



The Claims Commission has jurisdiction of this matter under Tenn. Code Ann. § 9-8-307(a)(1)(L), relative to actions for breach of written contracts with the State of Tennessee.

(L) Actions for breach of a written contract between the claimant and the state which was executed by one (1) or more state officers or employees with authority to execute the contract;

Tenn. Code Ann. § 9-8-307

Pursuant to Tenn. Code Ann. § 9-8-403(i), the Tribunal makes findings of fact and conclusions of law<sup>1</sup>.

### **THE CONTRACTING PARTIES AND THEIR AUTHORITY UNDER THE CONTRACT**

The State agency that was primarily responsible for contracting the rebuilding of the welcome center was the Department of Finance and Administration (F & A) and is listed as the owner of the Project. However, on Exhibit 1 page 1, the Tennessee Department of Transportation (TDOT) is listed as the owner and (F & A) is the contracting agency. The State contracted two separate firms as a joint venture to oversee the project as a Design Team. The Design Team was consisted of Vaughn & Melton and Kline Swinney Associates.

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<sup>1</sup> The Claims Commission does not try cases *En Banc*. The Commissioner (Judge) for each Grand Division tries each case individually. The Public Case History and opinions of the appellate courts should reflect the individual Commissioner as being the Trial Court Judge.

Gisela Patterson was the State Officer representing F & A. Melissa Cannon was the State Officer representing TDOT. Thomas Scott was the on-site representative, erosion control specialist and tester for TDOT. More than one state officer signed Change Orders on behalf of F & A. It appears that the firm partners of the Design Team signed the Change Orders that directed or ratified amendments to the contract.

Patrick J. Riley was the President of Claimant, RCR. Dan Riegle was the Project Manager for RCR. Kevin True was the on-site Superintendent for RCR.

The Tribunal finds that the following provisions of the Contract (Exhibit 76) are probative in the context of authority. In Section 2.1.1, the Owner is the State of Tennessee. The term "Owner" is defined as the Owner or the Owner's authorized representative. In Sections 2.3 and 2.4, the Owner retained the right to stop work by the Contractor and to carry out the work itself. Section 3.3 directed the Contractor had full and sole authority to direct and supervise the work on the Project. Section 4.2.1 instructs that the Design Team provides the administration of the Contract, is the Owner's authorized representative and has authority to act on behalf of the Owner as provided pursuant to the Contract.

The State of Tennessee had many “authorized representatives” under the provisions of the contract. It appears the State was attempting to oversee the Project by committee. There was no one individual State representative ultimately responsible for building and completion of the Welcome Center.

### **CREDITABILITY OF WITNESSES**

The Tribunal found Kevin True, Superintendent for RCR, a creditable and believable witness with the most knowledge concerning the actual building of the Project. Ms. Gisela Patterson was believable and sincere to the extent of her personal knowledge of the project requirements but not especially probative as to the activities at the Project. The Tribunal is sure that Andrew Hutsell is a competent and knowledgeable professional engineer. His testimony was creditable concerning intent and what should have happened at the Project, but not as to what actually occurred. David Kline of Kline Swinney Associates was believable and creditable but had very little knowledge of the activities at the Project. He only attended six to twelve progress meetings. David Swinney of Kline Swinney Associates was more involved with the Project than his partner, David Kline. Mr. Swinney’s testimony was believable and credible but somewhat vague on details. Alan Granville Durham was the manager of capital

projects for TDOT. The Tribunal found Mr. Durham knowledgeable about many aspects and requirements of the Contract and the Project itself but his testimony was not very probative concerning the claims in contention. Patrick J. Riley, for the limited purposes of his examination, was believable and creditable.

Many of the claims involve Mr. Thomas Scott who is a roadway, bridge, and culvert inspector for the Tennessee Department of Transportation. He is also a certified erosion inspector and tester. The Tribunal finds that Mr. Scott was the only state employee who was on the construction site on a day-to-day basis. The record and exhibits are replete with references to Mr. Scott's activities.

Claimant's demonstrative Exhibit No. 15 summarizes the change orders that were initiated by Mr. Scott and then ratified by the State representatives. The Tribunal finds that after reviewing the testimony and exhibits, Exhibit No. 15 is credible and accurately portrays Mr. Scott's activities, directions and labor on behalf of the State in dealing with the Claimant's agents and employees. The total value of the change orders initiated by Mr. Scott and ratified by the State by Change Orders totaled \$137,074.50. The majority of the instant claims concern Mr. Scott's directives and activities that were not ratified by the Design Team and F & A.

When Mr. Scott testified, he denied making any suggested changes to the project.

Q.: ....Were you involved in progress meeting for the project?

**Mr. Scott: Yes**

Q.: Can you kind of give us an idea of what goes on in a progress meeting?

**Mr. Scott: Basically every month they would have a progress meeting from, you know, the previous month to the next month to see, you know—go over what had been done that prior month and what was expected to be done the next month.**

Q.: Were potential changes to the project discussed in these meetings?

**Mr. Scott: Yes, ma'am.**

Q.: Okay. Did you make suggested changes?

**Mr. Scott: No.**

Trial Transcript pages 607-608

Taking into consideration the testimony of other witnesses and the exhibits as a whole, this cannot be true. This particular exchange makes the rest of Mr. Scott's testimony suspect. He contradicts his answer later in his testimony. The Tribunal finds his testimony to be vague, curt, contradictory and self-serving. Therefore, when Mr. Scott's testimony is contradictory to any other witness testimony, especially the testimony of Kevin True, then Mr. Scott's testimony shall not be accredited. Furthermore, the Tribunal finds that Mr. Scott aggressively directed RCR and its subcontractors to make many changes in this project. His superiors and the design team allowed him to direct the activities of the Claimant and its

agents and employees. Melissa Lee Cannon testified as the District Operations Supervisor for TDOT as Thomas Scott's direct supervisor. Although her testimony was sincere, her only probative testimony was that Thomas Scott was the only TDOT employee that was on the job site every day. (Trial Transcript page 689)

**CONCLUSIONS OF LAW CONCERNING THE AUTHORITY OF  
THOMAS SCOTT OF TDOT**

The State has alleged that Thomas Scott had no authority to direct or order the Claimant do anything at the Project site. Furthermore, the State argues that if the Claimant did, in fact, follow the orders or directions of Mr. Scott, it did so at its own peril. At this point, it is important to discuss the concept of apparent authority as it relates to contract law. Our Supreme Court defined apparent or ostensible authority in 1917 and discussed the concept at length. The following passage clearly enunciates its holding:

The apparent power of an agent is to be determined by the acts of the principal and not by the acts of the agent; a principal is responsible for the acts of an agent within his apparent authority only where the principal himself by his acts or conduct has clothed the agent with the appearance of authority, and not where the agent's own conduct has created the apparent authority. The liability of the principal is determined in any particular case, however, not merely by what was the apparent authority of the agent, but by what authority the third person, exercising reasonable care and

prudence, was justified in believing that the principal had by his acts under the circumstances conferred upon his agent." 2 Corpus Juris 574, 575.

*S. Ry. Co. v. Pickle*, 138 Tenn. 238, 197 S.W. 675, 677

This is still the law in Tennessee. The Tribunal must decide whether Thomas Scott had the apparent authority to act as an agent for the State and Design Team in directing, ordering and changing the work of the Claimant under the contract. What did the State officers and agents with contractual authority and the Design Team do in relation to Mr. Scott's activities?

- (1) They ratified with Change Orders (Exhibits 4, 5, 6, 8, 9, 10, 11) many of Mr. Scott's directives and suggestions and several of these were after the Claimant had already executed the change. (Exhibit 15)
- (2) They indicated in writing that they deferred to Mr. Scott's judgment in the areas of erosion control, utility lines and the building of roads, parking lots. (Exhibits 12, 13, 16, 22, 48 page 103, 50, and 53) The Tribunal specifically finds probative the e-mail sent by Andrew Hutsell, PE of the Design Team. He states, "It is our opinion that this change is being requested by TDOT (Thomas Scott) and therefore the decision to either use or not use this joint type is TDOT's to make."

(3) The Design Team was apprised of Thomas Scott's activities but chose to acquiesce in his supervision of the Claimant and its subcontractors. The record reflects of only one occasion when the Design Team refuted his activities after the fact.(Exhibit 42)

It is abundantly clear that the Design Team and State clothed Mr. Scott with the authority to direct activities at the Project work site. The Tribunal finds that Mr. Scott had the apparent authority to bind the State with his words and deeds and had the same authority as the State officers and Design Team under the contract.

### **THE INDIVIDUAL CLAIMS**

Each claim shall be treated separately by the Tribunal to prevent confusion.<sup>2</sup>

#### **CLAIM TWO: ADDITIONAL STONE INSTALLED AT PARKING LOTS**

The Design Team (Kline Swinney & Associates and Vaughn and Melton) directed that a layer of crushed stone should be installed upon the existing soil cement beneath the truck parking lot. Change Order 4 (Trial Exhibit 6) was issued to compensate RCR for 714 additional tons of crushed stone and required the TDOT representative, Thomas Scott, to keep track of the amount of additional stone above 714 tons that was installed. It was determined by Thomas Scott that an additional 1049 tons of stone exceeding the original 714 tons was

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<sup>2</sup> The Claimant voluntarily dismissed many of the claims before trial. Therefore, the numbers are not chronological.

installed in the layer. (Exhibit 16 page 25) However, the State only approved compensation for an additional 288 tons based upon the Design Team's mathematical calculation. The State should have given credit for all the stone that was actually installed; not just what was mathematically calculated. The Tribunal makes a specific finding that this additional installed stone was not a part of the original bid. Therefore, RCR is owed compensation for an additional 761 tons of crushed stone that was installed in the parking lot. RCR shall be awarded \$20,774.22 for this claim.

### **CLAIM THREE: CHANGE TO EXPANSION JOINTS**

Claimant alleges that a RCR subcontractor installed expansion joints at the direction of TDOT inspector Thomas Scott. The work was rejected and the Claimant was forced to install the correct expansion joints. It is clear that the change of the joint which was not part of the original plan was initiated by TDOT (Thomas Scott). The Design Team opined that it was TDOT's decision. (Exhibit 20) The E-mails of December 27, 2010 are particularly probative in that it tells of Thomas Scott instructing the subcontractor how to install the joint, rejecting it and having it installed a different way. (Exhibit 21) Mr. True testified that Thomas Scott actually took 2 x 4 wood and placed it to install the expansion

joints. This was an unacceptable solution. Mr. Scott talked directly with another subcontractor concerning installing an acceptable joint. (Exhibit 22) The final joint that was installed was drafted and approved by RCR, the Design Team and Thomas Scott. (Exhibit 25) RCR requested payment for the remediation of the expansion joints to correct the work directed by Thomas Scott. (Exhibit 26) The State refused to pay for the additional materials and labor involved. The Tribunal finds that the remedial work was caused by TDOT inspector Thomas Scott and the State is liable for the cost totaling \$7,763.89.

#### **CLAIM FOUR: CHANGED PLANS FOR CONTROL JOINTS**

The Claimant alleges that the original plans only called for control joints to be installed at thirty-foot intervals and this was included in the original bid. (Exhibit 27) The Design Team produced a revised set of plans showing control joints in a fifteen foot by fifteen-foot grid pattern. The Claimant constructed the grid pattern as shown and instructed by the Design Team. (Exhibit 28) It is apparent that the Design Team approved the change (Exhibit 29) Mr. True testified that the change was not included in the original plans or bid. The Claimant requested approval for payment for the change in plans as approved

and constructed. (Exhibit 30) The State denied payment for the materials and labor.

The Tribunal finds the 15' by 15' control joint grid was not included in the original plans or bid. Therefore, the State is liable for \$5,751.91 for the additional work and labor.

### **CLAIM SIX: REPAIR TO FIRE WATER LINE**

Claimant originally installed a PVC water pipe dedicated to fire control. Afterwards, a TDOT subcontractor installed another domestic water pipe next to the fire water line pipe. A water leak was discovered in the fire water line and the Claimant reopened the ditch to remedy the leak. Kevin True testified and wrote in an e-mail (Exhibit 32) that it was evident that a large piece of equipment (D-9 dozer) had run over the fire line. This equipment did not belong to RCR or its subcontractors. The weight of the dozer, probably thirty to forty thousand pounds, had either cracked the line or separated a fitting. The Claimant repaired the fire water line and requested payment of \$3,080.00. The Design Team indicated that the State had agreed to pay RCR the amount requested. (Exhibit 34) However, the State never executed the change order approving payment (Exhibit 35). Mr. Scott insinuated in his testimony that the leak was caused by a

bad connection installed by RCR. The Tribunal does not accredit Mr. Scott's testimony.

The evidence shows a dozer that either belonged to the State or directly contracted by the State damaged the fire water line. The Design Team recognized this event and it intended for the State to approve payment for the repair. The Tribunal finds that the State is liable for the \$3,080.00 cost to repair the fire water line.

**CLAIM SEVEN: ADDITIONAL STRAW INSTALLED AT PROJECT**

As part of the contract bid, Claimant agreed to install erosion control measures. This included installing straw on the construction site. The Claimant alleges that it installed straw in December of 2010 and then, at the request of the Design Team or the State, it installed straw in January of 2011. The Tribunal accredits Mr. True's testimony that the Claimant did install straw on both occasions. However, the contract indicates that the Claimant was responsible for landscaping and erosion control regardless of the weather and the time of year.

The Tribunal agrees with the State that the additional straw was not beyond the contract specifications because it was the winter season and the

Claimant was required to control erosion. Because of the aforementioned findings, this claim has not been proved by preponderance of the evidence.

**CLAIM EIGHT: WIDENING OF PROJECT ROADWAY**

A Welcome Center access road was originally planned and bid to be twelve feet wide. Claimant alleges that Thomas Scott painted the dimensions of the road and expanded it to twenty feet which was paved by Claimant's subcontractor. Mr. True personally staked the access road with road stakes on the centerline with writing indicating a twelve-foot wide road. He personally witnessed Thomas Scott pull all the stakes out of the roadbed and paint the dimensions of the road twenty feet across. The subcontractor, Rogers Group, came and paved to the paint marks place by Thomas Scott. In a meeting with Bob Swinney and David Kline of the Design Group that was attended by Thomas Scott, Mr. True said nothing because of the presence of Thomas Scott. He later protested that he was under duress by the presence and threats of Thomas Scott and then testified the contents of Exhibit 39 were basically untrue. The Tribunal accredits and believes the testimony of Mr. True.

The Tribunal finds that the Design Team had no understanding of what had actually happened that caused Rogers Group to pave a twenty-foot wide

road. Therefore, the claim for \$16,497.61 for the added costs paid to the subcontractor is reasonable and shall be awarded to the Claimant.

**CLAIM ELEVEN: REPLACEMENT OF TREATMENT PLANT ACCESS ROAD**

Claimant alleges it was directed to replace the sewage treatment access road after it had repaired it. Mr. True testified that the Claimant was only responsible for repairs that were caused by placing utilities across the access road. RCR placed the utilities and then repaired the road with concrete. Shortly before the end of the project, Thomas Scott and Gisela Patteson would not accept the repairs. The Claimant then completely replaced a portion of the road. The Design Team recognized that additional road repairs were necessary but could not find a request from RCR requesting compensation. (Exhibit 42 page 79B) Without explanation, the Design Team recommended the State and Claimant split the costs. The State has not shown why the costs of the replacement should be shared. Therefore, Claimant is awarded \$3,652.48 for the cost of replacing the sewage treatment access road.

**CLAIM TWELVE: ADDITIONAL STONE FILL FOR STORM DRAINS**

The Project required storm drains to be installed in the ground. The storm drains were to be installed with slope of the property so that the water on the

property would flow through the drains and away from the property. Mr. True testified that after the grades for the storm drains had already been determined and staked, he observed Thomas Scott shooting grades for the subcontractor using a surveying instrument. The Design Team was aware of Mr. Scott's activities but took no action. After Mr. Scott determined the grades, the subcontractor placed the drains and manholes as directed by Mr. Scott. It was soon discovered that the grades were completely wrong and would have to be reinstalled. The Claimant did remove the drains and manholes and reinstalled them correctly. This required additional stone fill for the drains.

The Design Team and F & A recognized that Thomas Scott incorrectly determined the grades. In a letter to RCR (Exhibit 42 page 79D), the Design Team stated:

...RCR's superintendent did report that some of these elevations were incorrect requiring additional stone fill. We agree that TDOT's representative should not have provided these elevations. We understand RCR's reluctance to question the TDOT representative's participation and, therefore, will recommend a 50/50 split to resolve this issue resulting in a \$1,434.89 payment to RCR.

RCR did not agree to split the extra costs of the remediation.

The State has not shown why the costs should be divided. This claim was directly attributable to Thomas Scott of TDOT. It is clear that he personally

directed the planning and installation of the storm drains and manholes incorrectly. The State is liable for Mr. Scott's actions and therefore the Claimant is awarded \$2,869.77 for the extra stone fill to correctly complete the work.

**CLAIM THIRTEEN: CHANGE TO CONCRETE FOR TRUCK DRIVEWAY**

Claimant contracted to remove the existing truck parking lot and replace it with a permeable asphalt base and nine inches of concrete. (Exhibit 46) Although the drawn plan of the Project shows the truck parking lot to be concrete, it shows the borders of the truck parking lot to be heavy-duty asphalt with a note. The Design Team made it clear that it intended that the parking lot and the borders be nine inch concrete. The Design Team amended its drawing (Exhibit 48) removing the heavy-duty asphalt note. The Design Team noted that it was removing the notes referring to asphalt at the truck parking area. (Exhibit 48 page 104) The Claimant had not bid these additional strips or borders as concrete but as heavy-duty asphalt according to the original drawn plan.

In the end, the Claimant did install nine-inch concrete in the truck parking lot including the borders as directed by the Design Team and the State. Claimant requested payment for the additional costs involved in installing the concrete instead of asphalt. The State did not approve payment. The Tribunal finds that

the additional concrete was not covered by the original bid. The State is liable for the additional costs and the Claimant is awarded \$36,365.11 for the installation of the additional concrete.

### **THE STATE'S COUNTERCLAIMS**

To give background for the Tribunal's findings and conclusions concerning the counterclaims, the Tribunal finds the Certificate of Substantial Completion (Exhibit 91) to be greatly probative. This Certificate, issued on January 26, 2011, was executed by Robert Swinney of the Design Team, Gisela Patterson of the State, and Dan Riegle of RCR. If the Design Team and State did not believe that the Project was substantially complete, they should not have signed the Certificate.

### **COSTS OF CERTIFIED EROSION PREVENTION INSPECTOR**

The State alleges that RCR did not provide a certified erosion prevention inspector at the Project. It is clear that the Design Team and the State never contemplated this claim until the Claimant filed suit. In reviewing the demeanor of Thomas Scott, it would have been difficult for any certified inspector to remain onsite and perform the work involved. In addition to this observation, the Tribunal finds that the Claimant sent a Certified Erosion Prevention Inspector,

Garry Sensing, to the Project at least three times. Each time he was informed that his services were not needed. The Design Team made it abundantly clear that Thomas Scott was authorized to direct erosion control measures. (Exhibit 12) The State admitted at trial that Thomas Scott was the certified erosion control inspector onsite. (Trial Transcript page 107) In view of Mr. Scott's directives, activities and authorization by the Design Team, it would contradict the previous findings and conclusions of the Tribunal to allow the State to charge the Claimant for the services of Thomas Scott. This counterclaim is denied and dismissed.

#### **REMOVAL OF EROSION CONTROL MEASURES**

The State alleges Claimant failed to remove and clear erosion control measures from the Project site. The State requests judgment for the costs of State employees and State equipment to remove the control measures. Mr. True testified that the Design Team and the State requested RCR to leave specific erosion control measures in place (ostensibly to continue to control erosion) until TDOT was finished with its part of the project and landscaping. The Claimant did remove erosion control measures and went back after the completion of the project to remove more erosion control measures at the request of Welcome

Center staff after TDOT had not. Thomas Scott, the erosion control inspector, was not questioned concerning what erosion control measures were left in place and why they were left in place. The State offered the cost of State employees and equipment to remove erosion control measures but did not differentiate between what measures were removed. Again, the State executed a Certificate of Substantial Completion on this Project. The State's claim fails by preponderance of the evidence and is dismissed.

#### **REMOVAL OF EXCESS FILL MATERIAL AKA THE SOIL PILE**

The State alleges Claimant left a pile of fill material or soil some twenty to thirty feet high without authorization and the State expended labor and equipment to remedy the material. Mr. True testified that the soil was originally on site to be used as fill material in a parking lot. The State and Design Team decided to use a pug mix instead, obviating the need for the soil. The State instructed Claimant not to haul the dirt off the site because of the additional cost. In Change Order 4 (Exhibit 6) this directive is corroborated by Line 8 which states, "Add cost to contract sum to add erosion control fencing for *spoils left on site* – per unit price." (Emphasis added) It is clear to the Tribunal that the State intended for the Claimant to leave this fill material in place to be used for

landscaping by TDOT. The State also intended for the erosion control measure, the silt fence, to be left in place as the Tribunal has previously found. Therefore, this claim is without merit and is dismissed.

### **LIQUIDATED DAMAGES FOR FAILURE TO FILE REPORTS**

The State alleges it is owed liquidated damages for Claimant's failure to file final reports to comply with the American Recovery and Reinvestment Act (ARRA). According to the Contract Section 9.12.3, secondary liquidated damages shall accrue if the work has not been completed or the Contract has not been fully performed. Based on the totality of testimony and exhibits the Tribunal finds that Claimant completed the contract and the Project. The Tribunal further finds this claim is retaliatory in nature. Therefore, this claim is dismissed.

### **CONSULTANT SERVICES**

The State claims it should be awarded costs because it continued to consult the Design Team to prepare for the instant lawsuit. The Tribunal considers these costs as purely discretionary. Because the Claimant has prevailed on the majority of its claims and the State's claims are dismissed, the Tribunal shall not award the costs of consultant services. This claim is dismissed.

## FINAL CONCLUSIONS

The State's theory that the Court must find the contract to be ambiguous for the Claimant to prevail is completely flawed. Although *Ray Bell v. State of Tennessee*, 356 S.W. 3d 384 (Tenn. 2011) is the authoritative opinion concerning contracts with the State, it does not apply to these facts. The Contract in the instant case is not ambiguous. Its execution by the State and Design Team was flawed and haphazard. Both the State and especially the Design Team sought to oversee this project without an agent being on the actual Project site. One cannot construct a major project from an office miles away. Thomas Scott filled the void on behalf of the State and Design Team with their permission. It was clear they were relieved to have him on site on a day-to-day basis to oversee and direct the Claimant and its subcontractors. The Tribunal further notes that a contract does not have to be ambiguous in order to make modifications within the framework of the Contract. Oral modifications to written contracts are permitted by the law.

After a written contract is made, it may be modified by the express words of the parties in writing, as well as by parol. *Co-Operative Stores Co. v. United States Fidelity & Guaranty Co.*, 137 Tenn. 609, 622, 195 S.W. 177, 180 (1917).  
*Galbreath v. Harris*, 811 S.W.2d 88, 91 (Tenn. Ct. App. 1990)

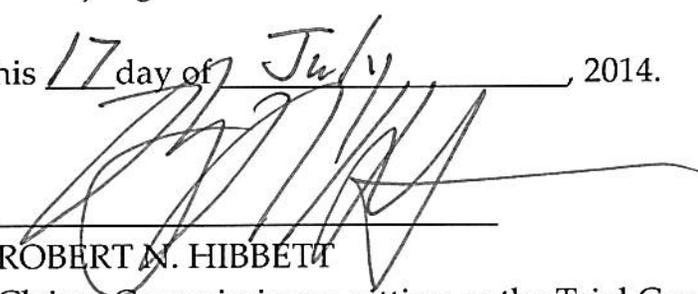
Furthermore, the State and Design Team breached the contract on every occasion when it had the Claimant change the scope of work without a Change Order and then ratified the change after the fact. The State cannot hide behind the Contract when it did not follow the terms of the Contract. To allow the State to avoid payment for the work it directed at the expense of the Claimant would defeat substantive justice.

In summary, the Tribunal finds for the Claimant on claims 2, 3, 4, 6, 8, 11, 12 and 13. Claim seven is dismissed. The State's counterclaims are dismissed. A total of \$96,754.99 is awarded to the Claimant, RCR Building Corporation.

**IT IS, THEREFORE, ORDERED, DECREED AND ADJUDGED:**

1. That judgment is rendered on behalf of the Claimant for \$96,754.99.
2. That the court costs, including the costs of the court reporter, are taxed to the State of Tennessee.
3. That each party shall bear its own discretionary costs.
4. That this is a final judgment.

ENTERED this 17 day of July, 2014.

  
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ROBERT N. HIBBETT  
Claims Commissioner, sitting as the Trial Court of Record

**CERTIFICATE OF SERVICE**

This is to certify that a true and exact copy of the foregoing document has been served upon the following parties of record:

MELISSA BRODHAG  
Attorney General's Office  
Civil Litigation & State Services Div  
P.O. Box 20207  
Nashville, TN 37202-0207

GREGORY L. CASHION  
Attorney for Claimant  
231 Third Avenue North  
Nashville, TN 37201-1603  
(615) 742-8555

This 23<sup>rd</sup> of July, 2014.

*Paula Swanson*

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PAULA SWANSON  
Administrative Clerk  
Tennessee Claims Commission