

IN THE CLAIMS COMMISSION FOR THE STATE OF TENNESSEE

JOHN SMITH,	)	
	)	
Claimant,	)	
	)	
vs.	)	No. xxxxx
	)	
STATE OF TENNESSEE,	)	
	)	
Defendant.	)	

**PRETRIAL BRIEF SUBMITTED BY CLAIMANT JOHN SMITH**

This case arises out of a motor vehicle collision in a Tennessee Department of Transportation construction zone involving Claimant John Smith. On the morning of August 12, 2002, Mr. Smith was driving on Dickerson Pike when he came to a road construction site located at the Interstate 65 North interchange. Mr. Smith turned left onto what he believed to be the entrance ramp to I-65 North. Mr. Smith will prove that, like a number of other motorists that day, he was misdirected onto the I-65 exit ramp by the inadequate signs and pavement markings at the intersection. Mr. Smith was involved in a head-on collision with a vehicle exiting I-65. There is no dispute that the collision left Mr. Smith with permanently disabling injuries.

The Commission will likely be asked to resolve three primary issues: the liability of the State of Tennessee; (2) the liability of Mr. Smith and the other driver involved in the collision; and (3) the amount of damages. Each issue will be addressed separately below.

**PROCEDURAL ISSUES**

Two witnesses, the State’s expert witness and one of the Claimant’s treating physician, will testify solely by deposition. The State’s expert witness, Jeff Jones, is the Director of the Design Division of the Tennessee Department of Transportation. He will be out of state in Alaska at the time of trial, and thus the parties have agreed that his deposition testimony may be

admitted in lieu of live testimony at trial. Dr. William Gavigan, an orthopedic surgeon treating the plaintiff, is a physician not subject to subpoena to trial under Tenn. Code Ann. § 24-9-101. Both Mr. Jones and Dr. Gavigan have been previously deposed and the transcripts of those depositions filed with the Commission. In this Brief, then, the testimony of Mr. Jones and Dr. Gavigan is referred to in the past tense.

The medical evidence is undisputed. Dr. Gavigan testified, and the parties have stipulated, that the medical expenses incurred by Mr. Smith were reasonable and necessary for the injuries he sustained in the collision. The parties have also stipulated to the authenticity and admissibility of Mr. Smith's medical records. The State has not proffered any physician to offer competing opinions to those of Dr. Gavigan.

#### BACKGROUND

In August 2002, the Tennessee Department of Transportation was engaged in a large, multi-year construction project which included the intersection of Dickerson Pike and Interstate 65 North. Driving south on Dickerson Pike on August 12, 2002, as Mr. Smith was, the intersection looked like this:



From another angle – facing directly at the Interstate ramps from the side of Dickerson Pike – the intersection appeared this way:



Mr. Smith will prove that the intersection was confusing to a reasonable person due to inadequate signs and pavement markings, and that led him onto the exit ramp. Mr. Smith will testify that he followed what he believed the signs and pavement markings were directing him to

do that morning. A civil engineer who formerly worked for the Georgia Department of Transportation will testify that the State failed to exercise reasonable and due care in planning the work zone traffic control at the intersection, and that a driver's inadvertent turn onto the exit ramp was a foreseeable risk of the State's negligence. He will testify that there were several additional traffic control devices that the State should have utilized in the work zone.

There is no dispute that John Smith was critically injured as a result of the collision. The medical records demonstrate that at Vanderbilt University Medical Center, Mr. Smith was suffering from significant base deficit and lactic acidosis, a condition where the acidity of the body's fluids rises to a critical level. He also developed a pneumothorax as gas began to accumulate in the cavity containing his lungs. In addition, he sustained a closed head injury and an open nasal fracture. He had an acetabular fracture and a sternal fracture in his chest resulting in a mediastinal hematoma. Mr. Smith suffered an open tibial fracture, a fracture in both bones of his forearm, and multiple rib fractures causing respiratory failure.

Surgeons attempted to salvage Mr. Smith's open tibial fracture using nail fixation. However, when no pulse returned, the nails were removed and a guillotine amputation was performed. Mr. Smith's spinal condition required a posterior fusion. His chest cavity had to be opened by way of a thoracostomy. During the course of his treatment, doctors were compelled to perform a tracheostomy in order to keep Mr. Smith breathing. To address the massive damage to the bones of Mr. Smith's forearm, surgeons inserted internal screws into the bones for stabilization.

As a result of the wreck, Mr. Smith was in-patient at various medical centers for eleven and a half weeks. He has incurred medical and pharmacy expenses totaling five hundred thirty-eight thousand, four hundred thirty-five dollars and eighty-four cents (\$538,435.84). Mr. Smith

will prove that his life has been irrevocably changed.

ISSUE 1: LIABILITY OF THE STATE OF TENNESSEE FOR  
NEGLIGENCE IN PLANNING OF THE WORK ZONE

The State has a duty to exercise reasonable care under all the attendant circumstances in planning, designing, constructing and maintaining the State system of highways. *Goodermote v. State*, 856 S.W.2d 715, 720 (Tenn. App. 1993) (citing Tenn. Code Ann., Sec. 9-8-307(a)(1)(I)). The determination of the state's liability in tort shall be based on the traditional tort concepts of duty and the reasonably prudent person's standard of care. Tenn. Code Ann. § 9-8-307(c). The State of Tennessee may be liable for negligence in planning and programming for, inspection of, design of, preparation of plans for, approval of plans for, and construction of, public roads, streets, highways, or bridges and similar structures, and negligence in maintenance of highways, and bridges and similar structures, designated by the department of transportation as being on the state system of highways or the state system of interstate highways. Tenn. Code Ann. § 9-8-307(a)(1)(I). Failure to follow industry standards may constitute a breach of the duty owed by the State to drivers traveling upon the highways of Tennessee. *Accord Goodermote* at 720.

In addition to its liability for negligence in planning and developing highways, the State of Tennessee may also be liable for dangerous conditions on state maintained highways, Tenn. Code Ann. § 9-8-307(a)(1)(J), and negligently created or maintained dangerous conditions on state controlled real property, Tenn. Code Ann. § 9-8-307(a)(1)(C). In proving a dangerous condition existed, the claimant must establish the foreseeability of the risk and notice given to the proper state officials at a time sufficiently prior to the injury for the state to have taken appropriate measures. Tenn. Code Ann. § 9-8-307(a)(1)(C) and (J). The decision of whether a condition of a highway actually is a dangerous and hazardous one to an ordinary prudent driver

is a factual one, and the court should consider the physical aspects of the roadway, the frequency of accidents at that place in the highway and the testimony of expert witnesses in arriving at this factual determination. *Sweeney v. State*, 768 S.W.2d 253, 255 (Tenn. 1989) (citations omitted).

The Claimant will prove that employees of the State of Tennessee's Department of Transportation failed to use reasonable care in planning traffic control for the work zone on August 12, 2002. The State's employees will admit that the Tennessee Department of Transportation was responsible for determining the work zone traffic control plan to be used on the project. They will admit that they had a duty to ensure that motorists trying to drive through the work zone had sufficient guidance to make it through safely. An engineer from the Georgia Department of Transportation will testify that the State had a duty to provide a work zone traffic control plan sufficiently detailed that, if the contractor followed the plan, drivers would have been guided through the construction zone in a clear and positive manner. He will also testify that on an intersection such as the one at Dickerson Pike and Interstate 65 North, with the entrance and exit ramps adjacent to one another, the State should have been particularly mindful of the likelihood that drivers may be confused and inadvertently turn onto the exit ramp.

There is no dispute that the work zone plans for this project did not provide for any of the signs directing drivers through the intersection that the permanent plans did. The State's expert witness, the Director of TDOT's Design Department, testified that the work zone traffic control plans generally should communicate to drivers as clearly as the permanent plans for the same area. The Georgia DOT engineer will testify that one of the reasons for this is that work zone traffic changes are a common cause of wrong way entry. Obviously, a work zone presents significantly more hazards and likely sources of confusion for drivers than the same area would under normal conditions. Thus, the Claimant will prove that the State should have utilized at

least the same signs during construction that it planned to use when construction was completed.

In this case, the permanent plans call for a “keep right” sign between the entrance and exit ramps, and “do not enter” signs on both sides of the exit ramp to clarify which ramp they cover. The State’s employees will admit that a “keep right” sign and “do not enter” sign would also have been applicable during construction on August 12, 2002, and that nothing would have prevented the State from using the signs if they were called for in the plans. However, neither sign was called for in the work zone plans.

In addition, the Georgia Department of Transportation engineer will testify that the State should have used more traffic control devices during construction because a work zone increases the danger of driver confusion. He will testify that the State should also have: (1) added “chicken scratch lines,” or dotted semi-circle lines on the pavement marking the intended path of drivers turning left onto the entrance ramp; (2) used variable message signs, giving drivers information about what to expect before they reached the intersection; (3) used temporary curb and/or delineators to prevent drivers from crossing into wrong way movement; and (4) moved the location of the stop bar and turn arrow forward, closer to the actual turning point so that drivers on Dickerson Pike would be in a proper position to make a left hand turn onto the entrance ramp, rather than backed up next to the exit ramp.

There is also no dispute that the changes mentioned by the Georgia DOT engineer were available to TDOT’s employees. The State’s employees will agree that the cost of adding them to the intersection would have been minimal, and nothing would have prohibited them from using the traffic control devices. The State’s employees on the project will also admit that at least some of those changes would have helped drivers trying to turn left from Dickerson Pike onto Interstate 65 North, like Mr. Smith. The State’s field engineer on the project was at the

intersection before the wreck and aware of the traffic control devices that were being used (and those that were not). He had the power and responsibility to modify the traffic control plan if it was not working on the site.

The State's expert witness testified, and the State will presumably argue at trial, that the plans were okay as they were prepared. The State's expert testified that the changes suggested by the Georgia DOT engineer were not required or shown in the Manual on Uniform Traffic Control Devices. He admitted, however, that there is no prescription in the Manual to cover a project like this; that the traffic control plan and this project was unique and for the most part an individual-type traffic control plan. He further admitted that the traffic control plan developed by the State was not based upon one of the standard drawings in the Manual. He also testified that, as Director of the TDOT Design Division, he has responsibility for the very plans that were issued for this project. Despite his contentions, the Claimant will prove that the work zone plans were deficient.

The Claimant will prove that the State's negligence resulted in an intersection in the midst of a construction zone that was likely to cause a reasonable driver to make an inadvertent wrong way movement onto the exit ramp. Mr. Smith will testify that he was confused by the intersection. A TDOT employee and a police officer will both testify that they witnessed other drivers turning onto the exit ramp from Dickerson Pike. Two neutral police officers will testify that, walking around the scene, they also found the intersection confusing. The Claimant will prove that the lack of adequate traffic control devices, combined with the confusing nature of the ones that were present, created a foreseeable risk that drivers attempting to turn onto the Interstate from Dickerson Pike would inadvertently turn onto the exit ramp, and this collision was the result.



## ISSUE 2: LIABILITY OF THE DRIVERS INVOLVED IN THE COLLISION

The State contends that Mr. Smith and the other driver involved were at fault for the collision. Because comparative fault is an affirmative defense, the State has the burden of proving by a preponderance of the evidence that Mr. Smith and/or the other driver was at fault, and that fault was a substantial factor in the collision. *See generally Raines v. Shelby Williams Indus., Inc.*, 814 S.W.2d 346, 350 (Tenn. 1991) (stating defendant has burden of proving by a preponderance of the evidence each element of the affirmative defense of misrepresentation); *Jenkins Subway, Inc. v. Jones*, 990 S.W.2d 713, 722 (stating defendant has burden of proving a preponderance of the evidence the affirmative defenses of waiver and estoppel).

Presumably, the State will argue that Mr. Smith was at fault for turning onto the exit ramp. The Claimant assumes that the State will rely primarily upon Mr. Smith's testimony. By deposition, he testified that there were two lanes on Dickerson Pike that morning, with no turning lane. He testified there were sawhorses in the middle of Dickerson between the traffic lanes, and that he crossed over those sawhorses into the lane of oncoming traffic before reaching the intersection. He testified that he was not certain whether he wore his glasses that morning. Throughout his deposition testimony, Mr. Smith repeatedly stated that the area so confused him that he picked the wrong ramp.

Under the law, the factfinder considers circumstantial evidence and direct evidence, measures the credibility of the various evidence, and is charged with determining how much weight to give to any evidence. Neither party would reasonably suggest that Mr. Smith's testimony, based on his own memory, accurately reflects the events of August 12, 2002. There is no dispute that there were, in fact, three lanes on Dickerson Pike that morning, including a turning lane in the middle. There is no other evidence suggesting that there were sawhorses

between the lanes, or that Mr. Smith was in the lane of oncoming travel on Dickerson Pike with sawhorses around him. While the Claimant believes the Commissioner will find Mr. Smith to be a genuinely truthful person, his testimony of his memory of the wreck nonetheless conflicts with the objective evidence.

Again, the State has the burden of proving that Mr. Smith was somehow at fault for the collision. The State's inspector on the project will admit that, aside from the arrows on the ramps, there was nothing to indicate to a driver which way to turn that morning. Moreover, the State's expert witness, reviewing the above photographs of the ramps in his deposition, did not identify those arrows until they were pointed out to him by defense counsel.

The Claimant is less certain how the State intends to blame the other driver in the collision, Douglas Rogers. There may be testimony offered at trial that Mr. Rogers did not see Mr. Smith's truck prior to impact. A driver does have a duty to keep a proper lookout under the circumstances. This, however, is a strained circumstance: the State will presumably argue that Mr. Rogers should have kept a better lookout for oncoming traffic on a one way, circular exit ramp. The State will not be able to prove that Mr. Rogers caused this collision.

### ISSUE 3: THE AMOUNT OF DAMAGES

There is no dispute that Mr. Smith's medical expenses, totaling \$538,435.84, were reasonable and necessary as a result of the injuries he sustained in the collision. In addition to his medical expenses, the Commission will be asked to determine the amount that is reasonable to compensate Mr. Smith for past and future pain and suffering and loss of enjoyment of life as a result of the wreck.

Mr. Smith will prove he suffered extensive injuries in the collision. His orthopedic surgeon testified he sustained a closed head injury and facial fractures. His ribs and sternum

were fractured, and he developed a pneumothorax and respiratory failure. Both bones in his left forearm were fractured, with screws permanently inserted by the surgeons to stabilize the limb. His left lower leg bone was fractured and, despite the surgeons' best efforts, ultimately had to be amputated. His injuries were so dire and pervasive that the doctors treating him did not even notice an open wound in the back of his head until weeks after the collision. In total, he was hospitalized for eleven and a half weeks following the collision.

His orthopedic surgeon testified that Mr. Smith's recovery was due to his own fortitude. He also testified that Mr. Smith continues to require treatment for his injuries. He will need periodic replacement of his left prosthetic leg, and refitting of the shoe. He will also need treatment of his hip where it was fractured.

Mr. Smith's friends will describe the profound impact of these injuries on his life. The Commissioner will hear that, before the wreck, Mr. Smith was a physically active person. He was a carpenter, and had recently restored a 200-year-old log house and worked on various other construction projects. Since the wreck, he is physically unable to work due to his injuries. Mr. Smith and his friends will testify that, today, it is a struggle for him to simply walk.

There is no dispute that the Claimant's injuries are permanent. The mortality tables in Tennessee Code Annotated provide a presumption that a person Mr. Smith's age (76) will live an average of approximately eight more years. The Claimant will prove that, considering the \$538,435.84 in medical expenses, the pain and suffering and loss of enjoyment of life that Mr. Smith has endured in the three years since the wreck, and the expected pain and suffering and loss of enjoyment of life that he will suffer over the next eight years, Mr. Smith's damages due to the collision exceed two million dollars (\$2,000,000).

## **CONCLUSION**

The Claimant will prove that the State of Tennessee was negligent in planning the work zone traffic control for the intersection of Dickerson Pike and Interstate 65 North on August 12, 2002, that the State's negligence created an intersection likely to confuse drivers into turning from Dickerson Pike on to the exit ramp of the Interstate, and that resulted in the head on crash and Mr. Smith's debilitating injuries. The Claimant will then ask the Commission to find the Claimant's damages are greater than two million dollars (\$2,000,000), and find the State of Tennessee liable for those damages.

Respectfully submitted,

---

John A. Day, No. 9416  
Rebecca C. Blair, No. 17939  
Brandon E. Bass, No. 22014  
BRANHAM & DAY, P.C.  
5300 Maryland Way, Suite 300  
Brentwood, TN 37027  
(615) 742-4880

Joe F. Gillespie, Jr., No. 15464  
Attorney at Law  
6408-A Clarksville Hwy.  
Joelton, TN 37080  
Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_ day of \_\_\_\_\_, 2005, a true and correct copy of the foregoing has been hand-delivered to:

Commissioner Stephanie R. Reeves  
Tennessee Claims Commission  
Middle Division  
10th Floor, Andrew Jackson Building  
50 Deaderick Street  
Nashville, TN 37243

George H. Coffin, Jr., No. 2157  
Attorney General's Office  
Civil Rights and Claims Division  
P.O. Box 20207  
Nashville, TN 37202  
(615) 741-7085

Counsel for State of Tennessee

---