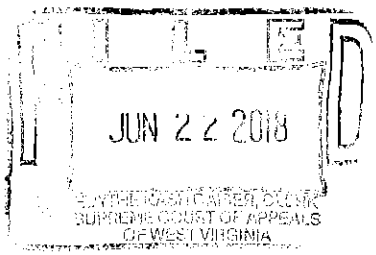
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA ex rel. DANITA LADANYE,
ADMINISTRATRIX OF THE ESTATE OF
JONATHAN S. LADANYE,

Petitioner,

vs. No. 18-~~0274~~ 0356

WEST VIRGINIA LEGISLATIVE
CLAIMS COMMISSION and
WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF HIGHWAYS,

Respondents.

RESPONSE OF
WEST VIRGINIA LEGISLATIVE CLAIMS COMMISSION

WEST VIRGINIA LEGISLATIVE
CLAIMS COMMISSION,
Respondent,
By counsel

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STATEMENT OF THE CASE

In this proceeding, the Supreme Court has been asked to review, by petition for writ of certiorari, an opinion from the West Virginia Legislative Claims Commission ("Commission") containing recommendations to the Legislature to deny a claim for damages against the Respondent, Division of Highways ('DOH"), brought by the administrator of the estate of a person who was killed in a motor vehicle accident on a state highway. The Petitioner has alleged that the DOH was negligent in removal of a hazardous buildup of snow on a bridge parapet on Interstate 79 following a winter storm event. This accumulation of snow acted as a ramp when the motor vehicle collided with it and caused the vehicle to overtop the parapet and fall to a roadway below, resulting in fatal injuries to the decedent.

The Petitioner asserts that the DOH had a mandatory, immediate duty to remove this hazardous buildup based upon the reports of the "operational postures" in effect during the two days following the onset of the storm. The manual was included as evidence in this case and the Petitioner presented expert testimony concluding that the build-up of the snow defeated the effectiveness of the parapet as a safety device.

In response, the DOH introduced evidence in the form of regular reports detailing the types of snow-clearing activities conducted by local DOH personnel for the affected area during the relevant period. These reports included specific information about what type of equipment was in use, the specific tasks undertaken, the condition of the roadways, and the local weather conditions. The DOH also introduced evidence that removal of snow from a bridge parapet is a special case, involving different equipment,

impacting the available roadway and presenting a hazard to the traveling public, especially under poor conditions.

The Commission's determination was that the Petitioner failed to meet her burden of proof of an essential element of a claim for damages: that the DOH had a reasonable opportunity to remove the hazard under all of the circumstances existing at the relevant time. In essence, the Commission concluded that the overall "operational postures" reported by the DOH was not sufficient to show all of the circumstances affecting the ability of the DOH to address particular hazards.

The Petitioner's challenge to this opinion consists of objections to the Commission's consideration of certain evidence contained in a police report of the vehicle accident and to the legal effect of the decedent's knowledge and acceptance of the risk of riding with an impaired driver. These arguments are neither well-founded nor do they affect the fundamental determination that the Petitioner did not meet her burden of proving an essential element of the claim.

SUMMARY OF ARGUMENT

Judicial precedent authorizes review of determinations of the Commission through writ of certiorari, although this review is narrow in scope. In this proceeding the Supreme Court has been asked to review the Commission's determination that a claimant, representing the estate of a man killed in a car accident, failed to show that the Division of Highways had a reasonable opportunity to remove a hazardous condition causing the Petitioner's injuries. Proof that there was a reasonable opportunity to correct the condition is an essential element of the claim.

The Petitioner did not present any eyewitnesses to testify as to the conditions present at the scene of the accident during the relevant period. Instead the Petitioner presented a report of "operational postures" of the DOH describing the general status within the districts of the DOH. Through an expert, the Petitioner claimed that the official manual of the DOH required the removal of snow from areas such as the bridge parapet based upon those reported operational postures.

It its analysis, the Commission followed its long-standing principle that, in cases alleging damages resulting from a defect or dangerous road condition, the DOH must have actual or constructive notice of the condition, that there was a reasonable time to take corrective action under all the circumstances presented, and that the defect was a proximate cause of the injury. The Commission determined that the Petitioner did not prove the second element of this claim because the Petitioner did not present testimony that the DOH could have safely removed the snow creating the condition during the

pertinent period. The DOH, on the other hand, presented evidence that removal of snow in this circumstance would require special equipment, restriction of travel lanes, and traffic safety controls that would have caused its own hazard to traffic on the highway under the conditions at the time.

In its written decision, the Commission made some of its findings and observations based upon statements of eyewitnesses as noted in a police accident report reviewed by the Commission. These eyewitnesses were not called to testify by either party in the proceeding below and neither party offered the police report into evidence. Under the statutory authorization of the Commission, though, the Commissioners asked the report to be included in the record for their review. The Commission was within their authority to deny the Petitioner's objection, based upon the West Virginia Rules of Evidence, because the Commission is not bound by these rules in the same way as courts.

The Commission also properly considered evidence that the decedent knew or should have known the driver of the car in which he was riding had been drinking alcohol beverages for a length of time prior to the fatal accident. Had the Commission found a basis to recommend an award for payment, this amount could be reduced under West Virginia law in proportion to the relative negligence of each of the actors in the situation. Knowledge that the decedent was aware of the driver's impairments was proper for a determination of the decedent's own negligence and for the Commission's determination whether the state had a moral obligation to pay the claim.

Finally, in response the Petitioner's claim that there were other findings not supported by the evidence in the record, the Commission avers that there was evidence to support the observations and statements of the Commission. The Commission

acknowledges that a couple of details were stated incorrectly, but none of these statements had a bearing on the principal determination that the Petitioner failed to present evidence that it was reasonable, under all the circumstances then existing, that the DOH could have safely removed the snow that had accumulated on the bridge parapet.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent believes that the facts and legal arguments can be adequately presented in the briefs of the parties and the record of the case and, therefore, oral argument would not significantly affect the decisional process in this matter. Because the scope of review in this proceeding is limited and the decision below was based upon insufficiency of the evidence, there are no significant issues of law requiring oral argument. The Respondent waives oral argument and consents to determination of the case by memorandum decision.

ARGUMENT

I. THE SUPREME COURT MAY REVIEW THE DETERMINATION OF A CLAIM BEFORE THE WEST VIRGINIA CLAIMS COMMISSION THROUGH WRIT OF CERTIORARI, BUT THIS IS A LIMITED SCOPE OF REVIEW.

The Petition argues that a statute regarding the effect of decisions of the Commission is unconstitutional to the extent that it would deprive the Supreme Court of the authority to review the Commission's opinion in this matter. The Petitioner has mistakenly anticipated that the Commission would assert this statute as a bar to the hearing of the Petition. The Commission does not assert that this statute, West Virginia Code §14-2-28, bars a review of its determination in the Supreme Court and, therefore, it is not necessary for the Court to rule upon the constitutionality of the statute.

The relevant portion of W. Va. Code §14-2-28(b) reads as follows:

> Because a decision of the commission is a recommendation to the Legislature based upon a finding of moral obligation, and the enactment process of passage of legislation authorizing payments of claims recommended by the commission is at legislative discretion, no right of appeal exists to findings and award recommendations of the West Virginia Legislative Claims Commission and they are not subject to judicial review.

The Commission respectfully asserts that this is a correct and proper statement of the law in West Virginia. Unlike many type of judicial and administrative proceedings, there is no 'appeal of right' from hearings and determinations by the Commission. It is established precedent, though, that the Supreme Court may review Commission determinations through writ of certiorari because that is an extraordinary remedy not granted as a matter of right, but only at the discretion of the court, *Foster Foundation v. Gainer*, 228 W. Va. 99, 104, 717 S.E.2d 883, 888, 2011 W. Va. LEXIS 14. The Commission

acknowledges that the *Foster Foundation* opinion is the controlling law with regard to the Supreme Court's power to review Commission determinations by writ of certiorari.

The Commission also respectfully notes that, pursuant to the *Foster Foundation* opinion, prior precedent, and common law, the scope of review under through certiorari is limited.

> When determining whether to award a writ of certiorari in a particular case, the standard for the issuance of the writ is quite limited. In this regard we have observed and now hold that "'the scope of review under the common law writ of certiorari is very narrow. It does not involve an inquiry into the intrinsic correctness of the decision of the tribunal below, but only into the manner in which the decision was reached.'" *Foster Foundation*, 228 W. Va. at 104, 717 S.E.2d at 888, citing *State ex rel. Prosecuting Attorney of Kanawha Cnty. v. Bayer Corp.*, 223 W. Va. 146, 150, 672 S.E.2d 282, 286 (2008) (additional citation omitted.)

At common law, the scope of the appellate court's review in certiorari proceedings was restricted to the question of whether the decision should be allowed to stand and that a court may not substitute its own judgment or rewrite the determination of the lower tribunal.

> On certiorari the appellate court only determine whether or not the tribunal or administrative authority whose order or judgment is to be reviewed has in the rendition of such order or judgment departed from the essential requirements of the law and upon that determination either to quash the writ of certiorari or to quash the order reviewed.
> When the order is quashed, as it was in this case, it leaves the subject matter, that is the controversy pending before the tribunal, commission or administrative authority as if no order or judgment had been entered . . ., *Tamiami Trail Tours, Inc. v. Railroad Com.*, 128 Fla. 25, 31, 174 So. 451, 453-454, 1937 Fla. LEXIS 1213, (opinion on rehearing, April 6, 1937).

This is particularly pertinent in this proceeding where the underlying tribunal is an instrumentality of the Legislature. As this honorable court has noted, "The awards of the court of claims [now the Claims Commission], however, are actually

recommendations, and are not binding on the Legislature." *G.M. McCrossin, Inc. v. West Va. Bd. of Regents*, fn. 2, 177 W. Va. 539, 540, 355 S.E.2d 32, 33, 1987 W. Va. LEXIS 478 (internal citation omitted). Because the Legislature is not bound to follow the recommendations of the Commission, the Commission and, by extension, the Supreme Court cannot specify what findings the Legislature must ultimately make. It is because the court does not review the "intrinsic correctness" of the Commission's findings and cannot specify or direct the findings to be made that W. Va. Code §14-2-28(b) properly states that those individual findings and award recommendations of the Commission are not subject to judicial review. The principles of separation of powers and the common law of certiorari restrict the scope of judicial review and the specificity of the relief that may be granted. The statute does not contravene these principles.

II. PETITIONER FAILED TO PROVE AN ESSENTIAL ELEMENT OF HER CLAIM THROUGH SUFFICIENT EVIDENCE.

The Petitioner has sought to prove that the DOH was negligent for failing to follow its operational manual regarding the removal of snow hazards on the highway and that the failure to remove snow on the Interstate bridge resulted in the death of Jonathan Ladanye. In claims alleging liability of the DOH for damages caused by a defect in road conditions, the Commission has consistently held that the DOH must have actual or constructive notice of the defective condition, that there was a reasonable time to take corrective action under all the circumstances presented, and that the defect was a proximate cause of the injury, Opinion of West Virginia Claims Commission, JA, 18. The essence of the Commission's decision in this case was that, though there was evidence to

prove the first and last of these elements, the Petitioner failed to prove that there was a reasonable opportunity to take corrective action *under all the circumstances presented.*

The Petitioner contended that the operational postures reported to and from the Transportation Management Center demonstrated that there was reasonable time in the days immediately prior to the accident for the DOH to have removed the snow accumulated on the bridge and, in fact, their manual required this to have been done based upon the DOH's operational postures during that period. The Petitioner did not, however, offer any testimony from witnesses present during this period to describe the actual road and hazard conditions at the location of the accident.

In contrast, the DOH presented testimony to show that, during this time period, road maintenance staff were steadily involved in their primary duty of keeping the traveled roadways clear and that clearing of large amounts of snow on the bridge would itself have caused a hazard to safe travel because it required special equipment and traffic controls. The position of the DOH was that, under all the circumstances presented, there was no period in which it would have been safe to remove the snow accumulated on the side of the bridge.

The DOH presented evidence in the form of testimony from a Maintenance Administrator, from an expert who was a professional engineer and traffic safety specialist, and from contemporaneous records of the DOH detailing the men, equipment in use and the types of maintenance activities being conducted during the time. These records were identified as DOT-12 and MM-77 forms and were admitted as evidence.

Neither the Petitioner nor the DOH presented any testimony from eye witnesses concerning the road and weather conditions in the days and hours preceding the accident. In the absence of such evidence, much of the testimony in the hearing amounted to the

competing opinions of experts for each side. The Petitioner asserted, through her expert, that the operational postures reflected in the summary report from the TMC must be the controlling evidence because these postures are referenced by the DOH maintenance manual and the maintenance manual must be obeyed. The DOH expert contended that lane clearance activities were in continuous operation during the relevant time period and that, when taking into consideration the road conditions and the special equipment and safety measures required, it was not reasonable to attempt to remove the snow from the bridge parapet during that period.

The conclusion of the DOH expert was consistent with other evidence presented through the testimony of Larry Weaver, a Maintenance Administrator for the I-79 / I-68 area. Mr. Weaver explained that when plowed snow accumulates along a bridge wall, use of a conventional snow plow is neither safe nor effective. Because the wall is a barrier to movement of the snow further to the side, a plow will merely force the snow back into lanes of travel or it may force the snow over the bridge parapet creating a danger to traffic below the bridge. In such circumstances, the snow must be removed with an end loader to lift the snow into dump trucks and the presence of this equipment presents hazards to passing vehicles. As a consequence, the DOH must implement traffic controls and potential diversion of travel lanes.

Mr. Weaver's testimony also rebutted another part of the Petitioner's argument. The Petitioner argued that, instead clearing the snow from the bridge parapet, some DOH crews were clearing areas of weigh stations, park and ride areas, and other sections not part of regular travel lanes. According to the Petitioner's expert, the maintenance crews should have cleared the bridge before attending to these areas. Mr. Weaver explained that these areas were, in fact, used by the public and, if those areas are not plowed, vehicles

may stop in these areas before fully exiting the highway area. It is important to note that these areas can be cleared with regular plow trucks and do not require the special equipment or safety precautions that are necessary to clear accumulated snow from a bridge parapet.

Of the two competing versions of events, the Petitioner's case failed to present evidence and a theory that took into account all of the circumstances during the relevant time period. It was therefore proper to conclude that the Petitioner failed to present sufficient evidence to prove an essential element of the claim to support an award of damages.

Pursuant to Rule 6(a) of the *Rules of Practice and Procedure of the Legislative Claims Commission,*

> Claims asserted against the State, including all the allegations in a notice of claim, are treated as denied, and must be established by the claimant with satisfactory proof, or proper stipulation as hereinafter provided before an award can be made.

In claims of negligence of a state agency, the Commission uses a preponderance of evidence standard to assess the sufficiency of the evidence. The Petitioner failed to meet this basic standard and the Commission, therefore, properly determined that no award should be made to the Petitioner.

III. IT WAS WITHIN ITS STATUTORY POWER AND WAS NOT ERROR FOR THE WEST VIRGINIA CLAIMS COMMISSION TO CONSIDER UNSWORN WITNESS STATEMENTS INCLUDED WITH THE POLICE ACCIDENT REPORT.

During the testimony of Mr. Pigman, the expert witness for the DOH, he mentioned that he had reviewed the police report of the vehicle accident and that he had read statements of witnesses that were included with this report. Counsel for the DOH did not propose this report as an exhibit, but after it was mentioned by the expert, the

Commission itself requested to receive this report. This was done over the strenuous objection of the Petitioner's counsel on the grounds that it was inadmissible hearsay under the West Virginia Rules of Evidence.

The West Virginia Legislature has specified that the Commission should develop and adopt rules governing proceedings before it rather than apply rules employed by the judicial branch. "Under its rules, the commission shall not be bound by the usual common law or statutory rules of evidence. The commission may accept and weigh, in accordance with its evidentiary value, any information that will assist the commission in determining the factual basis of a claim," West Virginia Code §14-2-15. In this claim proceeding, the Commission chose to review this police report and the included statements when it was identified and made available to the Commission. The statements at issued consisted of two written statements by eyewitnesses in another vehicle and police notes reflecting the comments of a person who was also riding in the vehicle with the decedent.

In the Commission's written opinion, the Commission referenced this information for three purposes: as evidence of the condition of the roadway at the scene at the time of the accident, as evidence of the manner of the accident, and as grounds to believe that the decedent had reason to know of the driver's state of intoxication. Pursuant to W. Va. Code §14-2-15, the Commission considered the police report and statements as information to assist the Commission in determining the factual basis of the claim. These were mentioned as factors in the Commission's decision, but they were ancillary to the ultimate conclusion that the Petitioner failed to prove all the elements of her claim.

The condition of the roadway at the time of the accident may have been relevant to whether it would have been safe and proper to remove snow *at the time of the accident*, but it had relatively little bearing on the Petitioner's contention that there was sufficient,

reasonable time to remove the snow in the hours *before the accident occurred.* Because the Petitioner's case was built around the amount of available time and the active weather conditions in the "47 hours prior to the accident," the evidence of a wet or slippery road surface was more significant to how the accident occurred than it is was to the question of whether the DOH had adequate opportunity to remove the snow prior to that time.

The witness statements also provided some insight as to how the vehicle may have come to have struck the bridge parapet in the first place. The Petitioner's case did not address this question. According to the Petitioner's expert, the accumulation of snow on the bridge reduced the effectiveness of the bridge parapet and led to the ramping of the vehicle overtop of the parapet. The Petitioner's expert did not address any conditions that may have exacerbated or contributed to this ramping of the vehicle. This demonstrated another weakness in the opinion of that expert. It was not the primary failing in the expert's opinion, but it would undercut the thoroughness and credibility of this witness.

The third observation of the Commission, based upon a statement in the police report, concerned the activities of the decedent and the vehicle's driver prior to the accident. According to comments from another passenger in the vehicle, the three men had been drinking alcoholic beverages for several hours prior to the accident. The Commission considered this as evidence that the decedent knew or should have known of the likelihood that the driver, Coffman, was impaired when the decedent got in the vehicle prior to the accident. There already was other evidence in the case – documents from criminal proceedings against the driver – to show that the driver was impaired and that impairment was a cause of the accident and the death of the decedent. The passenger's statement indicated to the Commission that the decedent should have known of an increased risk due to the driver's condition.

All these statements were relevant to subsidiary issues in the case and "determination of the factual basis for the claim." Therefore, it was allowable and proper, under the provisions of W. Va. Code §14-2-15 for the Commission to consider these statements.[1]

The Petitioner argues that the Commission should be compelled to adopt and abide by the West Virginia Rules of Evidence, but the Petitioner does not make a persuasive case as to why the Supreme Court can or should order this relief. The Rules of Evidence were created by the judicial branch under its inherent authority to govern its own proceedings. That does not mean that they must be mandatory for quasi-judicial proceedings under other branches of government. Not only does this contravene the legitimate, statutory provisions for such proceedings, it violates the constitutional principle of Separation of Powers. Under this principle, the Court's rule-making authority does not extend to other branches of government. The Legislature has explicitly allowed the Commission to develop its own rules to accept information that may assist the Commission in its fact-finding duties, considering the evidentiary value of that information, W. Va. Code §14-2-15. This is a matter in which the sound exercise of discretion is critical, not the wholesale application of a body of judicial rules upon an instrumentality of the legislative branch.

It is important to remember the purpose and function of the Commission, which "was established by the Legislature 'to provide a simple and expeditious method for the consideration of claims against the State' which cannot be decided within the normal judicial system." *G.M. McCrossin, Inc. v. West Va. Bd. of Regents*, Fn. 2, 177 W. Va. 539,

[1] The Commission also regularly considers matters within police reports, including unsworn statements, in its role of recommending awards from the Crime Victims Compensation Fund, *see* W. Va. Code §14-2A-17(c)

355 S.E.2d 32, 1987 W. Va. LEXIS 478. The Commission serves as a fact-finding instrumentality of the Legislature to make recommendations for appropriations to pay claims which the state "should in equity and good conscience discharge and pay," W. Va. Code §14-2-13. Though the Legislature chose to establish the Commission as a quasi-judicial body to receive sworn testimony and other evidence, there is nothing in the West Virginia Constitution that requires proceeding in this way. Because the Legislature may only make appropriations to serve a public purpose, the Legislature must find that the state has a moral obligation to pay a claim. This process of determination and appropriation could legitimately be carried out through established legislative procedures of referral to committee for consideration and subsequent debate on the floor of each house of the Legislature. Nothing requires that the Legislature make these determinations solely through sworn testimony of witnesses or that matters considered relevant by legislators must conform to the judicial Rules of Evidence.

The Petitioner argues that consideration of the police report, which was not identified as a potential exhibit, was an improper attempt of the DOH to introduce inadmissible evidence and that its acceptance would erode public confidence in the decisions of the Commission. Both statements are untrue. The Respondent DOH did not tender the police report as an exhibit to the Commission. The DOH merely provided the report to its expert for his review of the case. The expert only mentioned the witness statements as a predicate for his examination of the photographs from the accident and for his later examination of the bridge parapet. The DOH did not seek to admit the report and did not elicit testimony about it except as to an explanation of why the expert made a particular examination at the scene. It was the Commission that decided the police report would assist them in determining the facts of the claim.

The Petitioner did make a timely objection on the basis that this report had not been disclosed to her counsel. Under circumstances in which a party is surprised by the identification of previously undisclosed evidence, exclusion of that evidence is one possible remedy, but it is not the only allowable remedy. Where a party is surprised by the disclosure of evidence, the proceeding may be continued entirely to give the party time to respond, or the record may be kept open to allow that party to submit a rebuttal to the evidence. In this case, the Petitioner took the opportunity to submit her *Claimant's Motions to Alter of Amend Findings, Conclusions and Judgment* to the Commission following the issuance of the Commission's Opinion. In the Petitioner's motions, her counsel reiterated her objection to consideration of the police report, but she did not attempt to rebut it or submit any evidence to counter it. She had an opportunity to respond to the factual determinations of the Commission, but her only action was to object to them entirely. The Petitioner had an opportunity, but did not argue the relevance or the potential probative value of these statements. The Commission properly denied the written motions because the Petitioner did not present any new evidence to justify amendment of the decision, JA-1.

IV. DECEDENT'S KNOWLEDGE OF THE DRIVER'S INTOXICATION WAS A PROPER FACTOR FOR CONSIDERATION IN THE COMMISSION'S DECISION.

The Petitioner devotes a significant portion of her argument to the Commission's note of the decedent's knowledge of the intoxication of the driver of the vehicle. In consideration of this claim, it was proper for the Commission to weigh information regarding the decedent's awareness of the risk he was facing by riding in a car driven by an impaired driver. In her argument, the Petitioner confuses the doctrines of contributory

negligence and comparative negligence and she misapplies a concept of third-party liability that is not relevant in this case.

In West Virginia, the old, common law principle of contributory negligence was replaced almost forty years ago with a new rule of comparative negligence in the case of *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879, 1979 W. Va. LEXIS 403. In that case, this Court announced that a "party is not barred from recovering damages in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident." Syl pt. 3, *supra*. In that opinion, the Supreme Court explained that in a trial, "The jury should be required by general verdict to state the total or gross amount of damages of each party whom they find entitled to a recovery, and by special interrogatory the percentage of fault or contributory negligence, if any, attributable to each party. After the verdicts have been accepted, the trial court will calculate the net amount by deducting the party's percentage of fault from his gross award," *Bradley*, 163 W. Va. at 343, 256 S.E.2d at 879.

The Commission follows an analogous procedure with such claims. Where a claim alleges negligence on the part of a state agency, the Commission will also hear evidence of the relative culpability of other participants in the event. When warranted, the Commission may reduce an award by the percentage of the claimant's own fault. *See e.g. Monica Renee Watts v. Division of Highways*, CC-12-0621, issued March 8, 2018 (Commission determined total damages to be $1 million, but reduced the award by 35% based upon the claimant's degree of negligence.)

With this claim, there were several entities involved and, *if* the Petitioner had presented sufficient proof or her claim, the Commission could properly consider the

relative culpability of the driver of the vehicle and the decedent to adjust damages accordingly. To the extent that the decedent had reason to know of the risk of riding in a car with his buddy driving after several hours of drinking, that is relevant to the issue of the decedent's own negligence.[2]

In the Petition, the Petitioner mixes up the principles of contributory negligence and comparative negligence to argue that the Commission should not have considered any evidence of the decedent's negligence. However, the cases quoted or cited by the Petitioner do not support the contention that a passenger bears no responsibility for injuries sustained while a passenger in a vehicle driven by another.

Beginning on page 17 of the Petition, the Petitioner also cites several case decisions to argue that the negligence of the driver of a vehicle cannot be imputed to a passenger unless there is evidence that the driver and passenger were engaged in a joint enterprise. This argument is without merit because the rule cited in those cases only applies with regard to a passenger's negligence toward a *third party*. This principle does not apply to negate evidence of the passenger's negligence for his own damages incurred.

Had the Commission found that the DOH did have reasonable opportunity, in consideration of all circumstances, to remove the snow buildup on the bridge, the Commission would be obligated to consider the relative culpability of the driver of the car and of the decedent himself. The final award would be subject to an adjustment based upon the proportion of fault of each of these actors. Because the Commission did not find

[2] Also, in the case of *King v. Kayak Manufacturing Corp.*, 182 W. Va. 276, 387 S.E.2d 511, 1989 W. Va. LEXIS 238, ruled that the doctrine of assumption of risk may be weighed in the same fashion as comparative negligence under the *Brady* decision where "the plaintiff has full knowledge and appreciation of the dangerous condition and voluntarily exposes himself to it."

that negligence of the DOH was sufficiently proven, perhaps it was not necessary for the Commission to consider the decedent's negligence at all. Mention of this conduct by the Commission might be considered surplusage, but for the specific purpose of the Commission to determine whether the state has a "moral obligation" to pay the claim. As the Commission must make recommendations to the Legislature as to claims which the state should "in equity and good conscience discharge and pay," it is appropriate for the Commission to mention all appropriate factors for the Legislature to consider its its review of the Commission's recommendations.

V. THE PEITIONER'S ARGUMENTS ABOUT FINDINGS NOT SUPORTED BY EVIDENCE IN THE RECORD ARE NOT WELL FOUNDED AND THEY HAVE NO BEARING ON THE KEY FINDING THAT THE PETITIONER FAILED TO PROVE AND ESSENTIAL ELEMENT OF THE CLAIM

In the final portion of the Petition, counsel for the Petitioner alleges that several of the Commission's findings were not supported by the evidence in the record. Petitioner's arguments about these findings are conflicting and, for the most part, simply wrong.

First, the Petitioner objects to the Commission's finding that the decedent, another person, and the vehicle driver "were out drinking beer at some bars located on High Street in Morgantown," and that the decedent and the eventual driver had an argument about who should drive them home." Here the Petitioner converts the argument that these statements should not be considered by the Commission into an argument that this evidence did not even exist in the record. For the reasons stated previously, it was permissible for the Commission to consider this as statement in the police report in the determination of the claim.

Next, Petitioner objects to the Commission's note that a police officer listed the weather conditions as "sleet, hail, and freezing rain" and road conditions as "snow." The Commission is confused as to the Petitioner's point with this argument and reference to the testimony of First Sergeant Yaskoweak that "whatever snow and slush was present at the scene was actually to the side of the road, way off the roadway." Petition, at 23. Indeed, the Commission did mention the police officer's note from the accident report about the weather conditions at the time of the accident. To the extent that this is a "factual finding" it is on a minor point. The weather conditions most pertinent to the elements of the claim were those in the hours *prior to* the accident.

Then, the Petitioner refers to the Commission's notations regarding the expert testimony in this hearing. This is an argument about the weight to be given to the evidence; not about the absence of evidence in the record. The Petitioner objects because the Commission found that the MM-77 forms, filed by maintenance staff detailing their actions, assignments, equipment and weather conditions for each area of road upon which they worked, better reflected the circumstances than the operational posture reports that described overall operating status for a large district. Yes, the Commission mistakenly wrote that the operational postures were determined by officials in Charleston. This is not a significant error in the context of the Commission's analysis. In the opinion, the Commission determined that the more specific MM-77 reports better reflected the circumstances existing during the relevant time than the overall operational posture reports. The Commission noted in a footnote, on page 3 of the opinion, JA-17, that the best evidence should have been elicited from on-site workers, but neither party called these witnesses. It was within the sound discretion and it was not error for the

Commission to place more weight on the more specific reports to assess all of the weather conditions affecting the work of the DOH.

The Petitioner also objected to the Commission's summary of the testimony of Mr. Pigman, expert witness for the DOH. While the Commission's summary was not a word for word reiteration of Mr. Pigman's opinion, it is still a fair summary of the man's testimony. Apparently, the Petitioner finds fault with the Commission's statement that, because of the vehicle's approach angle to the wall, "the vehicle could still jump the parapet or break through it even without snow being present." Petition, at 26. Mr. Pigman did testify that "approach angles in excess of 20 degrees are going to compromise the effectiveness of a barrier wall dry or snow covered," JA-369. This might be a more relevant or important distinction if the Petitioner had been able to prove the essential element that, under all the existing circumstances, the DOH had reasonable opportunity to remove the snow. Then this particular statement would have a bearing on the relative fault of the driver. Here, however, the Commission's statement does not have a bearing on the fundamental issue of whether the DOH had a reasonable opportunity for the safe and proper removal of the snow on the bridge.

Finally, the Petitioner objects the Commission's description that the DOH maintenance staff were in "snow removal mode" or "snow mode." Although the Petitioner claims that this is a finding that was not supported by the evidence, the Petitioner's real claim is that these were not the official terms that appeared in the DOH Manual. It is a fact that both the DOH's representative (see JA 394) and the DOH's expert (see JA 373 and 379) used these terms in their testimony. While the Petitioner may view their use of

these terms as inaccurate, it was not error for the Commission to use these same words in rendering its decision. These words came directly from the record.

CONCLUSION

The Petitioner failed to produce sufficient evidence to prove all the elements of her claim. The West Virginia Claims Commission made this determination based upon a reasonable evaluation of evidence adduced through a fair hearing with sufficient procedural standards for the benefit of the parties. There is not a sufficient basis for the Supreme Court to rule that this determination was made in an improper manner. Therefore, the Supreme Court should deny the petition and the relief requested by the Petitioner.

WEST VIRGINIA LEGISLATIVE
CLAIMS COMMISSION,

Respondent,
By counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DANITA LADAYNE, ADMINISTRATOR OF THE
ESTATE OF JONATHAN S. LADANYE,
Petitioner,

vs. No 18-0356

WEST VIRGINIA LEGISLATIVE CLAIMS COMMISSION and
WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS,
Respondents.

CERTIFICATE OF SERVICE

I, Doren Burrell, do hereby certify that on this 22nd day of June, 2018, I have served true copies of the "Response of West Virginia Legislative Claims Commission" upon the counsel for parties to this action via United States Mail with postage prepaid, addressed as follows:

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