

**BEFORE THE ARKANSAS STATE CLAIMS COMMISSION**

**DEBBIE BROWN, AS ADMINISTRATRIX OF  
THE ESTATE OF CHRIS BROWN, AND  
JOE BROWN**

**CLAIMANT**

**V.**

**CLAIM NO. 200809**

**ARKANSAS DEPARTMENT OF  
TRANSPORTATION**

**RESPONDENT**

**ORDER**

Now before the Arkansas State Claims Commission (the “Claims Commission”) is the claim of Debbie Brown, as Administratrix of the Estate of Chris Brown, and Joe Brown (collectively referred to herein as the “Claimant”) against the Arkansas Department of Transportation (the “Respondent”). At the hearing held August 19, 2022, Claimant was represented by Brandon Lacy and Megan Henry. Trella Sparks and Amanda Andrews appeared on behalf of Respondent.

**Procedural History, Prehearing Matters, and Witness Testimony**

1. Claimant filed this claim against Respondent on February 10, 2020, seeking \$2,000,000.00 in damages related to the March 13, 2019, death of Chris Brown (the “Decedent”). The Decedent passed away following a single-vehicle rollover accident on State Highway 316 North (“Highway 316”). Claimant alleged in the complaint that the accident occurred because Highway 316 was flooded due to issues with the ditch next to the roadway.

2. Respondent filed an Answer denying liability.

3. The Claims Commission previously entered two orders in this claim: (1) a March 25, 2022, order granting Respondent’s motion to substitute counsel; and (2) a May 13, 2022, order granting Respondent’s motion to continue the hearing until August 19, 2022; denying Claimant’s

motion to exclude expert testimony of Stan Andrews and Dr. Chandra Thorbole; and providing a scheduling order for the parties.

4. At the beginning of the hearing, the Claims Commission considered Claimant's prehearing motion to exclude Respondent's Exhibit No. 4. However, Claimant's counsel confirmed that he was withdrawing the motion. As such, the motion was dismissed as moot.

5. At the beginning of the hearing, the Claims Commission considered Claimant's prehearing motion to exclude the expert opinion by Dr. Chandra Thorbole, which was disclosed outside of the time frame permitted in the scheduling order. Dr. Thorbole's opinion related to whether the Decedent would have survived the crash had he been wearing his seatbelt. Claimant argued that Dr. Thorbole is not a medical doctor and that his opinion is based on statistics, not specific facts in this claim. Respondent argued that, in March 2022, Respondent was still trying to get an unredacted copy of the coroner's report and that Dr. Thorbole supplemented his findings following receipt of the unredacted report. Respondent also argued that, as a biomechanical engineer with significant medical training, Dr. Thorbole can determine to a degree of biomechanical certainty whether the roof intrusion would have injured the Decedent or would have contributed to his death. The Claims Commission found that, while the attorneys representing Respondent at the hearing were not involved prior to March 2022, Respondent had already been given significant latitude with regard to Respondent's untimely expert witness disclosures. The Claims Commission also found that Dr. Thorbole's new opinion was disclosed after the extended time set for Claimant to identify any rebuttal witnesses, such that it would have been highly prejudicial to Claimant to allow Dr. Thorbole to testify regarding this untimely disclosed opinion. As such, the Claims Commission unanimously voted to GRANT Claimant's motion to exclude

testimony related to Dr. Thorbole's opinion regarding whether the Decedent would have survived the accident if he had been wearing his seatbelt.

6. At the beginning of the hearing, Respondent orally moved to exclude photos of the Decedent following the accident. Claimant's counsel agreed that he did not plan to introduce the photos (which were listed as Claimant's Exhibit No. 20). As such, the Claims Commission dismissed the motion as moot.

7. At the beginning of the hearing, the Claims Commission considered Claimant's motion to exclude certain opinion testimony of Stan Andrews and advised the parties that Mr. Andrews' testimony will be given the weight deemed appropriate by the Claims Commission, if not outright rejected.

8. At the beginning of the hearing, the Claims Commission considered Respondent's motion to exclude the affidavit of Tina Morrow. The Claims Commission found that Respondent's motion was mooted by Ms. Morrow's appearance at the hearing.

9. At the beginning of the hearing, the Claims Commission considered Respondent's motion to exclude Dr. Ralph Scott's use of VSL data. Claimant's counsel stated that the VSL tables would be removed from Dr. Scott's report and that a revised report would be circulated to Respondent and the Claims Commission, which Respondent agreed mooted its motion.

10. The Claims Commission admitted Respondent's Exhibit Nos. 1-5 (without Dr. Thorbole's supplemental report in Respondent's Exhibit No. 3) without objection, aside from Claimant's standing objection to Mr. Andrews' report. The Claims Commission admitted Claimant's Exhibit Nos. 1-19 and 21 without objection.<sup>1</sup>

11. The parties agreed to rely upon the pretrial briefs in lieu of opening statements.

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<sup>1</sup> Claimant's Exhibit No. 20 was not introduced by Claimant, as explained further in Paragraph 6.

12. The witnesses were sworn in by the chair commissioner.

Testimony of Debbie Brown

13. Claimant called Debbie Brown to testify.

14. Mrs. Brown testified that she has lived in Marvell, Arkansas, for 30 years. She is a medical staff coordinator for Helena Regional Medical Center. Mrs. Brown has three children. The Decedent was her youngest child. Mrs. Brown described the Decedent as very studious, a leader in his class, and a volunteer firefighter. He loved to hunt and fish. He had a 4.0 grade point average and was attending Phillips Community College with a plan to become a nurse anesthetist. Claimant's Exhibit No. 6 includes Claimant's transcripts and information about the induction ceremony for his collegiate honor society.

15. Mrs. Brown and her husband have a family farm. The Decedent helped with the farm.

16. Claimant's Exhibit No. 5 is a drone image of the roads involved in the accident. Mrs. Brown pointed out where the accident occurred near the intersection of Highway 316 and County Road 261 (the "Intersection"). Highway 316 runs north-to-south in the image. County Road 261 ("CR 261") runs west-to-east. On March 13, 2019, Mrs. Brown was at home not feeling well. The Decedent had attended classes that day. Mrs. Brown last saw the Decedent before he went to town to the firefighter gathering. After Mr. Brown came home with food from the firefighter gathering, he got a phone call to go to the accident scene.

17. When Mr. and Mrs. Brown got to the accident scene, there were other vehicles there. Water was running down the road. Mrs. Brown was stopped by a firefighter who told her that the Decedent had passed away. Someone took Mrs. Brown back to her vehicle.

18. Claimant's Exhibit No. 1 at 263-264 has photographs that Mrs. Brown took.

19. Claimant's Exhibit No. 14 is a video that Mrs. Brown took, which shows water running down the highway on the night of the accident.

20. The following day, Mrs. Brown went back to the accident scene because it was where the Decedent was last alive. She looked at the accident scene and the debris of what had come out of the Decedent's truck. Mrs. Brown picked up a soda can, fishing lures, a tackle box, a debit card, and a piece of the windshield. Mrs. Brown went back to the accident scene every day afterwards. Someone put a cross up. After the accident, and before Respondent widened the ditch, Mrs. Brown saw the road flood many times. It just took a little bit of rain to cause the road to flood. Claimant's Exhibit No. 2 includes photographs of the road flooded.

21. Mrs. Brown learned that Respondent made repairs to the ditch when she heard an employee of Respondent talking in a restaurant. Claimant's Exhibit No. 4 is a photograph of the ditch being widened. Mrs. Brown has not seen the road flooded as much since the ditch was widened.

22. The Decedent's funeral was held in a gym because the original planned location was not large enough to accommodate all of people attending the funeral.

23. The Decedent was well liked, and he valued his life. Losing the Decedent has changed Mrs. Brown's world. Claimant's Exhibit No. 21 shows the amount of work that Mrs. Brown has missed since the Decedent passed away. She took FMLA leave and used all of her sick leave. Mrs. Brown has gone to grief counseling in Jonesboro and had three days of in-patient treatment in Little Rock. Currently, Mrs. Brown battles depression and noted that it is a "roller coaster."

24. The Decedent was a careful driver. He knew that Mrs. Brown worried, so he would call to let her know when he arrived somewhere. As an example, Mrs. Brown recalled a time where the Decedent called her to say that he was okay after getting caught in a rainstorm.

25. Mrs. Brown noted that it is hard to go to church without the Decedent there.

26. On cross-examination, Mrs. Brown confirmed that she has received \$100,000.00 in insurance payouts related to the Decedent's death: (1) \$50,000.00 from a fire department policy; (2) \$10,000.00 policy from Mrs. Brown's employer; and (3) \$40,000.00 accidental death insurance policy from Mrs. Brown's employer. Mrs. Brown said that she is seeking to be reimbursed for the lost wages listed in Claimant's Exhibit No. 21, as well as her medical bills from Bridgeway. In reviewing Claimant's Exhibit No. 5 showing the aerial drone footage of the accident location, Mrs. Brown said that the dark line showed David Carruth's field (the "Carruth Property") draining into the ditch. She stated that the Decedent would have been able to help with the farm for awhile after he started his nurse anesthetist training but acknowledged that, in her deposition, she testified that the nursing program would be very strenuous. On the day of the accident, the Decedent left the house between 7:00–7:30 p.m. It was not raining when he left. The Decedent went to the location where Mr. Brown was cooking, then left to go to a friend's house.

27. Respondent then orally moved to exclude Mrs. Brown's claims for reimbursement of lost wages or medical bills. Claimant's counsel confirmed that Claimant is not seeking those damages. As such, the Claims Commission found that the motion was dismissed as moot.

#### Testimony of Joe Brown

28. Claimant called Joe Brown to testify.

29. Mr. Brown testified that he has lived in a ten-mile area for his entire life. He has a 700-acre farm. He farms beans and corn and does it pretty much by himself. The Decedent helped

a lot when he had time. His older son, Nathan, has come back from Jonesboro to help with the farm since the Decedent's death.

30. Mr. Brown explained that Claimant's Exhibit No. 7 is a picture of the Decedent with Governor Asa Hutchinson taken after the Decedent sold Governor Hutchinson a t-shirt while the Decedent was volunteering at a festival.

31. On March 13, 2019, Mr. Brown was grilling for three volunteer fire departments. As everyone was heading home, the Decedent drove up to see if there was any food left for Mrs. Brown. Mr. Brown said that he was going home and would take some food to her. The Decedent ate and then said he was going out to the derby car shop. Mr. Brown told him to be careful, and that was the last thing Mr. Brown said to the Decedent.

32. When Mr. Brown arrived at home, he carried some food inside, then he got a phone call from someone telling him that the Decedent had been involved in an accident. Mr. Brown knew at that time that the Decedent had not survived the accident and regrets not telling Mrs. Brown then.

33. When Mr. and Mrs. Brown arrived at the accident scene, he recalls seeing an overturned vehicle, different colored lights, and rescue vehicles. Mr. Brown went to take pictures, but when he realized that his phone was dead, he asked Mrs. Brown to take pictures. Another firefighter saw Mr. Brown running toward the Decedent's vehicle, told him that the Decedent had passed away, and asked Mr. Brown to let the emergency workers do their jobs. Mr. Brown could not do anything to help, so he prayed.

34. Claimant's Exhibit No. 14 shows the water in the roadway. Mr. Brown said that it was over his feet. He was wearing boots, but if he had been wearing dress shoes, the shoes would

have been full of water. The video shows flowing water, not standing water. The water was flowing south.

35. Claimant's Exhibit No. 1 at 302 shows the headlight from the Decedent's vehicle in the water. Mr. Brown noted that you can see the white line of the roadway under the water.

36. Claimant's Exhibit No. 1 at 303 shows the bumper from the Decedent's vehicle near the white line of the roadway. Claimant's Exhibit No. 1 at 298–299 shows the same bumper near the Carruth Property.

37. The following day, Mr. Brown went back to the accident scene with Mrs. Brown to look for anything that belonged to the Decedent, including the Decedent's Apple watch. They found the Decedent's debit card. Items had been carried down the road by the flowing water. There was still standing water the following day.

38. Claimant's Exhibit No. 2 at 372 shows part of the headlight from the Decedent's vehicle. Rocky Ford took the picture. Mr. Brown and others had picked up pieces of the headlight and piled them up in this location. He did not know that those pieces would be used to say that the Decedent was speeding at the time of the accident. Mr. Brown has been back to the accident scene many times.

39. Claimant's Exhibit No. 2 at 238 is a photograph Mr. Brown took of water on the roadway at the accident scene. This photograph shows a truck coming in the same area where the Decedent's accident occurred. He is not sure how much rain had fallen when the photograph was taken, but he stated that one-half inch of rain would bring the water over the highway.

40. Claimant's Exhibit No. 2 at 192 is another photograph taken by Mr. Brown. He noted the sunny skies and the ditch still full of water. Mr. Brown stated that this photograph shows the grass blocking the flow of water and that the water goes across the highway near the sign.



41. Losing the Decedent has been a struggle. It is difficult seeing a truck the same color as the Decedent's vehicle and not having the Decedent available to help on the farm. Before the accident, the Decedent helped a lot on the farm. But in 2019, the farm lost money, which Mr. Brown approximated at \$50,000.00. Nathan Brown helped when he could, and Mr. Brown had to hire a couple of guys but could not find good tractor drivers like the Decedent because the good tractor drivers all already had employment. In 2020, the farm did a little better, but 2022 was a "catastrophe."

42. Mr. Brown takes medicine to help with the pain of losing the Decedent. He has been to his family doctor several times, and the family doctor has increased Mr. Brown's dosage. Mr. Brown has not been able to afford counseling.

43. Claimant's Exhibit No. 6 at 1059 is the funeral home invoice for \$7,287.47. Mr. Brown testified that he also had a \$600.00 gravedigging expense.

44. Claimant's Exhibit No. 16 is the estimate for the Decedent's headstone, although Mr. Brown clarified that the estimate for \$11,864.48 has since expired.

45. Mr. Brown stated that the loss of the Decedent is not something you get over. Mr. Brown only has his wife, two of his children, and a sister left. He got to say goodbye to his parents and one of his brothers. The last words that the Decedent heard Mr. Brown say were "be careful." The Decedent would help anyone, and Mr. Brown called him "little man."

46. On cross-examination, Mr. Brown clarified that it was not raining when the Decedent left the cookout because they were sitting on the tailgate. It may have been drizzling. The Decedent was headed to the derby car shop, which is a place that he went three times per week or whenever he had time. The Decedent and others were working on derby cars there. Mr. Brown would help prep the packed dirt for the area, and the Decedent would mow the grass. The Decedent

wanted to build his own derby car. Regarding Claimant's Exhibit No. 5, Mr. Brown is not sure whether CR 261 is at a higher elevation, but CR 261 must drain into the ditch alongside Highway 316. The resting point of the Decedent's vehicle was near the road sign, and the pile of headlight pieces was south of the accident scene. Referring to Claimant's Exhibit No. 1 at 372, Mr. Brown cannot identify which pieces of the headlight were moved to that spot. He noted that other people were there before Mr. Brown arrived. Mr. Brown does not think he would have picked up the pieces of the headlight that were very small. Mr. Brown confirmed that he is not making a claim for damages based upon his farm losses. Mr. Brown does not know if NEA Counseling would have been free or low cost, but he stated that there was always a co-pay. He was focusing on his wife's counseling. Mr. Brown preferred to sit on a tailgate in a field to grieve the Decedent. Regarding Claimant's Exhibit No. 2 at 238, Mr. Brown stated that this photograph was taken after the Decedent's accident, but he does not know exactly when. He noted that the blue truck in the photograph made it through the water without rolling over, but he clarified that this photograph was taken during the day and that the water in the roadway is not visible at night.

47. On redirect, Mr. Brown testified that the Decedent was a careful driver. Mr. Brown took the Decedent to accident scenes with the fire department to show him the consequences of driving recklessly.

48. Upon a question from a commissioner, Mr. Brown confirmed that the Decedent was living at home prior to the accident.

#### Testimony of Tina Morrow

49. Claimant called Tina Morrow to testify.

50. Ms. Morrow lives in Lexa, Arkansas, and she used to be a bus driver for the school district. She knows who the Decedent was. Ms. Morrow was a bus driver when the accident

occurred. She saw the area of the Intersection flooded prior to the Decedent's accident. Ms. Morrow called Respondent to report the flooding before the accident, but no one did anything to address the flooding until after the Decedent's accident.

51. On cross-examination, Ms. Morrow stated that she does not know who she spoke with when she called Respondent. She told Respondent that there is a ditch beside the road that needs to be dug out because water would stand on the road when the ditch filled up. Ms. Morrow clarified that the flooding occurred near the Intersection. Ms. Morrow lives on CR 261, so she goes through the Intersection daily. She has never had an accident due to the flooding in the roadway. Ms. Morrow only called Respondent once to report the flooding. She does not know anyone who works for Respondent. The flooding happened by the Carruth Property. Ms. Morrow did not send any documentation to Respondent regarding her concerns.

#### Testimony of Clay Young

52. Claimant called Clay Young to testify.

53. Mr. Young lives in Lexa, Arkansas, on Highway 316. He is familiar with the area of the Decedent's accident. His land (the "Young Property") is northeast of the Intersection. He has owned the Young Property for 31 years and has observed the flooding. Respondent performed repairs on the ditch near the Young Property by digging it out in 2014, but the digging stopped at the end of his property line. Respondent came back to dig out the ditch after the Decedent's accident. After 2014, Mr. Young saw flooding along the Carruth Property. Mr. Young has never talked to anyone at Respondent about the flooding but said that everyone knew it was a problem.

54. On cross-examination, Mr. Young stated that his house sits in the middle of the Young Property. His house is a quarter mile from the Intersection. Respondent has worked on ditch issues around Mr. Young's house and put in a culvert when Mr. Young built his house. CR

261 is the southern border of Mr. Young's farm. He has seen CR 261 drain onto Highway 316. Mr. Young knows James Wallace, who used to work for Respondent, as well as another employee named Tony. Mr. Young had general conversations with Respondent's workers about the flooding, but it has flooded so many years that everyone knew it was a problem. He talked with Respondent about an issue one quarter mile north of the Intersection, and Respondent fixed that issue. He did not talk to Respondent about that Intersection.

#### Testimony of Lauren Reeves

55. Claimant called Lauren Reeves to testify.

56. Ms. Reeves lives on Highway 316 in Poplar Grove, Arkansas. She has lived there since 2014 and is familiar with the area of the Decedent's accident. Looking at Claimant's Exhibit No. 5, Ms. Reeves lives one mile north of the Intersection. She drives that road all the time and observed flooding before the Decedent's accident.

57. Claimant's Exhibit No. 8 is a video taken by Ms. Reeves on June 1, 2018. She took the video showing the flooded Intersection to show her frustration in trying to get home. Ms. Reeves complained to Respondent about the flooding. She called Respondent in 2016 and later wrote a letter about the continued flooding. Ms. Reeves mailed that letter to Respondent's address on I-49. She never received a follow up call from Respondent, and nothing was done to address the flooding until after the Decedent's accident. Ms. Reeves does not have a copy of the letter that she sent to Respondent.

58. On cross-examination, Ms. Reeves stated that she did not send the video to Respondent. She used the video to show her family and friends the condition of the road. She does not recall the name of the person she spoke with at Respondent's office. Ms. Reeves said that her letter was addressed to Respondent, not to a specific person. She did not follow up on her letter

with another phone call. Ms. Reeves does not know anyone who works for Respondent. CR 261 spills water onto Highway 316. There are a lot of farms on this road, and farms will drain into roadside ditches sometimes.

59. On redirect, Ms. Reeves noted that at the eight-second mark in the video found at Claimant's Exhibit No. 8, the water is flowing from the ditch onto Highway 316. Ms. Reeves called Respondent prior to the Decedent's accident and sent the letter to Respondent after the Decedent's accident.

60. On re-cross, Ms. Reeves confirmed that after the eight-second mark of the video, the water seen at the bottom of the screen is in the ditch.

#### Testimony of Bernie Auld

61. Claimant called Bernie Auld to testify.

62. Mr. Auld is an expert witness on hydrology issues. Claimant's Exhibit No. 10 is Mr. Auld's curriculum vitae. He has 30–40 years of experience in water safety. He has helped with roadway design for states, including Arkansas, as well as the federal government. Mr. Auld is a professional engineer in Arkansas.

63. In connection with this claim, Mr. Auld reviewed photographs, depositions, and videos. He is familiar with the guidelines for roadways.

64. Mr. Auld stated that Respondent deviated from the applicable standards and guidelines with respect to the Intersection.

65. Claimant's Exhibit No. 11 is a copy of Mr. Auld's presentation. The first slides show the cross-section of the road and ditch. The standard for highway ditches is a minimum of two feet. Respondent is responsible for the maintenance. The minimum culvert size is eighteen inches. One of the slides shows a buildup of grass and other materials preventing drainage from

the roadway. The inset photograph shows water in the roadway even after a rain event because the water is not able to overcome the buildup of grass. Mr. Auld stated that the right-of-way goes up to the power poles in the photographs.

66. The next slide shows how the height of soil and grass built up on the side of the roadway affects how much rain is required for the roadway to be inundated with water. Where the buildup of soil and grass is one inch tall, water will inundate four feet of the roadway. Where the buildup is two and one-half inches tall, water will cover the roadway. Where the buildup is three inches, the roadway will be overtopped by three-eighths of an inch of water. The buildup of material evident from the photographs in the slide forces water into the roadway.

67. In discussing a slide showing the “proper standard of care conditions,” Mr. Auld explained the importance of maintaining the ditch to ensure positive run-off.

68. Mr. Auld set out one of Respondent’s maintenance standards titled “Inspect, Clean and Repair Minor Drainage Structures” (referred to as Function 441) in a slide, noting the following language:

Emphasis to be placed on regular inspection and cleaning of all minor drainage facilities with repairs and replacement as necessary to prevent catastrophes and emergencies as much as possible. Work may be accomplished more efficiently and skillfully before it is under water, plugged up, or partially washed out.

...

Inspection and cleaning will be performed by proceeding along the roadway checking each drainage feature in sequence.

...

Inspections should be made during rains to locate trouble spots and insure [sic] that trash doesn’t block necessary drainage facilities.

Mr. Auld stated that Respondent did not follow the Function 441 maintenance standard.

69. Mr. Auld set out another of Respondent’s maintenance standards titled “Clean and Reshape Ditches” (referred to as Function 442) in a slide, noting the following language:

Definition[:] Machine Cleaning and reshaping of roadside ditches and other side ditches with excess material loaded, hauled and disposed of.

Guide[:] When normal drainage flow in ditches is obstructed or impeded because of erosion of back slopes, inslopes, ditches or natural channels deposit silt, sand, vegetation and other materials therein, cleaning is required to restore proper drainage pattern.

Mr. Auld stated that Respondent did not follow the Function 442 maintenance standard. When normal drainage flow is obstructed, ditches should be cleaned to restore proper drainage pattern. You should not see standing water in a ditch or water being forced onto the pavement. Mr. Auld stated that whether these maintenance standards were met is easily observable.

70. Another slide shows the ditch filled in, and water forced across the roadway. Without a continuous ditch, there is nowhere for the water to go except the roadway. Once water is in the roadway, Mr. Auld asserted that it is Respondent's job to convey the water in a safe manner. Any water that enters the right-of-way is Respondent's job to handle. The root cause of the drainage issues in this photograph is the obstruction south of the Intersection.

71. Another slide shows the ditch holding water. This demonstrates a lack of maintenance.

72. 'Overtopping' refers to water going over the crest of the road. From the previous slide calculating the amount of roadside buildup necessary to inundate the roadway with water, it is known that the water on the side of the roadway is at least two and one-half inches deep. That is known to a mathematical certainty. In this photograph, there is a significant amount of roadway inundation.

73. Mr. Auld pointed out that the lanes did not have retroreflective lighting. Respondent objected to this testimony but conceded that Mr. Auld discussed this at his deposition. The chair commissioner instructed Claimant's counsel to move on from this point.

74. Another slide shows water “unravelling” the shoulder, which could create a drop-off and cause a driver to lose control of his or her vehicle. Mr. Auld noted that this photograph also shows water present after a rain event.

75. Another slide compares the rainfall recorded by three nearby National Oceanic and Atmospheric Administration (NOAA) rain gauges in Marianna, Helena, and west of Marvell. The average rainfall for those three gauges on March 13, 2019, was 0.02 inches.

76. In another slide, the average of the three NOAA rain gauges would suggest that the roadway at the accident scene would have been overtopped by water twice in February 2019, twice in January 2019, and four times in December 2018.

77. Mr. Auld provided excerpts from Respondent’s drainage manual. Section 1-200 states that the gutter should limit the ponding of water so that at least one lane of traffic can travel safely. When this standard cannot be met, Respondent should notify law enforcement and have barricades and signage placed to warn motorists.

78. Mr. Auld included slides on Arkansas’s storm water law and the glossary from the drainage manual.

79. Mr. Auld also included the federal Geometric Design Criteria for Non-Freeway Resurfacing, Restoration, and Rehabilitation Projects, which were adopted by Respondent. These guidelines are sometimes referred to as “RRR” or the “Three Rs.” The purpose of these guidelines is to “preserve and extend the surface life of existing highways and to enhance safety.” Mr. Auld stated that the accident scene does not meet Sections 4.2 (regarding the cross-section of the roadway) or 5.1 (regarding the pavement drop off) of the RRR.

80. Mr. Auld included a photograph from the accident scene, which shows a portion of the Decedent’s vehicle in the ditch. He stated that this photograph shows the buildup on the side



of the roadway and water in the roadway from a lack of proper maintenance. Even if Respondent did not have the funding to fix the problem, Respondent had a duty to notify the motoring public with barriers. Had Respondent properly maintained the road, Claimant would not have had to file this claim.

81. Mr. Auld concluded that Respondent failed to comply with the applicable guidelines and standards for the maintenance and drainage of Highway 316 by not maintaining at least one lane of travel and failing to notify the public.

82. On cross-examination, Mr. Auld confirmed that he has not scheduled maintenance for highways. He also confirmed that the Marvell and Helena rain gauges did not register any rain on March 13, 2019. He has not been to the accident site to measure the buildup on the edge of the roadway. He acknowledged that some of the recent work by Respondent was completed by the time he became involved in this matter. Mr. Auld stated that, because of the inundation of the road, he can determine the height of the ridge. It is possible that CR 261 also has drainage issues, and he does not know who maintains that road. Functions 441–442 are maintenance standards, not requirements or directives. There is no maintenance schedule provided. Mr. Auld created the cross-section of the roadway and the ditch. That information was not part of the roadway design plan. Mr. Auld does not know the original design of the road. He is not offering an opinion as the cause of the accident or the cause of the Decedent's death. It is up to the state to determine what road projects are to be designated as RRR projects. Highway 316 has not been approved for such funding to Mr. Auld's knowledge.

83. On redirect, Mr. Auld stated that Respondent took over Highway 316 in the 1970s. There is no dispute that the Decedent's accident was caused by hydroplaning. Mr. Auld's testimony is that there was at least two and one-half inches of water in the roadway because

Respondent failed to maintain the right-of-way or to notify the public of the hazardous condition. If there was a drainage problem with CR 261, Respondent would have to take care of any water that came onto Highway 316 under state guidelines. Respondent objected to Mr. Auld offering a legal opinion, and the Claims Commission sustained Respondent's objection.

84. On re-cross, Mr. Auld confirmed that he did not have the reference for the county road drainage issue with him.

#### Testimony of Nathan Brown

85. Claimant called Nathan Brown to testify.

86. Mr. Brown has lived in Jonesboro, Arkansas, since 2011. He is married with one child. Mr. Brown was ten years old when the Decedent was born. Mr. Brown and the Decedent became close as the Decedent got older. They talked multiple times each week.

87. On March 13, 2019, Mr. Brown received a phone call from a friend while he was at work telling him to go to the accident scene. As he was coming into Wynne, Arkansas, he received another phone call from his father telling him to slow down because the Decedent had passed away.

88. Mr. Brown has days when he does not want to get out of bed. He said that his work ethic has plummeted and that he cannot take his mind off the loss of the Decedent.

89. Mr. Brown said that his sister is not present at the hearing because she is a school counselor and had to be at work. She was a mother hen to him and to the Decedent. Mr. Brown has observed his sister's grief and stated that she was in counseling for a period of time but prefers dark silence to grieve.

90. Mr. Brown noted that the Decedent was not an average teenager. This accident could have been prevented. The Decedent was an extraordinary kid and honor student. He woke up ready to help people.

91. Respondent declined to cross-examine Mr. Brown.

Testimony of Dr. Ralph Scott

92. Claimant's counsel proffered a revised report by Dr. Ralph Scott to replace Claimant's Exhibit No. 13. Claimant's counsel confirmed that the revised report is restricted to lost earnings and that only Tables 1–2 need to be considered. Respondent stipulated to the admission of the revised report but not to the validity of the revised report.

Testimony of Montae Hernandez

93. Respondent called Trooper Montae Hernandez to testify.

94. Trooper Hernandez works for the Arkansas State Police. As a state trooper, he patrols state highways. In 2019, he was assigned to Troop D covering several counties including Phillips County. He is familiar with the Decedent's accident.

95. When Trooper Hernandez was dispatched to the accident scene, that was the first time he had been on Highway 316. Upon arrival at the scene, he saw a Toyota Tundra in the eastbound ditch. Referring to the accident report, the vehicle was 59 feet south of the Intersection on its side facing the western side of the road. It was raining when he arrived and throughout his investigation.

96. Trooper Hernandez looked at the damage to the vehicle and walked down the south portion of Highway 316, where he saw two separate locations where the vehicle had impacted the ditch.

97. Trooper Hernandez stated that the roadway was covered in water.

98. He saw the Decedent facedown in the water with the vehicle on top of him. The Decedent was not wearing a seatbelt because there was no slack in the seatbelt.

99. In the accident report, Trooper Hernandez provided measurements to show how far the vehicle was off the roadway. He took photographs of the accident scene.

100. On cross-examination, Trooper Hernandez stated that his boots were submerged in the water at some spots. He was on the scene for at least one hour. He saw water flowing in the roadway but cannot recall which direction the water was flowing. Claimant's Exhibit No. 1 at 298 is a photograph taken by Trooper Hernandez. There is a beer bottle visible in the picture, but there is no evidence that the Decedent was drinking, and the toxicology report came back negative. Claimant's Exhibit No. 1 at 299–314 are additional photographs taken by Trooper Hernandez.

#### Testimony of Robert Gray

101. In Claimant's case-in-chief, Claimant proffered the deposition of Robert Gray, which was received without objection.

102. Respondent called Mr. Gray to testify.

103. Mr. Gray is Respondent's area maintenance supervisor in Phillips County and has served in that role since 2017. He has worked for Respondent in maintenance for 24 years. He is familiar with the accident scene. The topography of CR 261 slopes down toward Highway 316.

104. Mr. Gray stated that farmers can clean out the ditches adjacent to their property, but there is a process involving the farmer putting up a bond. Farmers cannot change the slope of the ditch. To the best of his knowledge, neither David Carruth nor Clay Young ever went through this process.

105. He noted that Respondent is not responsible for water coming from the farms. Highway 316 was not designed by Respondent. It was a county road that Respondent took over at some point.

106. Mr. Gray said that, to his knowledge, no one at his office ever received a call about flooding on Highway 316 prior to the Decedent's accident. His office keeps a record of people that call with complaints.

107. Respondent digs out ditches as needed. There is no set policy. If a landowner complains, or if one of Respondent's employees sees a blockage, the maintenance crew brings out equipment. Mr. Gray is familiar with Functions 441 and 442. There is no time frame for that maintenance.

108. Mr. Gray tries to go down every road in Phillips County at least once per week. He never saw too much grass in the ditches and never saw water overtopping the roadway south of the Intersection.

109. On cross-examination, Mr. Gray said that he is not aware of any standard for measuring the ditches. If water is flowing, the ditch must be deep enough. Mr. Gray acknowledged that Claimant's Exhibit No. 2 at 192 shows standing water and that the ditch is out of compliance. Mr. Gray interprets Functions 441 and 442 as standards that he follows and that are applicable to his job. He does not document when he inspects a roadway, but he does document when he finds a concern. He could look at the GPS to confirm whether he went by this stretch of highway, but he has not done that. Mr. Gray acknowledged that it is his responsibility to fix a problem before it results in a catastrophe whenever possible. Mr. Gray went to the Intersection the day after the accident and did not see any water on the road. "Mopping out" a ditch falls under Function 441, and machining the ditch to reestablish flow falls under Function 442. Respondent reshaped the

ditch ten months after the Decedent's accident. This reshaping was done because of a complaint by Clay Young, not because of the Decedent's accident. When Mr. Gray finds a problem, he talks to the maintenance crew supervisor to schedule a trackhoe. Mr. Gray has never seen flooding in the area of the accident. He has never seen an issue with water coming off of CR 261 onto Highway 316.

110. On redirect, Mr. Gray looked at Claimant's Exhibit No. 2 at 192 and said that the work done on the ditch was done to reshape the entire ditch from CR 261 to the next cross-drain.

Testimony of Matthew Emberton

111. In Claimant's case-in-chief, Claimant proffered the deposition of Matthew Emberton, which was received without objection.

112. Respondent called Mr. Emberton to testify.

113. Mr. Emberton is Respondent's district maintenance engineer for District 1. He has worked for Respondent since 2008 and in maintenance since 2015. District 1 covers multiple counties, including Phillips County. He oversees area maintenance supervisors.

114. Mr. Emberton tries to get over every part of the highway system in his district every two months. Other folks do, as well.

115. Functions 441 and 442 are functions that Respondent performs. There is a maintenance manual, as well. A chart in the back sets out the schedule for Function 441 and 442. Those functions are expected to be performed in March, April, or May. The chart allows crews to build a workplan.

116. Mr. Emberton is familiar with the Intersection. The topography of the highway is relatively straight. There is good visibility.

117. He is not aware of any complaints of water in the roadway near the Intersection. Those complaints are typically fielded at the local level by the area maintenance supervisor. If Mr. Gray had scheduled work to be done, Mr. Emberton would know about it.

118. Mr. Emberton is aware of two phone calls from Ms. Morrow, one of which was regarding the Barton school.

119. CR 261 and adjacent farmland flow into Highway 316.

120. It is quite a process if a farmer wants to clean out the ditches adjacent to his or her land. A formal letter must be issued by Respondent. Depending on circumstances, a farmer may have to have traffic control in place.

121. On cross-examination, Mr. Gray confirmed that for a farmer to clean out the ditches, the farmer must put up a bond, meaning that money is spent upfront. The approval can be as quick as a week, but if it involves a lane closure, it can take longer. Mr. Gray stated that the accident site was on Respondent's right-of-way. Mr. Gray saw videos of water overtopping the road and agreed that Respondent should proactively try to fix problems. He did not personally know about the flooding issue but agreed that if ditches cannot flow, they need to be fixed. Referring to Claimant's Exhibit No. 2 at 192, Mr. Emberton stated that he cannot tell if there is a ditch from the photograph but confirmed that there should be a ditch. He has been unable to find any engineering plans for this section of roadway and could not find any measurements to see if the ditch fits the standards. The buildup seen in Claimant's Exhibit No. 2 at 192 happens over time and prevents proper drainage.

122. On redirect, Mr. Emberton testified that he does not know the design flood stage for Highway 316. If a design flood stage is exceeded, there will be water in the road. Depending on the intensity of the rainfall, it can happen. The design flood stage refers to the maximum that

the ditches, culverts, cross-drains, and side drains are designed to handle. It is not the responsibility of Respondent to keep all water off the road at all times.

123. Upon a question from a commissioner, Mr. Emberton confirmed that efforts are made by Respondent to see the roadways in various weather conditions.

#### Testimony of Cannon Callicott

124. In Claimant's case-in-chief, Claimant proffered the deposition of Cannon Callicott, which was received without objection.

125. Respondent called Mr. Callicott to testify.

126. Mr. Callicott is Respondent's district engineer for District 1. He has been employed by Respondent for 26 years and has held a variety of engineering positions. His role is largely administrative.

127. Highway 316 has been a state highway since 1974. In the 1960s and 1970s, there were a lot of unimproved county roads that were made part of the state highway system because the state had more money for road improvements. There is a difference between an 'inherited' county road and a road built by Respondent. Inherited county roads are not brought up to current standards using maintenance funds because bringing a road up to current standards is considered a rebuild.

128. When Respondent designs a ditch on a highway, the side drains and ditches are designed for a 'two-year-storm.' If the road is inherited, the ditch is just shaped and fit to what is there.

129. If the ditch is not sufficient, Mr. Callicott stated that water could overtop the road.

130. Counties maintain county roads. Respondent has no responsibility or maintenance rights for county roads. If the county road is a gravel road, the county will grade the road.



131. There are a variety of ways for Respondent to receive complaints, including telephone calls to one of Respondent's offices, notification by law enforcement, and the reporting option through Respondent's website. There may also be options through social media. As much as possible, the local offices handle maintenance issues. Mr. Gray could handle pothole repairs or tree issues. If a ditch needed to be regraded, though, a trackhoe would be scheduled through the district.

132. Each office handles complaints with its own system. The records available might depend on the way the complaint comes into the office. If there is a flooding complaint, Respondent sends folks out to verify and to put up signs and barricades.

133. The district did not receive any road issue reports the night of the Decedent's accident. That same night, however, Lee County had two reports.

134. Mr. Callicott has seen water running into the right-of-way from farms. Grading and crop choice can all affect water coming into the ditches, although not typically to the extent seen in this situation.

135. There was some ditch work completed on Highway 316 before Mr. Callicott started in his position. Some additional work was done recently.

136. 'Mopping out' means cleaning out the drain. This is usually minimal. Usually, a 'mop out' is triggered by complaints by the public. A mop out is done by a district maintenance crew. Minor work with a backhoe can be done by a county crew.

137. RRR projects came about in the late 1980s and 1990s. When Respondent constructs a roadway, it must meet those standards in order to get the funding.

138. Mr. Callicott is not aware of any complaint from flooding on Highway 316.

139. In the videos showing the accident scene, the water is moving, so that indicates drainage because the water is going somewhere. The water is not leaving the roadway as quickly as everyone would like. There is more flow than there is capacity to drain.

140. Respondent must use maintenance funds to maintain the capacity of a highway when it was built, meaning a two-year storm.

141. On cross-examination, Mr. Callicott stated that the flowing water makes sense given the topography of the Intersection. Highway 316 is not an RRR project because acquisition of the highway happened prior to the start of the RRR program in the 1980s. Highway 316 cannot become an RRR project until Respondent reconstructs the highway. Mr. Callicott is not testifying that Respondent has no responsibility for an inherited highway until the highway is rebuilt. He does not know the particular design for Highway 316. The intensity of the rainfall matters more than the amount of rain. The ditch at issue here met the two-year storm requirement. This requirement means that, on average, a two-year storm will exceed the capacity of the ditch. Referring to Claimant's Exhibit No. 2 at 192, this ditch would meet a two-year design storm, although it does show water ponding south of the Intersection. Claimant's Exhibit No. 2 at 106 is another two-year rain event, as is Claimant's Exhibit No. 2 at 116. However, Claimant's Exhibit No. 2 at 116 has water pooling south of the Intersection that must be from CR 261. Claimant's Exhibit No. 2 at 112 shows water going over the road where the deeper part of the ditch ends. Claimant's Exhibit No. 3 is dated June 2014 and shows work being performed north of the Intersection on the Young Property. If someone reported an issue to one of the people working for Mr. Gray, it would not necessarily get back to Mr. Gray. People are prone to hyperbole, such as saying that a certain road is the worst in the state. If Mr. Young told workers about the flooding, those workers do not have to report every complaint to their supervisor. That is not a requirement

in the personnel manual. Mr. Callicott has no evidence regarding whether Ms. Morrow or Mr. Young were or were not telling the truth.

142. On redirect, Mr. Callicott stated that CR 261 goes uphill from Highway 316. On the aerial picture, you can see drainage coming from the Carruth Property. The mop out of the ditch adjacent to the Young Property was not continued south of the Intersection because it was beyond the scope of the complaint received by Respondent, and Respondent did not want to disturb the vegetation (a ditch with no vegetation will wash out).

143. On re-cross, Mr. Callicott testified that he is not sure of the date of the work done on the Carruth Property. He knows that it was regraded based on the Google Earth images.

#### Testimony of Stan Andrews

144. Respondent called Stan Andrews to testify.

145. Mr. Andrews is an accident reconstructionist. He has a bachelor's degree in biological and agricultural engineering and a master's degree in engineering. He has worked mostly in the field of mechanical engineering. Mr. Andrews worked at Tyson for seven years designing and building equipment. He has been working in the field of accident reconstruction for 22 years.

146. Mr. Andrews did a reconstruction of the Decedent's accident. He visited the accident scene, did a laser scan of the scene and the Decedent's vehicle, inspected the vehicle, and documented the condition and impact marks. An investigation done four weeks after the accident resulted in photographs, drone imagery, and a scan of the area that Mr. Andrews was able to view. He also reviewed the police report, the accident scene photographs, and the aerial photo taken by Rocky Ford.

147. Referring to his reconstruction report, found at Respondent's Exhibit No. 2, Mr. Andrews testified that the Decedent was traveling 53–60 miles per hour when he left the roadway and 49-54 miles per hour during the rollover. The Decedent's vehicle rolled over three and three-quarter times. The tires on the Decedent's vehicle were inadequate for the existing conditions. The Decedent was traveling too fast for the existing conditions. The Decedent was trapped underneath the vehicle when it came to rest. The Decedent drove through the water-covered roadway for some time before losing control, so he had warning about the water and, if he had slowed down, could have avoided the accident.

148. It is common for an accident reconstructionist to rely on photographs taken by other people because it is rare for an accident reconstructionist to get to the accident scene right after the accident occurs.

149. Referring to Respondent's Exhibit No. 2 at p. 11, Mr. Andrews testified that he worked backwards based on where the vehicle came to rest. He personally looked at the scratch marks on the vehicle. Mr. Ford had highlighted the headlight debris in his photographs, so Mr. Andrews could calculate based on that point. The headlights are important for the calculation. At 50 feet per rollover and three and three-quarter rolls, the vehicle traveled roughly 180 feet. With or without the headlight debris, the rollover distance is within nine feet of error. Looking at the photographs found in Respondent's Exhibit No. 2 at p. 7, Mr. Andrews is comfortable relying on the pile of headlight debris as a point of impact because of the tiny pieces embedded in the ground, which are typical of what he would expect to see.

150. 'Yaw' refers to a vehicle rotating but the direction of travel staying the same. You see 'yaw marks' when this happened. The yaw marks, in addition to the rollover distance, allow Mr. Andrews to calculate the speed of the vehicle.

151. The speed limit for this stretch of road was 55 miles per hour. The Decedent was traveling 53–60 miles per hour.

152. Looking at the tires on the Decedent's vehicle, the lack of tread depth was a contributing factor to the accident. The minimum tread depth means that hydroplaning and a loss of control is more likely. The tires on the front of the vehicle were better than the tires on the back.

153. On cross-examination, Mr. Andrews confirmed that he is not a professional engineer. He is not licensed in Arkansas or other states. He is being paid by Respondent to be here (\$31,659.00 had been billed prior to Mr. Andrews' attendance at the hearing). The crash data recorder was not required to be accessible to the public for a 2004 Toyota Tundra. Mr. Ford tried to download that information but could not get it. Toyota does not make that information available voluntarily. Mr. Andrews looked at the vehicle's resting point, headlights, and scratch marks. Without the headlight location, the speed range would be slightly faster. The headlight location adds accuracy to his calculation. The scratch marks show the number of rolls. In this case, the Decedent's vehicle had four types of scratches. There were lots of people at the accident scene, and, by walking around, those people could have compressed debris into the ground. Water was flowing north to south, but the headlight debris pile is consistent with where Mr. Andrews would expect it to be. Mr. Andrews conceded that people moved the bumper, but he does not think that people moved the tiny pieces of the headlight. Any scratches on the vehicle from the recovery process would be squiggly and would not run from front to back. When the road surface is wet, you do not get yaw marks as distinct as when the road surface is dry. If the Decedent went through the water for 300 feet and was still going 53–60 miles per hour when he left the roadway, his initial speed would have been astronomical. If there was no water on the roadway, the Decedent would

not have hydroplaned, and if he did not hydroplane, then he would not have lost control of his vehicle.

154. On redirect, Mr. Andrews testified that if the Decedent was traveling below 45 miles per hour, it is a lot less likely that he would have hydroplaned, especially if he had good tread on his tires.

Testimony of Dr. Chandra Thorbole

155. Respondent called Dr. Chandra Thorbole to testify.

156. Dr. Thorbole has a doctorate degree in engineering with an emphasis in crash dynamics and biomechanics. He analyzes accidents and how people are injured. Most of his work is directed at helping manufacturers prevent certain types of injuries.

157. Dr. Thorbole was hired by Respondent to do a biomechanical analysis of the accident and to determine whether the Decedent was wearing his seatbelt at the time of the accident. He inspected the vehicle, including the seatbelt hardware.

158. The Decedent's ejection kinematics caused him to be thrown in front of the rolling vehicle, such that the vehicle landed on the Decedent. The ejection portal was the driver's side window. The Decedent was ejected with a lot of energy. The ejection is the cause of his death.

159. The roof intrusion into the passenger space of the vehicle likely occurred after the Decedent was ejected.

160. The Decedent's vehicle did not have rollover-activated belt pretensioner or a curtain airbag.

161. All of Dr. Thorbole's opinions were given to a reasonable degree of biomechanical certainty.

162. On cross-examination, Dr. Thorbole confirmed that he relied upon Mr. Andrews' conclusions for the vehicle motion. If there was no rollover, there would be no roof intrusion. If there was no rollover, there would be no ejection.

Testimony of David Carruth

163. Claimant called David Carruth as a rebuttal witness.

164. Mr. Carruth is a lawyer in Clarendon, Arkansas. He manages his family's farm, which is owned by the Carruth Family Trust.

165. He has observed flooding on Highway 316 in the area of the Intersection.

166. Respondent took over Highway 316 in the early 1970s. Mr. Carruth remembers Respondent doing some work on the ditches next to the Young Property, which caused flooding by the Intersection. There was a lot of complaining. Mr. Carruth stated that his father said he was going to tell Respondent about the flooding in the early 1990s. Mr. Carruth went to the local office in 2015 or 2016 to complain about the flooding. The water was bad because the ditch had not been cleaned out.

167. Following this accident, Respondent did a lot of work on this highway.

168. Regarding the issue of runoff from the Carruth Property, Mr. Carruth stated that every highway in Arkansas has property adjoining that highway. When the Carruth Property was converted into tillable land in the late 1970s, Mr. Carruth's family allowed trees to grow up along the border and put hay bales there to stop the erosion and the water running off the property. However, Respondent took out that vegetation.

169. Mr. Carruth's tenant has done a lot of work to stop the runoff since Respondent removed that vegetation five or six years ago.

170. On cross-examination, Mr. Carruth stated that he has not seen water flowing down CR 261 because the ditches on the county road are very deep. He does not recall who he spoke with at the Respondent's local office when he complained about the flooding. He described the person as a white male approximately 50 years old. Mr. Carruth clarified that Respondent cleared the vegetation on the Carruth Property's side of the ditch embankment in probably 2013 or 2014.

#### Closing Arguments

171. Claimant argued that pursuant to Ark. Code Ann. § 27-67-207, Respondent has a duty to keep the state highways in good repair. There is no exception to this statute for inherited roads. Under the negligence standard, the evidence shows that Respondent knew or should have known about the flooding on Highway 316. Witnesses who have no interest in this claim testified that they notified Respondent of the flooding. Mr. Young and Mr. Carruth testified that Respondent's own actions caused the problem or made it worse. Respondent's employees provided explanations but not legal excuses why Respondent did not satisfy its statutory duty with respect to Highway 316. Even if Respondent's employees did not see the flooded road, they could have seen the standing water in the ditch on the sunny days. Respondent did not provide an expert to rebut Claimant's hydrology expert, Mr. Auld. Regarding the issue of comparative fault, Respondent's accident reconstruction testified that the Decedent was going 53–60 miles per hour, which is not speeding when the speed limit is 55 miles per hour. Mr. Andrews' analysis is not believable because of the astronomical speed the Decedent would have had to be traveling if the Decedent was going 53–60 miles per hour after traveling through 300 feet of water. The damages in this claim are twofold, as the Decedent's estate can recoup damage for loss of life and lost wages and the beneficiaries can recover for mental anguish. Dr. Scott's report gives a framework and



guidelines for evaluating lost wages. Claimant's damage claim is very conservative considering Dr. Scott's report.

172. Respondent argued that the question is whether it knew or should have known of the flooding near the Intersection. The specific location matters because of the topography. Respondent's employees testified that they did not violate any specific written standards. Per Mr. Callicott, Respondent's responsibility is to keep the ditches where they can handle a two-year storm. Respondent inherited Highway 316, and the maintenance funds do not include road improvements. The work done in 2014 by Respondent did not and could not have caused flooding. There was a lot of other testimony about other sources of water not in Respondent's control. Mr. Andrews talked about the issue of causation, including the fact that the Decedent's tires were in poor repair and that the Decedent should have been going ten miles per hour under the speed limit due to the rain. Dr. Thorbole testified that the cause of death was the Decedent's ejection from the vehicle. The Decedent knew this road and should have been on the lookout. The stretch of Highway 316 is a straight road, so the water should have been visible. The Claims Commission is charged with apportioning fault and damages. If the Decedent was 51 percent at fault, then Claimant cannot recover. If the Decedent was less than 51 percent at fault, then the damages must be weighed. Insurance payments received by Claimant should be put on Respondent's side of the apportionment of damages.

173. In rebuttal, Claimant argued that while Mr. Callicott said that the ditch met the design requirements, he also said that each picture of water on the road must be showing a two-year storm. Claimant also argued that the Decedent was not speeding.

### **Relevant Statutes and Caselaw**

174. The elements of a negligence claim are duty, breach of duty, and damages proximately caused by the breach. *See Union Pac. R. Co. v. Sharp*, 330 Ark. 174, 180, 952 S.W.2d 658, 661 (1997).

175. Ark. Code Ann. § 27-67-101 provides that the “the policy of the state [is] to . . . repair, maintain, and control all the public roads in this state comprising state highways. . . .” (emphasis added).

176. Ark. Code Ann. § 27-67-207 provides, in pertinent part:

- (a) As used in this chapter, unless the context otherwise requires, “maintenance” means the constant making of all repairs necessary to preserve a smooth surface on the roads and to keep the bridges and culverts in a safe condition and shall include drainage work, the building of bridges and culverts, and the making of cuts and fills as the commission deems necessary to accomplish these purposes.
- (b) It shall be the duty of the State Highway Commission to begin as soon as practicable and continue the maintenance of all roads that are properly designated as state highways, to the end that every part of the state highways shall be properly, fairly, and equitably maintained and kept in repair.
- (c) So far as practicable, maintenance and repair shall be according to what is known as the patrol system. Laborers as are deemed necessary may be employed and kept continually on the roads, with the force, equipment, and materials that are necessary to perform the work.

(emphasis added).

### **Findings of Fact and Conclusions of Law**

Based upon a review of the pleadings, testimony, evidence, and the law of the State of Arkansas, the Claims Commission unanimously finds as follows:

177. The Claims Commission has jurisdiction to hear this claim pursuant to Ark. Code Ann. § 19-10-204.

178. The Claims Commission finds that Claimant's claim is based upon Respondent's alleged negligent maintenance of Highway 316 and its drainage system.

179. The Claims Commission finds that, pursuant to Ark. Code Ann. §§ 27-67-101 and 27-67-207(b), Respondent had a duty to maintain Highway 316 and its drainage system.

180. The Claims Commission finds that Respondent knew or should have known of the flooding problem on Highway 316. Based on the evidence presented by Claimant, including the testimony of Ms. Morrow, Mr. Young, Ms. Reeves, and Mr. Carruth, complaints had been made to Respondent about flooding in the very location that this incident occurred.<sup>2</sup> The Claims Commission notes that Ms. Morrow, Mr. Young, Ms. Reeves, and Mr. Carruth have nothing to gain from the outcome of this claim, and there was otherwise no evidence of bias on their part. Moreover, the Claims Commission finds the numerous photographs and videos presented by Claimant showing Highway 316 flooded or the ditch overgrown and/or the ditch full of water to be significant in light of Respondent's witnesses' testimony regarding the frequency that Highway 316 was traveled looking for road issues. The Claims Commission finds that the standard that Respondent consistently argues should apply to Respondent in claims for potholes or other hazardous road conditions should apply to the instant claim as well. *See, e.g., Nwanonyiri v. Ark. Dept. of Transportation*, Claim No. 220326. As such, where Respondent had prior knowledge of a hazardous road condition and failed to remedy it within a reasonable amount of time, Respondent is liable for the damages that occur from that condition.

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<sup>2</sup> The Claims Commission notes its concern with Respondent's practice of allowing each local office to determine its own system of cataloguing reported complaints, given Respondent's position in this claim regarding notice despite the testimony of multiple witnesses.

181. The Claims Commission notes an incompatibility with Respondent’s simultaneous arguments that the Decedent had traveled that road previously, such that he should have known to travel cautiously, and that Respondent’s employees were unaware of the problem on Highway 316 despite checking that road every week (as Mr. Gray stated) and every two months (as Mr. Emberton stated that he and others did, as well).

182. However, pursuant to Ark. Code Ann. § 16-64-122, the Claims Commission must also consider the fault of the Decedent. The plain language of Ark. Code Ann. § 16-64-122 states that it applies to “... all actions for damages for ... wrongful death ... in which recovery is predicated upon fault.” (emphasis added). The Arkansas Court of Appeals discussed the applicability of the “broad language” in this statute in *Bishop v. Tariq*, 2011 Ark. App. 445, 384 S.W.3d 659. In the instant claim, while there was no evidence presented that the Decedent was speeding,<sup>3</sup> it is undisputed that the Decedent was not wearing his seatbelt at the time of the accident. The Claims Commission also finds that the condition of Decedent’s rear tires was a factor in the accident. Additionally, based on Mr. Brown’s testimony regarding the number of times that the Decedent traveled in this area, the Claims Commission finds that the Decedent was familiar with this roadway.

183. As such, the Claims Commission assigns fault as follows:

- (a) Decedent: 35%
- (b) Respondent: 65%

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<sup>3</sup> While the Claims Commission notes some concerns with Mr. Andrews’ calculations and conclusions, the Claims Commission finds it significant that Respondent’s own expert witness calculated the Decedent’s speed at 53–60 miles per hour in a 55 mile per hour zone.

184. As for damages, the Claims Commission must consider the damages for the Decedent's estate as well as the mental anguish damages for the Decedent's wrongful death beneficiaries (his parents and siblings).

185. Regarding the Decedent's estate, the Claims Commission finds that the estate is entitled to recover the funeral expenses for the Decedent (\$7,287.47), as well as the burial costs (\$600.00) and headstone (\$11,864.48), for a total of \$19,751.95. Additionally, considering the persuasive testimony of the Decedent's family members regarding how the Decedent valued his life, the Claims Commission finds that the damages associated with the Decedent's loss of life are \$2,500,000.00. The Claims Commission finds that this number is consistent with the conclusions of Dr. Scott regarding the Decedent's lost earning capacity (which ranged from \$1.52 million to over \$3 million given various scenarios), which were admitted in revised form without objection. As such, the Claims Commission finds that the Decedent's estate's total damages are \$2,519,751.95, of which Respondent is liable for 65 percent, equaling \$1,637,838.77. The Claims Commission further finds that the \$100,000 in insurance proceeds recovered by Claimant should be subtracted from the award, for a total award to the Decedent's estate of \$1,537,838.77.

186. The Claims Commission finds that the testimony about the help the Decedent would have been able to provide on the family farm to be too speculative and declines to make an award for such damages.

187. Regarding the Decedent's parents, the Claims Commission finds the testimony presented by Debbie Brown and Joe Brown regarding the mental anguish experienced following the Decedent's death to be moving and persuasive. As such, the Claims Commission finds that Debbie Brown and Joe Brown should be each awarded mental anguish damages of \$300,000.00, of which Respondent is liable for 65%, equaling \$195,000.00 to each.

188. Regarding the Decedent's siblings, the Claims Commission finds the testimony presented by Nathan Brown regarding the mental anguish experienced by him and his sister, Samantha Brown, to be moving and persuasive. As such, the Claims Commission finds that Nathan Brown and Samantha Brown should be each awarded mental anguish damages of \$50,000.00, of which Respondent is liable for 65%, equaling \$32,500 to each.

### **Conclusion**

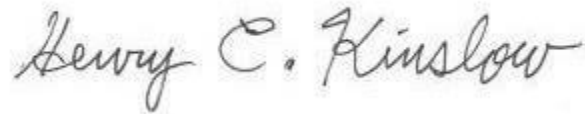
189. The Claims Commission AWARDS the Estate of Chris Brown a total of \$1,537,838.77. The Claims Commission further AWARDS Debbie Brown and Joe Brown \$195,000.00 each and Nathan Brown and Samantha Brown \$32,500.00 each. Pursuant to Ark. Code Ann. § 19-10-215(b), the Claims Commission refers this total award of \$1,992,838.77 to the General Assembly for review, approval, and, if approved, placement on an appropriations bill.

IT IS SO ORDERED.



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ARKANSAS STATE CLAIMS COMMISSION  
Courtney Baird



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ARKANSAS STATE CLAIMS COMMISSION  
Henry Kinslow



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ARKANSAS STATE CLAIMS COMMISSION  
Paul Morris, Chair

DATE: November 10, 2022

**Notice(s) which may apply to your claim**

- (1) A party has forty (40) days from the date of this Order to file a Motion for Reconsideration or a Notice of Appeal with the Claims Commission. Ark. Code Ann. § 19-10-211(a)(1). If a Motion for Reconsideration is denied, that party then has twenty (20) days from the date of the denial of the Motion for Reconsideration to file a Notice of Appeal with the Claims Commission. Ark. Code Ann. § 19-10-211(a)(1)(B)(ii). A decision of the Claims Commission may only be appealed to the General Assembly. Ark. Code Ann. § 19-10-211(a)(3).
- (2) If a Claimant is awarded less than \$15,000.00 by the Claims Commission at hearing, that claim is held forty (40) days from the date of disposition before payment will be processed. *See* Ark. Code Ann. § 19-10-211(a). Note: This does not apply to agency admissions of liability and negotiated settlement agreements.
- (3) Awards or negotiated settlement agreements of \$15,000.00 or more are referred to the General Assembly for approval and authorization to pay. Ark. Code Ann. § 19-10-215(b).