labor did not specifically ask for copies of checks. There was no subsequent communication from Labor requesting further information or checks from Claimant. There is nothing in Labor’s file that would cause Mr. Miller to conclude that Claimant was not paying prevailing wage from

November 15th through the end of December, 1988. Labor's file did not contain a notice of hearing or any documents indicating oral conversations between the investigator and Claimant.

Claimant moved to strike the testimony of Mr. Miller, arguing that he was provided only certain documents which formed an incomplete file to tailor the information, so as to create the result of an opinion sought by the Respondent. Although the motion was denied at the hearing, this Court will limit its consideration of Mr. Miller's testimony to those facts within his personal knowledge.

Rebuttal Witnesses

Claimant indicated a desire to call rebuttal witnesses; however, none were present and Claimant was not prepared to proceed. Claimant's oral motion to set this matter for another day was denied.³

The question before the Court is whether the Director of the Department had the right to terminate the contract. The December 23, 1988, letter from the Director states that the reason for the termination was Claimant's failure to pay its employees the required prevailing wage.

There is no dispute the contract specifies, in paragraph 15, that, pursuant to the Prevailing Wage Act, "the Contractor must pay the prevailing wage rate." The parties agree that the pertinent prevailing wage was \$9 per hour and \$1.15 per hour for fringe benefits.

The contract contemplates that the contractor may be in breach, and provides, in paragraph 29:

³ It was ruled that Claimant should not have been surprised that Respondent would use the alleged prevailing wage violation as a defense. The documents, Respondent's Exhibit No. 3A, Claimant desired to rebut were ruled inadmissible and it was noted that the Court would narrowly construe Miller's testimony. Claimant was invited to present a motion with a proper showing of an evidentiary basis indicating what testimony the proposed rebuttal witnesses would provide. None was ever filed.

“*Breach*: Failure of the Contractor to perform as specified is cause for immediate termination of the contract at the option of the State.”

The contract does not include any provisions whereby the State is obligated to notify the contractor of a default or perceived breach. There are no provisions affording the contractor any opportunity to cure a breach or default. There are no expressions requiring the State to give notice of termination or otherwise act within a specified time frame if it believes the contractor is in breach of its obligations. The contract is silent on whether the State may take action to terminate two to three months after it becomes aware of a breach.

The contract is silent as to what happens if the contractor does cure the breach prior to termination. Although not identified as such by the parties, it may be argued that there is an ambiguity in paragraph 29 because it states that a failure of the contractor is cause for *immediate* termination. The questions would be whether the contract requires *immediate* action, and whether delay operates to cause the State’s termination right to expire. In *Albion Carlson & Company v. State* (1996), 48 Ill. Ct. Cl. 245, the Court found in favor of a Claimant contractor on the pertinent issue because Respondent had not acted within a 20-day period as required by the contract. The Court stated that it was clear that the Respondent’s right to deny a minority business enterprise waiver request expired after the 20-day period. On a separate, nondeterminative issue, the *Albion* court noted that, an ambiguous contract is construed against the party who drafted it, since he chose the language, and it is therefore responsible for the ambiguity. (48 Ill. Ct. Cl. at 250.) This Court also recognized the rule of *contra proferentem* in *McCarthy Brothers Co., et al. v. State* (1995), 47 Ill. Ct. Cl. 15.

Respondent submits that the contractor was not paying the \$1.15 in fringe benefits to its employees for the months

of July and August, 1988. Respondent asserts that the Department of Labor investigated the alleged failure and determined that Claimant had not paid the fringe benefits.

Claimant asserts that Respondent did not determine that it had not paid the fringe benefits. Claimant appears to argue in the alternative that, even if Respondent did determine that it had not paid the fringe benefits to its employees during July and August, 1988, it subsequently did so by separate check. The Respondent does not contest this alternative point. Claimant also maintains, without refutation by the Respondent, that it was in compliance minimally from September, 1988, through December 23, 1988, the date of the letter terminating the contract.

The contract does not expressly require the State to submit the question of a violation of the Act to the Department of Labor for an official finding or determination. The fact that the Department requested Labor to investigate the matter does not contractually prohibit the Department from terminating the contract without a strict compliance with the procedures available to Claimant pursuant to the Act. There is no evidence that Claimant was notified in writing of Labor's or the Department's determination of failure to pay fringe benefits during July and August, until the December 23rd letter, and no-one testified that Claimant was orally informed.

Claimant's evidence is sufficient in its case-in-chief to demonstrate that it was in compliance with the Act. The question is whether the Respondent proved at the hearing that its termination was for cause, namely a failure to pay prevailing wage.⁴

⁴ Respondent's Exhibit No. 3 contains sufficient evidence to support the conclusion that fringe benefits were not paid; however, it was ruled inadmissible because there was no foundation and it was not included in the Department Report. (Respondent's Exhibit No. 5) The investigator did not testify. Two labor employees who began their employment after December 31, 1988, attempted to authenticate the file. More importantly, it was revealed by Respondent's counsel that Respondent's Exhibit No. 3 was not the actual and complete Labor file but was a file that she created or from which she had at least removed certain documents.

The October 20th and December 21st letters contained in Respondent's Exhibit No. 5 are sufficient to support a finding that Claimant was not in compliance with the Act in July and August. The issue then is whether or not the State had the authority to terminate the contract in December for violations in July and August.

Claimant's position would be that Respondent's right to terminate for a July/August breach had expired before December 23rd, and Respondent could not terminate the contract pursuant to paragraph 29 of the contract. This position is supported by the fact that apparently Claimant cured the violation and the Respondent did not act on the cause for immediate termination. We find that Respondent did not have the right to immediately terminate the contract on December 23, 1988.

The Claimant has the duty to prove his damages by a preponderance of the evidence. This burden applies in a contract case as well as in a negligence case. *Gildehaus v. State* (1993), 46 Ill. Ct. Cl. 176.

On the issue of damages, it appears that the contract specifies that Claimant was to be paid \$51,896 per month. This appears to be a gross amount and there is no evidence in the record in relation to Claimant's profit on such payment.

The Claimant presented absolutely no evidence regarding the value of the goodwill of the company to support its claim for \$3,000,000 for damage to its goodwill. No experts or professionals testified to the value of Claimant's goodwill, or any damages to that goodwill. Therefore, Claimant's request for \$3,000,000 in damages to Claimant's goodwill is denied for lack of any supporting proof.

The issue of Claimant's claim for \$400,000 for loss of income is also very difficult for the Court because Claimant

presented very little proof as to its loss of income. The Claimant only proved the monthly payment due of \$51,896 under the contract. There was no proof presented as to net income or Claimant's efforts to mitigate its damages. There is some merit to an argument that the Court could deny this claim on the basis of Claimant's failure to prove its damages by a preponderance of the evidence. Additionally, the contract, in paragraph 36, also authorizes the State the unilateral right, without cause, to cancel the contract upon 30 days written notification. Neither party has addressed this provision and its potential applicability to the issues.

We find that the Respondent had the unilateral right to cancel the contract with 30 days' notice, and the December 23, 1988, letter effectuated that right. The Court finds that, by virtue of the notice mailed on December 27, 1988, and received by Claimant on December 30, 1988, the contract was terminated, effective January 31, 1989. Claimant should receive the benefit of the 30-day written notice prior to cancellation.

As we find that the contract was canceled rather than terminated, we find that Claimant would be due the amount of \$51,896 for the month of January, 1989, for which it was not paid. Claimant has failed to prove any other damages by a preponderance of the evidence.

Our inquiry does not end here. Neither party presented evidence as to whether any funds lapsed under the contract. In a contract case, this Court is limited to an award of damages equal to the amount of lapsed funds. *Global Fire Protection Co. v. State* (1994), 46 Ill. Ct. Cl. 195; *Altman v. State* (1991), 44 Ill. Ct. Cl. 8.

Based on the foregoing, it is the order of the Court as follows:

A. That the Respondent shall file a notice with the Court indicating what amount of funds lapsed under the contract or which could be transferred into the line item for this contract.

B. That the Court will enter a final order upon the Department filing the lapsed funds information.

ORDER

FREDERICK, J.

This cause comes on to be heard on the Court's own motion following receipt of the Respondent's response to the decision entered herein on February 27, 1998. The Court finds:

In the aforesaid opinion damages were found to be \$51,896 but judgment was withheld pending filing of certain financial data. Respondent has since filed the necessary information. Sufficient GRF money lapsed to cover an award.

It is therefore ordered that the Claimant be, and hereby is, awarded \$51,896.

(No. 90-CC-0234)—Claimant awarded \$17,500.)

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

Opinion filed April 22, 1996.

Order filed January 5, 1998.

EDWARD F. DIEDRICH (JEAN M. DIEDRICH, of counsel), for Claimant.

JAMES E. RYAN, Attorney General (ROBERT J. SKLAMBERG, Assistant Attorney General, of counsel), for Respondent.

CONTRACTS—*Lessor's Liability Act—exculpatory clauses as to lessors' negligence prohibited but not as to waiver of contractual liabilities.* Section 1 of the Lessor's Liability Act prohibits agreements which have the effect of exempting a lessor from liability for damages for injuries to person or property caused by the lessor or his agents or employees in the operation or maintenance of the demised premises, but the statute does not apply to exculpatory clauses that waive contractual liabilities.

SAME—*claim by art teacher against university for flood damage to artwork—State's motion to dismiss granted in part and denied in part.* In an art professor's claim against a university for flood damage to artwork kept on university premises, the State's motion to dismiss the professor's negligence claim as barred by the statute of limitations, the Claimant's failure to exhaust other remedies and the claimant's assumption of risk under an exculpatory clause of the parties' agreement was denied, but the Court granted the motion to dismiss a third-party beneficiary breach of contract claim, based on the Claimant's waiver of the State's contractual liability.

STIPULATIONS—*art professor's claim for flood-damaged artwork—award entered pursuant to parties' joint stipulation.* Pursuant to the parties' joint stipulation, an award was entered in full and final satisfaction of an art professor's claim for flood damage to artwork stored on university premises.

OPINION ON MOTION TO DISMISS

EPSTEIN, J.

Claimant, a professor of sculpture at Northern Illinois University (the "University"), now retired, brought this two-count claim against the University seeking recovery for flood damage to his artwork which had been kept on University-leased premises. These claims, as alleged in Claimant's amended complaint, are before the Court on the Respondent University's motion to dismiss which, though undesignated, is a section 2—619 motion that asserts four affirmative bars to Claimant's tort (count I) and contract (count II) claims.

1. The Amended Complaint

Claimant alleges that in 1985 he was a member of the University's art department faculty, in which capacity he maintained his art studio and artwork in a building leased by the University for this and other art department

purposes, when the building flooded which caused \$160,000 of damage to his artworks. Count I alleges that the University was negligent in its operation of the building and its alteration of the property. Count II, on a third-party beneficiary theory, alleges that the University breached the insurance covenant of its premises lease with the landowner which required it to procure insurance for, *inter alia*, property damage.

2. The Section 2—619 Motion to Dismiss

The university's section 2—619 motion raises four issues: (1) failure to exhaust remedies as required by section 25 of the Court of Claims Act (735 ILCS 505/25), seemingly directed at both counts; (2) lack of jurisdiction over the count II third-party beneficiary claim under section 8(b) of the Act (735 ILCS 505/8(b)) due to lack of privity between Claimant and the University on the premises lease; (3) the bar of the catch-all two-year statute of limitations of section 22(g) of the Act (735 ILCS 505/22(g)) as to the count I tort claim; and (4) the written agreement between the Claimant and the University that provided that the University was not to be responsible for Claimant's personal property, which is apparently asserted as a bar to both counts I and II.¹

3. The Count I Negligence Claim

(a) Assumption of Risk

Respondent's argument is based upon Claimant's execution of a "letter of agreement" with the University that included the following exculpatory language:

"4. NIU carries no insurance and cannot assume responsibility for personal materials or works of art." (letter of agreement, par. 4; departmental report, pp. 1-2.)

¹ Respondent's articulation in its motion of a failure "to state a cause of action in which relief may be granted" is plainly not the intended objection to the complaint, is not argued by the Respondent, and will be disregarded by the Court.

The applicable doctrine is assumption of risk, which is still a viable though limited tort defense in Illinois. Most commonly applied as a defense to products liability actions (see, e.g. *Hanlon v. Airco Industrial Gases* (1st Dist. 1991), 219 Ill. App. 3d 777, 579 N.E.2d 1136), assumption of risk remains applicable to negligence actions, at least in cases involving a contractual or employment relationship or, as here, an express assumption of risk. See *Barrett v. Fritz* (1969), 42 Ill.2d 529, 248 N.E.2d 529.

However, the Court cannot apply this express assumption of risk defense to this negligence claim because of a law that neither party mentions, but which we must nonetheless apply. Exculpatory clauses as to lessors' negligence have been outlawed in Illinois since 1971. (Lessor's Liability Act, section 1, Public Act 77-1569, 765 ILCS 705/1.) The General Assembly has voided agreements, like the one presented by this Respondent, which would have the effect of:

"exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his or her agents, servants or employees, in the operation or maintenance of the demised premises * * *." Section 1, Lessor's Liability Act, 765 ILCS 705/1.

This statutory public policy is as applicable to the State as landlord as it is to a private landowner as landlord, as this Court has held. *Shalgos v. State* (1994), 46 Ill. Ct. Cl. 331 (lease of stable in State Fairgrounds to horse owner).

The exculpation of the "letter of agreement" clearly falls within the Act's operative language, quoted above, as to Claimant's personal property. The operation of the exculpatory clause against count I—a negligence action relating to the operation or maintenance of the premises—is clearly barred if the statute applies to this agreement. Whether this "letter of agreement" is covered by the Act, in turn, is determined by the following language of section 1, which establishes the statute's reach:

“every covenant, agreement or understanding in or in connection with or collateral to any lease of real property * * *.”

Under this statutory language it is not necessary for us to determine whether or not the “letter of agreement” itself constituted a lease or sublease. It is sufficient for present purposes that we find, as we do, that the letter of agreement would apply “in connection with” (or at least “collateral to”) whatever oral or written lease governed Claimant’s occupancy of the University’s premises.

Accordingly, the exculpatory clause of this agreement is “void as against public policy and wholly unenforceable” and is not a bar to the count I negligence claim. This aspect of the Respondent’s motion to dismiss is denied, with prejudice.

(b) Statute of Limitations

The parties do not dispute that the two-year period of section 22(g) of our Act (735 ILCS 505/22(g)) is the applicable limitation period for this negligence action. Its application here is disputed.

Respondent asserts, correctly, that the Claimant admits he knew of the flood of the premises within the two-year limitation period. This, however, is not dispositive. Claimant asserts the discovery rule applicable to statutes of limitations in Illinois (*Vogt v. Bartelsmeyer* (5th Dist. 1994), 264 Ill. App. 3d 165, 636 N.E.2d 1185), and asserts that he in fact did not know and, under the particular circumstances, could not reasonably have discovered the *actual damage* to his artwork until some days after the flood, within the two-year period. Claimant’s contention, if accepted, would commence the running of the statute within two years prior to his filing in this Court, which would avoid the bar of the statute.

The Respondent relies factually on the Claimant's deposition testimony to support this aspect of its section 2—619 motion. Claimant, in turn, disputes Respondent's reading of his testimony and has filed an affidavit which, *inter alia*, reviews his discovery of the damage to his artworks that were stored in his studio and in a loading area of the building. (Affidavit of William Haendel, 9/8/95; Exhibit A to Claimant's response to Respondent's motion to dismiss, par. 3(A)-(E).)

Claimant's deposition testimony is inadequate to support Respondent's conclusions about Claimant's actual or inferred knowledge of injury to his artwork. Claimant's admission that he knew of the flood and knew that it had reached his studio (more than two years before filing) does not quite reach the critical facts. Moreover, in light of Claimant's affidavit, which flatly denies knowledge of the injury and states that he was denied access to the area and was prevented from examining his artwork until a later date (within the two-year statute), the most that can be said is that the issue, tritely put, of what Claimant knew and when he knew it must be resolved by a trier of fact.² This presents a fact issue as to the discovery rule's application in this case.

Accordingly, this aspect of Respondent's motion to dismiss is denied without prejudice and subject to trial.

(c) Exhaustion of Remedies

Respondent's exhaustion of remedies argument is based on the Claimant's failure to pursue two alternate sources of potential recovery for the damage to his artwork: (1) Claimant's abandonment of his lawsuit against the landlord of the University-leased building, and (2) his

² The Court also leaves for later determination, on a better record than is presented on this motion, the question of what kind or degree of damage to the artwork must have been known to trigger the running of the statute of limitations under the discovery rule.

failure to seek damages from the designer of the retaining wall that the University built on the property and that may have caused the flood by channeling rainwater runoff into the building.

Respondent's exhaustion arguments require that the Claimant have (or had) a plausible claim against the suggested alternative source of recovery. If an alternative source of recovery for the claimed injury is shown to exist, in whole or in part, our Act and our rule command that no judgment can be entered by this Court until that potential recovery is resolved and reduces the State's liability. (735 ILCS 505/25, 74 Ill. Admin. Code section 790.60) If it is shown that the Claimant could have but now cannot pursue a real alternative source of recovery for the injury, then this Court will dismiss the claim against the State for failure to exhaust that remedy.

Respondent urges that Claimant's 1992 dismissal of his circuit court lawsuit against the landlord demonstrates a failure to pursue an alternative remedy (and one which, presumably, cannot now be pursued due to the apparent running of the statute of limitations), and requires us to dismiss these claims against the University. Claimant responds that the landlord's deposition testimony disclosed that the University, as a tenant, had the sole and exclusive responsibility for operation and maintenance of the property under the lease and that therefore, as a matter of law, the landlord cannot be culpable for either of the negligent acts alleged in this case: the design of the retaining wall that allegedly funneled rainwater into the building, and the failure to turn on, or keep on, the sump pumps that would have protected the lower level of the building from floodwaters.

As with Respondent's earlier reliance on the Claimant's deposition (on the limitation issue), the Claimant's

reliance on the landlord's deposition (on this issue) is misplaced. The landlord's deposition testimony says what Claimant says it says, to be sure. However, he was wrong, and thus, Claimant winds up being wrong too. Unlike the Claimant (and apparently unlike the Respondent as well), the Court read the lease. And contrary to the landlord's testimony that the lease delegated the *entire* responsibility for maintenance and operation of the leased premises to the tenant University, the lease in fact contains an allocation of maintenance and improvement responsibilities between the landlord and the University:

“VIII. REPAIRS AND MAINTENANCE

The Lessee * * * shall maintain and keep the Premises, including * * * windows, doors, skylights, interior walls and air conditioning systems in good repair. The Lessor shall maintain the structural system of the Building * * * except the windows, and the sidewalks on the Premises in good condition and repair. The Lessee shall be responsible for the maintenance of the grounds and snow removal. All necessary caulking, tuckpointing and other maintenance of the exterior walls shall be the Lessor's responsibility * * *.

IX. ALTERATIONS AND INSTALLATIONS

The Lessee shall not make any alterations in or additions * * * without first procuring the Lessor's written consent and delivering to Lessor the plans, specifications, names and addresses of the contractors, copies of the proposed contracts and the necessary permits, * * * satisfactory to the Lessor * * *.” (Lease, sections VIII, IX (contained in departmental report).)

In this posture, the Claimant cannot invoke the general rule of law that a leasehold transfer of the entirety of the responsibility and control of the premises to the tenant exculpates the landlord from liability for the condition of the premises. This rule applies when the lease transfers the entire control and responsibility of the property:

“Generally, a landlord is not liable for injuries caused by a defective condition on the premises leased to a tenant *and under the tenant's control*. (*Rowe v. State Bank of Lombard* (1988), 125 Ill. 2d 203, 126 Ill. Dec. 519, 531 N.E.2d 1358.) A lease is a conveyance of property ending the landlord's control over the leased premises, which is a prerequisite to tort liability. (*Wright v. Mr. Quick, Inc.* (1985), 109 Ill. 2d 236, 93 Ill. Dec. 375, 486 N.E.2d 908.) Only the tenant, as the party *in possession and control* of the leased premises, could be liable to persons injured on the premises. (*Wright* [citation omitted].)” *Almendarez v. Keller* (1st Dist. 1990), 207 Ill. App. 3d 756,

556 N.E.2d 441, 444, 152 Ill. Dec. 754, 757, *leave to appeal den'd.*, 137 Ill. 2d 663 (1991) (emph. added)

“* * * a lessor is not liable for injuries caused by a dangerous or defective condition on the premises leased to a tenant *and under the tenant's control*. (*Rowe v. State Bank* (1988), 125 Ill. 2d 203, 220-21, 126 Ill. Dec. 519, 527, 531 N.E.2d 1358, 1366; *Almendarez v. Keller* (1990), 207 Ill. App. 3d 756, 759, 152 Ill. Dec. 754, 757, 556 N.E.2d 441, 444, *appeal denied* (1991), 137 Ill. 2d 663, 156 Ill. Dec. 559, 571 N.E.2d 146.) As our supreme court put it in *Wright v. Mr. Quick, Inc.* (1985), 109 Ill. 2d 236, 238, 93 Ill. Dec. 375, 376, 377, 486 N.E.2d 908, 909: “The basic rationale for lessor immunity has been that the lease is a conveyance of property *which ends the lessor's control over the premises*, a prerequisite to the imposition of tort liability.” A lessor has no duty to maintain premises that are leased to *and under the control of the tenant*. *Gilbreath v. Greenwalt* (1980), 88 Ill. App. 3d 308, 309, 43 Ill. Dec. 539, 541, 410 N.E.2d 539, 541.” *Jackson v. Shell Oil Co.* (1st Dist. 1995), 272 Ill. App. 3d 542, 208 Ill. Dec. 958, 650 N.E.2d 652 (emph. added)

The record before us affirmatively reflects an allocation rather than an exclusive delegation of the maintenance and control of this property. Thus, on the present factual record on the motion to dismiss, we cannot find the landlord exculpated from responsibility as to the retaining wall improvement, over which he retained some control. Claimant has not demonstrated that its suit against the landlord was unmaintainable or frivolous due to the lease terms.

On the other hand, this Court cannot determine, on the record now before us, whether the landlord may have actually borne some liability for the flood and whether he was ultimately culpable for the damage to the Claimant's property. Among other things, that determination turns on whether the retaining wall construction (or design) was actually negligent, whether its construction or design or both caused or exacerbated the flood conditions inside the building, and whether or not such flood causation, if proved, was the proximate cause of the damages. Under the facts before us, it is at least possible that the proximate cause of the damage was the University's negligent failure to operate the sump pumps that allegedly would

have prevented the flood damage. This generates a series of questions of fact, to be determined initially by the trier of fact and not by us on this motion.

This Court's discussion in a recent case of similar posture, well covers the point:

"Here the Respondent is asking us to dismiss a case prior to trial. We therefore may not * * * have all of the facts necessary to decide as a matter of law whether the acts of [the alleged tortfeasor] were a proximate cause * * *. The Illinois Supreme Court addressed a similar issue in * * * *Briske v. Village of Burnham*, 397 Ill. 193. The Court there stated:

'If a negligent act or omission does nothing more than furnish the condition making an injury possible, and such condition, by the subsequent independent act of a third person, causes an injury, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury.'

Similar results were reached in *Carr v. Shirland Township*, 66 Ill. App. 3d 1033, 23 Ill. Dec. 655, 384 N.E.2d 449 (2d Dist. 1978); *Cannon v. Commonwealth Edison Co.*, 250 Ill. App. 3d 379, 190 Ill. Dec. 183 (1st Dist. 1993); and *Thompson v. County of Cook*, 154 Ill. 2d 374, 181 Ill. Dec. 922, 609 N.E.2d 290 (1993).

All of these cases stand for the proposition that if a defendant's negligence does nothing more than furnish a condition by which injury is made possible, that negligence is not the proximate cause of the injury." *Simmons v. State* (May 23, 1995) (Patchett, J.)

This proximate cause analysis applies equally to the Respondent's other suggested recovery source, *i.e.*, the designer of the retaining wall. We cannot, on this meager record, determine the potential culpability of the designer of something that may or may not have caused the flooding in the first instance, and that may or may not be the proximate cause of the damage sought to be recovered from the State. Those underlying fact issues must be tried.

Accordingly, the exhaustion of remedies portion of the Respondent's motion to dismiss is denied without prejudice and subject to trial.

4. The Count II Third-Party Beneficiary Contract Claim

Respondent attacks the count II third-party beneficiary contract claim on three grounds: (1) exhaustion of remedies

(the identical argument addressed, *ante*, as to count I); (2) subject matter jurisdiction; and (3) waiver, based on the “letter agreement” between it and the Claimant.

- (a) Subject-matter jurisdiction over third-party beneficiary claim

We necessarily address the jurisdictional issue first. Respondent contends that the Court of Claims lacks jurisdiction over third-party beneficiary claims, such as count II, under section 4(b) of our Act. 735 ILCS 505/4(b).

Respondent’s jurisdictional argument is based on the point that third-party beneficiary claims are not based on privity of contract, and are therefore not “contract” claims in the strict sense of a direct claim on an express contract. Respondent’s argument is also based on the language of our statutory grant of jurisdiction over contract claims in section 8(b) of our Act. Respondent argues that our section 8(b) jurisdiction is limited to claims on express contracts which do not include *quantum meruit* or quasi-contractual liabilities, relying on *Brighton Building Maintenance Co. v. State* (1982), 36 Ill. Ct. Cl. 36.

Initially, we note that this jurisdictional issue appears to be a matter of first impression, even though this Court has adjudicated third-party beneficiary claims (*see, e.g., Pal-Mar Steel v. State* (1991), 44 Ill. Ct. Cl. 13; *First National Bank of Springfield v. State* (1990), 43 Ill. Ct. Cl. 1; *Sargent & Lundy v. State* (1996), 48 Ill. Ct. Cl. 333, seemingly without this jurisdictional issue having been raised. *Brighton, supra*, on which Claimant relies, is another of our decisions that adjudicated (and rejected) a third-party beneficiary claim on its merits, but did not involve a jurisdictional issue over that claim. (Of course, our decisions adjudicating third-party beneficiary claims without jurisdictional objections or rulings are not precedent on the jurisdiction issue.)

We must reject Respondent’s jurisdictional objection as unfounded in the language of section 8(b), as unprecedented, and as unsupported by a cogent policy or historical basis. Respondent has not cited, and our research has not disclosed, any jurisdictional ruling in this Court or in any other court of limited jurisdiction that is at all pertinent on this issue. Similarly, we have found nothing in the legislative history of our statute, or its predecessor, that leads us to read the section 8(b) language any narrower than its plain meaning.

Our decision ultimately rests on the language of our statutory grant of jurisdiction over contract claims in section 8(b) of our Act (705 ILCS 505/8(b)), which reads as follows:

“§8. Jurisdiction. The court [of claims] shall have exclusive jurisdiction to hear and determine the following matters:

* * *

(b) All claims against the State founded upon any contract entered into with the State of Illinois.”

Under this language, this Court has jurisdiction over any action that is “founded upon” an express oral or written contract “entered into with the State * * *.” The “entered into” language limits the provision to express contracts, and thus excludes contracts that arise by means other than through agreement with the State. Respondent’s observation that this Court has construed its section 4(b) jurisdiction to exclude *quantum meruit* and quasi-contract claims, and the *Brighton* decision reflecting that holding, is accurate but inapposite. A third-party beneficiary claim is fundamentally different than *quantum meruit* and quasi-contract claims, which are *implied* contracts that arise as a matter of public policy in the *absence* of an express agreement.

That is not the issue in this case. More pertinent here is the “founded upon” language, which is the only

other limiting phrase in section 8(b). This phrase is broad enough to encompass *ex contractu* claims based on an express contract with the State that assert any established legal theory. The crucial nexus is the express contractual basis.

A third-party beneficiary claim ordinarily is “founded on” an express contract—perhaps one that the Claimant is not a party to, and perhaps even one between parties with whom the Claimant is not in privity, but an express contract nonetheless. And that is the test imposed by the statute. So long as a third-party beneficiary claim is predicated on an express contract with the State, as this one is, we perceive no jurisdictional impediment under section 8(b).

Privity of contract, urged by Respondent as the test, is just not an element of section 8(b) and is thus immaterial to the jurisdictional analysis. We simply do not find a privity requirement in the Act. We cannot and will not insinuate it into the statute.³

This third-party beneficiary claim is alleged to arise out of an express contract between the State and a third party. Accordingly, the count II claim is an action “founded upon a contract entered into with the State of Illinois” within the meaning of section 4(b). Respondent’s motion to dismiss count II for lack of subject matter jurisdiction is denied.

(b) Waiver

Respondent asserts the exculpatory provision of the “letter of agreement” between the University and the Claimant as a waiver of the count II claim. This waiver argument parallels the assumption-of-risk defense that was

³ We also reject Respondent’s unsupported and unfathomable argument that this Court lacks contract claim jurisdiction under section 8(b) to adjudicate damages to personalty as distinguished from “property or premise damage.” (Respondent’s motion to dismiss, part II, par. 3, at 4.)

interposed against the count I tort claim, which also was based on the exculpatory clause of the letter of agreement. Here, however, the exculpatory clause is presented as a bar to a contract claim rather than to a negligence claim.

The Lessor's Liability Act (765 ILCS 705/1), invoked above, applies to contract or lease provisions that exculpate a lessor from,

"liability for damages for injuries to * * * property caused by or resulting from the negligence of the lessor * * *."

The focus of the statute is lessors' negligence. The legislative intent reflected in the statutory language is directed solely at lessors' negligence liability, not their breaches of contracts. The statute cannot fairly be read as applying to exculpatory clauses that waive contractual liabilities.

We are constrained to hold that the statute does not bar the exculpatory clause in the letter of agreement from waiving the count II claim of this complaint, which asserts a liability that is not alleged to arise from a lessor's or sublessor's negligence but instead is predicated solely on a breach of a contract (to maintain insurance). The damages sought by count II are the loss of insurance benefits, not tort damages. This exculpatory clause, as applied to count II, does not "exempt" the respondent-lessor from "liability for * * * negligence * * * in the operation or maintenance of * * * real property," as the clause did as applied to count I. For the purpose of operating as a waiver of a contract claim, the letter of agreement is not unenforceable under the statute, and thus the letter of agreement bars Claimant's third-party beneficiary contract claim.

We recognize that it can be argued that the prohibited exculpation under the statute is from "*injuries* * * * caused by or resulting from * * * negligence," irrespective of the theory of the cause of action that generates liability. That would be a considerably broader reading of the Act.

However, such a mechanical reading of the statutory language belies its clearly indicated purpose. Such an expansive interpretation would read out of the statute its reference to lessors' "negligence." That phrase would be rendered meaningless if the statute were given across-the-board effect beyond negligence actions. In order to give effect to that statutory phrase, as we are required to do by the canons of construction and by deference to the legislature's enacted words, we must read the "negligence" phrase as a limitation on the application of the Act.

We need only dispose of Claimant's alternate argument that the letter of agreement should be voided as a misrepresentation, based on its assertion that "NIU carries no insurance * * *." Claimant contends that the statement was misleading because the University was obliged, under its lease, to obtain the very insurance that it announced to Claimant and other faculty members would not be obtained. This obviously duplicitous pair of pronouncements could not mislead Claimant or his peers: the University did *not* obtain insurance, and that is precisely what its "letter" told the art department faculty it would not do. Whatever else may be said, the University accurately told Claimant what it was not going to do.

Respondent's motion to dismiss count II as barred by the waiver of the "letter of agreement" is granted, and count II will be dismissed.

5. Order

For the foregoing reasons, it is hereby ordered:

A. Respondent's motion to dismiss count I (negligence):

- (1) as barred by Claimant's express assumption of risk in the letter of agreement of February 12, 1985, *denied with prejudice*; and

- (2) as barred by the section 22(g) two-year statute of limitations is *denied without prejudice*, and subject to further proceedings;
- (3) as barred by Claimant's failure to exhaust alternative sources of recovery is *denied without prejudice*, and subject to further proceedings; and

B. Count I is *remanded* to the assigned Commissioner for further proceedings;

C. Respondent's motion to dismiss count II (third-party beneficiary breach of contract):

- (1) for lack of jurisdiction is *denied*; but
- (2) as waived by Claimant's express exculpation of the Respondent in the letter of agreement of February 12, 1985, is *granted*; and

D. Count II is *dismissed with prejudice*.

ORDER

EPSTEIN, J.

This matter coming to be heard upon the joint stipulation of the parties to settle the claim herein, due notice having been given and the Court being fully advised in the premises.

It is ordered that Claimant be awarded the sum of seventeen thousand five hundred and no/100 dollars (\$17,500) in full and final satisfaction of the claim herein.

It is further ordered that the Court, while not bound by the settlement, does approve it, and that the award of \$17,500, as the agreed amount, is entered in favor of Claimant.

(No. 90-CC-1659—Claim denied.)

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

Opinion filed November 19, 1997.

CALANDRINO, LOGAN & LAMARCA (MICHAEL J. LOGAN,
of counsel), for Claimant.

JAMES E. RYAN, Attorney General (VERNE E. DENTINO,
Assistant Attorney General, of counsel), for Respondent.

CONTRACTS—*definition of ambiguous contract.* The existence of ambiguity in a contract is a question of law for the Court, and an ambiguous contract is one capable of being understood in more than one sense, or an agreement obscure in meaning through indefiniteness of expression or having double meaning.

SAME—*road repair work—contractor's claim for additional compensation denied.* A contractor's claim for additional compensation allegedly due under a contract with the State for road-patching work was denied, since any purported ambiguity in the contract did not support the contractor's interpretation of the disputed contractual terms, and the contractor failed to produce competent evidence that warranted additional compensation under the contract.

OPINION

EPSTEIN, J.

This is a contractor's three-piece claim for \$17,710.99 of additional compensation for FY1988 road-patching work under a competitively-bid contract with the Department of Transportation ("IDOT"). This 1990 claim over a 1988 dispute was tried to our Commissioner in 1991 and is finally before the full court on the pleadings, the trial record and the Commissioner's extraordinarily delayed 1997 report.

The Contract

Claimant, Kinney Contractors, Inc. ("Kinney"), brought this claim seeking additional compensation on three payment components of IDOT contract no. 42938 for FY88

road-patching work in IDOT District No. 2 (Boone, Carroll, JoDavies, Stephenson, and Winnebago counties). The contract was awarded to Kinney, as low bidder, in December 1987.

Under the contract, the Claimant was to, and did, perform road-patching work in District No. 2. Under this type of contract, the exact quantity and location of work to be done, as well as the ultimate compensation, is unknown at the time of bidding and contracting. The actual work is designated in work orders later issued by IDOT to the contractor. The contractor's compensation is determined by various unit costs and work charges specified in the contract.

Claimant's final billing for the contract period was \$192,387.79; IDOT approved and paid \$174,676.80 under the contract. Kinney's \$17,710.99 claim is for the difference. IDOT disputes Kinney's entitlement to any additional compensation under this contract.

The Claims

Claimant's \$17,710.99 claim has three distinct and independent components:

- (1) Charges for "call-outs," for which Claimant seeks an additional \$4,500.

This claim turns on the interpretation of the contract definition, for payment purposes, of the term "call-out" and its application to the work performed by Kinney. This term, undisputedly, affects or determines the number of compensable "call-outs" under the contract.

- (2) Charges for "non-lateral" movement of traffic control devices, for which Claimant seeks an additional \$1,537.61.

This claim turns on the interpretation of the contract language defining a “location” of traffic control. This term is claimed to affect or determine the number of compensable traffic control “locations” and hence the total charges for “non-lateral” (i.e., longitudinal, referring to the roadway directions) movements of traffic control devices between locations.

- (3) Charges for traffic control devices (“markers”), for which Claimant seeks an additional \$11,673.38.

This claim is based on the interpretation of the “length” aspect of “traffic control areas” prescribed in the “2316-10” diagram in the contract specifications. This length specification, as applied, is claimed to affect the quantity of traffic control devices required and compensable, and hence the total charges for such devices.

The Trial

Trial of this claim was held on May 2, 1991, before Commissioner Stephen R. Clark. The documentary evidence included the contract, the billing, work order, IDOT regulations and IDOT’s departmental report. Two witnesses testified: James R. Kinney, the president of the Claimant, and Darryl Stiemstra, then the district construction engineer for IDOT.

Analysis

The three contract construction issues in this case arise out of IDOT’s general specifications (“Standard Specifications for Road and Bridge Construction,” sometimes called the “Red Book”) or IDOT’s “Supplemental Specifications and Recurring Special Provisions.” Both are part of contract no. 42938 by incorporation. The Red Book and various selected supplemental/recurring provisions are incorporated into most IDOT road contracts.

There is no dispute as to the applicability of the contract provisions in issue or as to any facts. IDOT does not dispute the quantity, quality or contract-conformance of Kinney's work. The issues are purely matters of contract interpretation and application.

A. The "Call-Out" Issue

Claimant was paid \$1,500 for one "call-out" under this contract, based on the single IDOT work order that was issued (Respondent's Exhibit No. 3), which covered three routes in and around Rockford, in Winnebago County. IDOT maintains that that work order constituted one "call-out" under the contract. Claimant contends that the work order constituted three "call-outs," because it included three routes. Claimant also contends that a separate work order addendum that extended its patching work on U.S. Route 20 resulted in an additional "call-out" under the contract, bringing to three the number of claimed, but unpaid, "call-outs." Claimant's position is based on the interpretation that a "call-out" is limited to a single county and to a single route.

The contract definition of "call-out" is contained in the special/recurring provisions of the contract (special provisions, sheet 3), and provides as follows:

"CALL-OUT: This work shall consist of the preparation and operations necessary for the movement of personnel, equipment, supplies and incidentals for each call-out to the job site designated by the Engineer.

A work order will not be sent unless a minimum of 48 square yards of patching has been located; * * *.

Basis of Payment: This work will be paid for at the contract unit price each for each CALL-OUT as described above * * *."

Claimant contends that this provision is ambiguous, and that therefore parol evidence of the parties' intent and extrinsic evidence of IDOT's course of dealing on this recurring contract term are admissible with respect to its interpretation. Relying on the apparent facial circularity

of this “definition,” the Commissioner agreed and allowed parol evidence.

Having opened the door to extrinsic evidence, Claimant advanced its “one-county, one-route” interpretation of “call-out.” Claimant’s interpretation would impose geographical limits on this facially-unbounded term through extrinsic evidence. To this end, Claimant presented testimony: (i) of Mr. Kinney’s understanding of this term at the bidding time, fortified by the work order example contained in the bid documents (which was for a single route in a single county), (ii) of IDOT’s payment to Kinney under another contract for two “call-outs” on one work order that had directed work on one route in two counties, and (iii) that in performing the work, Kinney was required to move equipment on separate routes up to ten miles.

IDOT countered with evidence of billings and payments for “call-out” on other contracts; testimony of the purpose and of IDOT’s application of this provision; and testimony as to the purpose and application of another recurring provision, also contained in this contract, for “mobilizations.” The “mobilization” provision compensates the contractor \$500 for each movement of its equipment between job sites.

Although we are disinclined to reverse the Commissioner’s allowance of parol evidence in the absence of objection from a party, which is missing here, we must comment on the “ambiguity” issue and on the nature of the Claimant’s extrinsic interpretation argument, as we are not fully convinced that there was adequate justification for the parol evidence in this case, although the point is harmless in light of our ultimate conclusion.

Some things are clear about this “definition” in IDOT’s special provisions: (1) it is strikingly inartful; (2) it

is facially circular (in that it defines the term in terms of the same term); (3) because it is circular, it is not an objective definition of “call-out”; and (4) its language in no way supports or suggests either the “route” or “county” limitations urged by this Claimant. Indeed, the contract text does not support any physical limitations on “call-outs” other than those that may be embodied in the term “job site” which is an element of this definition.

However, we are unconvinced that this provision is ambiguous in the classic sense, or that it is ambiguous in any way that might help Claimant’s argument. We are also unconvinced that this “definition” cannot function sufficiently clearly to accomplish its contractual purpose notwithstanding its lack of objectivity or of quantitative specificity.

Ambiguity denotes a multiplicity of meanings that are each fairly conveyed by the text. That is classic linguistic ambiguity, in which competing meanings emanate from the words and phrases and sentence structure employed. The competition between multiple meanings, when unresolved by the rules of language or the canons of construction, may be resolved by resort to extrinsic evidence in an effort to glean the drafter’s actual or constructive intent.

This “call-out” definition does not present competing meanings: none are identified by the parties. However, Claimant’s contention is not so much that this definition is classically ambiguous, as that it is vague and indefinite. Claimant really objects that this definition is unbounded. This court does not accept the proposition that an absence of quantitative limits *per se* is vagueness that opens the door to parol evidence, although it surely is sometimes.

We would strike the extrinsic evidence in this case if the law were that only a classic ambiguity supports admission of parol evidence on a disputed contract term. But the law is somewhat broader than that. For purposes of opening the door to extrinsic evidence on a contract term, “ambiguity” encompasses severe vagueness as well as classic ambiguity:

“The existence of ambiguity in a contract is a question of law for the court. (*Joseph v. Lake Michigan Mortgage Co.* (1982), 106 Ill. App. 3d 988, 62 Ill. Dec. 637, 436 N.E.2d 663.) An ambiguous contract is one capable of being understood in more than one sense [citation omitted] or an agreement obscure in meaning through indefiniteness of expression or having a double meaning.” *Pioneer Trust & Savings Bank v. Lucky Stores, Inc.* (1980), 91 Ill. App. 3d 573, 47 Ill. Dec. 36, 414 N.E.2d 1152; *Mid-City Industrial Supply Co. v. Horwitz* (1st Dist. 1985), 132 Ill. App. 3d 476, 87 Ill. Dec. 279, 476 N.E.2d 1271 (emph. added); see also, 17A Am. Jur. 2d, *Contracts* section 403 (1991).

Thus, parol evidence admissible on the basis of “vagueness” or “indefiniteness” can open the door to an interpretation that does *not* emanate from the words and phrases employed in the contract, as this Claimant seeks to do here. We conclude that there is a basis—albeit a barely adequate one—for parol evidence in this case in the absence of objection by a party.

However, this court is skeptical of extrinsic meanings brought—by either side—to a contract whose text does not suggest such meaning. In this case, the Claimant seeks to evidence an interpretation that would impose two geographical limitations on a contract “definition” that are nowhere contained nor suggested by the words of the contract.

Having considered the parties’ parol evidence, the Court is utterly unconvinced that the Claimant’s “one-county” or “one-route” limitations can, or should, be engrafted onto this contract definition. We also conclude that this provision is not as unclear as it first appears on its face.

Claimant's evidence of past IDOT practice is inadequate. Claimant's meager evidence of prior billings and payments is ambiguous at best and does not reflect "county" and "route" limitations. Claimant's evidence is far short of a consistent usage that might persuade this Court to adopt an extrinsic meaning that is textually unsupported. Claimant's evidence simply does not support its argument.

Moreover, review of this definition in its contractual context shows that it is workable. The function of this provision in this contract, undisputedly, is to establish the basis for applying the contract's \$1,500 payment rate for "call-outs." This, we find, it does.

The contract states that this payment is for "the preparation and operations necessary for the movement of personnel, equipment, supplies and incidentals *for each call-out to the job site designated by the Engineer.*" (Emphasis added.) Although there is an element of circularity in this phraseology, it is clear enough that the ultimate determinant of a call-out—and the key operative phrase relative to any geographical or distance factors—is the "job site." The job site, in turn, is contractually specified to be the site "designated by the Engineer." Thus, in the absence of any further contract definition of "job site"—and in the absence of any contractual limitations on the [IDOT] engineer's designation of "job sites"—none of which are identified in this contract by either of the parties, this provision says only that a call-out for payment purposes is the engineer's call-out to whatever job site he or she designates.

It is immaterial that this provision does not qualify as an artful or as an objective "definition." It is clear enough to function as a specification of the work that is to be compensated as a "call-out" at \$1,500 per call-out. Claimant's complaint was more appropriately aimed at the engineer

who wrote the work order, rather than at this Court, which lacks a contractual basis for second-guessing the job site under that work order.

Finally, we note the presence in the contract of a different payment provision for moving equipment *between* job sites: “mobilization,” which are compensated at a \$500 contract rate for each such movement. This separate contract provision clearly disposes of Claimant’s contention as to the extension of the Route 20 work order.

For these reasons, we find no contractual basis for this “call-out” claim, and reject this first component of this claim for \$4,500 of additional compensation.

B. The “Non-Lateral Movement” Issue

The second component of the Claimant’s contract claim is for additional “installation” charges that are compensable for each separate “set-up” or “installation” of a work area in a “new location” under article 109.04 of the contract. The narrow contract construction dispute presented here focuses on the difference between “lateral” and “longitudinal” movements of the work area, both of which require movement of the protective “traffic control devices” but only one of which is separately compensable under the contract.

The material provisions of section 648.05 of the Red Book read as follows:

“b) Traffic control and protection required under Standards 2309, 2310, 2317 and 2318 will be measured at each location specified on an each basis. Standard 2316 will be paid for on an each basis when the traffic control and protection applies to isolated stationary work areas and does not involve or is a part of other protected areas.

Where the contract work to be performed requires longitudinal movement of the work area, each installation of a Standard in a new location will be paid for in accordance with Article 109.04. A contiguous lateral movement of the work area causing a change in the location of traffic control devices, but not a longitudinal relocation of the work area, will not be considered a new installation.”

Claimant argues for a strict application of “lateral movement” so as “not [to] encompass any longitudinal movements” (Claimant’s Brief, at 6) so that “the moving of barricades for lane change, unless straight across from the original repair, should be an additional expense item.” (*id.*, at 7) On that strict construction, supported by the principal of construing [ambiguous] contracts against the drafter [here IDOT], Claimant urges that Mr. Kinney’s testimony that “the required movement of traffic control devices was to some extent longitudinal and not purely lateral,” (*ibid.*) requires additional compensation for non-lateral traffic control set-up charges.

We disagree in two respects. First, Claimant’s proffered construction is not merely strict. Claimant’s construction is “pure,” as it concedes, and is so pure as to exceed the bounds of reasonableness as well as the Ivory Snow test [99 44/100]. We need not here explore the academic distinctions between truly lateral and truly longitudinal movements of road “work areas,” but we observe that the contract’s “non-lateral” standard must be read in light of its explicit purpose, which is to distinguish genuine “relocation[s] of the work area” that are compensable, from non-compensable lateral movements on the same stretch of road. In that context, we find no basis for a “pure” non-longitudinal standard for “new locations.”

Second, we find the Claimant’s evidence on this claim inadequate to support an award, much less to convince us to make an award, on any view of the standard. Simply put, the Claimant did not produce competent quantitative evidence of longitudinal movements of work areas under this contract that could warrant additional compensation.

For these reasons, we reject this second component of this claim.

C. The Traffic Control Markers Issue

The third and final component of the Claimant's contract claim is for \$11,673.38 of additional charges for supply and use of traffic control markers. Claimant's basis is the "2316-10" diagram in the contract specifications. This diagram, entitled "Typical Application of Traffic Control Devices—Highway Construction and Contract Maintenance," is a general IDOT directive on how and where to set up traffic control devices. As explained by IDOT's engineer at trial, and undisputed by Claimant, this diagram is applicable generally, if not universally, to several kinds of highway projects, including road patching and road repair.

Kinney contends that the diagram establishes the maximum length of a work area, and thus, that additional compensation is owed for the additional markers required for those work sites that exceeded the 2316-10 specifications under the subject contract, i.e., the excess markers. We must reject this claim for three reasons.

First, we do not find any maximum length of work areas or work sites specified in the 2316-10 document, and we do not find the diagram at all ambiguous in this omission (as Claimant erroneously contends, thereby seeking to invoke construction against IDOT as drafter). The diagram is a placement specification, is plainly intended to cover work areas of varying lengths, and does not purport to define or limit the work area length at all, but only to specify the placement and density of traffic control devices within, and adjacent to, the actual work area. The scale-break markings on the diagram are standard drawing protocol, and affirmatively show that the work-area lengths are *not* to scale. Claimant's interpretation of the diagram is baseless.

Second, there is an inadequate evidentiary basis in this record for this Court to award damages for additional

work areas or for additional markers. The sole basis identified by Claimant is a letter, which is argumentative and perhaps sufficient as a pleading, but far short of the mark as competent quantitative evidence. There is no evidence of additional set-ups at all.

Third, we are unpersuaded that there is an applicable compensation element or specific provision of this contract that applies to this issue. Claimant has not specifically pointed to one, except for the set-up charges, which are blatantly inapplicable to “additional markers” required for a hypothetically overlong work area. In the context of this “as-needed” repair contract, which the Court has reviewed extensively, we remain unconvinced that this third sub-claim presents a genuine claim for a separately compensable item under this contract.

Conclusion and Order

For the reasons set forth above, this claim is denied in its entirety. Judgment is entered for the Respondent and against the Claimant.

(No. 90-CC-3356—Claim denied.)

LOCATIONS & PLACES, JMS INC., Claimant, v.
THE STATE OF ILLINOIS, DEPARTMENT OF TRANSPORTATION,
Respondent.

Opinion filed February 24, 1998.

HARRIS AND LAMBERT, (ROBERT H. HOWERTON, of counsel), for Claimant.

JAMES E. RYAN, Attorney General (MARK W. MARLOTT, Assistant Attorney General, of counsel), for Respondent.

ESTOPPEL—*when principles of laches and estoppel apply to State.* Although ordinary limitations statutes and principles of laches and estoppel do not generally apply to the State, the State may be estopped when acting in a proprietary, as distinguished from its sovereign or governmental, capacity.

SAME—*affirmative act of State required to invoke estoppel doctrine.* Before the doctrine of estoppel can be invoked against the State, there must have been some positive acts by officials which induced the action of the adverse party thereby making it inequitable to hold the adverse party liable for its actions, and the affirmative act of the sovereign that would induce reliance sufficient to support a finding of estoppel must be the act of the government body itself, rather than the unauthorized act of a ministerial officer, or a ministerial misinterpretation.

SAME—*Claimant ordered to remove billboard previously approved by State—removal order was exercise of governmental function—claim denied.* Where an outdoor advertising company sought damages arising out of the Department of Transportation's order to remove a billboard that had previously been approved by the Department, the claim was denied because, in issuing the order, the State was exercising a governmental function by enforcing the Highway Advertising Control Act and, while it was unclear whether inattention of, or mishandling by, State employees resulted in the prior erroneous approval, there was an insufficient basis for estopping the proper enforcement of the statute.

OPINION

SOMMER, C.J.

The Claimant seeks an award against the Respondent for damages in the amount of \$3,471.90 sustained by the Claimant in the removal and replacement of an advertising billboard at the intersection of Illinois Route 13 and Illinois Route 148 in Herrin, Williamson County, Illinois. The Claimant alleges that on July 1, 1982, the placement and maintenance of highway advertising signs were controlled by the Highway Advertising Control Act of 1971, and that it was the duty of the Illinois Department of Transportation (IDOT) to enforce the provisions of the Act. The Claimant alleges that it owned and maintained a billboard at the site which had been previously approved by the Illinois Department of Transportation under the Act administered by the Department. The Claimant's damages arise out of the Department of Transportation

ordering the Claimant to remove the billboard that had previously been approved by the same Department.

This claim was submitted to the Commissioner on a written stipulation of the parties to submit the case on a bifurcated basis, trying first the issue of liability, and then, if necessary, the issue of damages.

The liability issue in this case is simply whether or not the State is equitably estopped because the State had previously issued permits for the structure in question. The Respondent argues that the State should not be estopped or held liable and cites *Hickey v. Illinois Central Railroad Company* (1966), 35 Ill. 2d 427, 220 N.E.2d 415; *Cities Service Oil Company v. City of Des Plaines* (1961), 21 Ill. 2d 157, 171 N.E.2d 605; *City of Chicago v. Unit One Corporation* (1991), 218 Ill. App. 3d 242, 578 N.E.2d 194; *Armond v. Sawyer* (1990), 205 Ill. App. 3d 936, 563 N.E.2d 900. The Claimant cites the following cases in support of its position: *Hickey v. Illinois Central Railroad Company, supra*; *Schumann v. Kumarich* (1981), 102 Ill. App. 3d 454, 430 N.E.2d 99, 58 Ill. Dec. 157; *Jack Bradley Inc. v. Department of Employment Security* (1991), 146 Ill. 2d 61, 81, 585 N.E.2d 123, 165 Ill. Dec. 727; *Board of Trustees v. Stamp* (1993), 241 Ill. App. 3d 873, 608 N.E.2d 1274, 181 Ill. Dec. 800; *Wachta v. Pollution Control Board* (1972), 8 Ill. App. 3d 436, 289 N.E.2d 484.

In *Hickey, supra*, the Illinois Supreme Court held that it was elementary that ordinary limitations statutes and principles of laches and estoppel do not apply to public bodies under usual circumstances, particularly when the governmental unit is the State. However, the Court went on to point out that the State may, in peculiar circumstances, be estopped when acting in a *proprietary*, as distinguished from its *sovereign or governmental capacity*. The Court went on to point out that it had always adhered

to the rule that mere non-action of governmental officers is not sufficient to work an estoppel and that, before the doctrine can be invoked against the State, there must have been some positive acts by the officials which may have induced the action of the adverse party under circumstances where it would be inequitable to permit the Corporation to stultify itself by retracting what its officers had previously done. (220 N.E.2d 415, 425-426.) In *Schumann, supra*, the First District Appellate Court reversed a trial court and held that the affirmative act of a sovereign that would induce reliance sufficient to support a finding of estoppel against a public body must be the act of the government body itself, rather than the unauthorized act of a ministerial officer or a ministerial misinterpretation. (430 N.E.2d 99, 103.) In *Bradley, supra*, the Illinois Supreme Court held that the State was not estopped by the actions of the Department of Employment Security in previously telling an employer that only services of a food demonstrator who had written contracts with the employer would be subject to unemployment contributions, and later determining that the services in question were "employment" under the Unemployment Compensation Act. The Court stated:

"Likewise, in the present case, even if the Department determination represented an actual change in its policy towards Bradley Inc., which we are not convinced is the case, the result here is no more burdensome or unjust than a re-examination of an assessment of unemployment contributions * * *. Under such circumstances, we do not find it necessary to apply estoppel." 585 N.E.2d 123, 132.

In *Board of Trustees, supra*, the Second District Appellate Court held that equitable estoppel would apply against the State only where some positive act by State officials may have induced actions by an adverse party where it would be inequitable to hold the adverse party liable for its actions. (608 N.E.2d 1274, 1280.) In *Wachta, supra*, the Second District Appellate Court held that where developers, in reliance upon the action of a water board in

issuing sewer permits, had expended substantial sums of money and incurred heavy continuing liability in connection with a construction project, the Environmental Protection Agency and the Pollution Control Board which had assumed the responsibilities of the Water Board and which, for eight months after assuming such responsibility, had remained silent while developers were acting in reliance upon authorizations given them by Water Board were estopped from withdrawing sewer connection permission earlier granted to developers by the Water Board. 289 N.E.2d 484, 487-488.

The stipulation of the parties on the issue of liability in this case reveals that the billboard in question was originally approved in June of 1976 by IDOT for the previous owner. Thereafter, IDOT inventoried the sign on January 14, 1982. In May of 1982, the sign was destroyed by a tornado and was rebuilt by the Claimant in July of 1982. Thereafter, a "new tag" was issued by IDOT on June 14, 1983, but on October 2, 1984, the Claimant was notified by IDOT that the sign violated the Highway Advertising Control Act. On March 9, 1987, IDOT reiterated its finding of non-compliance with the Act and ordered that the Claimant must modify the previously approved structure.

In this case the State was not acting in a proprietary manner, but was instead, exercising a governmental function in administering an act regulating signing and outdoor advertising. It is not known whether inattention or mishandling of the State's employees resulted in the previous error. In any event, the Claimant is entitled to rely on the actions of the State no more in this instance than he would be upon the re-examination of a previously approved tax form. The interest of the public in the proper enforcement of statutes regulating outdoor advertising could be defeated if the State were to be estopped from the proper enforcement of the statutory scheme.

It is therefore ordered that this claim is denied.

(No. 91-CC-0261—Claimant awarded \$3,000.)

BARNEY LONZO, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed August 28, 1997.

KENNETH W. FLAXMAN, for Claimant.

JAMES E. RYAN, Attorney General (JENNIFER M. LINK, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*State's duty to safeguard inmate's property—loss of bailed property raises presumption of negligence.* The State has a duty to safeguard an inmate's property through the use of reasonable care, as well as a duty to return the property to the inmate, and the loss of bailed property raises a presumption of negligence.

SAME—*lost property—Claimant must prove damages by preponderance of evidence.* The Claimant must prove his damages by a preponderance of the evidence, and in a claim for lost property, the age and nature of the property must be taken into consideration in making the award.

SAME—*loss of bailed property—damages awarded.* In an inmate's claim seeking compensation for a van and items of personal property stored therein which were taken by State officials upon the Claimant's arrest at his workplace and never returned, the undisputed evidence indicated that a bailment was created, and the State's failure to rebut the presumption of negligence resulted in the inmate being awarded \$3,000 in damages for those property losses which were proven by a preponderance of the evidence.

OPINION

FREDERICK, J.

Claimant, Barney Lonzo, filed his complaint sounding in tort on July 26, 1990. Claimant alleges that \$10,000 worth of his personal property was converted, lost and destroyed by Respondent. The cause was tried before Commissioner Fryzel.

The Facts

In July of 1988, Claimant was at work for his employer, the City of Chicago, at the taxi cab inspection facility. Claimant owned a GMC van. In the van, Claimant had tools, a hot dog vending cart, a radio, and stereo. Claimant valued the tools at \$1,091.44 which is the amount he paid for the tools. The van was valued by Claimant at \$2,800 which is the amount he paid for the van. On October 19, 1987, Claimant put tires on the van which cost \$460. The hot dog vending cart cost Claimant \$2,500.

While at work in July of 1988, Claimant was arrested. There were five people involved in Claimant's arrest. Two of the people were in plain clothes and three were wearing Chicago Police Department uniforms. Claimant spoke with the two plain clothes officers who told Claimant they were from the Illinois Department of Corrections Apprehension Unit and that they were there to execute a warrant that had been issued by the Department of Corrections. Claimant was then taken into custody. The officers from the Department of Corrections would not allow Claimant to take his van or give his keys to a co-worker when he was taken into custody. One of the Department of Corrections officers took Claimant's keys and drove the van to the police station. That was the last time Claimant saw his van and the items of personal property that he had in the van.

Joe Kain, Claimant's stepfather, testified at the trial that he attempted to retrieve Claimant's van at the police station. Two of the men who were not in uniform but who were involved in Claimant's arrest told Mr. Kain that they were from a State agency and that he could not have the van. One of these men told Mr. Kain that they would hold the keys to the van and that Mr. Kain could not have the van while Claimant was in custody.

Two of the Claimant's former co-workers, Jesus Sanchez and Robert Dolatowski, testified that they saw men in plain clothes drive the van away after Claimant was arrested. When Claimant last saw his vehicle, it was parked in the Chicago police lot at the police station. Claimant did not sue the City of Chicago.

The departmental report indicates that Claimant was arrested by officers of the Chicago Police Department. Fugitive Apprehension Investigator, Greg Hannett, logged the warrant. The report indicates that it is the policy of the Department not to take control of personal property when arresting a fugitive with the Chicago Police Department. The apprehension investigation report indicates Claimant was arrested by the Chicago Police Department. The report indicates the arrest was made on July 27, 1988.

A City of Chicago towing notice dated June 14, 1989, indicates Claimant's vehicle was towed by the Chicago Police Department to the auto pound. Apparently the vehicle was destroyed although there is no evidence in the record to that effect. The only evidence presented was that Claimant never received his vehicle back. The towing notice, apparently sent to Claimant at a Chicago, Illinois, street address, indicates the vehicle would be sold for storage and towing charges.

The Respondent presented no testimonial evidence and the Respondent failed to file a brief. This is a very difficult case for the Court. The Court must decide the case based on the evidence. The Court cannot decide the case based on innuendo, argument not based on evidence, and guesswork. The only evidence before the Court was that an agent of Respondent took sole possession of the Claimant's personal property against the apprehension unit's policy not to take control of personal property.

The Claimant testified that the plain clothes State officers took the property and this testimony was corroborated by Claimant's witnesses. The Respondent presented no evidence in opposition. The State has a duty to safeguard an inmate's property through the use of reasonable care and a duty to return the property to the inmate. The loss of bailed property raises a presumption of negligence. (*Holland v. State* (1992), 45 Ill. Ct. Cl. 343.) In this case, it is undisputed in the evidence that the fugitive unit took control and possession of Claimant's property. A bailment was created and the Respondent failed to rebut the presumption of negligence. While the Respondent probably could have rebutted the presumption of negligence and proved what occurred to the vehicle, for reasons unknown to the Court, the Respondent failed to present any evidence upon which the Court could find the presumption rebutted. The Court of Claims is a real court. Rules of evidence are followed in this Court. An adversarial process requires that the Claimant and Respondent present their cases. The Court cannot, and will not, be anything but neutral in the process.

Based on the evidence before the Court, we find that Respondent is liable for the loss of Claimant's property.

The issue of damages is much more difficult. For some unknown reason, Claimant failed to bring receipts to Court to corroborate his testimony in regard to damages. The Claimant must prove his damages by a preponderance of the evidence in order to prevail. (*Rivera v. State* (1985), 38 Ill. Ct. Cl. 272.) The age and nature of the property must be taken into consideration in making an award. (*Stephenson v. State* (1985), 37 Ill. Ct. Cl. 263; *Lindsey v. State* (1993), 45 Ill. Ct. Cl. 121.) Claimant proved to the Court's satisfaction that he owned the van. His only proof as to value was that he purchased the van for \$2,800 the

year before. Claimant presented no documents of proof as to the fair market value and ownership of the tools. His testimony indicated a purchase price figure of \$1,091.44. Claimant testified that in October of 1987, he put \$460 worth of tires on the van. However, Claimant failed to enter into evidence any receipts for the tires or testimony as to their fair market value on the date of loss. The hot dog cart also lacks a fair market value on the date of loss and proof of ownership. The amount of depreciation as to each item of property is also lacking from the evidence. However, rather than deny the claim, the Court will attempt to set fair damages for Claimant's loss which includes a reasonable amount for depreciation. We will award nothing for the alleged lost tools as there was no corroborating evidence as to the amount of tools in the van and the age of the tools. We will award Claimant \$2,000 for the van and tires and \$1,000 for the hot dog vending cart.

For the foregoing reasons, Claimant is awarded \$3,000 in full and complete satisfaction of his claim.

(No. 91-CC-1452—Claim dismissed.)

RICHARD DOWNS and MAURICE JACKSON, Claimants, *v.*
THE UNIVERSITY OF ILLINOIS and KAREN A. MEYER,
Administrator of the Estate of CLEO L. MEYER, JR.,
deceased, Respondents.

Order filed October 2, 1997.

GUY DELSON GELEERD, JR., for Claimant RICHARD DOWNS.

LAWRENCE BREZKY, for Claimant MAURICE JACKSON.

JAMES E. RYAN, Attorney General (ANNE E. LOEVY, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*when defendant is entitled to summary judgment.* A defendant in a negligence suit is entitled to summary judgment if he can demonstrate that the plaintiff has failed to establish a factual basis for one of the required elements of a cause of action for negligence.

SAME—*evidence—prohibited testimony under Dead Man's Act.* Pursuant to the Dead Man's Act, in the trial of any action in which any party sues or defends as the representative of a deceased person, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf as to any conversation with the decedent, or to any event which took place in the presence of the decedent.

SAME—*auto accident allegedly caused by State employee who subsequently died—Claimants' testimony barred by Dead Man's Act—claim dismissed.* Summary judgment was granted for the State and an order of dismissal was entered in an action alleging that a car accident involving the Claimants was caused by the negligence of a State employee who subsequently died, since the Dead Man's Act precluded the Claimants, as adverse parties and persons directly interested in the action, from testifying with respect to conversations and events in the decedent's presence, and neither the decedent's deposition testimony or other proffered evidence supported the Claimants' assertions of negligence.

ORDER

JANN, J.

This cause comes on to be heard on Respondent's motion for summary judgment and Claimant Maurice Jackson's response thereto. Claimant Richard Downs filed no responsive pleading herein.

Claimants' complaints arise from an auto accident on November 27, 1989, in Chicago, Illinois. Claimants were injured by the alleged negligence of Respondent's agent, Cleo L. Meyer. Mr. Meyer died on October 23, 1994, subsequent to the filing of this lawsuit. Mr. Meyer's death was from causes unrelated to the auto accident which is the basis for these complaints.

Claimants allege, *inter alia*, that Meyer was negligent and that the Respondent State of Illinois is responsible for the acts of its agents, servants and/or employees acting within the scope of their employment. Claimants allege

that they were injured and sustained damages as a result of the negligence of the Respondents.

I. Dead Man's Act

Respondent, University of Illinois, seeks to invoke the protection of the Dead Man's Act (735 ILCS 5/8—201) to bar the testimony of Claimants at trial as to conversations and events, i.e., the auto accident, in the presence of decedent, Meyer. Respondent, University of Illinois, alleges that application of the Dead Man's Act shall prevent Claimants from testifying to the events in question and Claimants would be unable to establish the elements of a cause of action for negligence.

Before considering the merits of the arguments submitted, we must address several procedural issues. First, Claimant Maurice Jackson responded to this motion. Claimant Richard Downs has not responded. The docket sheet entries indicate a motion for substitution of attorneys, assumedly for Mr. Downs, on December 7, 1992. The attorney shown of record is Guy Delson Geleerd, Jr. for Mr. Downs, not original counsel of record. Additionally, exhibits submitted by Mr. Jackson indicate that Mr. Downs was represented by yet another attorney in a circuit court suit on February 15, 1994. The Circuit Court of Cook County case (*Jackson v. Downs*, No. 91 L 19183) arose from the same incident before us. The deposition of Mr. Meyer in 91 L 19183 is at issue herein. Mr. Jackson was a passenger in the auto driven by Mr. Downs which collided with Mr. Meyer's vehicle. We note that the record before us does not include a report of the disposition of 91 L 19183 as required by section 790.70(c) of the Court of Claims Regulations. 74 Ill. Adm. Code 790.70(c).

The posture of the Claimants is discussed because there is reference to a second deposition by Mr. Meyer in

Exhibit B to Claimant Jackson's response. Given the demands upon Court resources, we wish to avoid duplication of effort where possible. The second deposition is not before us for consideration but we believe the ruling herein will address its potential admissibility by Mr. Downs. Additionally, Claimant Jackson moves for a voluntary nonsuit of decedent/agent, Cleo Meyer, to defeat application of the Dead Man's Act in the event the Court finds the deposition is inadmissible. References to "Claimant," henceforth shall apply to Mr. Jackson.

A defendant in a negligence suit is entitled to summary judgment if he can demonstrate that the plaintiff has failed to establish a factual basis for one of the required elements of a cause of action for negligence. (*Gresham v. Kirby* (1992), 229 Ill. App. 3d 952, 955, 172 Ill. Dec. 138, 595 N.E.2d 201.) Claimant argues that the rules of evidence and civil procedure will allow him to bring forth evidence which will prove all of the elements of negligence at trial. Claimant relies, in part, upon the deposition testimony of Mr. Meyer to prove his claim.

Respondent asserts that the Dead Man's Act prohibits Claimant from testifying as to events occurring in the presence of Meyer and thus prohibits introduction of Mr. Meyer's discovery deposition. The Dead Man's Act states:

"In the trial of any action in which any party sues or defends as the representative of a deceased person or person under legal disability, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability." 735 ILCS 5/8-201.

While a literal reading of the Act might imply wide application of the exclusion of evidence, current case law suggests a greatly limited application and interpretation of the statute in conjunction with the admissibility of depositions.

We shall first address the issue of who qualifies as an adverse party. This issue lies at the heart of the motion before us. Respondent seeks to invoke the protection of the Act to prevent Claimants from testifying to the collision. (We shall assume that the Attorney General's office represents the interests of both the University of Illinois and the representative of Mr. Meyer's estate based upon the record.) Decedent's interests have not been stated as adverse to those of the University in the pleadings. A witness who is rendered incompetent to testify must be either another party to the case or one interested in the outcome and must be adverse to the party being protected by the Act. The theory of that legislation (the Act) is that such a person is likely to lie. (*Overcast v. Bodart* (1994), 266 Ill. App. 3d 428, 431, citing Cleary & Graham's Handbook of Illinois Evidence, section 606.1, at 348 (6th ed. 1994).) Both parties cite *Schuppenhauer v. People's Gas, Light & Coke Co.* (1975), 322 N.E.2d 583 in support of their arguments. *Schuppenhauer* specifically states that "the purpose of the Dead Man's Act is to enable parties to enjoy comparable positions with respect to testimony by them on material matters." (322 N.E.2d at 588.) The Court continued "[that] when one interested party is incapable of testifying the danger of undetected perjury by the other party is increased. Furthermore, the influence of a personal interest is likely to alter a party's perception of events regardless of his intent. Since self-serving statements are difficult to evaluate even with the benefit of cross-examination, they should not be admitted unless they can be balanced by the equally self-serving testimony of the opposite party." 322 N.E.2d 583.

Respondent further relies on the holding in *Smith v. Tri-R Vending* (2nd Dist. 1993), 249 Ill. App. 3d 654, 619 N.E.2d 172, in which a "passenger" in a truck was killed when a driver struck a light pole. Although the Respondent

claims that *Smith* is dispositive in the case at bar, a closer look at the facts reveals that the case at bar is distinguishable. In *Smith*, the plaintiff's deceased was the party who was claiming application of the Dead Man's Act. *Smith* sought to bar the defendant from introducing the deposition and affidavit of its deceased agent, the driver of the truck. Facts adduced at deposition were adverse to plaintiff's cause, indicating plaintiff was a trespasser. *Smith*'s cause was dismissed on motion for summary judgment, as without the facts adduced in the deposition, plaintiff could not establish the elements of a cause of action in negligence. The deposition and affidavit were filed by the defendant in support of its motion to dismiss. Plaintiff *Smith* invoked the Dead Man's Act which resulted in a finding that, as defendant, the only occurrence witness, could not testify, and no evidence was presented by plaintiff to rebut the motion, a cause for negligence could not stand. We note that the deposition and affidavit were not admitted pursuant to the Act. The *Smith* court reasoned that any inference of negligence which might normally be imputed does not apply when a defendant is deprived by operation of the Act to contest the inference by conventional means. *Smith*, at 663. *Smith*'s reasoning follows *Schuppenhauer v. People's Gas, Light & Coke Co.*, *supra*, in that the purpose of the Act is to promote mutuality.

Claimant mistakenly cites *Overcast v. Bodart*, *supra*, as authority for the proposition that Meyer is not an adverse party under the Act. *Overcast* deals primarily with introduction of a decedent's discovery deposition which shall be discussed in part II of this order. However, *Overcast* deals with the improper application of the Act by the trial court. In the trial court, decedent/defendant's representative sought to bar decedent's deposition testimony by invoking the Act. The Appellate Court found that such an application was without precedent and improper.

We find Claimants are adverse and persons directly interested, as defined by the Act. A “directly interested” party is an individual whose interest in the resulting judgment is such that a pecuniary gain or loss would come to him or her as a direct result of the judgment. (*Bernardi v. Chicago Steel Container Corp.* (1st Dist. 1989), 187 Ill. App. 3d 1010, 543 N.E.2d 1004.) The testimony of adverse parties and interested persons is disqualified to the extent that it concerned a conversation with the deceased or an event which took place in the presence of the deceased. *Id.* See *In re: Estate of Babcock* (1985), 105 Ill. 2d 267, 273, 473 N.E.2d 1316.

Claimant asserts there were no conversations with Meyer. However, the deposition he seeks to admit evidences a short conversation at page 34, lines 12-24. Claimant also cites authority for the admission of parol evidence of physical transactions with a deceased agent. (*Schuppenhauer, supra* at 588-589, citing *Helbig v. Citizens Insurance Co.* (1908), 234 Ill. 251; *People v. Borders* (1980), 31 Ill. App. 126.) These cases involved contract disputes and course of conduct, not negligence arising from a single incident. However, in *Rerack v. Lally* (1992), 241 Ill. App. 3d 695, 609 N.E.2d 730, the court allowed plaintiffs to testify as to weather condition, the mechanical condition of plaintiff’s auto, noise heard by plaintiffs and whether plaintiff had his foot on the brake. Plaintiff was not allowed to testify to the collision itself, i.e., an “event which took place in the presence of the deceased.” See also *Nardi v. Kameron* (1st Dist. 1990), 196 Ill. App. 3d 591, 554 N.E.2d 397.

We hereby find Claimants are barred from testifying as to the conversations and events which took place in the presence of Respondent, Cleo Meyer pursuant to the Dead Man’s Act. 735 ILCS 5/8-201.

II. Introduction of Deposition

Claimant seeks to introduce the discovery deposition of Cleo Meyer under Supreme Court Rule 212(a) which provides:

“Discovery depositions taken under the provisions of this rule may be used only: * * * (2) as an admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person.” Emphasis added.

Claimant asserts that admissions made by Meyer in the deposition will allow Claimant to adduce evidence which will prove negligence by Meyer.

We find *Overcast v. Bodart*, *supra* dispositive of the issue of admissibility. The Court held that, “no logical reason exists to refuse admission of a statement into evidence because it was contained in a discovery deposition. Supreme Court Rule 212(a) expressly states that a discovery deposition may be used as an admission by a party. * * * in the same manner and to the same extent as any other admission made by that person. 134 Ill. 2d R. 212(a)(2).” *Id.* at 433. *Furniss v. Rennick* (3rd Dist. 1997), 286 Ill. App. 3d 318 specifically adopted *Overcast* and concluded that “any statements that the trial court concludes are relevant admissions are not precluded from evidence by Rule 212 and may be considered by the court when ruling on defendant’s motion for summary judgment.” *Id.* at 321.

III. Voluntary Non-Suit of Deceased Agent

Claimant asserts that a voluntary non-suit of Cleo Meyer as a Respondent will nullify the application of the Dead Man’s Act to bar Claimant’s testimony. Although Claimant is correct that a non-suit would not affect potential liability to be imputed to the remaining Respondent, he incorrectly asserts that the Act would not apply to the University of Illinois. We believe the principle of

mutuality expressed in *Schuppenhauer, supra*, would apply the Act to the University and bar Claimant's testimony except as noted in part I hereof.

IV. Summary Judgment

Summary judgment is proper if and only if the pleadings, depositions, admissions, affidavits and other relevant matters on file show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. (735 ILCS 5/2—1005(c)); *Purtill v. Hess* (1986), 111 Ill. 2d 229, 240, 95 Ill. Dec. 305, 489 N.E.2d 867.) Although a plaintiff need not prove his case at this preliminary stage, he must present "facts sufficient to support the elements of his claim," (*Kuwik v. Starmark Star Marketing & Administration, Inc.* (1992), 232 Ill. App. 3d 8, 12, 173 Ill. Dec. 543, 597 N.E.2d 251) or "some factual basis which would arguably entitle (him) to judgment." *Barber-Colman Co. v. A. & K Midwest Insulation Co.* (1992), 236 Ill. App. 3d 1065, 1071, 177 Ill. Dec. 841, 603 N.E.2d 1215.

To recover in a suit for negligence, a plaintiff must establish the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach. (*Wojdyla v. City of Park Ridge* (1992), 148 Ill. 2d 417, 421, 170 Ill. Dec. 416, 592 N.E.2d 1098.) When a defendant files a motion for summary judgment, the plaintiff must come forward with evidence of negligence on the part of the defendant and with evidence that defendant's negligence was the proximate cause of the plaintiff's injuries. (*Lindenmier v. City of Rockford* (1987), 156 Ill. App. 3d 76, 85, 108 Ill. Dec. 624, 508 N.E.2d 1201.) Liability must be premised on evidence and not on conjecture or speculation. *Lindenmier*, 156 Ill. App. 3d at 85, 108 Ill. Dec. 624, 508 N.E.2d 1201.

We find:

1. Claimant Downs has failed to respond or provide evidence to rebut Respondent's motion. We find no genuine issues of material fact disputed and hereby grant Respondent's motion for summary judgment.

2. Claimant Jackson's response, having been considered and discussed above, we shall address the sufficiency of his offer of proof in the form of Meyer's deposition. As stated in *Furniss v. Rennick* (3rd Dist. 1997), 286 Ill. App. 3d 318, all statements considered relevant admissions may be considered in ruling on a motion for summary judgment. A fair reading of Meyer's deposition is not favorable to Claimant's assertions of negligence. In fact, the inference drawn is that Claimant Downs was negligent in the operation of his vehicle. Additionally, the testimony indicates Claimants were not in Claimant Jackson's vehicle. Claimant Jackson has made no further offer of proof which would support a finding in his favor in light of the application of the Dead Man's Act.

3. Respondent's motion for summary judgment as to Claimant Maurice Jackson is hereby granted.

This cause is hereby dismissed.

(No. 92-CC-0392—Claimant awarded \$40,000.)

PEGGY ANN SIMMONS and HAROLD GORDON LOVE,
Co-Administrators for the Estate of LEWIS G. LOVE,
deceased, Claimants, v. THE STATE OF ILLINOIS,
Respondent.

Order filed May 23, 1995.

Opinion filed July 1, 1997.

ROBERT R. SCHULHOF, for Claimant.

JAMES E. RYAN, Attorney General (MICHAEL A. WULF,
Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*drowning in cistern—State’s motion to dismiss denied where factual issues as to proximate cause remained.* The State’s motion to dismiss a negligence claim brought by the family of a man who drowned in a cistern full of sewage located on State property was denied because, despite the State’s contention that the Claimants failed to exhaust their remedies against a trailer owner who discharged the sewage into the cistern, there were factual issues remaining as to whether the trailer owner’s actions were a proximate cause of the man’s death.

SAME—*State’s duty to maintain premises—State not insurer of safety of persons visiting recreational areas—notice.* While the State is under a duty to maintain its premises in a reasonably safe condition for persons lawfully on the premises, it is not an insurer of the safety of all persons who visit its parks and recreational areas, and before the State can be held liable for an injury on property maintained by it, it must have actual or constructive notice of the dangerous or hazardous condition.

SAME—*man drowned in cistern full of sewage—State had actual knowledge of danger—award granted.* In the Claimants’ wrongful death action arising out of the decedent’s drowning in an open cistern filled with sewage located on State property, the State was found to be negligent and damages were awarded to the Claimants, where the State had actual knowledge of the dangerous condition for more than a year before the drowning but failed to use reasonable care in warning the public of the danger.

ORDER

MITCHELL, J.

This cause comes before the Court upon a motion to dismiss filed by the Respondent. The Claimants are heirs of a gentleman who drowned in an open cistern filled with sewage. The cistern was located on land owned by the State of Illinois. The State was aware of the condition for over one year prior to the accident. The State was further aware that the cistern was located in an area frequently traveled by citizens. Part of the fluid in the cistern was sewage which apparently drained from a trailer owned by Mr. Denton.

A complaint was filed in September 1991. After extensive discovery, the matter was set for trial on July 20, 1994. On July 18, 1994, less than two days before trial, the Respondent filed a motion to dismiss. The Respondent did not give timely notice of the filing of this motion

to the Claimant's attorney. Unfortunately, under the present rules of the Illinois Court of Claims, the tardiness of this motion to dismiss is not, in itself, sufficient grounds for its denial. This Court, however, takes note of the fact that there has been a consistent pattern of extremely late filings of motions to dismiss by the Attorney General's office. It is hoped that this will be addressed by internal changes in procedure, or in the alternative, by a rule change in the future which will set reasonable deadlines for the filing of dispositive motions.

The Court feels that Commissioners of this Court have sufficient present authority to set discovery schedules and deadlines for the filing of dispositive motions. The Court notes that this was not done in this case, and therefore, we cannot, and do not, deny this motion on the basis of the timeliness of its filing.

Therefore, we address the merits of the motion to dismiss. The motion basically states that the case should be dismissed because the Claimants failed to exhaust their remedies. The Respondent claims that the actions of the trailer owner, Denton, in discharging sewage from his rented trailer into the cistern, were the, or a, proximate cause of the death which led to the filing of this claim. Because the Claimants failed to sue the trailer owner and exhaust those possibilities of recovery before filing this claim against the State, the Respondent argues that the claim should be dismissed.

The issue therefore becomes one of proximate cause. Were the acts of the trailer owner proximate causes of the death, or were the acts of the State proximate causes of death? If the acts of the trailer owner were the proximate cause, or a proximate cause, of the death in question, then the Claimants should have sued him and exhausted that potential remedy prior to bringing this claim. This claim

would be dismissed if we found that the acts of the trailer owner were a proximate cause.

Conversely, if the actions of the trailer owner were not a proximate cause of the death, then there would be no requirement for the Claimants to sue the trailer owner prior to bringing this claim. We would, in that case, deny the motion to dismiss.

Questions of proximate cause are ordinarily ones of fact. They can only be questions of law when the facts are not only undisputable, but are also such that there can be no difference in the judgment of reasonable minds as to the inferences to be drawn from them. Here, the Respondent is asking us to dismiss a case prior to trial. We therefore may not presently have all of the facts necessary to decide as a matter of law whether the acts of trailer owner Denton were a proximate cause of the death of Lewis G. Love. The Illinois Supreme Court addressed a similar issue in the case of *Briske v. Village of Burnham*, 397 Ill. 193. The Court there stated:

“If a negligent act or omission does nothing more than furnish the condition making an injury possible, and such condition, by the subsequent independent act of a third person, causes an injury, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury.”

Similar results were reached in *Carr v. Shirland Township* (2d Dist. 1978), 66 Ill. App. 3d 1033, 23 Ill. Dec. 655, 384 N.E.2d 449; *Cannon v. Commonwealth Edison Co.* (1st Dist. 1993), 250 Ill. App. 3d 379, 190 Ill. Dec. 183; and *Thompson v. County of Cook* (1993), 154 Ill. 2d 374, 181 Ill. Dec. 922, 609 N.E.2d 290.

All of these cases stand for the proposition that, if a defendant's negligence does nothing more than furnish a condition by which injury is made possible, that negligence is not the proximate cause of the injury. Proximate cause is absent if independent acts of the third person

break the causal connection between the alleged original wrong and injury. The new and independent act becomes the proximate or immediate cause of the injury.

When we apply these legal standards to the facts presently before the Court, we must of necessity conclude that we have insufficient facts to make a final decision as a matter of law whether Denton's negligence was a proximate cause of Lewis Love's death.

There has been significant discovery, and both parties have filed briefs on this issue. However, it is the belief of the Court that additional significant facts may be discovered or elicited at a trial of this cause.

Therefore, the motion to dismiss is denied. The Respondent is given leave to renew the motion to dismiss at the conclusion of the trial so that the issue of exhaustion of remedies will not be waived by the Respondent. This claim is therefore remanded to a Commissioner of this Court for trial.

OPINION

MITCHELL, J.

This is a wrongful death action. The complaint alleges that on January 13, 1990, Respondent owned, and was in possession of, a piece of real estate in Old Shawneetown, and that on the real estate there was an open cistern or pit with vertical sides being in excess of eight feet deep. It is alleged that Respondent knew or should have known of the existence of the pit, and that Respondent negligently allowed the pit to exist uncovered, unfilled, and unprotected. It is alleged that decedent fell into the pit and drowned. The action is brought under the provisions of the Illinois Wrongful Death Act.

Respondent has admitted that Respondent owns the property, and that there was a cistern or pit on the property

with vertical sides, but denies that the cistern or pit was open or that it was in excess of eight feet in depth. Respondent has also admitted that it knew of the existence of the cistern or pit at all times after the spring of 1989. Further, Respondent admitted that people traversed through the property upon which the cistern or pit was located, and admitted that Respondent received a written report from Hubert Combs early in 1989 informing Respondent of the cistern or pit.

The decedent's body was discovered on October 13, 1990, approximately five days after his disappearance was noted. The cistern was covered with sheets of tin supported by two-by-four boards. At some point, Respondent's agent had covered the hole with half-inch plywood and put some two-by-four posts around the edge of the hole nailing one-by-fours to the sides of the two-by-fours. The makeshift fence was three and one-half feet off of the ground and had two rungs. The barriers had been pulled down by somebody prior to the decedent's death. An adjacent landowner had put sheet metal over the plywood to attempt to keep the boards installed by the State from rotting. This was done because there were children living in a mobile home near the cistern. The State was informed that the adjoining landowner had placed tin over the plywood. The adjoining landowner testified that the State had put wood over the cistern and had "done a good job." The adjoining landowner, Denton, had looked in the cistern the first day that the decedent was missing and did not see him. They had to scoot the tin back to look in the cistern. There is no evidence in the record to suggest how it came to pass that the decedent fell in this cistern and drowned.

Claimant argues that the State had actual knowledge of a dangerous condition on State property and failed to take adequate steps to protect the public. Claimant argues that

the State knew that raw untreated sewage was seeping into this cistern, and argues that the State was not merely negligent, but grossly negligent. The efforts of the State to put a cover on the cistern are said to be a “bandaid” approach to a dangerous situation. Unfortunately, Claimant offered no citation of authority on the liability issue in this case.

Respondent contends that the evidence has not preponderated in favor of the Claimant, and the Claimants presented no evidence that the decedent fell through the covering put in place by Respondent’s agents. Further, Respondent argues that the steps taken by Respondent to put a cover on the pit were a reasonable exercise of Respondent’s duty of care. Furthermore, Respondent argues that Claimants have failed to exhaust their remedies because it was the sewage and seepage at the bottom of the hole that drowned the decedent, and no suit was filed against those allegedly responsible. Finally, Respondent argues that the damages alleged are excessive.

In acknowledging that the State has a duty to maintain its premises in a reasonably safe condition for persons legitimately on the premises, Respondent cites *Owens v. State* (1989), 41 Ill. Ct. Cl. 109. *Owens* involved a slip-and-fall case in the public aid office at Rockford. There was an accumulation of water and snow and this Court held for the Claimant stating that the water on the tile floor in the waiting room created a situation where it would be reasonably foreseeable that someone could slip and fall; to remedy this situation would not have been burdensome. The clerk should have summoned to keep the floor clear or to place mats and rugs on the floor in the trafficked areas. (41 Ill. Ct. Cl. 109, 111.) Respondent acknowledges that the State is to exercise reasonable care in the maintenance of its parks and cites *Finn v. State* (1962), 24 Ill. Ct. Cl. 177. The *Finn* case involved a hole a foot wide and

four or five inches deep at the playground area near the lodge at the Pere Marquette State Park. Claimant made a claim for an injured ankle. The claim was denied because of a lack of actual or constructive notice. In the course of the opinion, the Court made the following observations:

“While it is true that Respondent is under a duty to exercise reasonable care in maintaining its parks, it is likewise a law that Respondent is not an insurer against accidents occurring to patrons while using the park facilities. *Penwell v. State of Illinois*, 22 C.C.R. 477.

It has been the law of this State that, before the State can be held liable for an injury on property maintained by it, it must have actual or constructive notice of the dangerous or hazardous condition. *Penwell v. State of Illinois*, 22 C.C.R. 477.

We have previously held that the State of Illinois in maintaining a nature park, is not obligated to warn of every dangerous place within it. It is, however, obligated to warn of a danger that exists on a trail, which it knows is being used by the public, who would have no knowledge of the existing danger. *Alberta Hansen, Administrator of the Estate of Edward Boegen, Deceased v. State of Illinois*, 4843.

It is our opinion that the State cannot be held responsible for every depressed area or hole into which someone might step and turn their ankle, otherwise injure themselves, throughout the State Parks. To require a constant inspection in a park of some size, where the State maintains several thousand acres for the benefit of the public, would place an undue hardship and extraordinary burden on the State by and through its agents and servants.

• • •

In practically all of the State Parks there are certain areas for picnicking, play areas for baseball, swings, and areas of recreation where the ground might be depressed, and where someone might turn their ankle, which would result in injuries, such as were sustained by Claimant. If a recovery were had in all these cases, the State could be considered an insurer of everyone using the park facilities and playground areas, which would place an undue burden on the State to make careful inspection of every playground area as to any depression, which might be covered by grass, such as the one in question.”

Respondent cites *Dunbar v. State* (1992), 45 Ill. Ct. Cl. 176, for the proposition that the State is not an insurer of the safety of persons who visit the parks and recreational areas. Claimant sought damages when she stepped in a hole at the DuQuoin State Fairgrounds and injured her ankle. Her claim was denied because the hole was

shown to be in a landscaped area, was large and readily apparent, was a natural condition, and was located such that the area was not used by large numbers of people.

Respondent asserts that the State is not required to undertake extraordinary, burdensome inspections or maintain its parks in such condition that patrons may wander at will over each and every portion thereof and cites *Lyons v. State* (1987), 39 Ill. Ct. Cl. 192, and *Pulizanno v. State* (1956), 22 Ill. Ct. Cl. 234.

In *Lyons*, the Claimant sought recovery for injuries sustained when she fell after descending a flight of stairs constructed of wood and maintained by the State at the Blackhawk State Park located near Rock Island, Illinois. The claim was denied because the alleged defect was minor, and there was no evidence that Respondent had actual or constructive notice thereof. The Court stated as follows:

“Because the State is not an insurer, it cannot be expected to remove all risks of accidents which may occur in the absence of negligence. Obviously, there are certain risk inherent in hiking that must be assumed by the hiker.”

In *Pulizanno, supra*, this Court denied a claim for injuries sustained by Claimant who had attempted to rescue a companion and fell, injuring his leg. This Court held that Respondent could not reasonably have foreseen, or guarded against, the occurrence resulting in the Claimant’s injuries, and denied the claim. In so doing, this Court quoted *Pollock on Torts* as stating the proper rule to be followed in determining what is or is not negligence on the part of the State:

“If men went about to guard themselves against every risk to themselves or others which might, by ingenious conjecture, be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on any events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things.”

The site manager at the Shawneetown State Historic Site had known about the existence of this cistern for a year before the decedent's death. The first time the State did anything about this cistern is when the cover, apparently placed by adjoining landowners, caved in. This occurred perhaps six months before decedent's death. Respondent's agent put some two-by-sixes over the cistern and some half-inch plywood. At that time, the cistern was probably eight feet across and about eight feet deep. The area is very close to the Ohio River, subject to flooding, and seepage. The site manager reported the existence of the cistern to his superiors but was not authorized to fill the cistern in until after the accident. The area is open land and the site manager had seen people walking back and forth as their needs dictated. The site manager states he didn't fill the cistern in because he "thought they were on a deal to trade the lot" to a third party. The site manager made no recommendation to have the cistern filled in, and cannot recall whether he was ever told to take any action with regard to the open cistern after it was reported. After the site manager placed plywood over the hole, someone put sheet metal over the plywood. Although the site manager claimed to have checked the site every week after he placed the plywood on the hole, he never checked to see if there was anything under the sheet metal that had been placed over the hole.

Claimant's expert witness testified that the value of decedent's life over his life expectancy of 11.8 years was \$876,000. The adult children of the decedent testified that his health was generally good, but he occasionally took nitroglycerine for his heart. Decedent was not on any regular medication and suffered no particular problems.

Decedent's daughter and her family saw the decedent on a daily basis and decedent's son stated that he

saw his father regularly twice a week until he had moved about ten days prior to decedent's death. There was testimony that they were a close family and missed the decedent's instruction and moral training, society, companionship and love.

Claimant cites *Farrow v. Augustine* (1964), 45 Ill. App. 2d 295, 196 N.E.2d 16, and *Hall v. Gillians* (1958), 13 Ill. 2d 26, 147 N.E.2d 352, for the proposition that, in Illinois, when the decedent leaves direct lineal kin, there is the presumption that they have suffered some substantial pecuniary loss by reason of the death. This includes loss of the parent's society by the adult child and the support and attention of the deceased parent. On the other hand, there is evidence in the record that the decedent drank heavily and on a daily basis. Respondent argues that the evidence suggests a lack of closeness between the decedent and his family.

Although the State is not an insurer of the safety of persons who visit the parks and recreational areas, it does have a duty to maintain its premises in a reasonably safe condition for persons legitimately on the premises. *Owens, supra*. In the instant case, the Respondent's agents had actual knowledge of a dangerous condition and failed to use reasonable care in warning the public against this danger. Therefore, the Court awards \$40,000 to the Claimant.

(No. 92-CC-0744—Claim denied.)

PATRICIA BYRD, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed October 2, 1997.

Order on petition for rehearing filed December 26, 1997.

HISAW & BLEWITT, LTD. (ANTHONY KARAMUZIS, of
counsel), for Claimant.

JAMES E. RYAN, Attorney General (JOEL CABRERA,
Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*State not insurer of safety of persons visiting buildings—reasonable care.* The State is not an insurer of the safety of persons visiting its buildings, but it does owe a duty of reasonable care to business invitees in maintaining the premises.

SAME—*what Claimant must establish.* 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.

SAME—*constructive notice determined on case-by-case basis.* In order to charge the State with constructive notice of a defective condition, the condition must have existed for such a period of time as to allow the State to know of the defect and correct it, and constructive notice is to be determined on a case-by-case basis.

SAME—*fall on stairway in public aid office—no proof that State had notice of dangerous condition—claim denied.* Where the Claimant, who was injured when she fell on a staircase while leaving a public aid office, failed to present evidence showing that the State had actual or constructive notice prior to her fall of a broken handrail and debris on the stairway, her negligence claim was denied.

OPINION

FREDERICK, J.

This cause is before the Court on Claimant, Patricia Byrd's, first amended verified complaint which was filed on February 10, 1995, alleging that the Respondent, State of Illinois, was negligent in its maintenance responsibilities as lessee of a building. Claimant alleges that on October 23, 1989, she was a business invitee of the Illinois Department of Public Aid, hereinafter referred to as "IDPA."

The IDPA was a tenant of the second, third and fourth floors at 6317 S. Maryland, Chicago, Illinois. Claimant fell as she descended stairs in a common area. Claimant alleges that the condition of stairs between the second and first floors caused her injuries.

A trial was conducted in this cause on December 12, 1996, before the Commissioner. Claimant appeared at the hearing and testified. Claimant's Group Exhibit No. 1, copies of 17 pages of various medical records, and Claimant's Exhibit No. 2, wage loss verification, were admitted into the record without any objection. Respondent presented one witness, Mr. Victor Kurpita, the assistant supervisor of the building on the day of Claimant's injury. Respondent's Exhibit No. 1, a copy of a one-page report by a security employee, was admitted without objection.

The Facts

Claimant, Patricia A. Byrd, testified that she was a recipient of public aid. She was leaving the public aid office when she fell on October 23, 1989. The Illinois Department of Public Aid had its offices at 6317 S. Maryland, Chicago, Illinois. Claimant had to meet with her caseworker on the second floor.

On the date of the injury, Claimant was employed as a bus attendant for Windy City Coaches. She strapped kids into the bus. Claimant worked twenty hours a week at the rate of \$4.35 per hour.

Claimant left the office and fell down the stairs leading to the first floor. She walked down 15 to 20 stairs with nine more stairs to go when she fell. Claimant testified she slipped on a "piece of paper, crack and striping in the stairs." She reached for the rail but it was not safe. It was hanging off the wall. There were approximately ten candy wrappers on the staircase. Claimant thinks the wrappers caused her

to fall. She further testified there were cracks in the stairs, that there was no striping on the stairs, and that the staircase was slick. Claimant fell face first down the last nine stairs. Her right hand hit the concrete floor. Her wrist may have been broken. Claimant then ran outside the building. There were two guards on the landing of the staircase above where she fell. One of the guards retrieved her and called an ambulance. Claimant did not go in the ambulance. She took the bus to the Chatham Clinic. At the clinic, she had an x-ray and her arm was put in a cast. The third finger on her right hand was “popped out” of place. Two fingers were put into the cast that went to her elbow. Claimant’s arm was fractured and the cast went from the tip of her fingers to her elbow. Claimant testified she hurt and she cried when the doctor set her finger. The cast was on her right hand for approximately three weeks. She had pain in her hand for six weeks. She could not do anything with her right hand such as cook, bathe, comb her hair, or housework. Claimant took Ibuprofen for the pain. Claimant’s hand still hurt after the cast was taken off. The doctor instructed her on exercises to improve her strength.

On cross-examination, Claimant stated that she saw the condition of the stairway on her way up the stairs but “didn’t pay attention when she was coming down the stairs.” Additionally, the Claimant had visited the same office and used the same stairs many times since 1980 to the date of injury.

Respondent presented Victor Kurpita, a supervisor in administrative services with the IDPA. He was an assistant supervisor at the time of the incident. Mr. Kurpita supervised the people who take care of the facilities and was the liaison with the landlords. In 1989, he was supervising monitors that went to the buildings every other day. The monitors would check for any problems in the

buildings, anything that needed to be done by the landlords or the State, and make the facility ready for staff and clients. Mr. Kurpita did not have any recollection of maintenance problems or loose railings or tiles with respect to the stairwell in 1989. This was the type of information that monitors would bring to him.

The Department contracts with a janitorial service which cleans the facility nightly. If there were loose handrails or tiles, the Department was to notify the landlord and the landlord was responsible for repairs. On cross-examination, Mr. Kurpita testified that he had no knowledge of what Joe Hawkins, the monitor assigned to the building in question, knew in relation to the condition of the stairs in 1989. He did not know when the monitor last inspected the building prior to the Claimant's fall and he did not review any maintenance records of the building prior to the hearing.

Neither party filed a brief in this matter. Both parties communicated to the Commissioner that they would not file a brief. However, the parties did make closing arguments at the hearing.

The Law

The State is not an insurer of the safety of persons visiting its buildings. (*Berger v. Board of Trustees of the University of Illinois* (1988), 40 Ill. Ct. Cl. 121.) Rather, the State owes a duty of reasonable care to business invitees in maintaining the premises. (*Hall v. State* (1992), 45 Ill. Ct. Cl. 276.) 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 conditions. *Hardeman v. State* (1995), 47 Ill. Ct. Cl. 292.

During the trial in this cause, the parties at times made reference to a lease, a contract for janitorial services, a deposition of Claimant wherein certain admissions may have been made, and motions to dismiss and responses to motions. Neither party presented into evidence any of these documents and, therefore, none of said documents are a part of this record and are not considered by the Court. The parties were advised prior to the hearing by the Commissioner that any evidence they desired the Court to consider must be made a part of the record at the hearing. Neither party filed a brief or any other documents subsequent to the hearing.

From the testimony and exhibits, the Court makes the following findings:

That the IDPA was the lessee of the second, third and fourth floors of the building in question;

That the IDPA contracted for janitorial services;

That Claimant was on the premises to conduct business with the IDPA during normal business hours;

That Claimant fell on the steps leaving the IDPA's office on the second floor; and

That Claimant fractured her right wrist, suffered from pain, lost two days of work, and lost the ability to attend to her personal affairs for a period of time.

Claimant testified that there was debris on the stairs and that the surface tiles were cracked and broken. She testified that these conditions caused her fall. There was no credible evidence offered by the Respondent to rebut or refute this testimony.

There was, however, no evidence presented by Claimant that the Respondent had notice of the condition of the stairs. The burden is on Claimant to produce such evidence.

(*Divis v. State* (1969), 27 Ill. Ct. Cl. 135.) Mr. Kurpita stated that he did not recall any defective conditions on the day in question coming to his attention. He also testified that he was only contacted the day before the hearing and he did not review any documents in preparation for the hearing. His testimony is not credible on the issues of whether dangerous or defective conditions existed at the time, or whether such conditions may have been reported to the lessor, or whether the Department or others had a duty to clean or repair the stairs. Respondent had control of the stairs and a duty to take action to keep them clean and in good repair. A janitorial service was hired to do so. It is clear from the evidence that the Claimant was an invitee for whom a duty of reasonable care was owed by Respondent. (*Harder v. State* (1991), 44 Ill. Ct. Cl. 235.) The salient issue in this case is whether the defective condition of the staircase existed for such a period of time as to allow the State to know of the defect and correct it. (*Holman v. State* (1995), 47 Ill. Ct. Cl. 372.) Constructive notice is to be determined on a case by case basis. *Lambatos v. State* (1992), 44 Ill. Ct. Cl. 238.

The evidence shows that Claimant walked up the same stairs about 20 minutes prior to her fall. She presented no testimony that she reported a broken handrail and candy bar wrappers on the stairs to her caseworker or any guard or other employee of Respondent. She did not testify that she saw defective conditions 20 minutes prior to her injury.

If Claimant failed to see defective conditions in such close proximity to the incident we cannot hold the State to constructive knowledge of a defective condition. The Respondent had a nightly janitorial serviced hired to clean the stairs. It was the Claimant's burden to present evidence of actual or constructive notice. Claimant could have sought the monitor's reports through discovery and

presented evidence of notice if such evidence existed. No such evidence is before the Court.

We find that Claimant has failed to meet her burden of proof in that she has failed to prove by a preponderance of the evidence that Respondent had actual or constructive notice of a defective or dangerous condition.

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

ORDER

FREDERICK, J.

This cause comes before the Court on Claimant's motion for a rehearing, and the Court having reviewed the pleadings, evidence, the Court's opinion, and Claimant's petition, and the Court being fully advised in the premises, wherefore, the Court finds:

1. That on October 2, 1997, the Court issued an opinion denying Claimant's claim.

2. That the Court's opinion denying the claim was based on the Claimant's failure to prove by a preponderance of the evidence that the Respondent had notice of a dangerous or defective condition.

3. That Claimant walked up the stairs she fell down just prior to the fall.

4. That Claimant testified she did not pay attention when she walked down the stairs.

5. That the fact Claimant fell does not prove the stairway to be dangerous or defective.

6. That it was Claimant's burden to prove a dangerous or defective condition and that the State had actual or constructive notice of the dangerous condition or defect.

7. That Claimant did not call the security guards to testify about a dangerous condition or defect and their knowledge thereof.

8. That the State is not an insurer required to pay for all accidents that occur on its premises. *Dewalt v. State* (1994), 46 Ill. Ct. Cl. 293.

9. That the Court's decision denying this claim was based on the evidence and the law.

Therefore, it is ordered that Claimant's petition for a rehearing is denied.

(No. 92-CC-1780—Claimant awarded \$19,000.)

JOHN WHITEHEAD, Claimant, v. THE STATE OF ILLINOIS,
Respondent.

Opinion filed March 3, 1998.

ROBERT M. HODGE, for Claimant.

JAMES E. RYAN, Attorney General (S. ANGELA MEYERS, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*elements of medical malpractice claim.* To prevail in a medical malpractice action, the Claimant must establish by a preponderance of the evidence the standard of care by which Respondent's conduct is to be measured, that Respondent deviated from the standard of care, and that Respondent's deviation was a proximate cause of the injury to the Claimant, and the Claimant must further prove his damages by a preponderance of the evidence, which often requires expert testimony.

SAME—*failure to properly treat inmate's Bell's Palsy—damages awarded.* An inmate was awarded damages for disability as well as pain and suffering in his medical malpractice claim against the State for failure to properly treat his Bell's Palsy after it was diagnosed by a prison physician, since the State's failure to immediately prescribe steroids, provide an eye patch, and continue electrical stimulation of the inmate's facial muscles constituted a deviation from the standard of care, which proximately caused the inmate's residual injuries.

OPINION

FREDERICK, J.

Claimant, John Whitehead, an inmate with the Illinois Department of Corrections, seeks judgment against Respondent, the State of Illinois, for medical negligence, healing arts malpractice, and negligent infliction of emotional distress. The three-count complaint alleges in count I, negligent and untimely treatment; in count II, a failure to treat; and in count III, the negligent infliction of severe emotional distress. The cause was tried before Commissioner Rath.

Claimant testified that on January 17, 1990, he had pain on the left side of his face and talked to Respondent's medical technician about the pain. Claimant further testified that on the morning of January 18, 1990, when he awoke, he had full-blown symptoms of Bell's Palsy. Claimant's symptoms of Bell's Palsy were pain and numb facial skin to the touch, the left side of Claimant's face sagged, and Claimant's left eye was drooping and watering. Claimant spoke to Dr. Khan who conducted a physical examination and told the Claimant that he was suffering from Bell's Palsy. Dr. Khan prescribed Motrin for pain but did not set up any other appointment for further examinations. Claimant spoke to the doctor approximately one week later who again confirmed that Claimant was suffering from Bell's Palsy.

In the interim between these visits, Claimant had difficulty sleeping and would wake up in the middle of the night. Claimant's left eye would not close and he was given no patch or other eye protection. Claimant was given no medication except Motrin and Claimant was given no other treatment at this time. On January 25, 1990, the doctor advised Claimant he would provide him

with another medication which Claimant recalled as being E-Mycin. Claimant was not given an eye patch or Prednisone nor was Claimant given electrical stimulation. Dr. Khan conducted no physical examination during the second visit. Claimant contends that the Motrin was not relieving his pain which felt like it emanated from his ear.

Claimant first saw Dr. Zemlyn on January 29, 1990. Dr. Zemlyn confirmed Claimant's condition as Bell's Palsy and stated he would provide Claimant with Tylenol 3 and "some kind of eye treatment." Claimant believed the eye treatment to be eye wash. Three days after seeing Dr. Zemlyn, Claimant first received the eye wash. Claimant believes that the medications he was then taking had a positive effect. Apparently Dr. Zemlyn prescribed Prednisone for the Claimant on January 29, 1990, but Claimant testified the drug didn't show up to be administered until February 3, 1990.

On the 6th of February, 1990, Dr. Khan advised Claimant that he would be receiving electric stimulation of the face and that it would be scheduled. Electrical stimulation treatment began February 22, 1990, when Claimant was hooked up to an electrical machine that discharged electricity into his face in order to make the muscles move. Claimant underwent electrical stimulation treatment for about four months. The treatments lasted 15 to 20 minutes. No eye patch or eye protection was ever ordered for the Claimant. Claimant's left eye would not close.

After the onset of the symptoms in January of 1990, Claimant's speech was slurred and it was difficult for people to understand Claimant because the left side of his face wouldn't move when he talked. From January through May of 1990, it was difficult for Claimant to speak to his criminal lawyers and he was subjected to problems with other inmates who treated him differently because

“anybody that is different has got problems in many circumstances particularly in prison.”

Claimant saw a specialist eye doctor whose name he did not remember in the sixth month after the onset of Bell's Palsy. In the seventh month, he saw a neurologist named Dr. Eyerman from St. Louis who examined him. Dr. Eyerman hooked Claimant up to a different kind of electrical stimulation machine in order to find out how Claimant reacted. Dr. Eyerman examined the readings and took a history and talked to Claimant about what he felt should have been done and how that made what he wanted to do now difficult. When Claimant saw Dr. Eyerman in July of 1990, his condition was improved from his condition in January, 1990.

At the time Claimant saw Dr. Eyerman, the pain had subsided but Claimant was still having problems with slurred speech and with drool from the left side of his mouth. Dr. Eyerman gave Claimant a prescription for steroids. The medical records indicate there was no other treatment after that for Claimant.

At the time of hearing, Claimant had not completely recovered because Claimant's skin feels dead, his eye droops, and the left side of Claimant's mouth does not work. Dr. Eyerman's examination results were admitted through Dr. Eyerman's letter dated July 26, 1990. Dr. Eyerman found a 50 percent weakness in Claimant's eye closure, elevation of the left side of the mouth in smiling, hemi-facial spasm of a small degree, taste virtually normal, no sensory deficit, and a tongue that protrudes in the mid-line. The Claimant has a facial nerve distal latency which is more than twice that of the right side.

Claimant's expert was Dr. Sidney Feldman. Dr. Feldman testified that the standard of care for the treatment

of Bell's Palsy involved the use of Prednisone, electrical stimulation to the muscles of the face, and a patch on the eye. The standard is found in any textbook of medicine. The standard of care for the use of Prednisone has existed for at least 20 years. Dr. Feldman testified that the standard of care for Bell's Palsy was not met in this case. Dr. Feldman stated that the limited and late use of steroids indicated a mishandling of the case. The use of Prednisone early is crucial because later treatment is notoriously ineffective. The diagnosis of Bell's Palsy was made on January 18, 1990, and no Prednisone was started until January 29, 1990. No eye patch was ever ordered. Dr. Feldman stated that the standard of care was breached in Claimant's case due to the fact that Prednisone was not prescribed for eleven days after the initial diagnosis of Bell's Palsy. Further, Dr. Feldman testified that follow-up care of the Claimant was abominable because Claimant was not followed and a request for a neurological consultation was denied for many months. Dr. Feldman said that, because there was evidence in the neurologist's report that the Claimant's seventh facial nerve did recover, this is strong evidence that if Claimant had had proper care initially, Claimant would have ended up with a good nerve. If the Claimant had had the muscle stimulation that was needed, the good nerve would have prevented the muscle damage. Dr. Feldman testified that those people with a good functioning nerve were the people that have a good recovery.

There is no question that the standard of care was breached in this case. Claimant's condition of Bell's Palsy was diagnosed on January 18, 1990, but the prescription of Prednisone was delayed eleven days. No eye patch was ever ordered for Claimant. Electronic stimulation of Claimant's facial muscles in order to maintain the muscle until

the nerve was repaired was not started until February 22, 1990, more than a month following the initial diagnosis. Dr. Feldman thought that the electrical stimulation therapy would have met the standard of care “if it continued as long as possible.” Dr. Eyerman’s letter indicated this was not done. Claimant was still receiving positive results when the electrical stimulation was stopped.

Even Respondent’s physician testified that it would have been to Claimant’s advantage to commence the prescription for Prednisone earlier. Dr. Zemlyn admitted that electrostimulation of the facial muscles was part of the standard of care “if it is available.”

To prevail, Claimant must establish the standard of care by which Respondent’s conduct is to be measured, that Respondent deviated from the standard of care, and that the Respondent’s deviation was a proximate cause of the injury to Claimant. (*Cleckley v. State* (1994), 47 Ill. Ct. Cl. 235; *Lake v. State* (1996), 48 Ill. Ct. Cl. 420.) These elements must be proven by Claimant by a preponderance of the evidence. *Malone v. State* (1994), 47 Ill. Ct. Cl. 354; *Baker v. State* (1994), 47 Ill. Ct. Cl. 407; *Pink v. State* (1991), 44 Ill. Ct. Cl. 295.

The Court has carefully examined the testimony and exhibits. The Claimant has proven that the standard of care for a patient diagnosed with Bell’s Palsy in January of 1990 was early administration of Prednisone, an eye patch, and electrical stimulation of the face muscles. This stimulation would continue until no further improvement was detected. The Claimant has proven, through the testimony of an expert and Dr. Eyerman’s letter, that the Respondent deviated from the standard of care by its failure to prescribe Prednisone until January 29, 1990, by its failure to provide an eye patch, and by its failure to continue the electrical stimulation of Claimant’s facial muscles.

The issue of proximate cause is closer. While some patients who receive standard of care treatment have worse results than Claimant, we are persuaded by Dr. Feldman's testimony that, because Claimant had good nerve recovery, he more likely than not would have had a better recovery if his treatment had been within the standard of care. Therefore, we find that Respondent's deviations from the standard of care in its failure to prescribe Prednisone immediately and the lateness of, and failure to continue, electrical stimulation of Claimant's facial muscles was a proximate cause of Claimant's residual injuries.

The Claimant must also prove his damages by a preponderance of the evidence. Often an expert is required to prove damages. *Harris v. State* (1989), 41 Ill. Ct. Cl. 184; *Dye v. State* (1996), 48 Ill. Ct. Cl. 452.

In the instant case, there has been no proof presented as to medical expenses or lost wages. The only proof presented concerned pain and suffering and disability. There was no competent opinion testimony presented by way of expert testimony as to what recovery Claimant would have had if Respondent had not deviated from the standard of care. However, having reviewed the testimony of Claimant and Dr. Feldman, the Court believes that an award of six thousand dollars (\$6,000) for all pain and suffering and thirteen thousand dollars (\$13,000) for disability is appropriate under the facts of this case.

For the foregoing reasons, it is the order of the Court that Claimant be and hereby is awarded the sum of nineteen thousand dollars (\$19,000) in full and complete satisfaction of his claim.

(No. 92-CC-2705—Claim denied.)

WILLIE MILLER, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed April 25, 1997.

Order on petition for rehearing filed September 4, 1997.

SACHS, EARNEST & ASSOCIATES, LTD. (DAVID M. STERNBERG, of counsel), for Claimant.

JAMES E. RYAN, Attorney General (JOEL CABRERA, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*State not insurer of prisoners' safety.* The State is not an insurer of the safety of prisoners under its care.

SAME—*injury sustained by inmate while working on hot water pipe caused by inmate's own negligence—claim denied.* An inmate who suffered injuries in a fall when a hot water pipe on which he was working exploded could not recover in his claim alleging the State's violation of the Structural Work Act and negligence, since there were insufficient facts to conclude that the State failed to provide proper scaffolding under the Act and, as to the allegations of negligence, the inmate failed to prove that the State's agent ordered him to work on the pipe, and the evidence showed that the inmate's own failure to open the petcock to relieve pressure on the pipe proximately caused his injuries.

OPINION

SOMMER, C.J.

Claimant Willie Miller is seeking damages from the State for injuries sustained as a result of an accident while he was performing plumbing work at the Danville Correctional Center (hereinafter "DCC"). At the time of the incident, April 4, 1991, the Claimant was an inmate. The complaint alleges that "scaffold stays, supports or other similar mechanical devices" were used in the performance of the work at that the Structural Work Act (740 ILCS 150/0.01 *et seq.*) was applicable. Count II of the complaint alleges that the Respondent was negligent. It is alleged that the Claimant sustained injuries while attempting to repair a hot water pipe. An explosion occurred; the Claimant fell 30 feet and was injured.

1. Procedural Background

On July 20, 1995, the parties, through their counsels, contacted the Commissioner and indicated that they would stipulate to a record and a hearing would not be necessary.

Later, the Commissioner received a copy of a letter, dated August 24, 1995, from the Respondent's counsel to the Claimant's counsel. The letter states that a copy of the signed agreement between the parties, regarding the record and briefing schedule, was being transmitted to the Claimant's counsel and that a copy of the record was forwarded to the Commissioner. The Commissioner did not receive a "record." No copy of the parties' agreement or briefing schedule was received.

On July 18, 1996, a letter was mailed to the parties' counsel requesting that they advise the Commissioner of the status of this claim. The letter informed the parties that the Commissioner had not received a stipulated record or briefs.

On August 15, 1996, the Respondent filed a brief and argument for Respondent. The notice of filing indicates that a stipulated record was also filed; however, the Commissioner did not receive any documents other than the respondent's brief. The Claimant did not respond to the July 18, 1996, letter, and has not filed a brief or any other documents.

The Respondent's brief, at page one, identifies the seven documents which the parties agreed would comprise the stipulated record. Of the documents referenced, the Commissioner only had possession of: (1) the complaint; (4) Respondent's answer to Claimant's interrogatories; and (5) notice to produce. Copies of the following documents were not provided: (2) Plaintiff's answers to interrogatories; (3) Claimant's group exhibit C; (6) deposition

of Rayland Jackson; and (7) deposition of Willie Miller. The deposition of Rayland Jackson has since been found in the Court's files.

It is each party's burden to ensure that the record contains information that the particular party believes is necessary for its case-in-chief. To the extent that the Respondent's brief asserts that certain facts exist, this Court will accept those facts because they are not rebutted, objected to, or contested by the Claimant. To the extent that the Claimant's verified complaint alleges facts, this Court will accept those facts unless they are rebutted in the Respondent's brief.

II. Statement of Facts

Prior to his incarceration, the Claimant received training in plumbing, completed a five-year apprenticeship and became a licensed plumber. He had years of experience in plumbing work.

While incarcerated at DCC, the Claimant did plumbing work every day. He soldered pipes every other day and was familiar with the procedures to be followed when soldering a pipe and draining or bleeding a pipe. Hundreds of times he performed the procedure of cracking a pipe to release trapped air.

On April 4, 1991, the Claimant was working on a pipe in the gymnasium at DCC when the joint burst, releasing hot water. He tried to avoid the water and jumped from a lift he had used to reach the pipe. When he hit the ground, he received multiple broken ribs and other injuries. The Claimant had been trained in the operation of the lift and had used it prior to April 4. The incident reports contained in the documents produced by the Respondent do not establish that Miller "jumped," but rather that he moved to get away.

The Respondent's version of the facts can be stated succinctly. The Claimant began working on the pipes before they were drained. He did not make sure the pipes were drained and did not check the petcock to release pressure in the pipe. The petcock was later found to be closed and should have been open to relieve pressure. He was not ordered to begin working on the pipe. The Respondent's employee did not give the Claimant permission to begin his work and did not tell the Claimant the system was down.

III. Respondent's Argument

The Respondent, citing *Albers v. Continental Grain Co.* (1995), 220 F.2d 847, and *Gavin v. State* (1986), 39 Ill. Ct. Cl. 146, argues that the Claimant negligently contributed to his injury by exposing himself to possible danger which he could have avoided by use of reasonable care. The Respondent asserts that the Claimant's lack of due care for his own safety proximately caused his injuries.

In the alternative, the Respondent argues that the Claimant did not prove by a preponderance of the evidence that the Respondent breached its duty of reasonable care. The State is not an insurer of the safety of prisoners under its care. *Hunter v. State* (1994), 46 Ill. Ct. Cl. 335; *Starks v. State* (1992), 45 Ill. Ct. Cl. 281. The Respondent contends that Jackson, the Respondent's employee, was in the process of draining the pipes when the incident occurred and that he did not give the Claimant the okay to heat the pipe or use the lift.

IV. Claimant's Argument

The Claimant's position is that Jackson did order him to begin work on the pipe and use the lift.

In relation to the Structural Work Act count, the Claimant asserts that the lift “had no safety devise attached so as to prevent one from falling off,” and did not “give proper and adequate protection.”

This Court finds that there are insufficient facts to conclude that the Respondent failed to provide proper scaffolding as would be required under the Structural Work Act. Whether the Structural Work Act remains applicable to this claim is currently before the Supreme Court, but we do not need the Supreme Court’s ruling to make our finding.

Additionally, this Court finds that the Claimant has not proven by a preponderance of the evidence that the Respondent’s agent ordered him to work on the pipe when he began. Further, this Court finds that the Claimant failed to open the petcock to relieve pressure on the pipe; thus, the proximate cause of the Claimant’s injuries was his own negligence. 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 this Court being fully advised,

Finds that this Court’s opinion of April 25, 1997, was entered expressly without the benefit of parts of the stipulated “record.” Both parties agreed to provide the stipulated “record” and were given written notice when such was not provided.

This Court has read and examined that portion of the stipulated “record” now presented to us by the Claimant along with that portion previously presented. Particular

attention has been given to the depositions of the Claimant, Willie Miller, and a witness, Miguel Arce, which had not been presented to us previously.

This Court's opinion has not changed. The Claimant has not proven by a preponderance of the evidence that the Respondent's agent ordered him to work on the pipe when he began. Additionally, the Claimant's failure to open the petcock was the proximate cause of the Claimant's injuries. There are insufficient facts to conclude that the Respondent failed to provide proper scaffolding under the Structural Work Act.

There is a direct conflict between the testimony of the Claimant and his supervisor, Rayland Jackson, as to whether the Claimant was told to begin work on the joint that subsequently exploded. The testimony of Jonathan Booz, a third person working on draining the pipes, does not appear in the record, even though the Claimant identifies Booz as being part of the relayed command that told him to begin work.

The petcock where Claimant Miller was working was found closed. Jackson, Miller's supervisor, had opened two of the three petcocks in the room. He stated that he assumed that Miller, as a certified plumber, would know enough to open the petcock where he was working. There is no testimony by Miller as to why he did not open the petcock.

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

(No. 92-CC-3048—Claim denied.)

DENA PAKENHAM, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Order filed May 20, 1998.

PETER F. FERRACUTI, P.C. (JAMES LINDIG, of counsel), for Claimant.

JAMES E. RYAN, Attorney General (DANIEL F. LANCILOTI, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*State not insurer of safety of persons visiting its buildings—Claimant's burden of proof.* The State is not an insurer of the safety of persons visiting its buildings, and the Claimant has the burden of establishing by a preponderance of the evidence that Respondent breached its duty of reasonable care, that the Respondent's negligence proximately caused the injury, and that Respondent had actual or constructive notice of the dangerous condition from all of the circumstances in the case.

SAME—*student injured when door struck foot—no proof of dangerous condition—claim denied.* The Court of Claims denied a student's request for compensation for a foot injury suffered when a door being opened by another person struck her foot as she exited a university building, where the Claimant presented no testimony showing the existence of, or State's notice of, a dangerous condition in the door or entranceway, there was no evidence that the State was negligent in maintaining the premises, and the record indicated that there had been no prior complaints or injuries, and that the door and entranceway were in compliance with relevant building codes.

ORDER

MITCHELL, J.

On October 7, 1991, Claimant was a student at Northern Illinois University in DeKalb, Illinois, and was at Cole Hall, on Northern's campus, attending an algebra class with about 200 to 300 other students. When the class ended at 11:50 a.m., Claimant exited out of the right door of a double set of doors located on the north side of Cole Hall. She stepped out of the building onto the sidewalk with her right foot first, then she stepped to the left, in front of the other door, with her left foot. There was a step down of

approximately one and one-half inches from the doorway to the sidewalk. As she was stepping to the left, another woman, who Claimant did not recognize, was also exiting the building and opened the left door into Claimant's foot, causing the bottom edge of the door to cut the heel. The flow of students leaving Cole Hall at the time of injury was heavy. Claimant sat on a bench for a few minutes and then went to the university health center where the wound was cleaned and bandaged. She was referred immediately to Dr. Kornel Balon who performed outpatient surgery at Kishwaukee Hospital the same day. She was restricted in her movement of the left leg for two weeks, and her ankle was then casted for six weeks. She filed a personal injury complaint in the amount of \$28,377.77 on May 13, 1992. After various continuances at the request of the parties, a hearing was held before this Court on September 12, 1996. Subsequent briefs were filed by the parties in 1997.

Claimant testified that she still has a lump on her left heel from the scar tissue, and that the ankle is stiff and causes her problems when she has to walk long distances or wear particular kinds of shoes. Claimant also testified that: (1) prior to the date of her injury, she had been in Cole Hall many times and was familiar with the door and entranceway which she states caused her injury; (2) she did not see any type of defect in the door at the time of her injury; (3) she has no personal knowledge of whether or not Northern was aware of any type of condition regarding the door before October 7, 1991; (4) she had never complained or known of anyone who complained about the door; (5) she has never seen anyone injured at that doorway.

Roland Schreiber, employed at Northern Illinois University as a university architect since 1966, testified that he is familiar with Cole Hall, having met with architects while

the plans and specifications were being prepared and, as the building was being constructed, he observed and checked on the progress and quality. He gave details about the exterior doors at Cole Hall and stated that they have a sticker attached to them which indicates they were manufactured by Miller Industries, which is still in business. The step-down of one and one-half inches allows the door to move over any snow, slush or water which might accumulate outside.

The construction of Cole Hall complied fully with the National Building Code of 1967 which was in effect at the time. At the time of Claimant's injury, the 1990 BOCA Building Code was in effect with regard to new construction and remodeling. As with the National Building Code, BOCA requires doors to be hung to swing in the direction of egress. The BOCA code allows for a step-down of eight inches on all exterior doors not required for physically handicapped or aged persons.

Mr. Schreiber is not aware of any modifications made to the doors before or after installation. They are still in the same condition as when they were installed. There were no problems or complaints prior to the injury in this case. He personally inspected the doorway, and in his expert opinion as an architect, there is nothing defective or dangerous about the door or entranceway.

Edward O'Donnell, assistant director of the physical plant, was superintendent of building maintenance at the time of the accident and was responsible for all of the building craftsmen on the campus. Northern also has a summer repair list procedure whereby craftsmen go throughout the campus making needed repairs. On May 21, 1991, Mr. O'Donnell issued a preventative maintenance work order to the carpenter shop to check all of the main doors, 1 through 17 (including the door which Claimant

alleged caused her injury), at Cole Hall for needed repairs. Any repairs would have been documented. The only documented repair or change was a door closer which was replaced on one of the doors.

Claimant presented no expert or lay evidence or testimony that there was any defect or dangerous condition in the door or the one and one-half inch step-down, or that Northern was negligent in maintaining the door or entranceway at Cole Hall. She has failed to prove by a preponderance of the evidence that a dangerous condition existed or that Northern had actual or constructive notice of such a condition. The State is not an insurer of the safety of persons visiting its buildings. (*Hardeman v. State* (1995), 47 Ill. Ct. Cl. 292.) The Claimant has the burden of establishing by a preponderance of the evidence that Respondent breached its duty of reasonable care, that the Respondent's negligence proximately caused the injury and that the Respondent had actual or constructive notice of the dangerous condition from all the circumstances in the case. (*Roles v. The Board of Governors of State Colleges and Universities* (1995), 47 Ill. Ct. Cl. 131.) The cause of liability cannot be based on surmise or conjecture. (*Holloway v. Board of Trustees of the University of Illinois* (1992), 45 Ill. Ct. Cl. 255.) Therefore, the claim of Dena Pakenham is denied.

(No. 93-CC-0346—Claimant awarded \$6,827.13.)

STATE FARM FIRE AND CASUALTY CO., as SUBROGEE ROBERT R. REINERTSEN, Claimant, *v.* THE BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES, Respondent.

Opinion filed December 22, 1997.

HINSHAW & CULBERTSON (ROBERT M. BENNETT, of counsel), for Claimant.

JAMES E. RYAN, Attorney General (JAY SPENGLER, Assistant Attorney General, of counsel), for Respondent.

CONTRACTS—*“other insurance” exclusion in insurance policy determines whether coverage is primary or excess.* The “other insurance” exclusion clause in an insurance policy is the principal, and usually the sole, determinant of whether a particular insurance policy or coverage is primary or excess coverage, and an excess insurer can recover advances from a primary insurer.

SAME—*insured university employee sued for libel—subrogation claim against university by insurer for defense cost reimbursement—award granted.* In an insurer’s subrogation contract claim against a university which operated a self-insurance program for its faculty, the insurer was entitled to reimbursement for its defense, under a reservation of rights, of an insured faculty member in a libel suit prior to the insurer’s determination that its policy did not cover the claim, since the university’s policy was the employee’s primary insurance, the other insurer’s policy was never applicable, and therefore, the university’s “other insurance” exclusion clause was never triggered.

OPINION

EPSTEIN, J.

This court is rarely called upon to decide technical issues of insurance law such as this case presents. But with the State universities providing self-insurance and thus entering this field, we find ourselves embroiled in the kinds of arcane insurance issues that frequently occupy general jurisdiction courts.

This case is ultimately, but not technically, a dispute between two insurers over some of the defense costs of their common insured’s defense of a libel action. Legally, this is a subrogation contract claim by State Farm Fire

and Casualty Company (“State Farm”), as subrogee of its insured, against the Board of Governors of State Colleges and Universities (the “BOG”), which operates a self-insurance program (the “BOG Program”) that covered the same insured, Robert J. Reinertsen, who was a faculty member of Western Illinois University and was thus covered by the BOG Program.

The case is before the Court on the Claimant’s motion for summary judgment, which the Respondent opposes as a matter of law. There are no disputed questions of material fact with respect to the issues argued by the parties.

The Facts

Claimant State Farm issued a liability insurance policy to its insured, Robert R. Reinertsen. Reinertsen was also covered by the Respondent’s self-insurance program. Professor Reinertsen was sued for slander.

State Farm initially assumed Reinertsen’s defense under a reservation of rights, but later determined that its policy did not cover the slander claim. (Although State Farm’s no-coverage determination was not judicially confirmed, it was, and is, undisputed.)

Reinertsen then turned to the BOG Program, which he had earlier informed of the slander suit. Based on the inapplicability of the State Farm policy and the lack of other insurance, Reinertsen’s defense was then assumed by the BOG in accordance with the “other insurance” exclusion of its program (article VI, section B-4), which provided that,

“the Program does not apply * * * to * * * injury or * * * damage for which the insured has other valid and collectible insurance, unless such insurance is * * * specifically * * * excess.”

State Farm brought this claim as subrogee of Reinertsen, seeking to recover from the BOG \$6,827.13 of

attorney's fees and litigation expenses that State Farm spent on Reinertsen's defense of the slander action prior to its determination that its policy did not cover the claim.

The Parties' Positions

The Claimant, State Farm, essentially contends (i) that the BOG had a contractual duty to Mr. Reinertsen under its program, both to defend him in his slander lawsuit, and to indemnify him against any resulting liability, (ii) that State Farm is legally subrogated to that right, at least to the extent of its payment of such defense expenses, (iii) that the BOG Program was the primary insurance coverage for the slander claim against Reinertsen, (iv) that, as the primary insurer of the underlying claim, the BOG's duty to defend Reinertsen supersedes the prior and lesser duty of State Farm to defend him.

The Respondent challenges the Claimant's characterization of the two insurance coverages. Respondent denies that its duty to defend was "primary" during the period when State Farm was defending. Respondent contends that during the pre-determination period the BOG coverage was only "excess" coverage, not "primary" coverage, because under the BOG Program's exclusion that program's coverage is excess unless it is determined that no other "valid and collectible insurance" applies. Respondent also challenges State Farm's right to reimbursement in the face of its own duty to defend. Finally, Respondent urges that public policy mandates that insurers be obliged to pay for their own obligations to defend their insureds lest that obligation be diluted. Respondent raises the specter of insurers seeking, and getting reimbursement of, defense expenditures from their insureds, when it turns out that the underlying coverage of the insured's policy does not reach the claim at hand.

Several of the pertinent legal propositions are undisputed here. State Farm acknowledges, as it must, that an insurer's duty to defend is broader than its duty to indemnify; (see, e.g., *Aetna Casualty & Surety Company v. Prestige Casualty Company* (1st Dist. 1990), 195 Ill. App. 3d 660, 553 N.E.2d 39; *LaSalle National Trust, N.A. v. Schaffner* (N.D. Ill. 1993), 818 F.Supp. 1161) and that it had a duty to defend under its policy despite its ultimate inapplicability, until a proper determination of non-coverage was made. For its part, the Respondent BOG does not dispute its parallel contractual duty to defend Mr. Reinertsen's slander claim or the general proposition of State Farm's right to stand in Mr. Reinertsen's shoes as his subrogee to assert this reimbursement/subrogation claim. And, as noted above, neither Reinertsen nor the BOG have disputed State Farm's non-coverage determination.

Jurisdiction

Our jurisdiction over this claim is not challenged. We observe nonetheless that our jurisdiction here is founded on section 8(b) of the Court of Claims Act (705 ILCS 505/8(b)), which grants us jurisdiction over claims "founded upon any contract entered into with the State * * *" which encompasses the university systems. The parties agree that the underlying action here is predicated on enforcement of the BOG Program, which is a contract entered by the BOG with its employees such as Reinertsen. No issue of the validity of that contract or of the contractual undertakings therein is raised.

Opinion on Liability

This defense cost reimbursement-subrogation issue is largely determined by the legal characterization of the two insurance coverages involved, but not quite as absolutely as the parties would have it. We commence by rejecting the starting analyses of both parties.

State Farm says that the reimbursement issue is entirely determined by the characterization of the BOG coverage of Reinertsen's slander claim as "primary" rather than "excess," as it urges us to find, and as we do find below. However, State Farm's liability analysis is slightly oversimplified. Other factors, including the status and character of its own policy coverage, may bear on the ultimate liability in some circumstances.

At the other analytical extreme, we must also reject the BOG's argument that reimbursement of State Farm is precluded as a matter of law due to State Farm's duty to defend Reinertsen (at that time) under its own policy, irrespective of how the two insurance coverages are characterized. We reject this analysis for lack of authoritative support and because it is based on two erroneous premises: first, that this is a contest between two "primary" insurance coverages, which it is not (rendering irrelevant or distinguishable the case law cited by the BOG and the primary-primary insurance cases cited by State Farm, *e.g.*, *Home Indemnity Company v. General Accident Insurance Company of America* (1st Dist. 1991), 213 Ill. App. 3d 319, 572 N.E.2d 962, 157 Ill. Dec. 962; and second, that this is a legal fight between two insurers, which is only indirectly and immaterially so.

This is a dispute between the insured and his primary insurer, with a second insurer standing in the insured's shoes as his subrogee. The sole basis of liability advanced in this case is the subrogation theory—which rests on the rights of the insured. No contribution or other theory is advanced. Our decision is thus limited to the insured's subrogated rights.

The issue presented is thus, whether or not the insured can recover, from his primary liability insurer, defense costs expended by him prior to the time the primary

insurer assumed the defense. It is immaterial that the costs were paid by a second insurer—at least where the second insurer is not a “primary” insurer, as we here conclude that State Farm was not. We find that State Farm was not a primary insurer for the elegantly simple reason that it was not an insurer of the subject slander claim at all, which is undisputed by the parties.¹

On the other side of the fence, it seems clear that the BOG was a primary, rather than excess, insurer (*i.e.*, indemnitor) as to the slander claim against Reinertsen, based on the terms of its “other insurance” exclusion clause (article VI, section 4-B of the BOG Program, quoted above).

As our Courts have held, the “other insurance” exclusion clause in an insurance policy is the principal, and usually the sole, determinant of whether a particular insurance policy or coverage is primary or excess coverage (*Putnam v. New Amsterdam Casualty Company* (1970), 48 Ill. 2d 71, 269 N.E.2d 97), although arguably other contractual provisions of a policy may also be considered if relevant (the “entirety of the policy” approach) (*see, e.g., Illinois Emcasco Insurance Co. v. Continental Casualty Co.* (1st Dist. 1985), 139 Ill. App. 3d 130, 487 N.E.2d 110, 93 Ill. Dec. 666. In this case, the BOG Program’s “other insurance” clause is a form of “excess” clause that renders the coverage excess where—but only where—“the insured has other valid and collectible insurance.” In cases where this exclusion clause does not apply (so as to render the BOG coverage “excess”), it is clear that the BOG coverage is applicable as primary coverage in accordance with the

¹ We note in passing that if State Farm and the BOG Program had both been primary insurers of Reinertsen’s slander claim, it is possible that an entirely different analysis, and other public policies underlying insurance law, might well apply. *See, Home Indemnity Company v. General Accident Insurance Company of America* (1st Dist. 1991), 213 Ill. App. 3d 319, 572 N.E.2d 962, 157 Ill. Dec. 962, and cases cited therein. We do not address that situation, nor do we express, a view as to whether subrogation is available in such circumstances for reimbursement between primary insurers.

terms of the program. In this instance, the BOG excess clause plainly is not triggered by the inapplicable State Farm policy, and no other insurance coverage has been suggested, leaving the BOG Program coverage as primary.

More critically, and as State Farm emphatically and correctly contends, its policy was *always* inapplicable to Reinertsen's slander claim. The State Farm policy did not suddenly become inapplicable only when State Farm made its later determination (or, in the more usual case, when a Court finally makes a declaratory judgment). While the State Farm policy surely imposed a duty to defend under Illinois insurance law, the obligation to defend is not the same as the obligation to indemnify. Indeed, it is broader. We conclude that the duty to defend under another policy, by itself, does not trigger the "other insurance" clause of the BOG Program. Accordingly, the BOG Program was Reinertsen's primary coverage of his slander claim from the outset, and was the only primary coverage applicable to Reinertsen's defense.

This takes the analysis to the point of decision. With the dispute now firmly characterized as insured-and-non-insuring subrogee (State Farm) versus primary insurer (BOG), with respect to the defense of a particular tort liability coverage, the Court concludes that the primary insurer is liable for defense expenditures that were advanced in good faith by the insured or by his subrogee. In the circumstances presented, State Farm as subrogee of Reinertsen can, and will, recover the disputed defense costs from the BOG.

We understand that there is no Illinois precedent directly on point; at least the parties and this Court have not found any. However, it is established case law that an excess insurer can recover advances from a primary insurer. *See*, discussion in *Home Indemnity Company v.*

General Accident Insurance Company of America (1st Dist. 1991), 213 Ill. App. 3d 319, 572 N.E.2d 962, at 965, 157 Ill. Dec. 498, at 501, citing *New Amsterdam Casualty Company v. Certain Underwriters at Lloyd's, London* (1966), 34 Ill. 2d 424, 216 N.E.2d 665; *Aetna Casualty & Surety Company v. Coronet Insurance Company* (1976), 44 Ill. App. 3d 744, 358 N.E.2d 914, 3 Ill. Dec. 371; *Fireman's Fund Indemnity Company v. Freeport Insurance Company* (1961), 30 Ill. App. 2d 744, 173 N.E.2d 543; see also, *Country Mutual Insurance Co. v. Anderson* (1993), 257 Ill. App. 3d 73, 628 N.E.2d 499, 195 Ill. Dec. 35; *Padilla v. Norwegian American Hospital* (1994), 266 Ill. App. 3d 829, 641 N.E.2d 572, 204 Ill. Dec. 348; *Sportmart v. Daisy Manufacturing Co.* (1994), 268 Ill. App. 3d 974, 645 N.E.2d 360, 206 Ill. Dec. 355.

We find no material distinction, for this purpose, between the status of an insurer as an “excess” insurer and as a “non-insurer” (i.e., an insurer with inapplicable coverage). In both postures, the insurer seeking to recover advanced-in-good-faith benefits (here State Farm) did not have a present duty to insure the underlying claim at the time the expenses were paid. The technical reasons why such a duty did not exist may differ—one is a dollar limit, whereas the other is a lack of substantive coverage—but the relevant result is identical: no present duty to insure. Without a present duty to insure, we find no basis for precluding application of the insurance subrogation right, as the BOG has urged us to do. Nothing in our analysis in any way detracts from the initial obligation to defend (even under an inapplicable policy), and our conclusion in no way undermines the rights of the insured.

We therefore find the foregoing authority that allows subrogation recovery by excess insurers from primary insurers can be applied (or extended) to allow subrogation

recovery from a primary insurer by an insurer who has an inapplicable policy issued to the same insured.

We also reject the two additional points advanced by the BOG as defenses to its liability for the disputed defense costs. First, the BOG complains about the delay in State Farm's determination that its policy did not cover the slander claim. No authority has been presented and no prejudice has been shown by the BOG that gives rise to any consequences of that delay. Second, the BOG attacks the adequacy and timeliness of Reinertsen's notice to it of the slander claim and lawsuit. However, such defects were waived by the Bog's acceptance of the defense and assumption of the primary insurance indemnity. *See, O'Brien v. Country Mutual Insurance Company* (1st Dist. 1969), 105 Ill. App. 2d 21, 245 N.E.2d 30.

Conclusion and Order

For the foregoing reasons, we find the BOG Program is liable for reimbursing State Farm, as Reinertsen's subrogee, for the sum of \$6,827.13 expended as defense costs properly payable by the BOG as the primary insurer of Reinertsen's slander claim. For this reason, Claimant is entitled to judgment as a matter of law, and we grant Claimant's motion.

It is hereby ordered: (1) Summary judgment is entered for the Claimant and against the Respondent; (2) Claimant is awarded \$6,827.13 against the Board of Governors of State Colleges and Universities in full and final satisfaction of this claim.

(No. 93-CC-0499—Claim dismissed.)

WILLIAM A. KROLL, Claimant, *v.* ATHLETIC ASSOCIATION OF
THE UNIVERSITY OF ILLINOIS and NEALE R. STONER,
Respondents.

Opinion filed August 22, 1995.

Order of Dismissal filed August 28, 1997.

MARVIN GERSTEIN, for Claimant.

JAMES E. RYAN, Attorney General (CHARLES R. SCHMA-
DEKE, Assistant Attorney General, and EDWARD RAWLES, of
counsel), for Respondent.

CONTRACTS—*two counts of employment claim dismissed as time-
barred—remaining count dismissed pursuant to parties' joint motion.* After
the Court of Claims dismissed, as time-barred, two counts of the Claimant's
three-count complaint arising out of an employment contract and the matter
was returned to the Commissioner for further proceedings on the remaining
count, the parties reached a settlement and the remainder of the claim was
dismissed pursuant to their joint motion.

OPINION

JANN, J.

This cause comes on to be heard on Respondent's
motion to dismiss and Claimant's response thereto. The
Court being fully advised in the premises finds:

1. Respondent's motion to dismiss as to count II,
breach of employment contract, is denied. Neale Stoner
is named in count I in his official capacity as athletic di-
rector and a fair reading of the remainder of the com-
plaint clearly indicates that Stoner is named in his official
capacity as a university employee.

2. Respondent's motion to dismiss counts I and III
for failure to file within the statutory limitation period is
granted. Claimant's original action was filed in United
States District Court. That action was "ultimately dis-
missed" (per Claimant's response) on July 22, 1991, by

the Seventh Circuit Appellate Court for lack of jurisdiction. Claimant filed in the Court of Claims on September 21, 1992. The cause of action arose June 1, 1988, per Claimant's complaint. Pursuant to section 13—217 of the Code of Civil Procedure (735 ILCS 5/13—217):

“ * * * if * * * the action is dismissed by a United States District Court for lack of jurisdiction, then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after * * * the action is dismissed by a United States District Court for lack of jurisdiction.”

Claimant failed to file within one year of the original dismissal by the United States District Court and is thereby time barred before the Court of Claims. (See *Suslick v. Rothschild Securities Corp.* (1989), 131 Ill. Dec. 178, 128 Ill. 2d 314, 538 N.E.2d 553 and *Raper v. St. Mary's Hospital* (1989), 130 Ill. Dec. 131, 181 Ill. App. 3d 379, 536 N.E.2d 1342.) Claimant cited *Raper* for the proposition that 735 ILCS 5/13—217 applies to this cause. However, *Raper* further states that the appropriate starting date for measuring the one year period was the date of the Federal court order dismissing plaintiff's complaint, not the date of the Federal court order concluding the entire matter. *Suslick, supra*, found that a State court action was not timely filed because it was filed within one year of the Sixth Circuit Court of Appeals order affirming the district court's dismissal and that the one year period ran from the date of dismissal, not the date of affirmance of dismissal by a Federal appellate court.

This cause is hereby returned to the Commissioner's docket for further proceedings on count II.

ORDER OF DISMISSAL

This matter coming on to be heard on the parties' joint motion to dismiss, and the Court being advised the

above matter has been resolved by settlement, it is hereby ordered that the above cause be dismissed with prejudice, each party to pay its own costs.

(No. 93-CC-1729—Claim dismissed.)

KENNETH L. LAMKEY, Claimant, v. THE STATE OF ILLINOIS,
DEPARTMENT OF CORRECTIONS *et al.*, Respondents.

Order filed November 13, 1997.

KENNETH L. LAMKEY, *pro se*, for Claimant.

JAMES E. RYAN, Attorney General (JOEL CABRERA,
Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*collateral estoppel barred inmate's claim for injuries stemming from deprivation of medically prescribed diet—claim dismissed.* An inmate was collaterally estopped from asserting a claim for injuries arising out of the State's alleged deprivation of his medically prescribed diet since, in an earlier Federal court action involving the identical alleged injury and identical alleged wrongdoing, the Court entered summary judgment against the inmate for failure to show evidence of a health injury flowing from the acts of the defendants.

ORDER

EPSTEIN, J.

This prisoner's claim, brought as a tort claim for personal injuries suffered as a result of the Respondent's alleged deprivation of Claimant's special medically prescribed diet at the Sheridan Correctional Center, as required by Department of Corrections ("IDOC") regulations, is before the Court on the Respondent's motion to dismiss, which has been briefed by the Respondent and to which the Claimant has replied.

The Respondent's motion asserts *res judicata* on the basis of the adjudication of the United States District Court in *Lamkey v. Roth* (U.S.D.C., N.D. Ill., February 25, 1997), No. 93 C 7080. In the Federal *Lamkey* case,

this Claimant sued the same individual defendants (other than former Director Peters), but not the State or IDOC, on an Eighth Amendment Constitutional claim. That Constitutional claim is not the same cause of action as the State tort claim advanced in this Court, and indeed imposes a higher standard of liability than the State claim, and thus the bar wing of the *res judicata* doctrine does not apply to bar this liability claim in this Court.

The collateral estoppel wing of the *res judicata* doctrine, however, is another matter. Our review of this claim against the decision of the District Court (Grady, J.) shows that both are suits on the identical underlying injury and both lawsuits are based on, and only on, the identical alleged wrongdoing—the dietary violations allegedly effected by the same persons. Thus the Federal Court adjudicated the identical claim of injury and damages as that asserted in this case.

Accordingly, the Federal Court’s finding, in its summary judgment ruling against Mr. Lamkey, that he (the Claimant here) had failed in that court to show evidence of a health injury flowing from the alleged acts of the defendants is a finding that we can, and should, recognize as a collateral estoppel against the Claimant on his *respondent superior* claims against this Respondent for the same acts of the same IDOC employees.

Claimant has had a full Federal bite at this apple, and should not be given a second bite merely because he can find another legal theory in another legal forum to sue on the same injury. Mr. Lamkey has now exhausted his remedies, and this claim will be dismissed.

This claim is dismissed as collaterally estopped.

(No. 94-CC-0027—Claim dismissed.)

RAY HOYE, Claimant, v. THE STATE OF ILLINOIS, Respondent.

Opinion filed March 27, 1997.

Opinion filed October 2, 1997.

THOMSON & WEINTRAUB (KEVIN P. FITZGERALD, of counsel), for Claimant.

JAMES E. RYAN, Attorney General (GREGORY T. RIDDLE, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*diving accident—State’s motion to dismiss denied.* The State’s motion to dismiss was denied in a negligence claim filed by a man who was paralyzed in a diving accident at a State conservation facility, since the general immunity conferred to owners of land under section 3 of the Recreational Use of Land and Water Areas Act did not apply where the owner charged persons for the recreational use of the land, and the Claimant’s payment constituted such a charge.

SAME—*when landowner owes no duty to protect or warn—open and obvious risks.* A landowner owes no duty to protect or warn against possible injuries from the open and obvious risks associated with diving into water of unknown depths.

SAME—*man paralyzed in diving accident—danger was open and obvious—claim dismissed.* The Court dismissed a claim filed by a man who was rendered quadriplegic after he dove into a lake in an area where swimming was not permitted, since the man intentionally dove into the water without first attempting to ascertain its depth and without any basis to assume that the area was safe for swimming or diving, and the State owed no duty to protect him from the open and obvious dangers associated with his actions.

OPINION

SOMMER, C.J.

This is a claim for personal injuries allegedly sustained when Claimant dove from a boat into a portion of Clinton Lake, a conservation facility which Respondent has leased from Illinois Power Company. The amended complaint pleads ordinary negligence on the part of Respondent in allegedly failing to post warnings and properly supervise the area where Claimant’s diving accident occurred.

Of import to the present status of the litigation is paragraph 2(e) of the amended complaint:

“That at said time, the Respondent, the State of Illinois, Department of Conservation, charged a fee to persons using the Lake for recreational purposes, including the beach and swimming area.”

Respondent has filed a motion to dismiss grounded on the Recreational Use of Land and Water Areas Act, 745 ILCS 65, which provides in pertinent parts:

“Section 3. Except as specifically recognized by or provided in Section 6 of this Act, an owner of land owes no duty of care to keep the premises safe for entry or use by any person for recreational or conservation purposes, or to give any warning of a natural or artificial dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

* * *

Section 6. Nothing in this Act limits in any way liability which otherwise exists:

* * *

(b) For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof * * *.” See 745 ILCS 65/3 and 65/6.

The operative terms “owner” and “charge” are defined in section 2 of the Act as follows:

“(b) ‘Owner’ includes the possessor of any interest in land, whether it be a tenant, lessee, occupant, the State of Illinois and its political subdivisions, or person in control of the premises.

* * *

(d) ‘Charge’ means an admission fee for permission to go upon the land, but does not include the sharing of game, fish or other products of recreational use; or benefits to or arising from the recreational use; or contributions in kind, services or cash made for the purpose of properly conserving the land.” See 745 ILCS 65/2(b) and (d).

Claimant initially challenges the applicability of the Recreational Use of Land and Water Areas Act, citing to defunct precedent which this Court has previously referred to as the *Miller* doctrine.¹ The *Miller* doctrine was carefully reviewed by this Court and rejected in a January 31, 1994 opinion issued in *Sherman v. State*, 93 CC 2240,

¹ *Miller v. United States* (7th Cir. 1979), 597 F.2d 614.

and a copy of that decision is attached hereto for the benefit of the parties inasmuch as it has not yet been published by the Court. Since our decision in *Sherman*, the Appellate Court has also studied the *Miller* doctrine and reached the same result. *Hoye v. Illinois Power Co.* (4th Dist. 1995), 269 Ill. App. 3d 597, 601, 646 N.E.2d 651, 653, *app. denied* (1995), 162 Ill. 2d 567, 652 N.E.2d 341.

Claimant next challenges the applicability of the Recreational Use of Land and Water Areas Act by contending that the Swimming Pool and Bathing Beach Act, 210 ILCS 125, should instead govern. However, Claimant's counsel has provided no authority or reasoned argument to support this bald contention. Accordingly, it is rejected.

Thus, the narrow issue before the Court is whether the payment alleged in paragraph 2(e) of the amended complaint constitutes a "charge" so as to overcome the general immunity otherwise afforded to Respondent by section 3 of the Recreational Use of Land and Water Areas Act. The amended complaint specifically terms the payment as a "fee," not an "admission fee." Respondent has submitted an affidavit from its director of fiscal management indicating that the payment is deposited into the State parks fund, from which fund sums are then disbursed for the "maintenance, development, operation, control and acquisition of State Parks."

The "exception to the exception" set forth in paragraph 2(d) of the Recreational Use of Land and Water Areas Act expressly states that a "charge" does not include "*contributions* * * * made for the purpose of properly conserving *the* land" (emphasis added). The use of the terminology "contribution" suggests a voluntary, donative intent; in short, a gift. This seems especially so when viewed in distinction to the "admission fee for permission to go upon the land" language found earlier in the definition. Further, use of the

word “the” ahead of “land” suggests that the “contribution” is to be used solely for the particular facility at which the payment is made. Accordingly, we hold that a payment constitutes a “charge” unless it is a purely voluntary gift to be used for the particular facility at which it was given.

The affidavit submitted by Respondent says nothing about the voluntary or involuntary nature of the payment. However, Respondent’s affidavit clearly does indicate that the payment is deposited into a general, State-wide parks fund from which it may be used to support any number of other facilities. Thus, for purposes of this motion only, the Court finds that the payment referenced in paragraph 2(e) of the amended complaint constituted a “charge” which would trigger the operation of section 6(d) of the Recreational Use of Land and Water Areas Act.

It is therefore ordered that Respondent’s motion to dismiss Claimant’s amended complaint is denied.

OPINION

SOMMER, C.J.

This claim returns before the Court on Respondent’s second motion to dismiss. The complaint filed herein alleges that Claimant was rendered a quadriplegic when he dove into a portion of Clinton Lake where swimming was not permitted. Respondent’s initial motion to dismiss pursuant to the Recreational Use of Land and Water Areas Act (745 ILCS 65), was denied inasmuch as Respondent had charged Claimant a fee to use the lake.

The instant motion to dismiss is grounded on *Buchereles v. Chicago Park District* (1996), 171 Ill. 2d 435, 665 N.E.2d 826, which held that a landowner owes no duty to protect or warn against possible injuries from the open and obvious risks associated with diving into water of unknown depth. The *Buchereles* court wrote:

“In cases involving obvious and common conditions, such as fire, height, and bodies of water, the law generally assumes that persons who encounter these conditions will take care to avoid any danger inherent in such condition. The open and obvious nature of the condition itself gives [warning of potential harm] and therefore the risk of harm is considered slight; people are expected to appreciate and avoid obvious risks.

° ° °

[A] reasonable adult ° ° ° would recognize that an attempt to execute a head-first ° ° ° dive into [a] lake, without prior awareness of the depth of the waters, might result in severe injury from hitting one’s head on the lake bottom. [citation omitted]’ [T]he danger involved ° ° ° is open and obvious ° ° °.” *Bucheresles*, 171 Ill. 2d at 448 and 453, 665 N.E.2d at 832 and 834-35, quoting partially from *Downen v. Hall* (1st Dist. 1989), 191 Ill. App. 3d 903, 548 N.E.2d 346.

Here, Claimant specifically intended to dive into the water. Yet, from the record before us, he apparently did so without attempting to ascertain the water’s depth and without any basis to assume that it was safe for swimming, let alone for diving.

Inasmuch as the dangerous nature of diving under these circumstances was open and obvious to Claimant, Respondent owed Claimant no duty to protect him from any dangers associated with his dive. It is therefore ordered that Respondent’s motion to dismiss is allowed, and this claim is dismissed with prejudice.

(No. 94-CC-0131—Claim dismissed.)

ANDRE PINNICK, Claimant, v. THE STATE OF ILLINOIS,
SHERIDAN CORRECTIONAL CENTER, Respondent.

Opinion filed November 10, 1997.

KIPNIS, KAHN & BRUGGEMAN, LTD. (CLAUDE B. KAHN,
of counsel), for Claimant.

JAMES E. RYAN, Attorney General (PAUL CIASTKO,
Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*duty owed by State to inmates—reasonably safe conditions.* The State of Illinois is not an insurer of the safety of inmates in its custody, but it does have a duty to provide them with reasonably safe conditions.

SAME—*inmate burned by hot appliance—State’s breach of duty did not entitle inmate to award—no proof of proximate cause or exercise of due care—claim dismissed.* Notwithstanding the State’s likely breach of its duty of reasonable care for an inmate in failing to timely repair a defective electrical outlet in his cell of which it had notice, the inmate’s claim for injuries sustained when a hot pot fell on him while he was cooking in the cell was dismissed, since there was no evidence as to how the pot was caused to leave the shelf on which it was sitting, and the inmate failed to exercise due care for his own safety where he knowingly used the defective appliance.

OPINION

RAUCCI, J.

This matter comes to be heard on the claim of Andre Pinnick for personal injuries sustained in an incident on June 2, 1993. The Claimant, Andre Pinnick (hereinafter “Pinnick”), seeks compensation for injuries to his person incurred while he was a prisoner of the State of Illinois in Sheridan Correctional Center. Specifically, the Claimant Pinnick asserts that the State’s failure to adequately maintain the electrical outlet in his cell and/or to repair said outlet despite proper notice of its defective condition caused certain events to be put into motion, the end result of which was that he sustained serious burns to the area of his right thigh.

The details surrounding the actual incident are decidedly one-dimensional since only the Claimant and his cellmate, Christopher Nowling, testified as to the occurrence itself and the events immediately preceding and following said occurrence. Officers Michael Morris and Mr. Darryl Thompson, both employees of Sheridan at the time of the occurrence, offered very little insight with regard to the issues in controversy. The only concrete information forwarded was that upon their review of the written records,

no written request for repair of a defective outlet was filed by the inmates of cell 31 or the personnel of building C17.

Essentially undisputed, though is the following. On June 2, 1993, the Claimant was a resident of cell C-31 in building C17 at Sheridan Correctional Center, along with Christopher Nowling. On that date, at around 10:30 p.m., Claimant was using a “hot pot” to cook some macaroni. The area used to cook was a shelf above the desk in the cell and next to the toilet. The activity of cooking with a hot pot by an inmate in his own cell was allowed by the correctional facility. Claimant stated that the hot pot he was using did not work correctly, and specifically stated that he was unable to control the temperature other than by unplugging the machine and letting it cool down when it invariably overheated. This was corroborated by witness Nowling. Significantly, Claimant admitted that he understood the hot pot was defective when he was using it on June 2, 1993.

While cooking his macaroni, Claimant testified that the hot pot began to boil over, requiring him to unplug it. After the hot pot settled down (a period of three to five minutes), Pinnick attempted to plug it back in. It is unclear whether he attempted to put the plug back into the outlet or the plug back into the receptacle on the hot pot. According to Claimant, when he attempted to do so, he “got a shock, and [he] heard a dzzzzz, dzzzzz, a popping noise and then * * * jumped back.” When he jumped back, the hot pot fell from the shelf onto his lap.

Pinnick sustained various burns to the upper part of his right leg with resultant permanent scarring on his right thigh, as depicted by Claimant’s photographic exhibits. These are the injuries for which he seeks compensation.

In the eyes of this Court, the issues presented are threefold: (1) Did the State breach its duty to provide a

reasonably safe environment for the inmates, including Claimant, in its custody—specifically, was the outlet in the cell of Claimant defective or dangerous and did the State have proper notice of said deficiency but fail to timely correct it; (2) Did the defective outlet cause or contribute to cause the injuries of the Claimant; and, (3) Did the Claimant assume the risk of his injuries and exercise due care in his own actions that led to his injuries.

On the first issue, this Court finds it likely that the outlet in Claimant's cell was defective and dangerous *and* the State failed to seasonably repair said deficiency despite proper notice; thus arguably the State has breached a duty owed to the Claimant. The State of Illinois is not an insurer of the safety of inmates in its custody but it does have a duty to the inmates of its penal institutions to provide them with reasonably safe conditions. (*LaMasters v. State* (1981), 35 Ill. Ct. Cl. 90, 92; *Reddock v. State* (1978), 32 Ill. Ct. Cl. 611, 613.) There is ample evidence that the State had been notified on many occasions of the condition of the outlet (e.g., smoking, sparking and appliances shorting out), but had failed to timely correct the deficiency. This Court finds Claimant Pinnick's and witness Nowling's testimony credible in that one or both of them advised the various prison guards of their outlet's problem. The lack of written documentation of these requests, while pertinent, does not obviate the reasonableness of the testimony and the probability that said requests were made repeatedly. However, this finding does not settle liability in this matter.

It is well-settled that if a Claimant is to recover for personal injuries, that Claimant must prove that the State's *breach* of the above stated duty *proximately caused* his injuries. In the case at hand, neither the Claimant nor his sole "occurrence" witness can offer any insight as to

how the hot pot was caused to leave the shelf. The only testimony on this issue is forwarded by the Claimant, wherein he testified that “it just fell off the stand” when he “jumped back.” Nowling testified that he *heard* a “pop” and “turned over * * * [and] seen macaroni stick to both thighs of Andre.” The testimony offered as to the proximate cause issue is severely lacking in specificity. For this reason alone, the claim of Pinnick could be denied.

However, notwithstanding said conclusion and merely for the sake of argument, this Court is willing to assume, by inference, that the pop and spark noted by Claimant more likely than not “caused” Pinnick to knock the hot pot onto his own lap, in order to fully address the third issue: assumption of risk.

It is significant that both the Claimant and witness Nowling testified that they had personal knowledge that serious problems existed with the outlet in their cell, yet they continued to use said outlet to provide power for their TV and hot pot. Nowling testified that he had problems such as sparks and smoking with the outlet “like almost every * * * all the time,” that the outlet would spark “most of the time when [they would] plug in an appliance” and that he had seen Pinnick have the same type of problem. Claimant Pinnick admitted he had seen Nowling have problems with the outlet on prior occasions and had problems with sparking and smoking from the outlet himself. Testimony of this type raises serious concerns with the issue of assumption of risk. Eating macaroni and watching TV are not the type of activities that are guaranteed to inmates, but are merely privileges. Both Claimant and Nowling testified that they received three meals a day in the center’s cafeteria *and* that they could supplement that with items bought from the commissary. It is clear that the use of the outlet is not essential to the basic

well-being of these inmates. It is also abundantly clear that the decision to use the defective outlet was knowingly undertaken by the Claimant. In aggravation of this situation, the Claimant knowingly used a “defective” appliance in the “defective” outlet. Claimant cannot avoid the responsibility of showing due care for his own action when he prosecutes a claim before this Court. The State is not an insurer of all accidents or injuries that occur on its premises. (*Gilmore v. State* (1987), 40 Ill. Ct. Cl. 85.) This Court finds that Claimant has failed to show that he exercised due care, and, therefore, his claim must be denied.

Thus, even though the evidence presented raises an issue as to a breach of the duty of reasonable care and safety owed to Claimant Pinnick, this Court finds that Claimant Pinnick did not carry his burden of proving more likely than not that said breach proximately caused his injuries *and* furthermore, conclusively finds that Claimant Pinnick did not show that he exercised due care in his own actions which brought about his injuries.

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

(No. 94-CC-0467—Claim dismissed.)

KAREN HAMMONDS, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Order filed December 6, 1995.

Order filed September 4, 1997.

SHEILA T. KIRCHHEIMER, for Claimant.

JAMES E. RYAN, Attorney General (JOEL CABRERA, Assistant Attorney General, of counsel), for Respondent.

EXHAUSTION OF REMEDIES—*failure to exhaust remedies is grounds for dismissal.* Any person who files a claim before the Court of Claims shall, before seeking final determination of his claim by the Court, exhaust all other remedies and sources of recovery whether administrative, legal or equitable, and failure to comply with the exhaustion requirement shall be grounds for dismissal.

NEGLIGENCE—*duty owed by State to persons legitimately on premises.* Although the State of Illinois has a duty to maintain the premises in a reasonably safe condition for persons who are legitimately on those premises, the State is not an insurer of the safety of its invitees.

EXHAUSTION OF REMEDIES—*woman injured in store by falling sign—failure to sue tenant required dismissal of claim.* A claim brought by a woman who was injured in a store when a large letter “O” from an illuminated sign fell on her was dismissed for failure to exhaust her other remedies, since pursuant to an affirmative covenant in the lease between the State and the store tenant, the tenant had a duty to keep the sign in good repair and the woman was therefore obligated to sue the tenant before seeking a determination in the Court of Claims.

ORDER

JANN, J.

This cause coming on to be heard on the motion of Respondent to dismiss the claim herein; due notice having been given the parties hereto, and the Court being fully advised in the premises: The Court finds that the claim herein seeks damages for personal injuries allegedly sustained by Claimant on August 31, 1992, when Claimant walked into the store known as “Afterthoughts” and was struck when a large letter “O” fell from the sign.

We note that section 25 of the Court of Claims Act (705 ILCS 505/25) and section 790.60 of the Court of Claims Regulations (74 Ill. Adm. Code 790.60) require that any person who files a claim before the Court of Claims shall, before seeking final determination of his claim by this Court, exhaust all other remedies and sources of recovery whether administrative, legal or equitable. Section 790.90

of the Court of Claims Regulations is clear that failure to comply with section 790.60 shall be grounds for dismissal.

The leading case regarding the Court of Claims exhaustion of remedies requirement, *Boe v. State* (1984), 37 Ill. Ct. Cl. 72, is dispositive of the case at bar. In *Boe*, the Claimant was the mother of a passenger who was killed in an automobile which collided with an allegedly defective guardrail. Claimant sued the State but not the driver of the automobile, arguing “that Claimants should be given a certain latitude and discretion in determining whom to sue. From Claimant’s point of view, it probably did not seem reasonable to sue an uninsured 18-year-old boy with no assets.” (*Id.* at 75.) However, in rejecting Claimant’s argument, the Court stated that it does not “recognize any discretion on the part of Claimants to pick and choose whom they wish to sue.” *Id.* Quoting its prior watershed exhaustion of remedies case, *Lyons v. State* (1981), 34 Ill. Ct. Cl. 268, we stated:

“The requirement that Claimant exhaust all available remedies prior to seeking a determination in this Court is clear and definite in its terms. It is apparent to the Court that Claimant had sufficient time to both become aware of his other remedies and to pursue them accordingly. The fact that Claimant can no longer pursue those remedies cannot be a defense to the exhaustion requirement. If the Court were to waive the exhaustion of remedies requirement merely because Claimant waited until it was too late to avail himself of the other remedies, the requirement would be transformed into an option, to be accepted or ignored according to the whim of all Claimants. We believe that the language of section [505/25] of the Court of Claims Act [cite omitted] and [Section 790.60] of the Rules of the Court of Claims quite clearly makes the exhaustion of remedies mandatory rather than optional.” 34 Ill. Ct. Cl. at 271-272; quoted in 37 Ill. Ct. Cl. at 75, 76.

These principles were also utilized in our dismissal of the case of a mental health patient who had allegedly been raped by a fellow patient at a State mental health facility. The Court held that Claimant failed to exhaust her remedies by not pursuing civil action for damages against the assailant. *Doe v. State* (1987), 43 Ill. Ct. Cl. 172.

We find that, as in *Boe*, the instant Claimant was aware of the existence of a liable party, Afterthoughts, long before the statute of limitations for an action against it had run. In fact, she worked at the store.

We hold that it remains incumbent on Claimant herein to exhaust her remedies before seeking final disposition of her claim in this Court. By not pursuing any remedy which may have been derived from Afterthoughts, Claimant has thus failed to comply with section 25 of the Court of Claims Act, *supra*, and section 790.60 of the Court of Claims Regulations. Section 790.90 of the Court of Claims Regulations provides that failure to comply with the provisions of section 790.60 shall be grounds for dismissal.

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

ORDER

JANN, J.

This cause comes on to be heard on Respondent's motion to dismiss. Claimant has responded and filed a supplemental response. Respondent has filed a supplemental reply brief in support of its motion. The Court being fully advised in the premises herein finds:

Respondent's motion is based upon failure to exhaust remedies pursuant to section 790.60 of the Court of Claims Regulations (74 Ill. Adm. Code 790.60) and section 25 of the Court of Claims Act. (705 ILCS 505/25.) Careful review of the parties' submissions herein result in the following findings:

1. Claimant's complaint was filed on August 31, 1993. The Claimant herein seeks damages for personal injuries allegedly sustained on August 31, 1992, when Claimant

walked into the store known as “Afterthoughts” and was struck when a large letter “O” fell from the sign.

2. Respondent alleges Claimant has failed to exhaust remedies against Afterthoughts Boutique and/or F.W. Woolworth Co. Respondent alleges it is the tenant’s (Afterthoughts’) duty to keep the sign in good condition according to section 10.01 of the lease which states: “*Affirmative Covenant*. Tenant shall: (a) keep the Premises, including fixtures, displays, show windows, floors and signs, clean, neat, sanitary and safe and in good order, repair and condition (including all necessary replacements, painting and decorating) * * *.” The complaint also refers to the sign as a fixture. Section 7.05 of the lease, *Structural Building Systems Maintenance*, states, “Except for those portions of any utility distribution system installed by or on behalf of Tenant for its exclusive use, including fixtures, piping, vents, ducts, wiring, conduit, thermostats and all equipment which is a part thereof, Landlord shall use reasonable efforts to cause the State to keep all structural elements and systems of the Shopping Center, including foundations, floor slabs, stairs, escalators, elevators, exterior windows, heating, ventilating and air conditioning systems not serving the Premises exclusively, and plumbing and wiring, in repair and maintained in a condition consistent with similar facilities in first-class enclosed shopping malls in the Chicago metropolitan area.”

3. Claimant argues that the sign in the storefront was installed by the landlord and subject to the control of the landlord. The Claimant alleges the sign was defectively installed by the landlord and the landlord had a duty to install it properly; therefore, the landlord is liable. This allegation is not supported by proof.

4. The affirmative covenant referenced in paragraph 3 expressly states it is the duty of the tenant to keep a sign

in good repair and condition. A covenant is an agreement to do or not do a particular act and the parties have agreed in the affirmative covenant that the tenant will keep the sign in good repair. Also in section 10.01 of the lease the tenant shall: “defend and save the Landlord * * * harmless and indemnified from all liability, injury, loss, cost, damage and expense in respect of any injury to any person, and damage to, or loss or destruction of any property while on the Premises or any other part of the Building occasioned by any act or omission of Tenant * * *.”

5. The Claimant alleges the State of Illinois had a nondelegable duty to maintain its property. Because of the alleged nondelegable duty the Claimant alleges the State would be the appropriate party to sue. We disagree as regards exhaustion of remedies. The State of Illinois does have a duty to maintain the premises in a reasonably safe condition for persons who are legitimately on those premises. (*Owens v. State* (1989), 41 Ill. Ct. Cl. 109.) However, the State is not the insurer of the safety of its invitees. (*Heiman v. State* (1977), 32 Ill. Ct. Cl. 111; *Fausch v. State* (1989), 42 Ill. Ct. Cl. 175.) Since the duty to maintain the sign is that of the tenant, the Claimant has failed to exhaust all remedies. The lessee is not held harmless by the State and is a viable joint tortfeasor.

The leading case regarding the Court of Claims exhaustion of remedies requirement, *Boe v. State* (1984), 37 Ill. Ct. Cl. 72, is dispositive of the case at bar. In *Boe*, the Claimant was the mother of a passenger who was killed in an automobile which collided with an allegedly defective guardrail. Claimant sued the State but not the driver of the automobile, arguing “that Claimants should be given a certain latitude and discretion determining whom to sue. From Claimant’s point of view, it probably did not seem reasonable to sue an uninsured 18-year old boy with

no assets.” (*Id.* at 75.) However, in rejecting Claimant’s argument, this Court stated that it does not “recognize any discretion on the part of Claimants to pick and choose whom they wish to sue.” *Id.*

We find that, as in *Boe*, the instant Claimant was aware of the existence of a liable party, Afterthoughts, long before the statute of limitations for an action against it had run.

We hold that it remains incumbent upon Claimant herein to exhaust her remedies before seeking final disposition of her claim in this Court. Failure to pursue any remedy which may have been derived from Afterthoughts resulted in a failure to comply with section 35 of the Court of Claims Act, *supra*, and section 790.60 of the Court of Claims Regulations. Section 790.90 of the Court of Claims Regulations provides that failure to comply with the provisions of section 790.60 shall be grounds for dismissal.

It is therefore ordered the motion of Respondent be, and the same is hereby granted, and the claim is dismissed.

(No. 94-CC-0594—Claimant awarded \$50.)

ROOSEVELT CLAY, Claimant, *v.* THE STATE OF ILLINOIS,
DEPARTMENT OF CORRECTIONS, Respondent.

Order filed November 18, 1996.

Order filed July 7, 1997.

ROOSEVELT CLAY, *pro se*, for Claimant.

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

PRISONERS AND INMATES—*inmate's burden of proof regarding missing property*. The burden rests upon the Claimant to prove by a preponderance of the evidence that missing property was delivered to agents of the Respondent, that the Respondent did not utilize reasonable care to insure its return, and the value of the property.

SAME—*creation of bailment—rebuttable presumption of negligence*. Where Respondent inventories items and takes exclusive possession of them, a bailment is created, and where there is a subsequent loss of, or damage to, the bailed property while in the bailee's possession, a presumption of negligence is raised which the bailee must rebut by evidence of due care.

SAME—*jewelry lost during transfer between correctional facilities—damages awarded*. The undisputed evidence established that a bailment was created in an inmate's claim for jewelry lost during a transfer between correctional facilities, thereby giving rise to a presumption of the State's negligence, and since the State failed to offer evidence of due care to rebut the presumption, damages were awarded to the inmate, but the award was limited to \$50 which was the maximum value of jewelry an inmate could possess without a permit, and the inmate had no such permit.

ORDER

MITCHELL, J.

Claimant brings this cause of action as an inmate of the Illinois Department of Corrections seeking compensation for items of personal property allegedly lost during a transfer between institutions.

The Claimant's complaint alleged that on March 30, 1993, he was transferred from Menard Correctional Center to Graham Correctional Center. The segregation unauthorized personal property receipt dated March 30, 1993, indicated one gold chain and star.

On June 8, 1993, Claimant was transferred from Graham Correctional Center segregation unit to the Joliet Correctional Center. The property inventory record dated June 8, 1993, indicated one gold chain and star.

Upon receipt of his property at the Joliet Correctional Center, Claimant discovered that the gold chain had not been received.

Claimant described the chain as a 24-inch long gold chain valued at \$1,175 and the star as two inches thick, valued at \$350 for a total claim of \$1,525.

Claimant filed a grievance with the Administrative Review Board. The grievance was denied. The Review Board acknowledged that the property had apparently been lost in transit, but found that Claimant did not have authority to possess the items and concluded that reimbursement would be inappropriate.

On cross-examination Claimant admitted that he did not have a permit for the jewelry and acknowledged that policy dictated that a permit was required for jewelry valued in excess of \$50. However, Claimant said that the policy is not enforced.

In essence, Claimant admitted that he did not have authority to possess the necklace. However, he contends that he should have been afforded the opportunity to authorize that the property be shipped home.

The Respondent offered their departmental report and did not produce any witnesses.

At the close of testimony, Claimant requested the opportunity to write a brief in support of his position. A briefing schedule was established, but briefs were never filed.

The law is clear. The burden rests upon the Claimant to prove by a preponderance of the evidence, that the missing property was, in fact, delivered to the agents of Respondent, that the Respondent did not utilize reasonable care to insure its return and the value of the property. (*Doubling v. State* (1976), 32 Ill. Ct. Cl. 1, 2.) Where Respondent inventories items and takes exclusive possession of them a bailment is created and where there is a subsequent loss of, or damage to, the bailed property

while in the bailee's possession a presumption of negligence is raised which the bailee must rebut by evidence of due care. *Veal v. State* (1990), 41 Ill. Ct. Cl 170, 171; *Arsburg v. State* (1978), 32 Ill. Ct. Cl. 127.

The undisputed facts establish Respondent was in exclusive possession of the Claimant's necklace as is evidenced by the personal property inventories and further that the items were never received by the destination institution. Claimant has raised the presumption of the State's negligence and the State did not present any evidence of due care to rebut the presumption.

The Court must conclude that the Respondent was negligent. However, the next issue is whether Claimant was entitled to possess the gold chain. Respondent established that Claimant was entitled to possess jewelry not exceeding \$50 in value. Claimant admitted that he was aware of the policy. Clearly Respondent cannot be required to appraise or assess values on all of the personal property of the inmates. If, in fact, the necklace was valued in excess of \$50, it was the burden of the Claimant to advise the Respondent of the high value of the item and obtain the required permit or authorize transport of the item. Claimant did neither.

Therefore, the Court must conclude the State's negligence. However, the Respondent's liability should not exceed the highest value of the item the Claimant was legitimately entitled to possess.

The Court awards Claimant \$50.

ORDER

MITCHELL, J.

This matter comes before the Court on Claimant's request for review dated January 15, 1997 and filed January

27, 1997. After having reviewed the “notice of appeal” as a request for review, the Court hereby denies said request and reiterates its order entered November 18, 1996 awarding the Claimant the amount of \$50.

(No. 94-CC-1158—Claim dismissed.)

MARVIN A. BRUSTIN, LTD., CLAIMANT, *v.*
THE STATE OF ILLINOIS, Respondent.

Order filed December 26, 1997.

Order on petition for rehearing filed April 6, 1998.

MARVIN A. BRUSTIN, LTD., *pro se*, for Claimant.

JAMES E. RYAN, Attorney General (MICHAEL F. ROCKS,
Assistant Attorney General, of counsel), for Respondent.

JURISDICTION—*contract action against county board of school trustees—board not State agency—claim dismissed for lack of jurisdiction.* A contract claim against a county board of school trustees was dismissed for lack of jurisdiction since, although the board was created by the legislature, it was never an agency of the State, and the State was not liable for its debts.

ORDER

RAUCCI, J.

This cause coming on to be heard on the Respondent’s motion to dismiss and the Claimant’s motion for leave to file an amended complaint, the Court being fully advised in the premises, the Court finds:

1. This is a contract action against the Regional Board of School Trustees of Cook County, Illinois, for payment for legal services performed by Claimant.

2. The Regional Board has been statutorily abolished, and no longer exists. At the time that it existed, it was not an agency of the State of Illinois, and the State is not liable for its debts.

3. Claimant's proffered amended complaint is of no aid to Claimant since the Regional Board is not a State agency, and this claim is not within the jurisdiction of the Court of Claims.

It is therefore ordered:

A. The Claimant's motion for leave to file an amended complaint is denied.

B. The Respondent's 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 being fully advised in the premises, the Court finds:

On December 26, 1997, we dismissed Claimant's claim. Claimant misapprehends the basis of our order. While we noted that the Regional Board of School Trustees of Cook County had been abolished by the General Assembly, the abolishment of the Board was not the basis of the dismissal. The basis of the dismissal was that "[a]t the time that it existed, it was not an agency of the State of Illinois, and the State is not liable for its debts." Order of December 26, page 1.

Claimant maintains that the Board is an agency of the State since it was created by the legislature, and that cases have held that the changing of school boundaries by county boards of school trustees "is a legislative act, and that in performing this function the County Board of School Trustees is acting as an agent of the legislature." Petitioner's Petition for Rehearing, page 2.

Many instrumentalities of government are created by the legislature including municipalities, school districts,

the Illinois Sports Facilities Authority, the Illinois Housing Development Authority, and others. But the fact that they are created by the legislature does not make them agencies of the State. The Regional Board of School Trustees of Cook County was never an agency of the State of Illinois.

We have no jurisdiction of this claim. It is therefore ordered that the Claimant's petition for rehearing is denied.

(No. 95-CC-0425—Claim denied.)

KELLER CONSTRUCTION, INC., Claimant, *v*
THE STATE OF ILLINOIS, Respondent.

Opinion filed April 6, 1998.

BURROUGHS, HEPLER, BROOM, MACDONALD & HE-
BRANK (WILLIAM J. KNAPP, of counsel), for Claimant.

JAMES E. RYAN, Attorney General (GUY A. STUDACH,
Assistant Attorney General, of counsel), for Respondent.

CONTRACTS—*railroad protection construction contract—claim for additional compensation denied.* A contractor's claim for additional compensation for railroad protection work that was not set forth in the State's original contract bid specifications or included in the contractor's bid was denied, since in construing the competing standard provisions of the agreement, the Court determined that the cost of railroad protection work was incidental to the contract, and was not a contract "extra" requiring additional compensation.

OPINION

EPSTEIN, J.

In this breach of contract claim against the Department of Transportation ("IDOT"), the Claimant contractor seeks \$37,905 in additional compensation for installation of sheet piling that was required for "railroad protection" for

the Clark Bridge construction project in Alton, Illinois. This “railroad protection” claim, which arises largely on the standard provisions of IDOT construction contracts, is before us for final decision following trial to our Commissioner, Patrick Hanley. This appears to be the first “railroad protection” construction contract claim to be decided by this Court.

Nature of the Claim

The dispute in this case is over labor and material charges for sheet-piling installation that was required for the protection of railroad traffic and structures adjacent (and under) the bridge construction project that was the subject of Claimant’s contract with IDOT. This temporary sheet piling for “railroad protection” was not set forth in the contract bid specifications, and was not computed as a cost element of the Claimant’s winning contract bid to IDOT. The piling was required as excavation protection by the railroad’s engineer—after the Claimant’s work had commenced—under the railroad protection provisions of IDOT’s standard specifications, which are incorporated into virtually all IDOT road and bridge construction contracts:

“§105.02 Authority of Railroad Engineer. Whenever the safety of railroad traffic during construction is concerned, the Railroad Engineer will have jurisdiction over safety measures to be taken and his/her decision as to methods, procedure and measures used shall be final, and any and all Contractors performing work near or about the railroad shall be governed by such decision. Instructions to the Contractor by the Railroad Engineer shall be given through the Engineer. Unless otherwise specified, all costs incurred in conforming to the requirements, specified herein, shall be considered as incidental to the contract and no additional compensation will be allowed.”

The Claimant contends that this sheet pile installation, which was not called out in the contract specs, was a contract “extra” that requires additional compensation under the “Extra Work” provision of IDOT’s Standard Provisions:

“§101.15 Extra Work. An item of work not provided for in the contract as awarded but found essential to the satisfactory completion of the contract within its intended scope as determined by the Engineer.”

Claimant also contends, alternatively, that IDOT, by its custom and practice of specifying the “railroad protection” work in its bid documents and of paying for such work (either as part of the bid price or as extra compensation) in cases where it failed to specify the particulars, has waived its rights under section 105.02. Claimant also asserts, alternatively, that IDOT’s custom and practice of prior payment to this contractor, as well as its prior practice of specifying the railroad protection work, effects an estoppel against IDOT’s invocation of section 105.02.

The Facts

Claimant was awarded the Clark Bridge approach construction contract (IDOT Contract No. 96294) pursuant to its low bid on June 10, 1991. At the time of the bidding, adjacent railroad tracks were scheduled to be relocated at the bridge site, and the railroad relocation plans were included in the bid drawings, although the timing of the railroad relocation project was unspecified. As planned and as ultimately constructed, the new Clark Bridge spanned over the relocated railroad tracks and the approach that was constructed by the Claimant.

Although the IDOT bid plans and specifications did show the specific plans for the railroad track relocation, IDOT’s bid plans and specifications did not specifically call for the use of sheet piling (or any other method) to protect railroad property during the bridge/approach construction. When the Claimant’s work commenced, the railroad construction had not yet progressed to where bridge construction would interfere with the railroad. The Claimant did not include sheet piling for railroad protection in its bid.

After construction began, it became necessary for the Claimant to provide protection to the railroad relocation. After long negotiation with the engineer of the Norfolk & Southern Railroad, Claimant was directed to install temporary sheet piling to protect the railroad tracks (pursuant to the authority provided by section 105.02 and section 107.12 of the IDOT standard provisions). Claimant installed a sheet pile wall 95 feet long and 21 feet deep. After the contract was performed, the Claimant submitted its final billing, including \$37,905 as an extra work item for the sheet piling (computed at \$19/square foot, the contract pay item rate for such work) that was not included in the bid but was used on the project as mandated by the railroad. The Department refused to pay, based on its finding that the sheet piling was not an extra item but was an incidental item to be included in the bid price under section 105.02. This claim ensued.

The Trial; Evidentiary Rulings

A hearing was held on November 26, 1995 and March 19, 1996 before Commissioner Hanley, who filed his report to the full Court.

Testimony was presented by Richard Call, IDOT studies and plan senior squad leader; Bobby D. Martin, IDOT railroad technician; Larry Lipe, IDOT estimating technician; Alan Goodfield, IDOT engineering geologist in its bureau of bridges and structures; Jerry Wibbenmeyer, IDOT supervising field engineer; Dale Klohr, IDOT District 8 Engineer for District 8; Jerry Hamarn, Claimant's EEO officer, safety officer and corporate secretary; William Ulivi, IDOT supervisor in its department of planning.

Much of the testimony concerned contract interpretation and administration matters, but the IDOT witnesses did acknowledge that they had intended to include

specific railroad protection material—warnings that it would be necessary in the Clark Bridge project at a minimum, if not actual work specs—and that their omission of such references was an unintentional mistake. The testimony also showed, without dispute, that during the approximate 28 days that the bidders had to formulate their bid submissions, it was virtually impossible to obtain a definitive “railroad protection” plan from this or any railroad involved.

Numerous documents were also admitted into the record, including a memorandum written by Richard Call, a copy of the contract and plans for the Clark Bridge project, plans for other jobs, excerpts from the Stanford Specifications for Road and Bridge Construction, the preconstruction conference report letters from the railroad, and letters to and from the Claimant.

Evidence of other IDOT construction contracts with this Claimant and with other contractors, and of the payment treatment accorded to various railroad protection work under those contracts, as well as testimony about IDOT’s practices in this area, was admitted by the Commissioner over IDOT’s objections on relevance grounds primarily. Although the evidence adduced by these documents and testimony fell short of what Claimant proffered as its justification—*i.e.*, a consistent pattern of established custom and practice by IDOT—and although this Court does not agree with the threshold basis for admission of this parol evidence as bearing on the construction and application of section 105.02 and section 101.15 of the contract Standard Specifications—*i.e.*, that those provisions are ambiguous in the classic sense—we will allow the evidence and affirm the Commissioner’s ruling as within his and our discretion.

First, there is just enough lack of clarity as to the relationship and interaction between the two competing

Standard Specification provisions (section 105.02 and section 101.15) to justify parol evidence of actual practice by IDOT, which wrote and administers these provisions; second, the proffered custom and practice evidence is germane to the Claimant's waiver and estoppel theories which were in the case; and finally, the evidence as proffered if not as delivered was potentially helpful to this Court in construing recurring Standard Specification of IDOT contracts. The evidence was properly admitted.

Analysis

On this record, neither party has covered itself with righteousness or reasonableness.

For its part, the Claimant plainly disregarded the prospective or possible need to supply railroad protection. Although the specifics were unstated, and although there was a chance that the sequencing of the railroad and bridge projects might moot the need for railroad protection, the Claimant was affirmatively put on notice of the proximity of the railroad and its imminent relocation to the bridge construction site by IDOT's bid documents. Thus the Claimant plainly determined—and presumably made a business decision—to take its chances on the railroad protection aspect of the project and not to include a contingency amount for this item in its bid.

We nevertheless accept Claimant's point that in the absence of specifications of any railroad protection in IDOT's bid documentation, and given the short time available before the bid deadline, Claimant could not timely obtain a definitive or authoritative answer—from the railroad engineer—as to the cost of railroad protection. Similarly, it is possible, although the record is less clear on this point, that the bidder could not ascertain from the railroad the likely schedule of the railroad relocation project (so as

to determine the probability of actually needing railroad protection) during the critical 28-day, pre-bid period.

On this analysis, the Court concurs with the Claimant that, to the extent of the railroad protection element of this project, IDOT sought and obtained blind bids: the bidder(s) could only guess and take some degree of chance on this aspect of the job. However, that applied equally to all bidders and does not uniquely prejudice the Claimant.

Claimant maintains, however, that such was not the contractual intent and should not be the result imposed by this Court's interpretation of the contract provisions. Claimant further maintains that it relied on its understanding of IDOT practice, *i.e.*, to reimburse contractors for unspecified railroad protection as a contract "extra."

For its part, and although the evidence was not systemic, IDOT has been shown to have a strikingly inconsistent bidding practice in regard to railroad protection. The evidence in this record shows IDOT to be inconsistent in sometimes including detailed railroad protection specs, and sometimes—as in this case—not. Similarly, the pattern is imperfect as to paying for such work, although the handful of contracts introduced into this record makes us wary to draw definitive conclusions. But once this record was opened, below, to parol evidence of IDOT practices, neither side established a consistent IDOT practice with regard to paying for unspecified railroad protection or with regard to treating this element as a part of the original bid or as a separate "extra." It is also provocative that IDOT witnesses could neither explain, nor justify as policy, the inconsistent contract administration practices as to railroad protection.

In the absence of a consistent pattern of practice that might rise to the level of an actual or constructive

administrative interpretation of these Standard Specification terms, and in the face of an affirmative (if undesired) showing of inconsistent practice, the Court must reject Claimant's waiver and estoppel arguments and revert the analysis to the language of the governing contract provisions, which thus become the stopping point as well as the starting point of the analysis.

In rejecting Claimant's estoppel defense to the section 105.02 clause, we must also observe that the estoppel defense is predicated, in part, on the notion that Claimant reasonably relied on the contract specifications—*i.e.*, on their *omission* of railroad protection specs. In light of the provisions of section 105.02 and the presence of the railroad relocation plans in the bid package, we are unprepared to find that Claimant's reliance on the omission of specific protection plans was reasonable or (equivalently) that Claimant had a right to rely on such omission for this purpose.

Turning first to the terms of section 107.12 and section 105.02, which Respondent contends are the dispositive provisions, we find it impossible to agree with Claimant's contention that the language is ambiguous in any material respect—either on its face or as applied (standing alone) to railroad protection work that is not specified in the contract documents. The language is clear in two key respects at least: (1) that railroad protection *work* is to be specified/approved by the railroad engineer, not IDOT; and (2) that the *cost* of railroad protection is included in the bid price “unless otherwise specified” in the contract. That much, at least, is clear.

Turning next to the terms of section 107.12, we find no ambiguity on the face of this language, nor in its application to unspecified work generally.

Nevertheless we must agree that there is an element of uncertainty—but not necessarily of “ambiguity” in the classic multiple-meaning sense—in the interplay of section 105.02 (covering cost of railroad protection work) and section 107.12 (covering the cost of work “not provided for in the contract” initially but later required). On their face, the two sections both appear to apply to the unspecified railroad protection work that is the crux of this claim.

On closer analysis of the section 107.12 language, it is not so clear that the section 101.15 “Extra Pay” provision applies to railroad protection work in the first instance. Claimant assumes that the unspecified railroad protection work is covered by the section 107.12 phrase “work not provided for in the contract as awarded.” That turns on the meaning of “provided for,” which the Claimant implicitly—but not explicitly—equates to detailed specification in the contract documents. That is a plausible but nonexclusive reading of the phrase.

The phrase “provided for” is not identical to “specified” or “detailed” and has somewhat broader scope. As used in section 107.12, the arcane phrase “provided for” is akin to “required,” and does not obviously or readily connote any particular level of detail. In that sense of “required,” the phrase “provided for” appears to cover work that is *then* mandated (at the time of initial contracting) but is to be specified later in accordance with some mechanism or process contained (or “provided”) in the contract. That, of course, is precisely what is “provided for” by this contract in the case of “railroad protection” work, which is required by the contract at the time of bidding, but is delegated to the railroad engineer for later specification and approval. The narrow contract construction issue is whether “provided for” covers only specified work

or also covers work requirements that are expressly imposed but in a different manner. Although it should not be necessary to engage in such pedantic exercises to ascertain the meaning of a standard provision in a State construction contract, we are constrained to find that “railroad protection” work is “provided for” in this contract within the plain, non-technical, meaning of the words involved.

This conclusion is buttressed by the Claimant’s acknowledgement at oral argument that the railroad protection work was required by the contract. We do not find any material difference in this context between “requiring” the work, “mandating” the work and “providing for” the work, just to take the most obvious equivalent phraseology.

But even if we were to assume (*arguendo*) that section 107.12 covered the “railroad protection” work because it was delegated rather than detailed in the original contract documents, and thus were confronted with the contract interpretation issue whereby *both* section 107.12 *and* section 105.02 applied on their face to the disputed “railroad protection” work, the outcome would be the same.

If both section 107.12 and section 105.02 applied, but called for different results—section 107.12 requires extra compensation for “extra work” and section 105.02 designates the cost of this work as “incidental to the contract” and bars extra compensation—then there is a simple, straightforward and ancient rule of construction that settles this issue: the specific provision prevails, every time, over the general provision. We do not bother with citations of authority for such a fundamental and settled principle. This principle is as applicable as between competing “standard” contract provisions—as in this case—as it is between “standard” and individualized contract provisions. Here, section 105.02 is specifically applicable to

unspecified *railroad protection work*, whereas section 107.12 is applicable generally to *all* unspecified work that later becomes required. In this contest, section 105.02 wins as the governing provision, and section 107.12 must defer.

Before concluding the analysis, however, there is one dangling argument—that focuses on one dangling contract phrase—that must be addressed. Claimant focuses on the exception to the “no additional compensation” provision in section 105.02, which reads: “Unless otherwise specified * * *.” (The full sentence is set forth above, in the “Nature of the Claim” section of this opinion.) Claimant argues, with considerable vehemence and some persuasion, that the reference to “otherwise specified” must or can refer to the “Extra Work” pay provisions of section 107.12 and its related pay provisions. Although this is a plausible reading, particularly in light of the convoluted language and inartful syntax and structure of IDOT draftsmanship, we are constrained to reject it for two reasons.

First, the plain meaning of the term “specified” requires something more than merely “providing for”—the flip side of our analysis above. Hence the “otherwise specified” exception of section 105.02 is not triggered by the generic “extra work” provisions of section 107.12. It would require another provision specifying compensation for the *railroad protection* work in order to supersede the “no extra compensation” proviso of section 105.02. Second, the Claimant’s interpretation of these two “standard specifications” would read into them a circularity that would render the “no extra compensation” provision of section 105.02 nugatory—which is a contract construction no-no. The Claimant’s reading of these sections would subordinate section 105.02 to the “extra work” provisions of section 107.12 in *every* contract, and thus section 105.02

would never apply. That is clearly neither the intent nor the sense of these standard contract provisions.

For the foregoing reasons, therefore, we must and do hold that under the terms of this contract, the costs of the later-designated railroad protection work ordered pursuant to section 107.12 and/or section 105.02 is incidental to the contract and is not subject to the extra work provisions of section 107.12 and related provisions. Based on this conclusion, we must reject Claimant's claim for additional compensation under this contract.

Conclusion and Order

We observe that there are some hints of unfairness in the result that we find to be mandated by the contract analysis. There are overtones of guilt and acknowledgments of error in some of the IDOT staff testimony in this case, which may well be attributable to the avoidability of the result here if the contract specifications on the Clark Bridge project had been done as intended. But we are not a Court of equity and can only apply the law and the contract language as we find it. The Respondent is entitled to the contract bargain it made, and the Claimant is bound by the contract it signed.

The disturbing aspect of this case is the inconsistency with which IDOT seemingly treats this technical aspect of construction contracts, and the resulting disparity in treatment of contractors that can and, according to the evidence in this case, sometimes does occur. If contracts continue to be bid in the blind on "railroad protection," then that practice under the current Standard Specifications—coupled with our decision today—will prompt contractors to build in some contingency for "railroad protection" in every contract on every project near railroad tracks. In Illinois that covers a lot of projects. Whether such a practice

is good or bad for Illinois and its taxpayers is not a question for this Court. But it is a question that might be addressed by IDOT sometime.

For the reasons set forth above, it is hereby ordered: This claim is denied on its merits and forever barred. Judgment is entered for Respondent and against the Claimant.

(No. 95-CC-1913—Counts I, II, IV and V stricken;
motion to dismiss count III denied.)

LALITHA GARIMELLA, Claimant, *v.* THE BOARD OF TRUSTEES
OF THE UNIVERSITY OF ILLINOIS, Respondent.

Order filed May 8, 1996.

CHAWLA & ASSOCIATES (T. PAUL S. CHAWLA, of counsel), for Claimant.

JENNER & BLOCK (CARLA J. ROZYCKI, of counsel), for Respondent.

JURISDICTION—*Court of Claims had no jurisdiction to determine equitable claim.* Two counts of a student's five-count complaint seeking declaratory and injunctive relief, as well as specific performance of her contract with a university were dismissed because the Court of Claims does not have jurisdiction to determine equitable claims in the absence of specific statutory provisions empowering it to do so.

NOTICE—*failure to comply with notice requirement mandated dismissal of student's intentional infliction of emotional distress claim.* That portion of a student's complaint alleging the State's intentional infliction of emotional distress in terminating her from a State medical school program was dismissed, based on the student's failure to timely file her notice of intent to commence the action as required by section 22—1 of the Court of Claims Act.

DAMAGES—*Court of Claims has no authority to award punitive damages—punitive damages claim stricken.* In a student's claim against a university arising out of her termination from a medical school program, one count of the complaint which sought punitive damages was stricken because the Court of Claims has no authority to award punitive damages.

CONTRACTS—*student terminated from medical school program—State's motion to dismiss breach of contract claim denied.* Although four counts of a

student's five-count complaint against a university which she filed after being terminated from its medical school program for poor scholarship were dismissed, the student's breach of contract claim was allowed to stand and the State's motion to dismiss was denied, because the record supported the existence of a contractual relationship despite the State's assertions to the contrary.

ORDER

PATCHETT, J.

This cause coming on to be heard on the Respondent's motion to dismiss verified complaint, and the Claimant's brief in support of claim for equitable relief, and the written responses of the parties thereto, a commissioner of this Court having conducted an evidentiary hearing, the Court having heard oral argument and being fully advised in the premises, the Court finds:

1. For the reasons hereinafter set forth, the Court grants in part the motion to dismiss, denies in part the motion to dismiss and denies the Claimant's request for equitable relief.

2. The critical issue in this case is whether the Court of Claims has jurisdiction to determine equitable claims. Our prior decisions could be interpreted as holding that we do not have such jurisdiction (e.g. see generally *National Railroad Passenger Corporation v. State* (1983), 36 Ill. Ct. Cl. 265, 266, 267; *New Life Development Corp. v. State* (1992), 45 Ill. Ct. Cl. 65, 89; *Gass v. State* (1990), 44 Ill. Ct. Cl. 186, 195-196). But see *Hicks v. State* (1978), 32 Ill. Ct. Cl. 529 where the Court stated:

"We believe that this Court does possess limited equitable powers including authority to enter an award reforming a deed. It must be remembered that such an award would still require some legislative action to carry out the award, and that in so holding, the Court does not imply that it has general equitable powers."

Decisions of the Supreme and Appellate courts are urged by Claimant as supporting the exercise of broad equitable powers, including the issuance of injunctions,

by this Court. See *Ellis v. Board of Governors of State Colleges and Universities* (1984), 102 Ill. 2d 387, 466 N.E.2d 202; *Management Association of Illinois, Inc. v. Board of Regents of Northern Illinois University* (1st Dist., 1993), 248 Ill. App. 3d 599, 618 N.E.2d 694; *Brucato v. Edgar* (1st Dist., 1984), 128 Ill. App. 3d 260, 470 N.E.2d 615; *Liebman v. Board of Governors of State Colleges and Universities* (1st Dist., 1979), 79 Ill. App. 3d 89, 398 N.E.2d 305; and *Sternberg v. Bond* (5th Dist., 1975), 30 Ill. App. 3d 874, 333 N.E.2d 261.

3. As stated by the Supreme Court in *Ellis, supra*, 466 N.E.2d at 206-207:

“It is clear that since we have decided that the Board is an arm of the State and must be sued in the Court of Claims, whether the plaintiff’s cause of action sounds in tort, or in contract for breach of her employment contract, or is for a violation of section 8(3), the Court of Claims has exclusive jurisdiction. Section 8(a) states, ‘All claims against the state founded upon any law of the State of Illinois * * *.’ (Emphasis added.) (Ill. Rev. Stat. 1981, ch. 37, par. 439.8(a).) Certainly, section 8(3) is a law of the State of Illinois. Section 8(b) would be applicable if plaintiff’s suit were based on a breach of her employment contract. (See *S.J. Groves & Sons Co. v. State* (1982), 93 Ill. 2d 397, 67 Ill. Dec. 92, 444 N.E.2d 131.) And under section 8(d), a cause of action against the Board, sounding in tort, would come within the exclusive jurisdiction of the Court of Claims.

Because plaintiff seeks injunctive relief, in addition to money damages, does not mean, as plaintiff asserts, that her suit must be severed into two parts, that portion of the suit for money damages being brought in the Court of Claims and the other portion being brought in the circuit court. As the appellate court correctly noted, *Bio-Medical Laboratories, Inc. v. Trainor* (1977), 68 Ill. 2d 540, 12 Ill. Dec. 600, 370 N.E.2d 223, stands for the proposition that if a plaintiff is not attempting to enforce a present claim against the State, but rather seeks to enjoin a State officer from taking future actions in excess of his delegated authority, then the immunity prohibition does not pertain. (68 Ill. 2d 540, 548, 12 Ill. Dec. 600, 370 N.E.2d 223.) However, we agree with the appellate court that the plaintiff’s suit in the instant case is clearly based upon a present claim which has the potential to subject the State to liability and thus must be brought in the Court of Claims.”

In *Ellis*, the plaintiff alleged that she had been constructively discharged without good cause and sought money damages and injunctive relief.

In *Management Association of Illinois, supra*, plaintiff, a not-for-profit corporation engaged in providing education and training services to companies brought suit against Northern Illinois University and six former employees of plaintiff who left plaintiff to work for the University. The action sought money damages and injunctive relief. The Appellate Court, 618 N.E.2d at 700, stated:

“The Court of Claims does have jurisdiction to grant injunctive relief. In *Fernandes v. Margolis* (1990), 201 Ill. App. 3d 47, 51, 146 Ill. Dec. 736, 558 N.E.2d 699, the court held that a claim of retaliatory discharge from state employment which sought injunctive relief in addition to damages was under the exclusive jurisdiction of the Court of Claims. In *Liebman v. Board of Governors of State Colleges and Universities* (1979), 79 Ill. App. 3d 89, 93, 34 Ill. Dec. 630, 398 N.E.2d 305, the court stated that the plaintiff’s request for injunctive relief did not alter the basic nature of the complaint which was an action against the State based on a contract. Therefore, the Court of Claims had exclusive jurisdiction.

For the Court of Claims to have jurisdiction to grant an injunction, the injunction must either (1) control the operation of the State (*G.H. Sternberg & Co. v. Bond* (1975), 30 Ill. App. 3d 874, 877, 333 N.E.2d 261) (intent was to enjoin all members of state government including successor director who performed no wrongful acts), see also *Hudgens v. Dean*, 75 Ill. 2d at 357, 27 Ill. Dec. 193, 388 N.E.2d 1242 (injunction required affirmative act by State to rebuild road); or (2) involve a present claim against the State. In *Ellis v. Board of Governors of State Colleges and Universities* (1984), 102 Ill. 2d 387, 80 Ill. Dec. 750, 466 N.E.2d 202, a professor claimed she had been discharged without good cause from her tenured position at a State university. She sought damages and an injunction requiring the university to reinstate her. (*Ellis*, 102 Ill. 2d at 389, 80 Ill. Dec. 750, 466 N.E.2d 202.) The Court of Claims had exclusive jurisdiction: (quoting *Ellis*.)”

We have never issued an injunction, and, notwithstanding the decisions set forth above, do not believe that the General Assembly ever intended that we would enjoin State agencies. Our decisions declining to exercise broad equitable powers have not evoked a legislative response to the contrary. In the absence of *specific* statutory provisions empowering us to issue injunctions we decline to do so.

4. Having determined that we do not have authority to grant the relief sought by Claimant, we deny the Claimant’s request for equitable relief, and we dismiss counts I

(declaratory judgment and injunctive relief) and count II (specific performance).

5. Respondent has moved to dismiss the Claimant's five-count complaint on the additional grounds that (1) counts I, II, and III are premised on a breach of contract theory and that no contract is alleged or exists; (2) count IV alleges intentional infliction of emotional distress and must be dismissed for failure, within one year of the date of injury, to file a notice of intention to commence the action pursuant to 705 ILCS 505/22—1; and (3) count V should be dismissed for the reason that it seeks punitive damages against the Respondent and there is no authority for such damages. Respondent also urges that Claimant has failed to exhaust her administrative remedies.

6. A fair reading of the record in this case indicates that the Claimant proceeds on the theory that the contractual underpinning of this claim is not the curriculum requirements prescribed by the Committee on Student Promotions, but is the contractual relationship with the university from the date of admission through the last date of termination. We believe that at this stage of the proceeding the record supports the existence of a contractual relationship. (See generally, *Sternberg v. Chicago Medical School* (1977), 69 Ill. 2d 320.) The Claimant paid tuition, adhered to school requirements, and generally engaged in a course of conduct demonstrating consideration for the contract. This finding, however, does not preclude the Respondent from asserting the lack of such a relationship as a defense. We also find that Respondent's assertion that the proper authorities had not entered into such a contract to be without foundation since all of the practices, policies and procedures used in this case were the Respondent's.

7. Claimant was terminated from the program on July 30, 1993. Her complaint in this Court was filed on

January 10, 1995, more than one year after her termination. She never filed the notice of intent required by 705 ILCS 505/22—1. Even if we construed the filing of the complaint as satisfying the notice requirement, it was not done within the required time. Count IV will be dismissed.

8. We have previously expressly ruled on the question of whether we have the authority to award punitive damages. We do not. (See *Brown v. Southern Illinois University* (1994), 47 Ill. Ct. Cl. 336.) Count V will be stricken.

9. We find that the Claimant sufficiently exhausted her administrative remedies.

It is therefore ordered:

A. The Respondent's motion to dismiss is granted to the extent that counts I, II, IV and V are stricken.

B. In regards to count III, the motion to dismiss is denied.

SOMMER, C.J., CONCURRING.

Claimant, a former student at Respondent's College of Medicine, filed a claim seeking both equitable relief and damages as a result of her dismissal from the college. Claimant also filed concurrently therewith an emergency motion for temporary restraining order and preliminary injunction, and an evidentiary hearing on the motion was begun by Commissioner Sternik. However, as the result of motions to stay and dismiss filed by Respondent, the Commissioner thereafter suspended the hearing and requested that the parties brief the issue of whether the Court of Claims possesses equitable jurisdiction. The parties have thoroughly addressed that issue, and the Court has also heard oral arguments of the parties' counsel.

Prior to bringing her claim in this Court, Claimant had sought equitable relief from the Circuit Court of Cook County, but her case there was dismissed on the basis that the Court of Claims has exclusive jurisdiction over the matter. (See *e.g.*, *Ellis v. Board of Governors of State Colleges and Universities* (1984), 102 Ill. 2d 387, 466 N.E.2d 202.) *Ellis* stands for the proposition that persons such as Claimant cannot avail themselves of the judicial courts of this State but that they instead must go to the Court of Claims for whatever relief might be able to be obtained here. Nothing in *Ellis*, however, indicates that the Court of Claims possesses so-called “equitable” jurisdiction. In fact, *Ellis* implies exactly the opposite, for Mr. Justice Simon lamented the unavailability of such relief from the Court of Claims:

“The Court of Claims only has authority to recommend that the legislature make an appropriation for an award of damages in this case. But damages do not sufficiently recompense the plaintiff for the injury alleged; they do not give her back her professorship. To allow *Ellis* the opportunity to obtain complete relief I would allow her to maintain her claim for reinstatement in the circuit court.” 102 Ill. 2d at 397, 466 N.E.2d at 207.

A review of the status of sovereign immunity in Illinois confirms this reading of *Ellis*. The 1970 Illinois Constitution expressly left it to the legislature to regulate the nature and extent of sovereign immunity. Section 4 of Article XIII provides:

“*Except* as the General Assembly may provide by law, sovereign immunity in this State is abolished [emphasis added].”

Utilizing that authority, the legislature promptly passed the State Lawsuit Immunity Act, 745 ILCS 5/1:

“§1. Except as provided in the ‘Illinois Public Labor Relations Act,’ enacted by the 83rd General Assembly [5 ILCS 315/1 *et seq.*], or except as provided in ‘AN ACT to create the Court of Claims, to prescribe its powers and duties, and to repeal AN ACT herein named,’ filed July 17, 1945, as amended [705 ILCS 505/1 *et seq.*], the State of Illinois shall not be made a defendant or party in any court.”

Section 8 of the Court of Claims Act (705 ILCS 505/8), strictly limits this Court’s jurisdiction to specified “claims”

set forth therein. Although nominally referred to as a “court,” the Court of Claims does not possess the jurisdictional attributes of a judicial court. (*Seifert v. Standard Paving Co.* (1976), 64 Ill. 2d 109, 122, 355 N.E.2d 537, 542.) Rather, the Court of Claims is a *legislative* court, an administrative arm of the General Assembly which exists to receive and process in an orderly manner “claims” for the various types of damages enumerated in section 8 of the Act. (*Id.*, 64 Ill. 2d at 123, 355 N.E.2d at 542.) As Mr. Justice Clark quite succinctly put it in an opinion issued approximately a year and a half prior to *Ellis*:

“It is in essence the legislature—the body called upon to fund any awards—that is deciding through the Court of Claims the merits of the claims before it.” *S. J. Groves & Sons Co. v. State* (1982), 93 Ill. 2d 397, 405, 444 N.E.2d 131, 135.

The Court of Claims has clearly understood this limitation on its jurisdiction and, accordingly, has steadfastly refused to entertain the notion that it possesses any sort of equitable authority:

“The legislature has granted this Court authority to decide cases only in specific cases, and we must adhere to the limits imposed on us. This is a concession to the rule that the State, as a sovereign, cannot be sued. In deciding our cases, we must decide them within the authority granted to us regardless of any harshness involved. Were we authorized to consider equities, our holdings might be different in many cases, but we deem it beyond our authority to do so. The legislature has limited us in this regard.” *National Railroad Passenger Corp. v. State* (1982), 36 Ill. Ct. Cl. 265, 266-67.

“[W]hile it would be easy to be sympathetic to Claimant’s situation, there is a long line of cases which hold that Court of Claims jurisdiction does not encompass equitable remedies * * *. In this respect the Court of Claims differs from courts of general jurisdiction [i.e., judicial courts]. Persons dealing with the State are held to whatever terms the legislature may impose. The result of these limitations may be seen as harsh in some instances, but the legislature has not authorized the Court of Claims to act otherwise.” *New Life Development Corp. v. State* (1992), 45 Ill. Ct. Cl. 65, 89.

Only the General Assembly has authority to confer equitable jurisdiction on this Court:

“No branch shall exercise powers properly belonging to another.” (Ill. Const. 1970, Art. II, sec. 1.)

Certainly the General Assembly is well aware of this Court's myriad decisions and opinions commenting on the absence of equitable jurisdiction. Had the legislature desired to change the situation, it could have easily done so by expressly giving this Court such equitable jurisdiction. But it has not, and we cannot usurp the General Assembly's authority to prescribe our jurisdiction. Writing for a unanimous Supreme Court in *Groves*, Mr. Justice Clark provides us with a cogently stated reminder of why courts must adhere to their jurisdictional limitations:

"We agree with the plaintiff that a State government should be required to observe the same rules of conduct that it requires of its citizens. But it is the legislature's task to codify public policy; we refrain from undertaking such impermissible judicial legislation.

* * *

While we acknowledge that there is no longer a King and agree that all of us, including the State, * * * should have an independent forum * * * we see no reason for usurping a function of government that is not ours.

The language of [Pennsylvania Supreme Court] Justice Pomeroy * * * epitomizes our reasoning here: 'When by their Constitution the people * * * have expressly delegated to the legislative branch of government the task of determining in what manner and in what court and in what cases the Commonwealth may be subjected to suit * * *, I fail to see how this Court can properly hold that it has a right to preempt this legislative function. * * *. We may lament the legislative failure to correct before this date an inequitable situation, but impatience should not cause us to upset the balance of power in our tripartite system of government by making the correction ourselves. [Citations omitted.]'

It is not our province to take action to make the [available] remed[ies] more palatable for the aggrieved [plaintiff]." 93 Ill. 2d at 405-406, 444 N.E.2d at 135.

Accordingly, Commissioner Sternik properly suspended the evidentiary hearing on Claimant's motion, for this Court does not possess subject matter jurisdiction to afford Claimant the requested equitable relief. Simply put, Claimant's action here is limited to a claim for damages, and she will be unable to obtain equitable relief of any sort.

EPSTEIN, J., CONCURRING.

I join in the Court's order on all counts. I concur with the majority that this Court lacks authority to issue

injunctions “in the absence of specific statutory provisions empowering us” to do so (Slip Op., at 1), and that we must reject this Claimant’s plea—and all other Claimants’ pleas—for injunctive relief. I write separately for four reasons.

First, the dismissal of the declaratory judgment portion of count I is not required by our lack of injunctive powers and is otherwise unexplained. I concur in the dismissal of the count I declaratory action as moot, in light of the count III breach of contract claim which we have upheld at this stage and which encompasses the issues in the count I declaratory claim.

Second, further analysis is required of the sovereign immunity injunction decisions of our constitutional courts that say or appear to say that the Court of Claims can issue injunctions. Contrary to the suggestion in Judge Raucci’s dissent, those *dictums* do not foreclose our independent analysis and conclusion on the injunction issue. See Point 2, *post*.

Third, clarification is required because the majority has unnecessarily overstated the issue in this case, which may prompt an overly broad reading of the Court’s decision. The majority states the issue as: “whether the Court of Claims has jurisdiction to determine equitable claims” (Slip Op., at 1). That is ambiguous and a misformulation of the narrow issue decided.

The sole issue decided in this case is our power to grant injunctive *remedies*. That is a distinct issue from our adjudicatory jurisdiction to “determine” various kinds of claims and issues. None of the opinions in this case hold that this Court cannot adjudicate an “equitable claim” in the sense of an equitable cause of action, *i.e.*, an action that derives from equity jurisprudence as distinguished than from those that derive from common law or from

statute. (This case does not even involve an “equitable claim” in this sense; the underlying claim is a legal action—breach of contract—which derives from the common law writ of *assumpsit*.)

This Court’s statutory jurisdiction includes some equitable causes of action that we can adjudicate insofar as they give rise to relief within our narrow statutory authority: a monetary award, a declaration of rights, or a recommendation for relief to the General Assembly. This Court’s inability to grant equitable remedies does not *per se* preclude jurisdiction to adjudicate equitable claims; and the language and legislative history of the Court of Claims Act and its predecessors reflects that “equitable jurisdiction” has never been categorically excluded from this Court’s jurisdiction. In any event, that is not the import of the Court’s decision in this case. See, Point 3, *post*.

Finally, I write to urge legislative review of the consequences of our decision, together with the recent sovereign immunity injunction decisions of our Supreme and Appellate Courts. The cumulative effect of these decisions is to preclude all, or almost all, claims for affirmative injunctive relief against the State in all Illinois courts, no matter how deserving the claims.

Claimants like this one, who seek reinstatement (or admission or retention) in State programs and, in another recurring example, Claimants who seek reinstatement in State employment after wrongful discharge, and other Claimants suffering ongoing injury to their personal or property rights at the hands of the State now have no Illinois court to which they can turn for affirmative relief. This is especially troubling in the case of disputes over property (*e.g.*, disputes between the State and a private party over ownership or possession of land), where a determination against the State may lack a means for judicial

enforcement of the private party's property rights in our Courts. This leaves *Claimants* to seek relief in the federal courts, when available, or to sue for damages that in some cases will be seriously inadequate to redress or cure the injury, or to go home without a day in Court.

This consequence of the statutory (formerly constitutional) doctrine of sovereign immunity deserves review by the elected policymakers. Whether this is a good or bad result, in whole or in part, whether or not it is in the State's interest to preclude affirmative injunctive relief in some or all situations, and whether this ultimately helps or hurts the State treasury are issues for the General Assembly to evaluate. See Point 4, *post*.

1.

Remedial Powers of this Court

On the dominant issue in this case—whether we can grant injunctions—it is clear that the Court of Claims has always lacked authority to do so: this Court and its predecessors have never had constitutional status or power, and the General Assembly has never granted us any authority to issue injunctive orders. I agree with the majority and with Chief Judge Sommer's analysis that we cannot issue such orders without an express statutory authorization.

However, my conclusion—and I believe the Court's conclusion—on injunctions does not rest on their equitable character. The statutory analysis of this court's powers is applicable generally. Review of the Court of Claims Act, which defines our exclusive jurisdiction and remedial powers on claims against the State that are otherwise barred by sovereign immunity, also fails to disclose authority for this Court to issue many of the common law writs and their contemporary counterparts. For example, I find no authority for the Court of Claims to issue writs of *habeas corpus* to the Department of Corrections or anyone else.

Under all three Acts that have created and governed this court since 1903, our authority to provide a remedy for the various legal, equitable and statutory claims under our adjudicatory jurisdiction has been understood to be limited to: (1) making monetary awards from appropriated funds, (2) recommending payment and appropriation (or other relief) to the General Assembly, and (3) issuing declarations of rights (declaratory judgments). The Court's decision in this case properly adheres to that traditional and narrow statutory view.¹

2.

The Sovereign Immunity Options of the Supreme and Appellate Courts

In an unusual division of this Court, the majority almost disregards, and the dissenter concludes he must follow, a series of opinions of our Supreme and Appellate Courts that say or appear to say that this Court can issue injunctions. Although I side with the majority, the dissenting comments of Judge Raucci demonstrate that our decision rejecting injunctive power can be perceived, erroneously, as conflicting with those decisions. This deserves elaboration.

I disagree with Judge Raucci's hedged conclusions that our Supreme Court may have held, in *Ellis v. Board of Governors of State Colleges and Universities* (1984), 102 Ill. 2d 387, 466 N.E.2d 202, 80 Ill. Dec. 750, and that our Appellate Court did hold, in *Management Ass'n. of Illinois, Inc. v. Board of Regents of Northern Ill. Univ.* (1st Dist. 1993), 248 Ill. App. 3d 599, 618 N.E.2d 694, 188 Ill. Dec. 124, that this Court has authority to issue injunctions. Because I do not accept his view of those decisions,

¹ For completeness, I observe that the question of whether this court is authorized to grant various *statutory* remedies likely turns on the particular statutes involved, their legislative intent and possibly their interplay if any with the Court of Claims Act. My comments here intimate no views whatever on that subject.

I agree with the majority that this Court is obliged to make our own independent determination of our powers to issue injunctions. *Ellis* and *Management Association* do not foreclose our decision.

Similarly, I agree that we are not bound by the other appellate court opinions that, like *Management Association*, say unqualifiedly that the Court of Claims has authority to enjoin the State in cases in which sovereign immunity bars jurisdiction of our constitutional courts: *Fernandes v. Margolis* (3rd Dist. 1990), 201 Ill. App. 3d 47, 51, 146 Ill. Dec. 736, 558 N.E.2d 699; *Leibman v. Board of Governors of State Colleges and Universities* (1st Dist. 1979), 79 Ill. App. 3d 89, 34 Ill. Dec. 630, 398 N.E.2d 305; *Betts v. Department of Revenue* (1st Dist. 1979), 78 Ill. App. 3d 102, 33 Ill. Dec. 426, 396 N.E.2d 1150; *G.H. Sternberg & Co. v. Bond* (5th Dist. 1975), 30 Ill. App. 3d 874, 333 N.E.2d 261.

Our decision is consistent with the majority opinion in *Ellis, supra*, because the Supreme Court majority did *not* hold that the Court of Claims has injunctive power nor did it review our statutory powers. *Ellis* held only that the constitutional courts *lacked* jurisdiction over the injunction claim in that case due to sovereign immunity. Moreover, the *Ellis* majority did not base its jurisdictional holding on the premise that this *Court* could provide the requested injunction. As Judge Sommer correctly observes, both the majority opinion and Justice Simon's dissent in *Ellis* may be read to suggest that there may be no injunctive remedy at all for the Claimant in that case, as we have held there is not for this Claimant.

Although I appreciate Judge Raucci's deferential view of the appellate decisions, especially *Management Association, supra*, I do not believe they carry weight on the issue of this Court's authority. The appellate pronouncements in

the cited cases were *obiter dictum*. Those courts' statements range from assumptions about this Court's powers to misplaced reliance on the majority opinion in *Ellis, supra*, or on each other. But none of those Appellate Court pronouncements on this Court's authority is a holding on an issue that was actually presented there for decision. Most important, none of those opinions identified any constitutional, statutory or other source of authority for this Court to issue injunctive remedies. Those decisions, like *Ellis, supra*, stand only for the proposition that sovereign immunity barred the constitutional courts from issuing the injunctions against the State that were requested in those cases. That is entirely consistent with our parallel decision here which denies injunctive relief in this court, albeit for another reason.

Two further points must be made about the notion, seemingly accepted by Judge Raucci, that the constitutional courts could conclude that the Court of Claims has injunctive powers.

First, Judge Raucci makes a statutory point, with which I agree, that the legislature meant "all claims" when it repeatedly said "all claims" in section 8 of the Court of Claims Act that establishes our exclusive jurisdiction. I also agree that that language precludes the kind of law/equity distinctions that some would try to read into our statutory jurisdiction to "hear and determine" the types of claims specified in our Act. 705 ILCS 505/8, "Jurisdiction."

But I do not agree that the statutory delegation of authority to "hear and determine" various categories of claims encompasses (or implies) the power to grant remedies that are nowhere mentioned in the statute. I am unaware of judicial authority requiring or suggesting a broader construction. Moreover, in construing an Illinois jurisdictional statute in light of our constitution's vesting of "the judicial power" in our "Supreme Court, an Appellate Court and

Circuit Courts” under Article VI (1970 Ill. Const., Art. VI, section 1), it would be improper at best to imply any judicial powers that are not expressly granted by the legislature.²

Second, I find no authority in our Constitution or in common law precedent that might provide the Supreme Court or the Appellate Court with the power to delegate to us equitable powers, and those courts have not sought to do so in any event.

For these two reasons—the absence of statutorily delegated authority and the absence of judicially delegable authority—and because of my strict constructionist view of this issue, I cannot share Judge Raucci’s view that the Supreme Court or the Appellate Court could have held, or that their opinions may be read to hold, that we have injunctive powers. There is just no source of such power under current law.

3.

Equitable Jurisdiction Generally

With some exclusions that result from particular provisions of our Act, the Court of Claims has general jurisdiction to adjudicate “equitable” causes of action as much as any other actions that lie without our section 8 jurisdictional grant. (705 ILCS 505/8.) Our inability to grant equitable remedies does not, by itself, preclude jurisdiction to adjudicate equitable claims and defenses. (However, if an equitable remedy were the *sole* relief available for an equitable action, the underlying action would arguably be moot in this Court.) Our focus necessarily is those equitable claims that can give rise to damages and declaratory judgments, *i.e.*, where this Court can grant some form of

² I have little doubt that in the area covered by sovereign immunity, at least, the General Assembly could grant such judicial powers to a statutory court like this one under its Article XIII, Section 4 powers.

relief. “Equitable claims” involved in this analysis include, for example, promissory and equitable estoppel, quiet title, quasi-contract and restitution.

The primary statute, of course, is section 8 of the Court of Claims Act (705 ILCS 505/8), which is our exclusive jurisdiction statute. In its most general and broadly applicable provisions, section 8 grants this Court exclusive jurisdiction “[t]o hear and determine * * *”:

“(a) *All claims* against the state founded upon any law of the State of Illinois, or upon any regulation thereunder * * * .

(b) *All claims* against the state founded upon any contract entered into with the State of Illinois.

* * *

(d) *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 in a civil suit * * * .” 705 ILCS 505/8.³

I agree with Judge Raucci that this statutory “all claims” language must be given its plain and ordinary meaning: that “all” means all and does not mean some and that, in the absence of legislative history to the contrary, we must conclude that the General Assembly did not utilize the expression “all claims” to mean “all claims except equitable claims.”

Moreover, in light of the General Assembly’s practice of engrafting exclusions to our jurisdiction in the section 8 language itself (*see* section 8(a), for example; *see Ardt v. State of Illinois and Dept. of Professional Regulation* (1996), 48 Ill. Ct. Cl. 429), the absence of an exclusion for equitable claims must be taken as an intentional omission.

³ In this and succeeding excerpts from the statutory grants of jurisdiction in this opinion, the provisions relating to jurisdiction over the State universities and the provisions granting narrow, specialized jurisdictions (e.g., adjudications under the Crime Victims Compensation Act, provided in section 8(g) of the current Act) are excluded, because they are not relevant to the question of the scope of the Court of Claims’ underlying jurisdiction to adjudicate general claims against the State.

Similarly, looking at the tort jurisdiction provision of section 8(d), two limitations are noteworthy. First, this Court's tort jurisdiction is expressly limited to "damages." That limitation would be unnecessary and redundant if our underlying jurisdiction already excluded equity claims. Second, section 8(d) expressly restricts our tort jurisdiction to actions that "would lie against a private person or corporation in a civil suit." That language includes both legal and equitable claims. This is confirmed by the legislative history. That restriction formerly read:

"(d) All claims against the State for damage in cases sounding in tort, in respect of which claims the claimant would be entitled to redress against the State of Illinois, *at law or in chancery*, if the State were suable * * *." 705 ILCS 505/8(d).

The legislative change from "at law or in chancery" to the current "civil suit" language was enacted in 1971 by P.A. 77-953, which was one of a long series of amendatory acts that followed the adoption of the 1970 Constitution to conform statutory language to the terminology of the new constitution. Public Act 77-953 was an amendment that conformed statutory language to the Judicial Article of the 1970 Constitution. Thus the elimination of the words "law or * * * chancery" in favor of "civil" was a nomenclature change, not a substantive change, and confirms that the present language encompasses both legal and equitable claims, as does "civil" under the 1970 Judicial Article.

The Court of Claims historically has had jurisdiction over equitable claims under each of its three statutory incarnations: the Acts of 1903 and 1917 and the current 1945 Act. (This Court's predecessor agency, the Claims Commission, also had jurisdiction over equitable claims under the Acts of 1877 and 1891.) The legislative prescriptions of the former Commission's jurisdiction, and of the former and present Court of Claims' jurisdiction bear review:

The 1877 Statute (jurisdiction of the Claims Commission, emphasis added):

“to hear and determine all unadjusted claims of all persons, against the State of Illinois * * * according to the principles of equity and justice except as otherwise provided in the Laws of this State.”

The 1889 Statute (amended jurisdiction of the Claims Commission; also applicable to the original Court of Claims created in 1903, emphasis added):

“1. All unadjusted claims founded upon any law of the state, or upon any contract, expressed or implied.

2. All claims which might be referred to it by either house of the general assembly.

3. Claims for taking or damaging property by the state for public purposes.

4. All unadjusted and controverted claims against state penal, educational, charitable, and military institutions.

5. All setoffs, counter claims, and claims for damages, whether liquidated or unliquidated.

6. All other unadjusted claims of whatsoever nature or character against the State of Illinois.”

The 1917 Act (the second Court of Claims Act, emphasis added):

“* * * to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, *ex contractu* and *ex delicto*, which the State as a sovereign commonwealth, should, in equity and good conscience, discharge and pay.”

The 1945 Act (the third and present Court of Claims Act, as originally enacted):

“A. All claims against the state founded upon any law of the State of Illinois, or upon any regulation thereunder * * *.

B. All claims against the state founded upon any contract entered into with the State of Illinois.

C. All claims against the State for damage in cases sounding in tort, in respect of which claims the claimant would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable * * *.

D. All claims against the State for personal injuries or death arising out of and in the course of the employment of any State employee * * * in accordance with the substantive provisions of the Workmen’s Compensation Act or the Workmen’s Occupational Diseases Act * * *.”

1996 Statute (The general provisions of the 1945 Court of Claims Act, as amended to date, is set forth above):

This legislative language, which extends over the course of more than a century, shows affirmatively that equitable claims and defenses were contemplated and included in the jurisdiction of this Court from the outset. In almost 120 years of legislative history, there is no hint to be found of any categorical exclusion of equity jurisprudence generally, or of equitable claims in particular, in any of the formulations of this Court's jurisdiction.

In the context of this legislative history, it is even clearer that "all claims" in section 8 of the Court of Claims Act still includes the equitable claims that had been explicitly included in earlier formulations of this Court's and its predecessor's jurisdiction.

Nevertheless, as the majority correctly observes, the caselaw of this Court is not altogether consistent on the subject of our general jurisdiction to entertain and decide equitable claims and defenses. There is a body of caselaw to the effect that this Court lacks jurisdiction to entertain or adjudicate claims predicated on equitable rather than legal actions, or to entertain defenses based on equitable principles. Our precedents paint a mixed picture of this Court's application of equity jurisprudence in practice.

However, many of our decisions declining relief or refusing to entertain equitable claims or defenses are compelled by specific statutory restrictions on this Court, rather than by a general lack of jurisdiction over equitable claims or defenses. For example, this Court has consistently rejected claims based on the equitable doctrines of *quasi-contract* or implied contract. (See, e.g., *Brighton Building Maintenance Co. v. State* (1982), 36 Ill. Ct. Cl. 36.) However, our rejection of those claims is required by our limited jurisdiction over contract claims under section

8(b) of our Act, which we have consistently read as limited to contract claims based on *express* contracts entered by the State which excludes all kinds of implied contracts including the equitable doctrines, but does not exclude third-party beneficiary contract claims. *Haendel v. State*, 50 Ill. Ct. Cl. 224.

There may well be other provisions of our statute that may additionally preclude application of equitable principles in various circumstances, but that does not detract from our threshold jurisdiction over equity jurisprudence.

I submit that there is little sense or justice in rejecting out of hand State liability—or State defenses—that derive historically from English chancery rather than the law courts of England. The legislature has not commanded us to do so. To the contrary, it appears that our legislature has been directing us to apply equity as well as legal principals. In the long run, application of equity in this Court, where such does not run afoul of our specific statutory limitations, should do little to alter the overall liability of the State but should in many individual cases result in better justice for both Claimants and the State. After all, that is why equity jurisprudence came to supplement the law courts long ago in England, and why equity jurisprudence was adopted by American courts along with the common law. The Illinois Court of Claims should do likewise.

4.

Implications of our Decision Rejecting Injunctive Power

The consequences of today's decision must be emphasized. Under our decision today, this Claimant cannot present her claim for reinstatement to this Court. Under Illinois sovereign immunity law as articulated by our Supreme Court, it is clear that all other Illinois courts

also lack jurisdiction over this Claimant's reinstatement claim. Thus this Claimant—and similarly situated Claimants having legitimate pleas for mandatory injunctive redress—have no Illinois court to which they can turn for a remedy. Quite possibly they have no remedy at all, at least not an effective injunctive remedy.

Under our Supreme Court's prevailing test of sovereign immunity, injunction actions against the State no longer can be maintained in our constitutional courts—even when brought nominally against a State officer or agency director—when the claim is “a present claim which has the potential to subject the State to liability.” (*Ellis v. Board of Governors of State Colleges and Universities* (1984), 102 Ill. 2d 387, 466 N.E.2d 202, 207, 80 Ill. Dec. 750, 755.) That principle seemingly bars most, if not all, mandatory injunctions—orders that direct and compel the doing of some affirmative act.

When our decision today is grafted onto *Ellis* and its progeny, the result is that no Illinois court can entertain an injunction plea or can order redress that “has the potential” to cost the State money. This seemingly bars all or almost all mandatory injunctions, and may well bar many prohibitory injunctions as well, but it clearly prohibits employment and State program reinstatement claims like this case and *Ellis*. Those injunctive claims, at least, now have no place to go in Illinois.

This result, of course, is part and parcel of sovereign immunity, which the legislature has seen fit to reinstate in full measure under the 1970 Constitution. The current 1970 Illinois Constitution leaves the issue of sovereign immunity to the General Assembly (Art. XIII, section 4), thus deconstitutionalizing this doctrine which had been established directly by the 1870 Constitution. Illinois statutorily re-adopted the identical sovereign immunity

formulation of the 1870 Constitution: An Act in relation to immunity for the State of Illinois. 745 ILCS 5/1, *et seq.*

In this case, we apply the statutory sovereign immunity as a complete shield against mandatory injunctions. We must recognize, of course, that the injustice occasioned, from time to time, to a deserving citizen by the unavailability of such injunctive relief against the State is not nearly as harsh as having no remedy at all for State-caused injuries, as pure sovereign immunity would require. The injustice of not being able to stop or prevent a wrong is ameliorated by the availability of damage awards to compensate for injuries suffered at the hands of the State. Under our law such damages are almost always available to deserving Claimants.

Still, there are cases where recoverable damages are inadequate to remedy the injury, as could possibly happen in this case. In such instances, by retaining the State's sovereign immunity shield against injunctions, Illinois denies full redress to deserving Claimants who have been or are being injured by the State. This is arguably inconsistent with Illinois' tradition as a state that favors redress for its citizens as well as with our often ignored constitutional principle that

"Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely and promptly." Ill. Const. 1970, Art. I, sec. 12.

Now that we have shut the final Illinois door on these kinds of injunction claims, this issue should be reviewed by the General Assembly, which ultimately determines whether and where and how various kinds of claims against the State should be adjudicated and remedied. This is a legislative issue. But it is one that has not been publicly revisited in recent times.

There is a debatable question as to whether some Illinois court in at least some situations ought to be able to provide this kind of affirmative injunctive relief to Claimants. Whether the State treasury—the intended beneficiary of the doctrine of sovereign immunity—will be well or ill served in the long run by the absence of such injunctive remedies under the reinvigorated sovereign immunity doctrine is at least debatable. In terms of both State liability and justice to Illinois Claimants, therefore, there are legitimate questions as to the State’s ultimate interests. These involve analyses and judgments that ought to be made by the General Assembly, and which deserve thoughtful consideration by the elected policymakers.

This opinion does not advocate any particular legislative change. Nor do I suggest that this Court is the proper forum, or even a suitable forum, in which to litigate any kind of injunctions against the State. I will, however, note my own view, which I expect is shared by many of my colleagues, that the Court of Claims is now underequipped to handle injunction claims throughout Illinois—especially emergency injunction demands—against the many departments, agencies, officers and bureaus of our State government. Whether this Court is, or ever would be, an appropriate forum or the most suitable forum to hear injunction claims against the State, if such suits are ever permitted, is an open question.

In this regard, it is an interesting and often overlooked historical fact that in the early years of Illinois’ statehood, from 1818 to 1870, claims against the State were justiciable in the circuit courts. (See *Laws of Illinois*, 1819, at 184; *Revised Code of Laws of Illinois*, 1829, at 171; *Revised Statutes of Illinois*, 1845, at 394, 464.) Under the 1818 and 1848 constitutions, sovereign immunity was not even the law of Illinois. The 1870 Constitution

first adopted the doctrine of sovereign immunity in Illinois and barred the constitutional courts from exercising any jurisdiction over the State, which therefore had been permitted. Ill. Const. 1870, Art. IV, Sec. 26. See generally, Spiegel, *The Illinois Court of Claims: A Study of State Liability* (U. of Illinois Press 1962), Ch. 3, at 60.

Under the 1970 Illinois Constitution, the General Assembly has the prerogative of altering or reducing sovereign immunity, and arguably may have the authority to allocate jurisdiction over different kinds of claims that are subject to sovereign immunity to whichever court or courts or administrative agencies or other tribunals as it may select. There are a host of alternative solutions for various kinds of cases from which the legislature might pick and choose. I only suggest that it is timely for legislative reconsideration of this difficult and complex but important question that seriously affects the administration of civil justice in Illinois, and that the General Assembly has many options it may choose if it determines to act on this issue.

RAUCCI, J., CONCURRING IN PART AND DISSENTING IN PART

I concur with that part of the majority's order dismissing counts IV and V, and denying the motion to dismiss as to count III. I respectfully dissent from that portion of the order which holds that the Court of Claims does not have the authority to grant injunctive relief, and dismisses counts I and II.

My reading of *Ellis v. Board of Governors of State Colleges and Universities* (1984), 102 Ill. 2d 387, 466 N.E.2d 202; *Management Association of Illinois, Inc. v. Board of Regents of Northern Illinois University* (1st Dist., 1993), 248 Ill. App. 3d 599, 618 N.E.2d 694; *Brucato v. Edgar* (1st Dist., 1984), 128 Ill. App. 3d 260, 470 N.E.2d 615; *Liebman v. Board of Governors of State Colleges and*

Universities (1st Dist., 1979), 79 Ill. App. 3d 89, 398 N.E.2d 305; and *Sternberg v. Bond* (5th Dist., 1975), 30 Ill. App. 3d 874, 333 N.E.2d 261, leads me to the conclusion that the law of this State is that the Court of Claims has authority to grant some forms of equitable relief. I will not repeat the extended quotations from these cases contained in the majority opinion, however I note that while *Ellis* does not completely close the door on the issue, the Appellate Court has expressly done so in *Management Association of Illinois, supra*, where the Court stated, "The Court of Claims does have jurisdiction to grant injunctive relief." 618 N.E.2d at 700.

The holding of the Appellate Court is supported by a reading of the Court of Claims Act (705 ILCS 505/1, *et seq.*). In that Act, the General Assembly has provided:

"The court shall have exclusive jurisdiction to hear and determine the following matters:

- (a) All claims against the State founded upon any law of the State of Illinois, or any regulation thereunder by an executive or administrative officer or agency, other than claims arising under the Workmen's Compensation Act or the Workmen's Occupational Diseases Act, or claims for expenses in civil litigation * * *.
- (b) All claims against the State founded upon any contract entered into with the State of Illinois." 705 ILCS 505/8.

I believe that when the General Assembly said "all claims" it meant "all claims." The claims presented are founded in university regulations, promulgated pursuant to law, and in the contract between the university and the Claimant.

In reaching the position that I do, I recognize that, while we are part of the legislative branch of government, we are bound to follow decisions of the Supreme and Appellate Courts of this State.

I am well aware of the practical obstacles which make difficult the effective and efficient disposition of requests for injunctive relief from the Court of Claims. And I am not at all certain of our ability to enforce any such order.

But I do believe that the decisions cited above make our responsibility clear.

An examination of the facts in this case demonstrates that Claimant would be entitled to equitable relief.

The complaint alleges that Claimant first enrolled in the University of Illinois at Chicago—College of Medicine (UICCOM) in August, 1990, but failed to meet the academic requirements during the 1990-91 academic year. She repeated the first year during the 1991-92 academic year, but again failed to meet the minimum pass levels and was dropped from the medical school in January, 1992. Claimant successfully petitioned for readmission in August, 1992. On December 16, 1992, Claimant was advised that she was being dropped from the medical school for poor scholarship. However, effective January 22, 1993, the Committee on Student Promotions recommended and approved specific curriculum requirements for Claimant. Those curriculum requirements specifically outlined which courses Claimant was to take (and when), and which she was not to take. One condition was that she was not to take the preventive medicine and health examination during academic year 1992-1993.

Claimant successfully completed the course work for the academic year 1992-93 in May of 1993. She then sat for the first component of a three-part examination (preventive medicine) in preventative medicine and health in June, 1993 during the 1993 summer makeup examination period. Ironically, UICCOM's policy dictates that permission be obtained from the Office of Academic Student Affairs prior to taking the examination. Claimant received such permission. The Respondent's position is that by sitting for this examination she violated the curriculum requirements. For that reason, on July 30, 1993, the Committee on Student Promotions dropped Claimant from UICCOM.

Claimant urges that the Respondent has incorrectly interpreted the definition of academic year 1992-93. She urges that academic year 1991-92 ended with the “last day of final examinations of the spring semester or quarter.” Her position is supported by Dr. Thomas Henderson who was appointed by Dr. Gerald Moss, Dean of UICCOM, as the grievance officer to consider the Claimant’s grievance. He reported to Dr. Moss as follows:

“The issue to be resolved revolves around this interpretation of the time period described by the phrase “Academic Year 1992-1993.” No matter what the intent of CSP (Committee on Student Promotions) may have been in January, 1993, there is no specific time frame given for Academic Year 1992-1993. The usual interpretation of the time encompassed by an academic year refers to the time beginning with the first day of classes of the Fall Semester or Quarter and continuing through the last day of final examinations of the Spring Semester or Quarter. Using the official calendar of the University of Illinois at Chicago for Academic Year 1992-1993, the period in question was August 24, 1992 to May 8, 1993. As another example of the time period to be considered an academic year, faculty members at the University of Illinois on academic year appointments (i.e. AY contracts) are required to render services to the University for the Fall and Spring Semesters and are paid for nine months service.

With respect to student status, in my experience, once a student has successfully completed the academic requirements for a given academic year (as described above), the student is generally able to take courses required for the next academic year during the summer, if appropriate courses are available. Indeed, even in the College of Medicine, students who have completed their M-2 requirements in May of a given year are allowed to begin taking M-3 clerkships approximately two weeks after sitting for the USMLE: Step 1 examination in June, rather than being required to wait until late August to begin these activities.”

Dr. Henderson determined that

“Lalitha Garimella was dropped from the College of Medicine because of an overly zealous interpretation of the “curriculum requirements.”

He recommended that Claimant be reinstated effective with the beginning of the fall semester, 1994. Ignoring Dr. Henderson’s findings, Dr. Moss replaced him with Dr. Edward Cohen who confirmed the dismissal. This action was taken notwithstanding the fact that the grievance procedures contain no provision for ignoring the recommendation, or for replacing the grievance officer.

I would find that the Claimant's dismissal for the reason that she took the preventive medicine examination during the summer of 1993 to be arbitrary and capricious, and contrary to law.

The majority's action today leaves the Claimant with a wisp of a remedy if any remedy at all. Since the Claimant will be denied the ability to attempt to complete her education, she will be limited to her breach of contract claim. While the record casts doubt on her ability to successfully complete the medical program, the likelihood is that any damages for termination from the program will be held to be speculative. She will have no adequate remedy for the wrong done to her.

I would deny the motion to dismiss counts I and II.

(No. 95-CC-1914—Claim dismissed.)

ANNIE L. WARREN, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Order filed March 9, 1998.

GOLDMAN & MARCUS (ARTHUR R. EHRLICH, of counsel), for Claimant.

JAMES E. RYAN, Attorney General (MICHAEL F. ROCKS, Assistant Attorney General, of counsel), for Respondent.

JURISDICTION—*adverse ruling by Civil Service Commission regarding Claimant's employment—claim dismissed for lack of jurisdiction.* By failing to appeal the circuit court's dismissal of her complaint seeking review of the Civil Service Commission's adverse ruling arising from her employment, the Claimant did not exhaust her other remedies as required under the Court of Claims Act and, in any event, the Court of Claims was without jurisdiction to entertain the claim and it was dismissed since, pursuant to the Administrative Review Law, the circuit court was vested with authority to review the decision of the Civil Service Commission.

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. Claimant seeks relief in this Court after an adverse ruling by the Civil Service Commission on her claim for reclassification and back pay arising from her employment by the Department of Public Aid. Claimant maintains that this action is not an "appeal" but is an original action pursuant to section 8(a) of the Court of Claims Act. 705 ILCS 505/8(a).

2. However characterized, Claimant is required to exhaust all other remedies before a recovery can be had in this Court. 705 ILCS 505/25.

3. Claimant sought review of the decision of the Civil Service Commission by filing a complaint in administrative review in the Circuit Court of Cook County. On March 18, 1993, the circuit court dismissed the complaint. No appeal was taken.

4. By failing to appeal the circuit court order, Claimant has failed to exhaust all other remedies. But more fundamentally, we do not have jurisdiction to entertain Claimant's claim. In *Wenetsky v. State* (1993), 45 Ill. Ct. Cl. 264, 266, a former State employee sought lost wages. In dismissing the claim, we stated:

"Jurisdiction over the Claimant's job classification was with the Secretary of State's Department of Personnel, the merit commission, and circuit court on judicial review. (Ill. Rev. Stat., ch. 124, par. 101 *et seq.*) This Court has no jurisdiction in personnel matters where adequate remedies are provided in a court of general jurisdiction. (*Halima v. State* (1989), 41 Ill. Ct. Cl. 193.) Therefore, this Court has no jurisdiction to decide the issue of Claimant's job classification."

Similarly here, the circuit court is invested with jurisdiction pursuant to the Administrative Review Law to

review the decision of the Civil Service Commission. We are without jurisdiction.

It is therefore ordered, adjudged and decreed that the Respondent's motion to dismiss is granted, and this claim is dismissed and forever barred.

(No. 95-CC-3033—Claimant awarded \$1,625.)

EVEN/ANNA PROMOTIONS, Claimant, *v.* THE STATE OF ILLINOIS,
BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES,
Respondent.

Order filed April 10, 1998.

METNICK, WISE, CHERRY & FRAZIER (KATHRYN SALT-
MARSH, of counsel), for Claimant.

JAMES E. RYAN, Attorney General (SUZANNE L. DEN-
NIS, Assistant Attorney General, of counsel), for Respon-
dent.

CONTRACTS—*Christmas ornaments returned by university two months after delivery—refusal to pay was breach of contract—award granted.* Where a university rush-ordered customized Christmas ornaments from the Claimant after declining an opportunity to inspect a sample, the university's return of the ornaments two months after they were delivered, along with its refusal to pay for the items constituted a breach of the parties' contract and damages were awarded, since the ornaments were not defective and fully complied with the description originally provided, while the university's rejection of the items because it did not like them was unreasonable.

ORDER

RAUCCI, J.

This claim comes before the Court on Claimant Even/Anna Promotions' complaint against Respondent, The State of Illinois, Board of Governors of State Colleges and Universities for Chicago State University. The complaint

alleges breach of contract and seeks damages in the amount of \$1,600.

The facts adduced at trial are as follows: Vickie Metnick testified that she is president of Even/Anna Promotions, a promotional business merchandise company. On December 2, 1993, she received a telephone call from an employee at Chicago State University (CSU). Claimant had previously provided merchandise to Respondent. On this occasion, Respondent inquired about Christmas ornaments to be used as gifts at the faculty Christmas party. The Respondent expressed concern about budget and time constraints noting that the party was scheduled for December 19, 1993. Claimant faxed information to Wylola Evans at Chicago State University, including pictures of several different types of ornaments. Although she discussed with Ms. Evans providing a sample, due to the event date, there was not enough time in which to have a sample delivered. Ms. Metnick recommended a brass ornament that could be inexpensively imprinted with the University's logo. Contrary to Ms. Metnick's recommendation, Chicago State University chose an acrylic ball ornament with a paper or cardboard insert of its logo in the middle. Respondent provided camera-ready copy of its logo, and the industry standardized color chart was used to match the school's colors. The cost per unit of each ornament was sixty cents. The ornaments were produced by rush order, for which the school was not charged. The ornaments were messengered to the school on December 17, 1993.

A week after delivery, Ms. Metnick was advised that the ornaments had not been used at the party. She received a telephone call from Wylola Evans who advised, "We don't like the ornaments and we didn't use them." Ms. Metnick testified that there was no mention of any

defect in the ornaments and no refusal to pay for the ornaments was initially communicated to her. Ms. Metnick testified that she had numerous discussions with Brian Bochenek at Chicago State University during which Mr. Bochenek assured her that the invoice for \$1,600 was going to be paid. However, the payment was never made and the ornaments were returned to Claimant two months after they were received.

In February, 1994, Claimant was informed by letter that Chicago State University was claiming that the ornaments were defective and that payment was being refused.

When Claimant received the returned ornaments she noted that only one of the ten boxes had been opened. She described the ornament as having a molded loop at the top for purposes of hanging. Claimant produced a sample of the ornament which was admitted into evidence.

Wylola Evans, Director of Special Events for CSU, testified for the Respondent. Evans stated that she ordered the ornaments but did not use them as gifts at the Christmas party because she determined them to be of inferior quality. Evans testified that they examined quite a few of the ornaments and the "hoops" kept falling off the ornament and that the imprinted logo looked as though it had been xeroxed. Ms. Evans testified that she contacted the Claimant a week before the party. On February 18, 1994, Respondent sent a letter refusing payment for the ornaments and the actual ornaments were returned to Claimant some time later.

The Respondent produced their departmental report which was admitted into evidence.

Claimant filed a trial memorandum. Respondent did not file a trial memorandum.

In this case it is clear that Respondent placed a special order for 1,000 custom-made Christmas ornaments with the Chicago State University logo. Claimant's clear and convincing testimony established she had initially recommended an alternate product, however, Respondent was specific in its order request. In fact, Respondent waived their opportunity to inspect a sample item because they were working under time constraints. The order was promptly delivered to Respondent. In the months following the delivery, CSU's agent represented that they did not like the product but repeatedly indicated that the invoice would be paid.

Respondent formally rejected the order by letter approximately two months after delivery and the product was actually returned at some later date. Respondent contends that the product was defective and that the hoops for hanging kept falling off the ornaments.

Respondent's version of the facts is unlikely and incredible. An inspection of a sample ornament showed that the hoop on the ornament was plastic molded into the ornament. It could not fall off without breaking the ornament. Further, when the rejected goods were returned, only one of the ten boxes had been opened and the ornaments were intact.

Clearly Respondent did not "like" the ornament. However, Respondent assumed the risk when they placed the rush order without an inspection of a sample prior to placing the order.

Claimant fulfilled all of their obligations under the agreement. Pursuant to Respondent's custom order, Claimant produced an inexpensive plastic ornament which fully complied with the description and specifications originally provided.

Respondent failed to reject the product for more than two months after delivery, and the basis for the rejection was not reasonable or supported by the evidence. Respondent breached its agreement by refusing to pay for the items.

It is therefore ordered, adjudged and decreed that the Claimant is awarded sixteen hundred twenty-five and no/100 (\$1,625) in full and complete satisfaction of this claim.

(No. 96-CC-3412—Claimant awarded \$5,455.52.)

MARILYN SCHWARTZ, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed September 26, 1997.

LEVIN & BREND (JEFFREY W. BREND, of counsel), for
Claimant.

JAMES E. RYAN, Attorney General (MICHAEL F. ROCKS,
Assistant Attorney General, of counsel), for Respondent.

EXHAUSTION OF REMEDIES—*reasonable settlements with alternative-source defendants satisfy exhaustion requirement.* Reasonable settlements with alternative-source defendants suffice to satisfy the Court of Claims exhaustion requirements, in lieu of full pursuit of all alternate sources to judgment and collection, and the Court has not insisted on autonomic exhaustion beyond reason, as in the case of a judgment-proof defendant.

SAME—*tax refund erroneously paid to Claimant's former husband—attempts to recover from judgment-proof husband in divorce case satisfied exhaustion requirement—award granted.* The Claimant was awarded an amount representing her half of a State joint income tax refund which was erroneously paid by the Department of Revenue to her ex-husband, since there was no significant question as to the Claimant's entitlement to the refund or the State's responsibility for the error, and the Claimant's prior attempts to recover from the husband in the parties' dissolution proceeding until learning that he was judgment-proof satisfied the exhaustion requirement.

OPINION

EPSTEIN, J.

This is a former wife's claim for half of an Illinois income tax refund jointly claimed by and jointly payable to her and her former husband that was erroneously paid to him. The State says she should sue him for the money, rather than have the State pay twice. She replies that she tried, but he is broke. The State says that is not good enough. This Court says it is, and that the State should pay her and recover the excess from him when and if it can. For the reasons that follow, we will award the requested 47% of the refund amount to the Claimant.

The Facts

Marilyn Schwartz, f/k/a Marilyn Goldboss (when she was married to Lee Goldboss) brings this \$5,455.52 claim for her half (actually 47%) of a State income tax refund for tax years 1986, 1987, and 1988 that the Department of Revenue (IDR) approved but then erroneously paid to Lee Goldboss, who by then was the Claimant's ex-husband, instead of jointly to him and her. The IDR has acknowledged its refund error. The facts are substantially undisputed.

Marilyn and Lee, both then Illinois residents and married to each other, filed joint state income tax returns for years 1986-88 and paid their taxes for those years from joint (marital) property. In 1989, still filing jointly, Marilyn and Lee reported a net operating loss, which allowed them to file amended returns for 1986-88 claiming refunds totalling \$11,607.50. This they did, also jointly, after their divorce.

The couple divorced in June, 1990. Under their 1990 divorce judgment, which incorporated a marital settlement agreement, Marilyn received 47% of the marital

assets and was (undisputedly) therefore entitled to 47% of any joint tax refund. After the divorce, but before the State issued the refund, Lee asked the IDR to send the refunds to him instead of to the accountant designated on the amended returns; the IDR not only directed the three refund warrants to Lee, but also “dropped off” Marilyn’s name, so that the warrants ultimately issued and sent by the Comptroller were made out to Lee alone as well as mailed to him. Of course, he cashed them.

In 1995, in response to inquiries from Claimant, the IDR acknowledged its error when it “dropped off” Claimant’s name, and admitted that “the refunds should have gone out in both names.” (Tr. Ex. No. 8.) The IDR nevertheless refused to pay Claimant her share of the refunds.

Claimant filed suit. Proceeding within the divorce case in the Circuit Court, Claimant filed a complaint against her former husband, the IDR, the Attorney General, her accountants, and two banks. She necessarily dismissed the IDR from that action, as it could not and would not consent to suit in that forum, and proceeded against Lee Goldboss, her former husband, who was required to and did file an asset disclosure statement pursuant to local rule 13.3(b) of the Circuit Court of Cook County. In that disclosure, Mr. Goldboss reported under oath that he then had no income or assets. (Tr. Ex. No. 11.) Claimant then filed her refund claim in this Court.

The Issues

As argued in this Court, there are only two issues, which may well be termed non-issues as neither is terribly substantial in light of the arguments advanced:

First is whether the Claimant was and is entitled to 47% of the refund amount.

Second is whether the Claimant has adequately exhausted her prospective alternate sources of recovery under the “exhaustion” requirements of section 25 of the Court of Claims Act (705 ILCS 505/25) and section 790.90 of the Court of Claims Regulations. (74 Ill. Admin. Code 790.90.) The exhaustion issue boils down to whether or not the Claimant adequately exhausted her potential recovery of her share of the refunds from her ex-husband Lee Goldboss.

Opinion

There is no significant question of Claimant’s entitlement to 47% of the total refund; this is not substantially disputed by the Respondent. There is no dispute that the original tax liabilities, tax returns, and tax payments were all jointly made and were all joint responsibilities of Marilyn and Lee when and as married. There is no dispute that the funds involved were marital property when paid as taxes to the State, and there is no genuine issue about the legal character of the refunds as repayments of marital property. Finally, the Respondent does not dispute that the divorce judgment entitles Claimant to 47% of all marital property.

The exhaustion issue is a trifle more substantial. Under the facts at hand, the issue becomes whether or not this Court’s exhaustion of alternate recovery sources requirement mandates that a claimant pursue a judgment-proof defendant beyond the point when there is a reasonable (or as here, undisputed) determination of the fact of such defendant’s inability to pay a judgment on the asserted liability if one were obtained. Claimant relies on the “rule of reason” construction of our exhaustion requirement, citing the settlement precedents in *Dellorto v. State* (1979), 32 Ill. Ct. Cl. 435, and *J.F. Inc. v. State* (1988), 41 Ill. Ct. Cl. 5, which held that reasonable settlements with

alternative-source defendants suffice to satisfy our exhaustion requirements, in lieu of full pursuit of all alternate sources to judgment and collection. This Court has not insisted on autonomic exhaustion beyond reason, when reason is shown. A judgment-proof defendant can be one such reason to forego further litigation which thus appears futile, although this Court is always skeptical of that justification.

In this case, two factors inform our decision. First, pursuit by Marilyn of her former husband, Lee, was attempted in good faith (and with extraordinary motive as well as incentive) and was only terminated when he had affirmatively and under oath showed himself to be judgment-proof in a judicial proceeding. Second, in the unusual circumstances of this case, where the Respondent itself put the sought-after funds into the hands of the putative alternative source—and thus generated the need for the Claimant to seek recovery from that source—this Court is not inclined to a rigid application of our exhaustion rule. Here, Marilyn Schwartz did enough. We will not withhold her wrongfully unpaid refund and force her to pursue her impoverished ex-husband. It is far more appropriate, significantly more efficient and considerably more just for the IDR now to cure its error by paying the Claimant her legitimate tax refund, and by assuming the responsibility of collecting the excess refund from Mr. Goldboss when and if he subsequently has income or assets.

Order

Claimant Marilyn Schwartz is awarded the sum of \$5,455.52 as her 47% share of her and Lee Goldboss' joint Illinois income tax refund for tax years 1986, 1987 and 1988, in full satisfaction of this claim. Judgment of \$5,455.52 is entered for Claimant against the Respondent.

(No. 96-CC-4112—Claimant awarded \$140,350.)

JAMES ALLEN NEWSOME, Claimant, v. THE STATE OF ILLINOIS,
Respondent.

Opinion filed November 4, 1997.

LOCKE E. BOWMAN III and BRIAN GRUBE, for Claimant.

JAMES E. RYAN, Attorney General (PAUL H. CHOE and ROGER FLAHDEN, Assistant Attorney General, of counsel), for Respondent.

DAMAGES—unjust imprisonment—maximum compensation—attorney fees. Under the Court of Claims Act, a Claimant who has been incarcerated unjustly is entitled to maximum compensation in the amount of \$35,000 with a one-time adjustment as of January 1, 1996, to reflect the cost of living increase since the date the maximum award was last adjusted, and the statute further provides that the Court shall fix attorney fees not to exceed 25 percent of the award, but the fees must come from the Claimant's award.

SAME—Claimant awarded compensation for 15-year unjust imprisonment—attorney fees not separately recoverable. A man who was unjustly imprisoned in a State correctional facility for more than 15 years for a crime he did not commit was entitled to the statutory maximum compensation plus a cost of living adjustment, resulting in an award of \$140,350 from which his attorney fees would have to be paid, but since the Claimant's attorney indicated that they would donate any fees to which they were entitled to the Claimant, the fee issue was substantially mooted.

OPINION

SOMMER, C.J.

This matter comes before the Court on the Claimant's petition for compensation for unjust imprisonment, pursuant to section 8(c) of the Court of Claims Act, hereinafter referred to as "statute" (735 ILCS 505/8(c)), and the Claimant's motion for summary judgment. A hearing was held on May 29, 1997, before Commissioner Rochford. Following the hearing a briefing schedule was established and the parties submitted briefs in support of their positions.

The undisputed facts of this claim are as follows: The Claimant was incarcerated in an Illinois state prison

for a period in excess of fifteen (15) years. It has been established that the Claimant was innocent of the crime for which he was incarcerated. On July 14, 1995, Governor Edgar granted the Claimant a pardon on the grounds of innocence.

The statute provides for maximum compensation to a claimant who has served time unjustly in the amount of \$35,000. The statute further provides for a one-time adjustment as of January 1, 1996, to reflect the cost of living increase since the date the maximum award was last adjusted. 705 ILCS 505/8(c).

At the hearing, the Claimant presented the expert testimony of investment analyst Charles S. Gofen. Mr. Gofen testified that the maximum award plus the cost of living adjustment based on the Consumer Price Index as required by the statute would result in an award to the Claimant in the amount of \$140,350. We find that \$140,350 is the correct award under the statute.

The Claimant's attorneys further seek attorney's fees in addition to the amount awarded for his unjust incarceration. The statute provides that "the court shall fix attorney fees not to exceed 25% of the award." 705 ILCS 505/8(c).

At the hearing, affidavits and testimony of Locke E. Bowman and Norval Morris were presented in support of their request for attorney fees. Additional affidavits concerning attorney fees were submitted on June 18, 1997. The combined fee request is in excess of the 25% maximum as provided by statute. However, Mr. Bowman and Mr. Morris both stated at the hearing that they would donate any fees to which they were entitled to the Claimant.

In its post trial brief of June 26, 1997, the Respondent withdrew its previous objections to the Claimant's

complaint. In essence, the Respondent agreed that the Claimant is entitled to an award of \$140,350. Further, based on its readings of the findings in *Mustafa v. State* (1975), 30 Ill. Ct. Cl. 567, 569, and *Anderson v. State* (1967), 26 Ill. Ct. Cl. 119, 122, the Respondent withdrew its objections to the attorney fees being paid in addition to the award.

Both the *Mustafa* and *Anderson* cases find that the attorney fees should come from the award made to the Claimant. The language of the statute setting attorney fees was not changed in the 1996 amendment to section 8(c), which increased the amount recoverable by the cost of living.

Consistent with *Mustafa* and *Anderson*, we find that attorney fees must come from the Claimant's award. As Mr. Bowman and Mr. Morris testified at the hearing that they, commendably, were donating their fees to the Claimant, the issue of attorney fees is substantially mooted. There were affidavits by Mr. Gofen, the financial expert, and Mr. Gruber, a law student, indicating costs attributable to their activities, but we will assume that these costs, along with other costs noted in the record, were also to be donated to the Claimant.

It is therefore ordered that the Claimant is awarded \$140,350 pursuant to his claim for compensation for unjust imprisonment.

(No. 96-CC-4213—Claimant awarded \$15,170.)

ECONOMY CURRENCY EXCHANGE, INC., Claimant, *v.*
THE STATE OF ILLINOIS, LOLETA A. DIDRICKSON,
Comptroller, Respondents.

Order filed September 3, 1997.

SCOTT A. SLUTSKY & ASSOC., for Claimant.

JAMES E. RYAN, Attorney General, for Respondents.

NEGOTIABLE INSTRUMENTS—*definition of negotiable instrument.* As defined by the U.C.C., negotiable instrument means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges, described in the promise or order, if it is payable to bearer or to order at the time it is issued or first comes into possession of a holder, is payable on demand or at a definite time, and does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money.

SAME—*State-issued warrant dishonored by Treasurer due to Comptroller's "stop order"—currency exchange entitled to payment as holder of negotiable instrument.* The Claimant, a currency exchange that cashed a State-issued warrant for a payee State contractor, was entitled to summary judgment in its claim seeking payment for the amount of the warrant after it was dishonored by the Treasurer due to a "stop order" issued by the Comptroller, since the warrant was a negotiable instrument, and as a transferee and holder of the warrant, the Claimant succeeded to the rights of the payee to enforce it, and the State presented no defense to the Claimant's rights as holder.

ORDER ON SUMMARY JUDGMENT

EPSTEIN, J.

This is a \$15,170 claim on a \$15,170 State warrant issued in 1995 that was dishonored by the Treasurer due to a "stop order" issued by the Comptroller. Claimant is a currency exchange that cashed the warrant for the payee, a State contractor. Claimant seeks to enforce the warrant as a holder in due course under Article 3 of the Uniform Commercial Code (810 ILCS 5/3—101 *et seq.*) (the UCC), notwithstanding the stop payment order.

This claim is before us on the Claimant's motion for summary judgment, supported by an affidavit of the Claimant's manager and the warrant (#4546781, issued

September 29, 1995). The Respondents have made no response to the motion and have not filed a departmental report, despite this Court's directive of February 7, 1997.

The Respondents have shown an irresponsible and cavalier disregard for the rights of citizens as well as for the process of this Court. It is indefensible and almost inexplicable for two agents of the State government to fail or refuse for almost two years to disclose the reason, if any, for this \$15,170 stop payment order and its source (which presumably lies in the Comptroller's office or in the Department of Central Management Services, the paying agency), despite innumerable requests from the Claimant and an order of this Court.

In these circumstances, the Respondents have earned a default. At a minimum, the Claimant is now entitled to a decision on the basis of the undisputed but obviously incomplete record before the Court. This we shall do. But this Court will not impose a full default.

We will review the legal issues presented by Claimant's motion, insofar as it claims entitlement to payment on the basis of (1) the warrant instrument and (2) Claimant's status as a transferee or holder or holder in due course resulting from the undisputed facts of Claimant's purchase and acquisition of the warrant instrument from the payee. That entitlement issue has not previously been the subject of this Court's review. And, surprisingly, we have not found any decision on the UCC status of a State warrant by any Illinois court of record.

The ultimate issue in this case is whether the Claimant's asserted status as a holder in due course, or any lesser status under the UCC, trumps the "stop order" issued by the Comptroller. The rights, if any, attaching to the instrument itself, and the Claimant's status as the

assignee and possessor—or, in UCC terms, as a transferee and holder—of the instrument, depends in the first instance upon whether the State warrant is a negotiable instrument under the UCC. That is a question of law governed primarily by section 3—104 of the UCC, which establishes which writings are negotiable instruments.

On this threshold issue, we conclude that a State warrant is a negotiable instrument under section 3—104 of the UCC. A warrant is an order by the Comptroller on the State Treasurer to pay a sum certain “to the order of” a named payee. The Treasurer’s role as custodian of State funds, and the Comptroller’s role as chief payment officer who “orders the payment of funds into and out of the Treasury” are, of course, established in the first instance by our Constitution (Ill. Const. (1970), art. V, sec. 17 (Comptroller) sec. 18 (Treasurer).) As a signed order for the payment of a sum certain of money, the warrant is a “draft”—a form of negotiable instrument—within the terms of section 3—104 of the UCC (810 ILCS 5/3—104), which provides:

“§3—104. Negotiable Instrument.

(a) Except as provided in subsection (c) and (d), ‘negotiable instrument’ means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges, described in the promise or order, if it:

(1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) is payable on demand or at a definite time; and

(3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of any obligor.”

It is clear and undisputed that there was a “transfer” of the warrant from the payee to the Claimant, and that

the warrant, on its face payable to the payee, was “negotiated” to the Claimant as it was endorsed by the payee. (See sections 3—201 and 3—203 of the UCC.) Accordingly, the Claimant is at a minimum the transferee and holder of the warrant for purposes of the UCC.

It is unnecessary for us to carry the analysis further and to determine if this Claimant is a holder in due course as it contends. As a transferee, the Claimant succeeds to the rights of the transferor—the payee—to enforce the warrant. (See section 3—203 of the UCC.) As a holder of the warrant, the Claimant has its own right to enforce the instrument according to its own terms. (See section 3—301 of the UCC.) Because the alleged “stop order” is unexplained and unjustified on this record, there is no defense presented to the Claimant’s right, as its holder, to enforce the warrant instrument.

We do not need to, and do not, address the issue of whether the undocumented stop order (which is before us only because the Claimant has alleged it) might be a defense to a claim by the original payee. Similarly, we need not and do not determine whether the Claimant is a holder in due course. Although that status or lack thereof could be dispositive in some cases, depending on the defenses that are advanced, in this case there are no defenses advanced and it is thus sufficient to our ruling on this claim to hold as we do that the Claimant became a holder of the warrant and is entitled to enforce it.

For these reasons, this claim is allowed, and summary judgment is granted in favor of the Claimant and against the Respondents.

Claimant is awarded the sum of \$15,170 in full satisfaction of this claim.

(No. 96-CC-4338—Claim dismissed.)

BOARD OF DIRECTORS OF 345 FULLERTON PARKWAY
CONDOMINIUM ASSOCIATION, Claimant, *v.* TEACHERS'
RETIREMENT SYSTEM OF THE STATE OF ILLINOIS,
and T. R. FULLERTON CORP., Respondents.

Opinion filed March 20, 1998.

BOEHM, PEARLSTEIN, BRIGHT, LTD. (GARY I. BLACK-
MAN, of counsel), for Claimant.

JAMES E. RYAN, Attorney General (THOMAS S. GRAY,
Assistant Attorney General, of counsel), for Respondent.

STATUTES—*statutory purpose of Teachers' Retirement System.* Pursuant to the Illinois Pension Code, the Teachers' Retirement System was created for the purpose of providing annuities and other benefits for teachers, annuitants and beneficiaries, and all Teachers' Retirement System business is to be transacted, its funds invested, and its assets held, in such name.

JURISDICTION—*Teachers' Retirement System pension fund not State fund—claim seeking damages from fund dismissed for lack of jurisdiction.* In a claim brought against the Teachers' Retirement System stemming from a real estate transaction and seeking damages from the TRS pension fund, the Court of Claims determined that it lacked subject matter jurisdiction and the claim was dismissed, since the Court's jurisdiction is limited to claims against the State, the pension fund assets were trust funds rather than State funds, and the Court therefore had no statutory authority to direct payment from such funds.

OPINION AND ORDER

EPSTEIN, J.

This claim is brought against the Teachers' Retirement System of the State of Illinois (the TRS), a statutory pension system for certain school district employees, seeking damages from the TRS pension fund arising from a real estate investment of the TRS. This court *sua sponte* raised the issue of our subject matter jurisdiction over this claim, and over a similar claim against the TRS in another case, which has since settled and been withdrawn.

The Jurisdictional Issues

The issue is whether this court's subject matter jurisdiction under section 8 of the Court of Claims Act (705

ILCS 505/8)—and, concomitantly, whether Illinois’ statutory sovereign immunity (under the Immunity Act (745 ILCS 5/1))—covers (a) liabilities of TRS pension fund assets, and (b) liabilities of a business corporation that is (allegedly) an *alter ego* of the TRS, a State agency. The first jurisdictional issue has two aspects because of the different funds from which a TRS liability might be paid: (i) liability of the TRS pension fund itself payable from pension funds, and (ii) liability of the State payable from appropriated State tax-derived funds.

Decision

This court now dismisses this claim and holds that:

(1) This court lacks jurisdiction over the TRS pension fund (and sovereign immunity does not cover that fund) because it is a trust fund for the sole benefit of present and future TRS members, and is not a State fund;

(2) This court lacks authority to order funds paid out of the TRS pension fund to satisfy a TRS liability; the General Assembly cannot do so because the pension fund is not appropriated;

(3) This court therefore lacks jurisdiction over the TRS Board in its capacity as trustee-owner of the TRS pension trust fund, and lacks jurisdiction over this claim, which asserts a liability arising out of the TRS’ ownership of a real estate investment of the TRS pension fund;

(4) Insofar as this claim seeks to impose liability on the State, payable from State general funds, for a liability of the TRS pension fund, we have jurisdiction over such claim as it claims against the State, but such claim fails to state a cause of action against the State because:

- (a) liabilities of the TRS pension fund are not State liabilities, except insofar as such liabilities have been statutorily assumed by the State;

- (b) the only TRS liabilities statutorily assumed by the State are those obligations assumed in §16—158(c) of the Illinois Pension Code (40 ILCS 5/16—158(c)):

“Payment of the required State contributions and of all pensions and * * * other benefits granted under or assumed by this retirement system, and all expenses in connection with the administration and operation thereof, are obligations of the State.”

- (c) This claim is an investment liability and is not an “expense[] [of] * * * the administration and operation” of the TRS and is therefore not an assumed State obligation. *See Jones v. Jones-Blythe Construction Co.* (4th Dist. 1986), 150 Ill. App. 3d 53, 501 N.E.2d 374, 103 Ill. Dec. 353.

(5) This court lacks jurisdiction over the T.R. Fullerton Corporation, an Illinois business corporation, notwithstanding the allegation in the complaint that it is an *alter ego* of the TRS, a State agency.

Our decision recognizes a bifurcated jurisdiction over the TRS and, impliedly, over some other statutory governmental agencies that function in both State and non-State capacities. Under our decision, such agencies may sometimes be “State agencies” and sometimes not, depending on the particular function or capacity that gives rise to a particular claimed liability. We recognize that this subtle distinction in Illinois sovereign immunity law may well create a trap for unwary litigants and their lawyers until finally resolved by the Supreme Court or codified by the General Assembly. We would prefer to avoid claims bouncing between the constitutional courts and this statutory court, which can prejudice good claims, but we are constrained to apply the statutes as we find them.

Nature of the Claim

This claim arises out of a residential apartment building in Chicago (the “345 Fullerton Building”) that was

converted to condominium ownership and which the TRS allegedly acquired from the defaulted original developer that the TRS had financed. The complaint seeks damages on behalf of the purchasers of the condominium units for certain alleged contractual liabilities of the developer, which are alleged to fall on the TRS as successor “equitable” owner and as indirect *de facto* operator and successor developer of the condominium building. The complaint also names an Illinois business corporation, the T.R. Fullerton Corporation (“TRF Corp.”), which is alleged to hold legal title to the building as an *alter ego* and subsidiary of the TRS.

Another claim against the TRS based on its investment ownership of the 345 Fullerton Building—a contractor’s contract claim for HVAC work done on the building—was also brought in this court, but was settled and withdrawn. *Mid Res, Inc. v. Teacher’s Retirement System of the State of Illinois*, No. 95 CC 3515.

Procedural History

Both this case and *Mid Res* were filed here after the circuit court dismissed the claimants’ actions in that court on sovereign immunity grounds, holding that this court has exclusive jurisdiction of the claims against the TRS and, apparently, of those against TRF Corp.

This court *sua sponte* raised the issue of our subject matter jurisdiction over this claim and the *Mid Res* claim, and directed the parties in both cases to brief the jurisdictional issues. None of the parties filed a brief, and the *Mid Res* case settled as noted above. Because of the importance and recent recurrence of the peculiar sovereign immunity and jurisdictional issues presented, we now decide the matter without further delay.

Analysis

The TRS Pension Fund and State Funds.

The crux of the analysis is that the TRS pension fund is a statutory trust fund for the benefit of its present and future members—certain local school district employees—and is not a State fund and is not owned by the State in any material sense. Accordingly, as the funds and other investment assets of the TRS pension fund are not State funds or assets, they are outside the scope of this court’s jurisdiction, which is limited to claims “against the State” (see section 8 of Court of Claims Act, 705 ILCS 505/8) and are outside the scope of the sovereign immunity established by section 1 of the Immunity Act (745 ILCS 5/1), which immunizes the “State of Illinois” from being sued as a defendant or party except in this court (or in the Public Labor Relations Board).

Although the TRS and its Board and staff may be a “State agency” for some purposes, as they surely are, the TRS’ capacity with respect to the TRS pension fund is purely as fiduciary trustee for the benefit of the TRS members, as the statutory scheme makes clear.

Article 16 of the Illinois Pension Code is the current codification of the Teachers’ Retirement System statute, and like its legislative pre-Code antecedents, plainly establishes the TRS for the benefit of certain defined classes of individuals, and not for the benefit of any governmental entity much less the State. The current version of the lead section of Article 16 (40 ILCS 5/16—101) states:

“§16—101. Creation of System. Effective July 1, 1939, there is created the “Teachers’ Retirement System of the State of Illinois” for the purpose of providing retirement annuities and other benefits for teachers, annuitants and beneficiaries. All of its business shall be transacted, its funds invested, and its assets held in such name.”

Under the Illinois sovereign immunity caselaw—which extends back at least as far as the adoption and constitutionalization of State sovereign immunity in the 1870 Illinois Constitution (*see* Art. IV, section 26)—the primary and most dispositive factor in determining whether a particular governmental entity or agency is, or is not, part of the “State” for purposes of sovereign immunity is the character of the funds held or controlled by it. As our Supreme Court held in *People v. Illinois State Toll Highway Com.* (1954), 3 Ill. 2d 218, 227, 120 N.E.2d 35, 41 (Toll Highway Com. not a State agency, outside Court of Claims’ jurisdiction):

“The multiplicity of factors which the courts have considered in reaching a decision of this question makes it impracticable to extract a simple rule which will fit every situation. The factor entitled to most weight, in our opinion, is [whether] * * * the general funds of the State [can] be reached in order to satisfy an obligation of the [defendant agency].”

Review of the sovereign immunity decisions of our Supreme Court discloses no more significant factor and discloses no qualification of this principle that sovereign immunity attaches to the State’s funds and not to other funds. There are undoubtedly situations in which the character of particular funds is ambiguous or doubtful, as between being State funds, non-State governmental funds, private funds or some hybrid of these categories.¹

But this case does not present an ambiguous or doubtful situation in this regard. The TRS pension funds are trust funds and are not State funds available for general

¹ Due at least in part to Illinois’ extraordinary complex of statutory governmental entities that evolved during the century (1870-1970) of growth under the constraints of the 1870 Constitution, our courts have had to wrestle with some difficult issues of classification of various statutory entities (and their funds), as in *Toll Highway Commission, supra*. See, also, *Gocheff v. State Community College of East St. Louis* (5th Dist. 1979), 69 Ill. App. 3d 178, 386 N.E.2d 1141, 25 Ill. Dec. 477 (Community College of E. St. Louis as of 1977 not a State agency; outside Court of Claims’ jurisdiction). See, also, *Williams v. Medical Center Comm’n* (1975), 60 Ill. 2d 389, 328 N.E.2d 1; *Ellis v. Board of Governors of State Colleges and Universities* (1984), 102 Ill. 2d 387, 80 Ill. Dec. 750, 466 N.E.2d 202; see, generally, *S.J. Groves & Sons Co. v. State of Illinois* (1982), 93 Ill. 2d 397, 67 Ill. Dec. 92, 444 N.E.2d 131.

State purposes. In this regard, we point out but do not rest upon the additional Illinois constitutional protection afforded to all Illinois pension rights. (See, 1970 Illinois Constitution, Art. XIII, sec. 5.) This reinforces our conclusion that the Illinois statutory pension fund is separate from the State treasury and from State funds.

This pension fund situation is analogous to cases in which state agencies act as court-appointed fiduciaries of private parties and their private funds. In such cases, we have held that this court lacks jurisdiction over the private funds over which the State agency has fiduciary custody. See, *eg.*, *Kulas v. Vogler* (1997), 49 Ill. Ct. Cl. 172, No. 95 CC 3631 (Public Administrator and Guardian of Lake Co., as court-appointed administrator of a decedent's probate estate); *Reynolds State Bank v. Office of State Guardian* (June 12, 1997), No. 97 CC 423 (Office of State Guardian, as court-appointed guardian of an incompetent individual's estate).

On the other side of the coin, but equally fundamentally, State general funds are not available to pay investment losses of pension trust funds like the TRS pension fund—or losses of other private trust funds over which a State agency may have fiduciary custody or trust ownership, as in *Kulas, supra*, and *Reynolds State Bank, supra*. This consideration bears additional comment as it is such a fundamental concern.

If this Court were to find liability against the TRS arising out of this investment asset (which happens to be improved real estate) and if we were then to pay the award from our general claims appropriation or if the General Assembly were then to appropriate the award from the general revenue fund—as ordinarily occurs under the present statutory scheme—then the claim against the pension fund would ultimately be paid from general State funds.

That would result in the State (the taxpayers) subsidizing the pension fund and its investment risks and losses. This court finds no basis for permitting such a legislatively unauthorized State subsidy of the TRS pension fund.

Under such a scheme, which we have rejected today, the State would effectively become a guarantor of all State-administered pension fund investment liabilities and many losses. In our view, that is not the law; has never been the law or the practice in Illinois; and would be a potentially huge and unpredictable drain on the State treasury. It should not escape notice that such a result would be an inversion of the principle and purpose of sovereign immunity.

This brings the discussion to the two reported Illinois reviewing court decisions addressing jurisdiction over the TRS:

Jones v. Jones-Blythe Constr. Co. (4th Dist. 1986), 150 Ill. App. 3d 53, 501 N.E.2d 374, 103 Ill. Dec. 353 (slip-and-fall on TRS office premises) (held that exclusive jurisdiction lies in the court of claims, based on statutory assumption of State liability under section 16—158, Illinois Pension Code (40 ILCS 5/16—158) providing that “all expenses in connection with the administration and operation [of the TRS] are obligations of the State”); and

Utterback v. Board of Trustees of the Illinois Teachers’ Retirement System (4th Dist. 1997), ___ Ill. App. 3d ___ (slip-and-fall in White Oaks Mall, a TRS investment property) (held that exclusive jurisdiction lies in the court of claims, putatively based on *Jones* and the absence of an exception in section 8(d) of the Court of Claims Act, which grants exclusive jurisdiction over “all claims against the State for damages * * * sounding in tort”).

Both *Jones* and *Utterback* held that exclusive jurisdiction over those tort claims against the TRS lie in this court rather than in the constitutional courts. We agree with and follow the analysis of *Jones*, but thereby arrive at the opposite conclusion on the facts of this case. We disagree with the result and with the incomplete analysis of *Utterback*, which we find to be inconsistent with *Jones*, and we decline to follow *Utterback*.

In the 1986 *Jones* decision, the appellate court ultimately applied the statutory division of liability in section 16—158 of the Pension Code. That statute assumes State financial responsibility for “administration and operation” expenses and thus liabilities of the TRS, as we observed above, and thereby opens the door to State liability in this Court for claims that fall within the statutory standard, as the *Jones* court concluded was the case for that slip-and-fall claim on TRS office premises. *Jones* was thus a straightforward application of the statute.

Utterback, however, ignored the statute and arrived at an incorrect result by following *Jones*’ disposition while disregarding its reasoning. The *Utterback* opinion neither considered nor applied the section 16—158 “administration and operation” standard prescribed by the legislature for State responsibility for TRS liabilities. Although *Utterback* correctly rejected the common law proprietary-governmental distinction for determination of the scope of State sovereign immunity, that court never reverted to the statutory distinction that the legislature adopted for assuming responsibility for TRS liabilities.²

Thus *Utterback* wound up treating a TRS real estate investment liability as a TRS operating expense. If that

² Instead the *Utterback* opinion focused on the “all claims” language of this court’s jurisdictional grant over tort claims against the State. (See section 8(b) of the Court of Claims Act.) That analysis, however, evades the dispositive issue of whether or not “the State” and State funds are the liable parties.

treatment were followed, the effect would be to shift that TRS investment liability onto the State's general revenue fund *sub rosa* through the procedures of this court and the routine appropriations process. These consequences were apparently not pointed out to the *Utterback* court nor were considered by it. *Utterback's* result is wrong in imposing the expense of a slip and fall in a shopping mall onto the taxpayers merely because that mall is owned by a teachers' pension fund that is administered by a State board. It is the pension fund that should pay, assuming negligence of the TRS is proven, and not the Illinois taxpayers through the appropriations process.

We must observe that there is nothing inherently improper about this court adjudicating claims against the TRS or any other statutory pension system in Illinois if that were someday the will of the legislature. The problem is that this court cannot allocate pension fund investment liability to the responsible pension fund without statutory authority to direct payment from such funds. We now lack such remedial authority, which only confirms our conclusion that we lack adjudicatory jurisdiction over TRS pension fund liability claims. We do not seek such jurisdiction, but must point out that such jurisdiction would make little sense without the corresponding authority to allocate liability to the responsible fund, all of which would require legislative authority that in almost 100 years has not been deemed suitable for this court.

Jurisdiction over the Corporate Alter Ego.

Claimant named the T.R. Fullerton Corporation as a Respondent on the allegations that it is owned and controlled by the TRS and is effectively the TRS's *alter ego* for purposes of ownership and operation of the 345 Fullerton Building which is alleged to be a TRS pension fund investment. The short answers to this are (1) the TRF Corp. is as

a matter of law a private business corporation which is therefore outside our statutory jurisdiction irrespective of its ownership, and (2) assuming *arguendo* as we must on these pleadings that the TRS does own it and assuming further that it is legal for the TRS to own a subsidiary business corporation (neither of which issues we consider or decide here), this Court is still without jurisdiction over the TRF Corp. because, as we held above, we lack jurisdiction over its alleged principal, the investment properties of the TRS pension fund; because we lack jurisdiction over the principal we lack jurisdiction over its [alleged] *alter ego* absent an independent jurisdictional basis.

Conclusion and Order

For the reasons set forth above, this claim is dismissed.

(No. 97-CC-0170—Claim dismissed.)

BLACK KNIGHT PRODUCTIONS, INC., Claimant, *v.* THE
UNIVERSITY OF ILLINOIS AT CHICAGO, BLACK STUDENT
ASSOCIATION, Respondent.

Order filed May 13, 1998.

JAMES, JAMES, & MANNING (LUKE A. CASSON, of
counsel), for Claimant.

BURDITT & RADZIUS (NORMAN P. JEDDELOH &
PATRICK J. SULLIVAN, of counsel), for Respondent.

PRACTICE AND PROCEDURE—*properly pleaded facts are taken as true for purposes of ruling on motion to dismiss.* In ruling on a motion to dismiss, all facts properly pleaded in the complaint and those contained in exhibits made a part of the complaint are to be taken as true for purposes of the motion.

CONTRACTS—*one must ascertain at own peril agent's authority to bind State.* In dealing with an agent of the State, one must ascertain at his peril the

authority of the agent, and the mere assertions of the agent are not sufficient to bind the State, and the statutes, rules and regulations dealing with State purchases are available to any vendor who cares to acquaint himself with them.

SAME—failure to establish authority of agent to execute contract for State—breach of contract claim dismissed. In a breach of contract claim arising out of an agreement between the Claimant production company and a student organization, which was witnessed by a university employee, the State's motion to dismiss the claim was granted since, assuming that the employee was acting as an agent of the State and not merely as a witness to the execution of the contract, the Claimant failed to establish the agent's authority to take such action on behalf of the State, nor did it prove that the State was responsible for the contractual breach under the theory of *respondet superior*.

ORDER

HESS, J.

This cause comes before the Court on motion of Respondent, the Board of Trustees of the University of Illinois, to dismiss, filed November 14, 1997, and motion of Claimant for oral argument, filed February 2, 1998. For the reasons discussed below, Claimant's motion for oral argument is denied and Respondent's motion to dismiss is granted.

Claimant's Motion for Oral Argument

In its motion for oral argument, Claimant argues that it must be afforded an opportunity to rebut "additional materials" submitted by Respondent for the first time in Respondent's reply in support of its motion to dismiss. On February 10, 1998, Respondent filed its objections to Claimant's motion for oral argument stating that "any purported 'additional material' set forth by [Respondent] in its reply brief was simply a response to new matter not contained in [Claimant's] complaint but instead raised for the first time in [Claimant's] opposition to [Respondent's] Motion to Dismiss."

Section 790.200 of the Court of Claims Regulations (74 Ill. Adm. Code 790.200) states that "[t]here shall be

no oral argument on motions or objections to motions, except on motions to dismiss where, in the Court's discretion, oral arguments thereon would be of value to the Court." Having considered the pleadings of record, it is the Court's opinion that oral arguments in this instance would be of no value to the Court. Therefore, it is hereby ordered that Claimant's motion for oral argument be, and the same is, denied.

The Court will now consider the motion of Respondent to dismiss.

Respondent's Motion to Dismiss

In ruling on a motion to dismiss, all facts properly pleaded in the complaint and those contained in exhibits made part of the complaint are to be taken as true for purposes of (and only for the purposes of) the motion. *Royal Dental Manufacturing v. State* (1989), 43 Ill. Ct. Cl. 252.

On July 22, 1996, Claimant filed its two-count complaint with the court clerk. In count I of its complaint, Claimant alleges that on July 31, 1992, Claimant and the Black Student Association of the University of Illinois at Chicago, Inc. (BSA), entered into the following contract:

"Contractual Agreement
between
BLACK KNIGHT PRODUCTIONS
and
BLACK STUDENT ASSOCIATION
of the
University of Illinois at Chicago

July 30, 1992

The BLACK STUDENT ASSOCIATION [hereafter BSA] has hired BLACK KNIGHT PRODUCTIONS [hereafter BKP], a non-profit company, to organize, coordinate and manage the First Annual African American College Expo/Fair (AACE). BSA is the main sponsor of the First AACE which will be held on UIC campus from Friday, July 31, 1992 through Sunday, August 2, 1992.

As defined by BSA, throughout this agreement the term *proceeds* shall mean all money collected and the term *profits* shall mean proceeds less expenses.

BSA and BKP understand that all door money *proceeds* are to be deposited into the BSA account by Monday, August 3, 1992. After all UIC incurred costs have been met, the BSA's percentage of the door money *profits* shall be fifteen percent (15%) of which five percent (5%) will go towards the *Grace Holt Scholarship Fund* and eighty percent (80%) of the door money *profits* are to be turned over to BKP no later than Thursday, August 6, 1992 to be distributed as follows:

- 45% Chicago housing rehabilitation (South and West)
- 15% Donated to Roseland Community Hospital
- 10% Lewis University *Black Student Union*
- 10% Chicago State University *Student Government Association*

BSA and BKP understand that the remaining five percent (5%) of the door money *profits* will remain in the BSA account for *at least* two months after the AACE to absorb any remaining UIC expenses associated with this event. After that time period, the five percent or its remains will be turned over to BKP. If other UIC expenses associated with the AACE arise after the five percent (5%) or its remains have been turned over to BKP, the expenses are to be paid 50/50 with Black Knight Productions paying fifty percent (50%) of the bill and BSA paying the remaining balance.

BSA and BKP understand that vendor sale proceeds are to be counted on the premises each night. Ten percent of the vendor *proceeds* is to be paid each night to the University of Illinois at Chicago for rental space. BSA, the sponsoring organization for this event, is entitled to a percentage of the *profits* from vendor sales. Thus, three percent (3%) of the profits from *all* vendor sales from three *all* days is to be paid to the BLACK STUDENT ASSOCIATION by Black Knight Productions *before* any money is turned over to BKP.

There shall be at least one BKP and one BSA staff member present at all times when handling, counting money associated with the AACE. BKP will receive copies of the receipts for all AACE deposits into the BSA account.

The concept of the First African American College Expo/Fair was developed on October 4, 1991 by Yett-i Howard, President of Black Knight Production in Matteson, Illinois. The Black Student Association of the University of Illinois at Chicago is a proud official sponsor of the First Annual African American College Expo/Fair.

The signatures below verify that the Black Student Association and Black Knight Productions understand that the contents of this contractual agreement are *binding* in order for this event to take place on UIC campus.

Date: 7/31/92
Lisa M. Boyd, President Black Student Association

Date: 7/31/92
Yett-i Howard, President Black Knight Productions

Date: 7/31/92 Phone: []"
Witness

(Emphasis in original.)

The contract is signed by Lisa M. Boyd, President Black Student Association and Yett-i Howard, President Black Knight Productions. The contract also bears the signature of Christine Grgurich for University of Illinois at Chicago as “Witness.” Claimant’s count I goes on to allege that BSA breached the above contract.

In count II of its complaint, Claimant seeks breach of contract damages against Respondent. Claimant alleges it entered into a written contract with Respondent “whereby [University of Illinois at Chicago] UIC agreed to allow and permit [Claimant] to promote, manage and coordinate the AACE and UIC was at all times relevant herein in control of all facilities which were to be used in the execution of the event.” (Paragraph 21 of Claimant’s complaint.) Claimant further alleges that “UIC is held responsible for breach of the terms of the contract directly and under the theory of respondent [sic] superior.” (Paragraph 23 of Claimant’s complaint.)

Although the caption of the contract states that it is an agreement between Claimant and BSA, Claimant appears to allege that Respondent is a party thereto as a result of Ms. Grgurich signing the contract as a witness. Assuming arguendo that Ms. Grgurich was acting as an agent of Respondent, it is a well settled principle of law that in dealing with an agent of the State one must ascertain at his peril the authority of the agent, and the mere assertions of the agent are not sufficient to bind the State. (*New Life Development Corp. v. State* (1992), 45 Ill. Ct. Cl. 65, 86; *Melvin v. State* (1989), 41 Ill. Ct. Cl. 88; *Dunteman v. State* (1985), 38 Ill. Ct. Cl. 51.) “There are statutes dealing with State purchases and there are rules and regulations. These statutes, rules and regulations are all published and available to any vendor who cares to acquaint himself with them.” (*Central Office Equipment Co. v. State* (1979), 33

Ill. Ct. Cl. 90 at 91.) “[A] purchase order emanating from an office or official authorized to obligate the funds of the State is a prerequisite to the establishment of an obligation * * * against the State.” 33 Ill. Ct. Cl. at 91.

Respondent, citing *Rend Lake College Federation of Teachers v. Community College District* (5th Dist. 1980), 84 Ill. App. 3d 308, 405 N.E.2d 364, 39 Ill. Dec. 611, argues that the same principles apply in the case of Respondent. This Court agrees. The general rules concerning university organization and procedure of the University of Illinois are quite clear as to the party[ies] having authority to execute contracts on behalf of Respondent. The general rules in effect on July 31, 1992, the date of the contract in issue, state:

“ARTICLE II. BUSINESS ORGANIZATION AND POLICIES

SECTION 1. THE COMPTROLLER

As an officer of the Board of Trustees, and in accordance with the By-laws of the Board, the Comptroller shall . . .

(d) Sign contracts to which the University is a party, unless otherwise ordered by the Board in specific cases.

SECTION 4. AWARD AND EXECUTION OF UNIVERSITY CONTRACTS

(a) Purchases, construction contracts, and other contracts shall be awarded by the Board of Trustees in accordance with applicable State law and with regulations adopted by the Board of Trustees . . .

(b) All contracts, other than purchase orders, shall be executed at least in duplicate, and the original thereof shall be filed with the Secretary of the Board of Trustees and remain in the custody of the Secretary . . .

(c) Contracts relating to appointments to the staff may be executed by the Secretary of the Board of Trustees. Agreements providing for the appointments of Resident Physicians and Dentists may be executed by the Chief of Staff of the University of Illinois Hospital. Purchase orders issued pursuant to awards made by the Board of Trustees may be signed by the University official in charge of the purchasing activity, as designated by the Vice-President for Business and Finance. Unless otherwise ordered by the Board of Trustees in specific cases, other contracts to which the University is a party shall be signed by the Comptroller of the Board of Trustees and attested to by the Secretary of the Board of Trustees.

SECTION 5. DRAFTING AND APPROVAL OF UNIVERSITY
CONTRACTS

(b) All contracts prior to the execution thereof shall be approved as to legal form and validity by the University Counsel, such approval to be endorsed in writing on the contract, provided that such approval and endorsement shall not be required with respect to individual contracts or extensions or renewals thereof, the form of which has been previously approved by the University Counsel as a standard and which contains no substantive changes or additions, other than those pertaining solely to the description of the project, the amount involved, and the term of the contract or extension.”

In view of the general rules, Respondent cannot be considered as a party to the contract in issue because it was not signed by the comptroller of the Board of Trustees and attested to by the secretary of the Board of Trustees.¹ Assuming that Ms. Grgurich was in fact acting as an agent of Respondent and not merely as a witness to the execution of the contract in issue, the burden remained on Claimant to ascertain whether she had the authority to execute the contract on behalf of Respondent. Claimant failed to do so and, therefore, its claim against Respondent for breach of contract must also fail.

Claimant also alleges that Respondent is responsible for breach of the terms of the contract under the theory of *respondeat superior*. *Respondeat superior* is a tort doctrine, premised neither on contract principles or policies. *Industrial Indemnity Co. v. Vukmarkovic* (1st Dist. 1990), 205 Ill. App. 3d 176, 187, 150 Ill. Dec. 270, 562 N.E.2d 1073; *appeal denied* (1991), 136 Ill. 2d 544, 567 N.E.2d 332, 153 Ill. Dec. 374. Claimant fails to state or maintain against Respondent a claim for tortious interference of contractual relations or any other tortious action. Consequently, Claimant’s claim in count II against Respondent for breach of

¹ The contract in issue is not a “standard” contract and thus to be enforceable against Respondent would have had to be signed by the Comptroller of the Board of Trustees and attested to by the Secretary of the Board of Trustees.

contract under the doctrine of *respondeat superior* necessarily fails. *Douglas Theatre Corp. v. Chicago Title & Trust Co.* (1st Dist. 1997), 288 Ill. App. 3d 880, 681 N.E.2d 564, 224 Ill. Dec. 249; *appeal denied* (1997), 174 Ill. 2d 558, 686 N.E.2d 1160, 227 Ill. Dec. 4 (1997).

For the foregoing reasons, it is hereby ordered that Respondent's motion to dismiss be, and the same is, granted and this cause is dismissed, with prejudice.

(No. 97-CC-2793—Claim denied.)

CHARLES E. KNOX, Claimant, v. THE STATE OF ILLINOIS,
DEPARTMENT OF CORRECTIONS, Respondent.

Opinion filed October 2, 1997.

CHARLES E. KNOX for Claimant.

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

PRISONERS AND INMATES—*no proof that alleged power surge destroyed inmate's radio and television—claim denied.* An inmate's testimony that a gush of smoke came from his television shortly before the television and his radio became inoperable was insufficient to support his claim for damaged property, since, despite the inmate's allegation that an electrical power surge caused the damage, he produced no evidence of a power surge or any negligence on the part of the State.

OPINION

EPSTEIN, J.

Claimant Charles E. Knox, an inmate of the Department of Corrections (IDOC) brought this claim seeking reimbursement for damaged property in the amount of \$255.99. The case is before us after hearing on the record and our Commissioner's report.

At the June 11, 1997, hearing on this claim, the Claimant testified that during his incarceration at Joliet Correctional Center he was the owner of a television and radio that were in working order prior to the alleged incident. Claimant testified that on or about October 30, 1996, he was watching his television when a “gush of smoke” came from the television and both the radio and television became inoperable. He testified that one appliance was plugged into an extension cord and the other directly into the outlet, and asserts that the damage was the result of an electrical power surge at the institution. Claimant produced receipts for the television in the amount of \$204.34 and for the radio in the amount of \$51.65.

The Respondent produced William Schriever, a Plant Maintenance Engineer II, and the Chief Engineer for the Correctional Center. Mr. Schriever testified that he had reviewed the facts and allegations, and that there was no evidence of a power surge on that date.

Claimant urges us to find that a power surge occurred, and that it was the cause of the injury to his personal property. Claimant then asks us to find that the Respondent was negligent (and presumably that that negligence caused the power surge somehow) and thus liable to Claimant for the cost of the appliances.

Claimant has produced no evidence—by testimony or by documentation—of (1) a power surge, (2) such a surge “causing” injury to the appliances, (3) any negligence by the IDOC, or (4) any causal connection between IDOC acts or omissions and a power surge. In short, this claim is 100% unsubstantiated and baseless, except for the lonely fact that Claimant’s property was damaged somehow. This is not a close case.

For the foregoing reasons, the court finds for the Respondent as to liability and denies this claim in its

entirety. It is therefore ordered that this claim is denied and forever barred.

CRIME VICTIMS COMPENSATION ACT

Where person is victim of violent crime as defined in the Act; has suffered pecuniary loss; notified and cooperated fully with law enforcement officials immediately after the crime; the injury was not substantially attributable to the victim's wrongful act or substantial provocation; and the 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 1998

(No. 94-CV-3047—Claim denied.)

In re APPLICATION OF DELORIS ARMSTRONG

Order filed December 6, 1994.

Order filed June 7, 1996.

DELORIS ARMSTRONG and GAIL TONEY, *pro se*, for Claimant.

JAMES E. RYAN, Attorney General (PAUL CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*reduction of denial of award—victim's contributory acts or prior criminal conduct.* Section 10.1(d) of the Crime Victims Compensation Act states that an award shall be reduced or denied according to the extent to which the victim's acts or conduct provoked or contributed to his injury or death, or to the extent to which any prior criminal conviction or conduct of the victim may have directly or indirectly contributed to his injury or death.

SAME—*confrontation with rival gang members—victim's conduct contributed to his death—claim denied.* Where the victim, who was known as the chief of a street gang, was shot and killed by a rival gang member after he went to confront the gang about an earlier altercation, the victim's conduct and gang membership provoked and contributed to his own death so as to warrant the denial of his aunt's request for compensation for funeral expenses.

ORDER

PER CURIAM.

This claim arises out of an incident that occurred on September 29, 1993. Deloris Armstrong, aunt of the deceased victim, James Earl Thomas, 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 May 6, 1994 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 29, 1993, the victim was shot by the alleged offender. The incident occurred near 4216 West Jackson, Chicago, Illinois. Police investigation revealed that the victim was known as a chief of a street gang. He went to this area to confront members of a rival street gang about an earlier altercation. During an ensuing dispute, the alleged offender shot the victim. The alleged offender has been apprehended and charged with first degree murder. The criminal proceedings against him are currently pending.

2. That section 10.d of the Crime Victims Compensation 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 this incident occurred due to the fact that the victim and the alleged offender were members of opposing street gangs. This incident occurred as a result of their gang affiliation, gang rivalry and face to face provocation.

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.

ORDER

SOMMER, C.J.

On September 29, 1993, James Earl Thomas was shot to death on West Jackson in the City of Chicago. Pursuant to the Crime Victim's Compensation Act (Ill. Rev. Stat. 1991, ch. 70, par. 71 *et seq.*, now 740 ILCS 45/1 *et seq.*) a claim was made by Deloris Armstrong, the decedent's aunt, for funeral expenses she had paid. On December 6, 1994, this Court originally denied the application for benefits submitted by the Claimant due to the fact that the Claimant's decedent was participating in gang activity which contributed to his death.

A hearing on this matter was held on August 14, 1995. Submitted during the course of the hearing was the report of the pathologist who conducted an autopsy on Mr. Thomas. In his opinion, the decedent died as a result of multiple gunshot wounds to the body. According to the reports submitted by the Chicago Police Department, the decedent was found at the scene of the shooting in clothes

which exhibited gang graffiti and symbolism. A friend of the victim informed the police that Mr. Thomas was a member of the Black Gangster Disciples. That person also indicated that the victim was in that location to talk with another gang about a prior fight. The investigating officers checked the Chicago Police Department records and determined that the victim was a Black Gangster Disciple, with a criminal record. Further investigation by the police confirmed that the victim was at the scene of the shooting because of a prior incident. The man eventually arrested for shooting Mr. Thomas admitted that the motive for the shooting was a previous gang altercation.

It is clear that the victim and the alleged offender in this case were from opposing street gangs. This incident occurred because of their gang affiliation, gang rivalry and previous gang incidents. The victim's conduct and his membership in a gang provoked and contributed to his own death and, therefore, the claim will be denied under section 10.1(d) of the Crime Victims Compensation Act (740 ILCS 45/10.1(d)), which states that an award may be denied where the decedent provoked and contributed to his own death.

It is therefore, ordered that this Court's order of December 6, 1994, is affirmed and the present appeal is denied.

(No. 95-CV-0309—Claim denied.)

In re APPLICATION OF MARGARET GIVENS

Order filed September 12, 1995.

Opinion filed April 27, 1998.

MARGARET GIVENS, *pro se*, for Claimant.

JAMES E. RYAN, Attorney General (PAUL H. CHO and DONALD C. McLAUGHLIN, Assistant Attorneys General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*reduction or denial of award—victim's contributory acts or prior criminal conduct.* Section 10.1(d) of the Crime Victims Compensation Act states that an award shall be reduced or denied according to the extent to which the victim's acts or conduct provoked or contributed to his injury or death, or to the extent to which any prior criminal conviction or conduct of the victim may have directly or indirectly contributed to his injury or death.

SAME—*Claimant's burden of proof.* The Claimant has the burden of proving that she has met all conditions precedent for an award under the Act.

SAME—*victim shot after he stabbed offender during altercation—contributory conduct precluded recovery.* In a mother's claim for compensation stemming from her son's murder, recovery was denied based upon the victim's contributory conduct, where the record showed that the victim had stabbed the alleged offender in the back after an egg and fist fight, whereupon the offender left the scene and returned with a gun, shooting the victim.

ORDER

PER CURIAM.

This claim arises out of an incident that occurred on June 30, 1994. Margaret Givens, mother of the deceased victim, Marvin Givens, 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 3, 1994, 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 July 30, 1994, the victim was fatally shot, allegedly by an offender who was known to him. The incident occurred at 223 West 111th Place, Chicago, Illinois. Police investigation revealed that prior to the incident, the victim and the alleged offender were involved in an egg

fight which escalated to a fist fight. During this altercation, the victim produced a knife and stabbed the alleged offender in the back. The offender then left the scene but quickly returned, armed with a handgun. The alleged offender then shot the victim. The alleged offender has been apprehended and charged with first degree murder. The criminal proceedings against him are currently pending.

2. That section 10.1 of the Act indicates factors used to determine entitlement to compensation. Specifically, section 10.1(d) of the Act states that an award shall be reduced or denied according to the extent to which the victim's acts or conduct provoked or contributed to his injury or death, or to the extent to which any prior criminal conviction or conduct of the victim may have directly or indirectly contributed to the injury or death of the victim.

3. That it appears from the investigatory report and the police report that the victim and the alleged offender were involved in an egg fight which escalated to a fist fight. During this altercation, the victim stabbed the alleged offender in the back. The alleged offender left only to return moments later and shoot 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

MITCHELL, J.

This claim arises out of an incident that occurred on June 30, 1994. Margaret Givens, mother of the deceased

victim, Marvin Givens, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereinafter referred to as the Act. 740 ILCS 45/1 *et seq.*

On September 12, 1995, the Court entered an order denying the claim based on the investigatory report. Claimant made a timely request for a hearing. The cause was tried before Commissioner Sternik.

The testimony, police reports, and investigatory report all indicate that the victim, Marvin Givens, was killed by an offender that knew him on July 30, 1994. The victim and neighborhood young men were involved in an egg fight over two days. The participants agreed to change to water balloons but someone threw an egg at Marvin Givens. A fight ensued and the victim ended up cutting the offender with a knife and leaving a superficial wound in the offender's back. Shortly thereafter, the offender obtained a gun and shot the victim in the chest. The victim was found in the alley.

The only testimony presented at the hearing was the testimony of Claimant, Margaret Givens, the mother of the victim. She did not witness the incident and only relayed hearsay testimony that her son had stopped fighting and was at home in bed. However, the undisputed evidence was that the shooting occurred in the alley at 223 W. 111th Place, Chicago, Illinois, and not in the bedroom.

The Claimant has the burden of proving by a preponderance of the evidence that she has met all conditions precedent for an award under the Act. 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 may have directly or indirectly contributed to the injury or death of the victim. While it is clear the offender

murdered the victim, it is also clear that the conduct of the victim contributed to his death. The victim started the fighting and drew and used a knife against the offender. Even though time passed and the offender was not justified under the criminal law in shooting the victim, the victim's acts are significant enough to completely deny an award under the Act.

While the death of the victim is tragic, we find that Claimant has failed to prove her entitlement to an award under the Act. Claimant has failed to prove that she has met all conditions precedent for an award under the Act. The victim's act of cutting the offender with a knife contributed to the victim's death to such an extent that an award must be denied.

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

(No. 96-CV-0206—Claimant awarded \$3,310.75.)

In re APPLICATION OF RODRIGO ARZALUZ

Order filed April 15, 1996.

Opinion filed October 29, 1997.

LEGAL ASSISTANCE FOUNDATION OF CHICAGO (DEV-
EREUX BOWLY, of counsel), for Claimant.

JAMES E. RYAN, Attorney General (PAUL H. CHO and
DONALD C. McLAUGHLIN, Assistant Attorneys General,
of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*prerequisite for recovery—coop-
eration with law enforcement officials.* Pursuant to section 6.1 of the Crime
Victims Compensation Act, a person is entitled to compensation if the appli-
cant has cooperated fully with law enforcement officials in the apprehension
and prosecution of the assailant.

SAME—*battery victim cooperated sufficiently with police and prosecutors—award granted.* Although the Claimant's initial request for compensation arising out of a battery was denied because of his alleged failure to appear in court for criminal proceedings, on reconsideration of the matter the Court awarded him compensation for lost wages and medical expenses, since there was no question that the Claimant was an innocent victim of a battery, and the evidence revealed that the Claimant had appeared in court on the specified date, but left when he could not get assistance and thought that the case was being continued.

ORDER

PER CURIAM.

This claim arises out of an incident that occurred on July 6, 1995. The Claimant, Rodrigo Arzaluz, 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 25, 1995, on the form prescribed by the Attorney General, and an investigatory report of the Attorney General 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 July 6, 1995, the Claimant was allegedly shot by an offender who was known to him. The incident occurred at 1121 North Dearborn, Chicago, Illinois. Police investigation revealed that, prior to the incident, the Claimant and the alleged offender were involved in a verbal dispute. During this dispute, the alleged offender punched the Claimant in the face. The alleged offender was apprehended and charged with battery. However, due to the Claimant's failure to appear in court, an order of stricken on leave to reinstate by the Court and the criminal charge was later dismissed.

2. That section 6.1(c) of the Act states that a person is entitled to compensation under the Act if the applicant

has cooperated fully with law enforcement officials in the apprehension and prosecution of the assailant.

3. That an investigation by the Attorney General's office shows that the Claimant declined to cooperate fully with law enforcement officials in the apprehension and prosecution of the assailant, in that he failed to appear in Court for the criminal proceedings. As a result, an order of stricken on leave to reinstate was entered by the Court and the criminal charge was dismissed.

4. That by reason of the Claimant's refusal to fully cooperate with law enforcement officials in the apprehension and prosecution of the assailant as required by the Act, he is not eligible for compensation thereunder.

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

EPSTEIN, J.

This crime victim's claim arises out of an incident that occurred on July 6, 1995, in which the Claimant was a victim of a battery. Claimant seeks compensation pursuant to the Crime Victim's Compensation Act (the Act). 740 ILCS 45/1 *et seq.*

History of the Claim

On July 25, 1995, Claimant filed his application for compensation; on March 1, 1996, the Attorney General's investigatory report was filed; and on April 15, 1996, this Court issued an order denying the claim for failure to cooperate with law enforcement officials. On May 13, 1996 Claimant filed his request for reconsideration and hearing on the matter, which we granted and assigned the

claim to our Commissioner for hearing, which was set for February 20, 1997.

The Evidence at Hearing

At the hearing, Claimant appeared with his attorney. Claimant testified that he is 25 years old and a pharmacology student (Transcript 5), and that on July 6, 1995, he was the innocent victim of a battery. Claimant was taken from the scene of the incident by ambulance. (Transcript 12.)

He learned the court date would be on August 29, 1995, at 9:30 a.m., in Room 1000 at 1121 S. State Street from the police report and from his friends, who were witnesses to the incident. (Transcript 19.) The police did not notify him of the offender's name. (Transcript 6-7.)

Claimant appeared on the court date. The courtroom was very crowded and noisy, and Claimant did not hear or recognize the name of the offender when his case was called. However, Claimant did recognize the names of some of the witnesses called by the State's Attorney, whom the Claimant approached. The prosecutor advised Claimant that his name was not on the witness list and that they would request another hearing to get his name on the list. (Transcript 8-9.) Claimant attempted to explain that he was the victim but in the confusion he was apparently unable to make himself clear to the State's Attorney, who appeared to believe that he was another occurrence witness. The State's Attorney told Claimant that the case would be called again. (Transcript 9-10.)

Claimant testified that he had no prior experience in court and that he went immediately to the public phone and called the crime victim advocate at the Legal Assistance Foundation and asked what he should do. She advised him that she would have to get back to him. (Transcript 9-10.) Claimant left the court after 10:00 a.m. thinking the case would be continued. (Transcript 11.)

Claimant testified that as a result of the incident he lost 17 days from work. His lost wages totaled \$2,685.75.

Concepcion Tapia, a friend of the Claimant, also testified. She said she was present and witnessed the offender's attack on Claimant. She testified that he was the innocent victim of the crime. Tapia also testified that she appeared late on the court date, and saw Claimant in the hall outside the courtroom. Claimant then related the events in the courtroom to her much as he testified in this proceeding. She also was unfamiliar with the court system and assumed the case would be continued. (Transcript 24-25.)

Discussion

Section 6.1 of the Act provides 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. The sole question in this case is whether Claimant has done so.

The Claimant was clearly and undisputedly the innocent victim of a battery, which is a covered crime under the Act.

In reviewing Claimant's conduct, we take note of the fact that at the time of the incident, Claimant was taken from the scene by ambulance and only later advised of the court date. There is no issue of his cooperation or non-cooperation on the date of the incident.

Claimant makes a showing of his intent to prosecute the offender, which is supported by his court appearance. The record affirmatively reflects a consistent course of conduct that is cooperative and that reflects an effort to testify. There is no police or prosecution testimony or documentation of Claimant being uncooperative. The Claimant's testimony was clear and credible to our Commissioner.

The statutory intent of section 6.1 of the Act is to preclude recovery to persons who fail to cooperate with law enforcement. Clearly in this case, Claimant made a sincere attempt to prosecute the offender. Unfortunately, due to the all too common circumstances of our criminal justice system, his attempts were thwarted. But his efforts are sufficient to convince this Court that he should not be denied recovery under the Act for non-cooperation under section 6.1.

Claimant also produced clear testimony and sufficient supporting documentation to establish both his claim for lost wages in the amount of \$625, and for medical expenses to Northwestern Memorial Hospital in the amount of \$2,041.75 and to Northwestern Medical Faculty Foundation, Inc. in the amount of \$644.

It is hereby ordered that the Claimant is awarded the sum of \$3,310.75 from the crime victims fund as his compensation under the Act as an innocent victim of battery on July 6, 1995 to be paid as follows:

Lost wages to Claimant	\$ 625.00
Medical expenses to	
Northwestern Memorial Hosp.	\$2,041.75
Northwestern Medical Facility	
Foundation, Inc.	<u>\$ 644.00</u>
	\$3,310.75

(No. 96-CV-0514—Claim denied.)

In re APPLICATION OF BETTY GOSS

Order filed February 26, 1996.

Opinion filed December 3, 1997.

BETTY GOSS, *pro se*, for Claimant.

JAMES E. RYAN, Attorney General (PAUL H. CHO and MICHAEL F. ROCKS, Assistant Attorneys General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*reduction or denial of award—victim's contributory acts or prior criminal conduct.* Section 10.1(d) of the Crime Victims Compensation Act states that an award shall be reduced or denied according to the extent to which the victim's acts or conduct provoked or contributed to his injury or death, or to the extent to which any prior criminal conviction or conduct of the victim may have directly or indirectly contributed to his injury or death.

SAME—*Claimant's burden of proof.* The Claimant has the burden of proving by a preponderance of the evidence that she has met all conditions precedent for an award under the Act.

SAME—*homicide victim pursued and struck assailant after argument in parking lot—claim denied.* The mother of a homicide victim could not prevail in her claim for crime victims compensation where, after an argument in a parking lot between her son and the offender, the son and an accomplice pursued the offender's car in their own vehicle, then got out and struck the offender in the face causing the offender to shoot at them, since the son's conduct in following, threatening and striking the offender contributed to his death.

ORDER

PER CURIAM.

This claim arises out of an incident that occurred on July 18, 1995. Betty Goss, mother of the deceased victim, Antonio Goss, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. 750 ILCS 45/1 *et seq.*

This Court has carefully considered the application for benefits submitted on August 18, 1995, 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 July 18, 1995, the victim was fatally shot by the alleged offender. The incident occurred in a parking

lot located at 1559 North Central Avenue, Chicago, Illinois. Police investigation revealed that the victim was standing in the driveway of the parking lot when the alleged offender began yelling for the victim to move his auto as it was blocking the parking lot exit. The victim and his accomplice then entered the victim's auto and drove southbound on Central Avenue while the alleged offender drove northbound on Central Avenue. As the alleged offender stopped at a stop light, the victim made a u-turn and drove up to the alleged offender's auto. Both the victim and his accomplice exited the car, walked over to the alleged offender, and punched him through the window of his car. As a result, the alleged offender produced a handgun and fired several shots, striking the victim in the chest and leg areas. The alleged offender has been apprehended and charged with first degree murder.

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 as the alleged offender stopped at a stop light, both the victim and his accomplice approached the offender and punched him through the window of his car. As a result, the alleged offender produced a handgun and fired several shots, striking the victim in the chest and leg areas.

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 July 18, 1995. Claimant, Betty Goss, mother of the deceased victim, Antonio Goss, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereinafter referred to as the Act. 740 ILCS 45/1 *et seq.*

The Claimant, Betty Goss, is the mother of the deceased victim, Antonio Goss, who was fatally shot on July 17, 1995, at North and Central in Chicago, Illinois. The police report indicates that the victim and the offender, Joseph Gilmore, were arguing in a 7-Eleven parking lot about Mr. Goss's auto blocking Mr. Gilmore who was trying to exit the lot. Mr. Goss moved his car and Mr. Gilmore pulled onto Central Avenue northbound and stopped at the traffic light at North Avenue. Mr. Goss then entered his auto with Brant Barber and they were proceeding south on Central when they made a u-turn and pulled up at the corner of North and Central. Subsequently, they exited the car and went up to Mr. Gilmore's car. Two police officers who happened to be stopped at the light westbound on North Avenue saw one of the two men reach through the window of Mr. Gilmore's vehicle and strike Mr. Gilmore. Mr. Gilmore then produced a pistol and fired four or five shots at the two men, killing Mr. Goss and wounding Mr. Barber. Mr. Gilmore was then apprehended by the officers and charged with first degree murder.

On February 1, 1996, Betty Goss filed her claim pursuant to the Crime Victims Compensation Act seeking

\$4,412.57 for funeral expenses, \$180 for clothing, and \$1,484.50 for medical expenses. The Court of Claims denied the claim on February 26, 1996, stating the facts as noted above and that section 10.1(d) of the Act states that an award shall be reduced or denied according to the extent the victim's acts or conduct provoked or contributed to his injury or death. The victim's conduct in this case contributed to his death to such an extent as to warrant that the Claimant be denied entitlement to compensation.

The Claimant requested a review of the Court's decision. A hearing was held before Commissioner Michael E. Fryzel on June 24, 1997.

The Claimant did not witness the incident upon which her claim is based. The Claimant testified that she heard that Mr. Gilmore had left and come back and started shooting. The police interviewed several people, including the two officers who witnessed the shootings. All witnesses stated that the offender left the scene and was followed by the victim, who along with the other shooting victim, threatened and hit the offender in his car. The shootings resulted from the actions of the two victims. Section 10.1(d) of the Act provides that an award shall be reduced or denied to the extent that the victim's acts and conduct provoked or contributed to his death. *In re Application of Casey* (1993), 46 Ill. Ct. Cl. 610; *In re Application of Blackman* (1984), 37 Ill. Ct. Cl. 466.

It is more likely than not that the victim would be alive if he had not followed, threatened and struck Mr. Gilmore. The Claimant has the burden of proving by a preponderance of the evidence that she has met all conditions precedent for an award under the Act. (*In re Application of Hogan* (1985), 38 Ill. Ct. Cl. 409.) Claimant has failed to prove that the victim did not provoke the

incident which caused his death. *In re Application of Spain* (1993), 45 Ill. Ct. Cl. 552.

For the foregoing reasons, it is the Order of the Court that Claimant's claim be and hereby is denied.

(No. 96-CV-1740—St. Clair Radiology awarded \$184;
Sherman Hospital awarded \$177.95.)

In re APPLICATION OF REBECCA RAMBERG

Order filed February 26, 1996.

Opinion filed October 3, 1997.

Opinion filed December 31, 1997.

REBECCA RAMBERG, *pro se*, for Claimant.

JAMES E. RYAN, Attorney General (PAUL H. CHO and DONALD C. McLAUGHLIN, JR., Assistant Attorneys General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*prerequisite for recovery—cooperation with law enforcement officials.* Section 6.1 of the Crime Victims Compensation Act provides that a person is entitled to compensation if law enforcement officials were notified of the perpetration of the crime and the applicant cooperated fully with law enforcement officials in the apprehension and prosecution of the assailant.

SAME—*Claimant's burden of proof.* To receive compensation pursuant to the Act, a Claimant must prove by a preponderance of the evidence that she has met all conditions precedent for an award under the Act, and no award shall be made for any portion of the applicant's claim that is not substantiated by the applicant.

SAME—*awards may be paid directly to applicant's service providers.* Under section 18(c) of the Crime Victims Compensation Act, the Court may order that all or a portion of an award be paid solely and directly to the provider of services.

SAME—*Claimant beaten and robbed during home invasion—denial of claim reversed—insufficient proof of lost earnings but direct award made to medical providers.* In reversing the denial of a victim's claim for compensation after she was beaten and robbed during a home invasion, the Court found that the victim had cooperated with law enforcement authorities and

there was no proof of inconsistencies in her statement to police, but the victim failed to prove her claim for lost earnings, and compensation was limited to a direct award to medical providers who had not already received payment from public aid.

ORDER

PER CURIAM.

This claim arises out of an incident that occurred on September 3, 1994. The Claimant, Rebecca Ramberg, 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 December 6, 1995, 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 3, 1994, the Claimant was beaten and robbed by several unknown offenders. The incident occurred at 1115 North Sacramento, Chicago, Illinois. While being questioned by the investigating police officer, the Claimant refused to give a full disclosure about the incident. Due to the Claimant's lack of cooperation, no further action was taken by the Chicago Police Department.

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 she refused to give a full disclosure about the incident to the investigating police 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, 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.

This claim arises out of an incident that occurred on September 3, 1994. The Claimant, Rebecca Ramberg, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereinafter referred to as the Act. 740 ILCS 45/1 *et seq.*

On February 26, 1996, the Court, relying on the investigatory report, denied the claim. The Court found that Claimant failed to cooperate fully with the law enforcement officials in the apprehension and prosecution of the assailant pursuant to section 6.1(c) of the Act. The Claimant timely filed a request for hearing and the cause was tried before the Commissioner.

The evidence before the Court consists of the testimony of the Claimant and the police reports.

The Claimant testified that she was in the process of packing up personal property as she was moving. She was also in the process of selling some of the furniture. Two girls and a man agreed to buy some things and indicated they would come back with a truck. The three buyers came back. Instead of buying the property, the two girls locked the doors and the man beat the Claimant. The

Claimant was tied up with an extension cord and dragged into the kitchen. She was told she would be killed if she had them arrested. Claimant did not know the three suspects. Shortly thereafter, the suspects found Claimant trying to untie her feet. Then they picked Claimant up and threw her out the window. Claimant landed in the garden next to the house. She felt paralyzed.

The police were called when a witness found Claimant lying in the garden. An ambulance was called and Claimant was taken to the hospital. Claimant testified she talked to the police and told them everything, including giving them a description of the perpetrators. Claimant indicated that her back was broken. She had surgery and rods were put in her back. She was in the hospital for six weeks but no police made any inquiries. Claimant testified she worked for Jewel prior to the incident but has too much pain to work now.

Claimant did indicate that a Detective Jaglowski interviewed her. She agreed he may have asked her if the incident was drug related. Claimant indicated she told the detective it was not drug related and it was about selling furniture. She did not recall becoming hostile when the detective asked her if the incident was drug related.

Claimant testified she never saw the perpetrators before and did not know who they were.

Claimant indicated she had numerous medical bills which she had sent to the Attorney General. She did not know the full extent of the bills or if they had been paid by Public Aid. From what she understood, they all had been paid by Public Aid but she did not know for sure.

Claimant also testified she cleaned houses and worked for Jewel part-time. She claims a loss of support for her

13-year-old son. Claimant was receiving \$250 per month from AFDC.

The Court has also carefully reviewed the police report. The reports substantiate Claimant's testimony in all factual respects regarding the occurrence. The reports indicate the police responded to a home invasion. The Claimant was found lying on the ground below a second-floor window. The Claimant told the police what occurred and the report taken by the police is consistent with Claimant's testimony. Claimant gave a description for the offenders but indicated she did not know them. The police reports indicate that "R/O's noted several inconsistencies in victim's statement." However, the alleged inconsistencies are not stated in the report and no police officers testified at the trial to explain the purported inconsistencies.

The supplemental report states: "During this interview [of the victim], it was determined that this incident might have been drug related and when the victim was confronted with this information, the victim became hostile towards R/O refusing to answer additional question." This confrontation occurred after the Claimant had related the information concerning the incident to the detective. The detective suspended the case. Detective Jaglowski did not testify at the trial to explain how the incident "might be" drug related. Claimant testified this incident was not drug related.

To receive compensation pursuant to the Act, a Claimant must prove by a preponderance of the evidence that she has met all conditions precedent for an award under the Act. (*In re Application of Cox* (1994), 47 Ill. Ct. Cl. 586.) Section 76.1 of the Act provides that a person is entitled to compensation under the Act if law enforcement officials were notified of the perpetration of the crime and the applicant cooperated fully with law enforcement

officials in the apprehension and prosecution of the assailant. *In re Application of Dymon* (1992), 45 Ill. Ct. Cl. 460.

Claimant testified that she reported the crime as she lay on the ground with a broken back and gave descriptions of the assailants who were not known to her. She testified she cooperated with police. She denied the incident was drug related. The best that can be said for the police report is the police thought there were some vague unidentified discrepancies in Claimant's version of the facts and that a follow-up detective thought the incident "might be" drug related. When Claimant denied the relation to drugs, the detective felt Claimant was hostile and suspended the investigation. No police officer testified at the trial to explain their suspicions to the Court.

The Court must decide a case based on the evidence. A review of the evidence leads to a finding that Claimant cooperated with law enforcement officials. Based on the evidence, we must reverse our order of February 26, 1996.

It is therefore ordered:

A. That the Court's order of February 26, 1996, is vacated.

B. That the Claimant cooperated with law enforcement officials.

C. That the cause is remanded to the Attorney General with directions to file a supplemental investigatory report indicating whether Claimant complied with all other conditions precedent to an award, whether Public Aid paid some or all of the medical bills, the amount of unpaid medical bills, if any, and the extent of lost wages and/or support.

D. That the Attorney General shall file its supplemental investigatory report within 120 days.

OPINION

PER CURIAM.

This claim arises out of an incident that occurred on September 3, 1994. The Claimant, Rebecca Ramberg, sought compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. 740 ILCS 45/1 *et seq.*

The Claimant was denied compensation by order of the Court on February 26, 1996. This claim is now before the Court pursuant to a request for reconsideration filed by the Claimant on March 18, 1996.

This Court has carefully reviewed its prior order in this cause, the Claimant's request for reconsideration and a supplemental investigatory report by the Attorney General's office. Based on all of the above, the Court finds:

1. That on February 26, 1996, the Court of Claims entered an order denying compensation on the grounds that the Claimant failed to cooperate with law enforcement officials.

2. That on March 18, 1996, the Claimant requested the Court to reconsider her claim and the case was assigned to Commissioner Jerry Douglas Blakemore on April 3, 1996.

3. That on February 27, 1997, subsequent to a hearing conducted by Commissioner Jerry Douglas Blakemore, the Court entered an order vacating its original decision. The Court ruled that the Claimant had cooperated with law enforcement officials and that the Claimant is eligible for compensation. The Court also directed the

Attorney General's Office to file a supplemental investigatory report indicating the award amount for medical/hospital expenses and for loss of earnings.

4. That the Illinois Department of Public Aid has assumed responsibility for the Claimant's medical/hospital expenses with the exception of \$361.95, for which the Claimant is responsible. To date, the Claimant has paid nothing towards this amount.

5. That after considering insurance and other sources of recovery, the Claimant's net compensable loss for medical/hospital expenses is based on the following:

	<i>Compensable Amount</i>
St. Clair Radiology	\$184.00
Sherman Hospital	<u>177.95</u>
Total	\$361.95

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 has indicated that she was employed during the six months preceding the incident. However, the Claimant has not submitted documentation to substantiate her net earnings or her period of disability. Therefore, the Claimant has not met required conditions precedent for loss of earnings under the Act.

8. That the Claimant has complied with pertinent provisions of the Act and is entitled to compensation thereunder.

9. That pursuant to section 18(c) of the Act, the Court may order that all or a portion of an award be paid solely and directly to the provider of services. In the instant case, the Court finds this section applicable and orders that direct payment be made.

It is hereby ordered that the sum of \$184 (one hundred eighty-four dollars) be and is hereby awarded to St. Clair Radiology for the medical expenses of Rebecca Ramberg, an innocent victim of a violent crime.

It is further ordered that the sum of \$177.95 (one hundred seventy-seven dollars and ninety-five cents) be and is hereby awarded to Sherman Hospital for the medical expenses of Rebecca Ramberg.

(No. 96-CV-1895—Claim denied.)

In re APPLICATION OF GLADYS JOHNSON

Order filed August 22, 1996.

Opinion filed February 23, 1998.

GLADYS JOHNSON, *pro se*, for Claimant.

JAMES E. RYAN, Attorney General (PAUL H. CHO and MICHAEL A. WULF, Assistant Attorneys General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*reduction or denial of award—victim's contributory acts or prior criminal conduct.* Section 10.1(d) of the Crime Victims Compensation Act states that an award shall be reduced or denied 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 his injury or death.

SAME—*gunshot victim threatened assailant's wife—assailant's failure to establish self-defense at trial did not entitle Claimant to compensation.* There was no merit to the Claimant's argument that, because the jury in the trial of her son's assailant rejected the assailant's claim of self-defense and convicted him of second-degree murder, she was entitled to crime victims compensation, since the victim provoked the shooting incident which claimed his life by threatening the assailant's wife and smashing the couple's car window with a steel pipe.

ORDER

PER CURIAM.

This claim arises out of an incident that occurred on November 8, 1995. Gladys Johnson, mother of the deceased victim, Andre Levon Burdette, 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 December 22, 1995, on the form prescribed by the Attorney General and an investigatory report of the Attorney General of Illinois which substantiates matters set forth in the application. Based upon these documents and other evidence submitted to the Court, the Court finds:

1. That on November 8, 1995, the victim was shot, allegedly by an offender who was known to him. The incident occurred at 126 Parkview, Johnson City, Illinois. Police investigation revealed that prior to the incident, the victim and the alleged offender were involved in a verbal dispute. During this dispute, the victim produced a lead pipe and smashed out one of the alleged offender's car windows. The victim then threatened to kill the alleged offender and his wife. As a result of these actions, the alleged offender produced a handgun and shot the victim. The alleged offender has been charged with second degree murder and the criminal proceedings are currently pending.

2. That section 10.1 of the Act indicates factors used to determine entitlement to compensation. Specifically, section 10.1(d) of the Act states that an award shall be reduced or denied according to the extent to which the victim's acts or conduct provoked or contributed to his injury

or death, or to the extent to which any prior criminal conviction or conduct of the victim may have directly or indirectly contributed to the injury or death of the victim.

3. That it appears from the investigatory report and the police report that the victim produced a lead pipe and threatened to kill the alleged offender during a verbal altercation. As a result of these actions, the alleged offender fatally 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

SOMMER, C.J.

This is a claim arising out of the shooting death of the Claimant's son, Andre Leon Burdette, which occurred in Williamson County, Illinois, on November 8, 1995. Gladys Johnson, mother of the deceased victim, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act. 740 ILCS 45/1 *et seq.*

This Court originally denied the claim because it found that the deceased victim's conduct contributed to his death. This Court found that the victim was shot by an offender, who was known to him, in Johnston City, Illinois. The police investigation revealed that before the shooting, the victim and the offender were involved in a verbal dispute, and that during the dispute the victim produced a pipe and smashed out one of the offender's

car windows. The police investigation further determined that the victim threatened to kill the offender and his wife, and that immediately thereafter, the offender produced a handgun and shot the victim between the eyes. As a result of the incident, the offender was charged with second degree murder and was subsequently convicted by a jury in Williamson County.

The issue presented by the Claimant, the victim's mother, Gladys Johnson, arises from the fact that the offender was convicted of second degree murder by a Williamson County Jury after a full trial, and the offender's defense of self-defense was rejected by the jury and the Williamson County Circuit Court. Accordingly, the Claimant reasons that since the defense of self-defense on the part of the offender was not successful at the criminal trial, this Court committed error in refusing compensation under the Crime Victims Compensation Act.

Under the Act, section 10.1 indicates factors used to determine entitlement to compensation. Specifically, section 10.1(b) 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, and to the extent to which any prior criminal conviction or conduct of the victim may have directly or indirectly contributed to the injury or death of the victim.

In this case, the victim was killed after he had voluntarily gone to the home of the offender because he was upset that the offender's wife was trying to interfere with the victim's relationship with her daughter. The victim threatened to kill her. Later the same day, the offender and his wife drove to their daughter's apartment with a loaded gun and a wooden club. When they arrived at their daughter's apartment, the victim was there with their daughter and he was intoxicated. The victim then

took a steel pipe and he moved toward the offender and his wife. The offender and his wife then got back in their vehicle, which was running at the time, and the victim broke out the passenger side window of the car with the steel pipe. Thereafter, the offender shot the victim between the eyes although at the time the victim did not have the steel pipe, was holding his hands up, and did not represent an immediate threat to the offender. The steel pipe apparently came out of the victim's hand and went into the front passenger floorboard of the offender's vehicle where it was found by police after the incident. All of this information came from a review by the Court of the trial transcript which describes the death of the victim and the criminal prosecution of the offender.

The Claimant in this case appeared *pro se*, and the Respondent has chosen not to present the Court with any brief on the issues presented. This Court is of the opinion that the fact that the offender is found by a criminal trial jury to have been unjustified in his use of deadly force under a theory of self-defense does not foreclose the question of the victim's actions provoking or contributing to the violent crime for which the Claimant is seeking compensation.

It is clear from the newspaper reports and a review of the trial transcript in Williamson County, that the victim in this case, Andre Levon Burdette, engaged in serious and prolonged provocation, which not only helped to bring about his murder, but which was a motivating cause of the whole unfortunate incident. The offender's failure to establish a defense of self-defense at the trial does not detract from the fact that the victim engaged in prolonged and serious provocation which ultimately resulted in his death at the hands of the offender. The taxpayers should not be required to pay monies on behalf of the

victim, as he was not an innocent victim of crime. Thus, this Court's original decision was correct.

It is therefore ordered that this Court's previous opinion is affirmed and this claim is denied.

(No. 97-CV-0464—Claim denied.)

In re APPLICATION OF JOSEPH A. MOSLEY

Order filed December 26, 1996.

Opinion filed April 14, 1998.

MACCHITELLI & ASSOCIATES (JAMES J. MACCHITELLI, of counsel), for Claimant.

JAMES E. RYAN, Attorney General (DONALD C. McLAUGHLIN and MICHAEL F. ROCKS, Assistant Attorneys General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*definition of crime victim—person killed or injured in Illinois by crime of violence.* Section 2(d) of the Crime Victims Compensation Act defines a victim as a person killed or injured in Illinois as a result of a crime of violence perpetrated against him, but an Illinois resident may be entitled to recover for a crime occurring outside the State if the state in which the crime occurred does not have a crime victims compensation law for which the Illinois resident is eligible.

SAME—*Act is secondary source of recovery and must be strictly construed.* The Crime Victims Compensation Act is a secondary source of recovery which is intended to aid and assist crime victims under certain circumstances to receive compensation to help pay for the damage victims sustain, but the rules and procedures applicable to such claims must be followed before benefits can be awarded, and the Court must strictly construe the Act.

SAME—*Illinois resident shot through window of school bus in Indiana—Indiana claim filed—claim denied.* Where the Claimant, who was shot through the window of a school bus which was traveling in Indiana, filed a claim requesting compensation under the Illinois Crime Victims Compensation Act, the claim was denied based on evidence indicating that the crime did not occur in Illinois, the Claimant had filed an action under the Indiana Victims of Crimes Act, and because a strict construction of the Illinois law did not provide for an exception where the maximum recovery was less under the Indiana law.

ORDER

PER CURIAM.

This claim arises out of an incident that occurred on August 19, 1995. The Claimant, Joseph A. Mosley, 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 19, 1996, 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, 1995, the Claimant was shot, allegedly by an unknown offender. The incident allegedly occurred at 9th and Burr, Gary, Indiana. The Claimant alleges that he was a passenger on a school bus when he was shot by the offender.

2. That pursuant to section 2(d) of the Act, a victim is defined as a person killed or injured in the State as a result of a crime of violence perpetrated or attempted against him.

3. That the shooting incident allegedly occurred in the State of Indiana, not the State of Illinois. Because the crime did not occur in Illinois, the Claimant is not eligible for compensation pursuant to section 2(d) of the Act.

4. That this claim does not meet a required condition precedent for compensation under the Act.

It is hereby ordered that this claim be and is hereby denied.

OPINION

FREDERICK, J.

This claim arises out of an incident that occurred on August 19, 1995. The Claimant, Joseph A. Mosley, seeks compensation pursuant to the Crime Victims Compensation Act, hereinafter referred to as the Act. 740 ILCS 45/1 *et seq.*

On December 26, 1996, based on the investigatory report, the Court denied the claim. The Court found that the victim was injured in the State of Indiana. Pursuant to section 2(d) of the Act, a victim is defined as a person killed or injured in *this* State as a result of a crime of violence perpetrated or attempted against him. (Emphasis added.) The Claimant, who lives in Chicago, Illinois, was shot through the rear window of a school bus on August 19, 1995, by an unknown offender while he was riding on the school bus at 9th and Burr in Gary, Indiana. Claimant was 15 years old at the time of the shooting and was an orphan. Claimant now has limited use of his legs due to the injury. On August 19, 1996, he filed his claim under the Crime Victims Compensation Act for medical, transportation and education expenses. Because the crime did not occur in Illinois, the Claimant is generally not eligible for compensation pursuant to section 2(d) of the Act. The Claimant, through his attorney, requested a review of the Court's decision denying the claim. A hearing was held before Commissioner Michael E. Fryzel on June 24, 1997.

The Claimant testified that he is seeking benefits for medical bills, tuition and transportation. His medical bills were being paid by public aid, however, when his mother died, he did not reapply in his own name because he did not have a guardian. Claimant's attorney believes the Claimant should be paid \$25,000 pursuant to the Illinois Act for

three reasons: The first reason advanced by the Claimant is that the maximum limit of compensation is higher in Illinois than it is in Indiana. The second reason is that Claimant applied to Indiana for compensation but has not heard from Indiana in regard to his claim. The third reason is that the Claimant lives in Chicago and was on a Chicago school bus when the incident happened. Further, all of the witnesses are from Illinois, and most of Claimant's medical treatment was in Illinois. The facts are not in dispute that the crime and injury occurred in Indiana. Claimant has made a claim pursuant to the Indiana Compensation for Victims Act but the limit for compensation in Indiana is \$10,000.

Section 2(d) of the Act defines a "victim" as a person killed or injured in Illinois as a result of a crime of violence perpetrated or attempted against him. Because the crime in this case did not occur in Illinois, the Claimant is not eligible for compensation pursuant to this section of the Act.

The Crime Victims Compensation Act is a secondary source of recovery. (*In re Application of Lavorini* (1989), 42 Ill. Ct. Cl. 390.) The Act is intended to aid and assist crime victims under certain circumstances to receive compensation to help pay for the damage victims sustain. The rules and procedures applicable to such claims must be followed before the Court of Claims can award benefits. (*In re Application of Geraghty* (1989), 42 Ill. Ct. Cl. 388.) The Claimant has the burden of proving his claim and that he has met all conditions precedent for an award under the Act by a preponderance of the evidence. *In re Application of Sole* (1976), 31 Ill. Ct. Cl. 713; *In re Application of Hogan* (1985), 38 Ill. Ct. Cl. 395; *In re Application of Steffel* (1993), 45 Ill. Ct. Cl. 546.

Claimant asks the Court to find that a crime committed in Indiana against an Illinois resident is compensable

under the Act. This Court must strictly construe the Act. (*In re Application of Drake* (1994), 47 Ill. Ct. Cl. 563.) Section 2(d) of the Act clearly requires the crime and injury to occur in Illinois to be compensable under the Act except under limited circumstances. Section 2(d)(6) of the Act does give Illinois residents certain relief for crimes committed in other states. This section states:

“[A]n Illinois resident who is a victim of a ‘crime of violence’ as defined in this Act except, if the crime occurred outside this State, the resident has the same rights under this Act as if the crime had occurred in this State upon a showing that the state, territory, country, or political subdivision of a country in which the crime occurred does not have a compensation of victims of crimes law for which that Illinois resident is eligible.”

Based on the evidence that Claimant has made a claim under the Indiana Victims of Crime Act and that we must strictly construe the Illinois Act, it is clear that Claimant is not eligible for compensation pursuant to the Illinois Crime Victims Compensation Act. *In re Application of Drake* (1994), 47 Ill. Ct. Cl. 563.

Claimant has not proven that Indiana does not have a victim of crimes compensation law for which Claimant is not eligible. Claimant’s complaint is that the maximum recovery is less pursuant to the Indiana law than it is under the Illinois law. A strict construction of our Act does not allow for that circumstance alone to be an exception so that Claimant can bring his claim under Illinois Act. Such a construction is best left to our legislature if that body believes an exception should be made for those circumstances. At this time, however, no such exception exists. Claimant must proceed with his claim in Indiana.

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