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Arkansas  
State Claims Commission  
MAR 07 2014

RECEIVED

BEFORE THE STATE CLAIMS COMMISSION  
Of the State of Arkansas☒ Mr.  
☐ Mrs.  
☐ Ms.  
☐ MissSheldon Lee Mitchell, Claimant

vs.

State of Arkansas, Respondent  
Highway Dept.

## Do Not Write in These Spaces

Claim No. 14-0673-CCDate Filed: March 7, 2014  
(Month) (Day) (Year)Amount of Claim \$ 5,850,000.00Fund AHTDCOMPLAINT  
Personal Injury, Pain & Suffering,  
Mental Anguish, Negligence, Refund  
of ExpensesSheldon Lee Mitchell, the above named Claimant, of 1450 South West Temple, Apt. G-104, Salt Lake City  
(Name) (Street or R.F.D. & No.) (City)  
Utah 84115 (801) 577-7561 County of Salt Lake represented by: Michael D. Snell (Ark. Bar # 07153)  
(State) (Zip Code) (Daytime Phone No.) (Legal Counsel, if any, for Claim)  
of 116 E. Military Rd, P.O. Box 1280 Marion AR 72364 (870) 739-8487 (870) 739-8491, says:  
(Street and No.) (City) (State) (Zip Code) (Phone No.) (Fax No.)State agency involved: Arkansas Highway and Transportation Department Amount sought \$5,850,000.00Month, day, year and place of incident or service: March 8, 2011; Highway Mile Marker 271, Interstate 40, West Memphis, AR

Explanation: On March 8, 2011, Mitchell, a University student, was traveling west on Interstate 40 in West Memphis, Arkansas near Mile Marker 271. Mitchell was riding as a passenger in the rear seat of the vehicle. At that time, another vehicle in front of the vehicle in which Mitchell was riding ran over a snowplowable pavement marker, which became detached from the roadway, and was propelled into the air toward the vehicle in which Mitchell was riding. The pavement marker penetrated the windshield on the driver's side of the vehicle, traveled at a high rate of speed past the head of the driver, and impacted Mr. Mitchell in the forehead, penetrating the tissue and skull of his forehead, and causing severe and permanent physical, emotional and neurological injuries. Mitchell was a bright university student; with a promising career ahead of him. As a result of his injuries, he has and will continue to suffer from permanent physical, neurological and cognitive difficulties; such as limited ability to concentrate, severe headaches, and he is unable to sit upright for long periods of time, which will affect his ability to study and work for the remainder of his life.

As parts of this complaint, the claimant makes the statements, and answers the following questions, as indicated: (1) Has claim been presented to any state department or officer thereof? No; when? \_\_\_\_\_; to whom? \_\_\_\_\_  
(Yes or No) (Month) (Day) (Year) (Department)  
; and that the following action was taken thereon: \_\_\_\_\_

and that \$ \_\_\_\_\_ was paid thereon; (2) Has any third person or corporation an interest in this claim? No; if so, state name and address

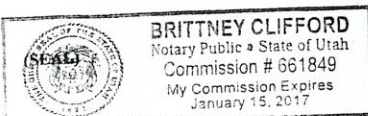
(Name) (Street or R.F.D. No.) (City) (State) (Zip Code)  
and that the nature thereof is as follows: \_\_\_\_\_

\_\_\_\_\_ ; and was acquired on \_\_\_\_\_, in the following manner: \_\_\_\_\_

THE UNDERSIGNED states on oath that he or she is familiar with the matters and things set forth in the above complaint, and that he or she verily believes that they are true.

Sheldon Lee Mitchell  
(Print Claimant/Representative Name)

(Signature of Claimant/Representative)

SWORN TO and subscribed before me at Salt Lake City, UT  
(City) (State)on this 27 day of February, 2014  
(Date) (Month) (Year)Brittney Clifford  
Notary PublicMy commission expires: Jan 15, 2017  
(Month) (Day) (Year)

3. Defendant Epoplex (“Epoplex”) is a division of Stonhard, L.P., which is a New Jersey limited partnership, with its principal place of business at 1 Park Avenue, Maple Shade, New

Jersey 08052. Epoplex can be served by certified mail pursuant to the provisions of Ark. Code Ann. 16-4-101, et seq.

4. Defendant Traf-Mark Industries, LLC ("Traf-Mark") is a Tennessee Limited Liability Company, with its principal place of business located at 280 Mann Drive, Piperton, Tennessee 38017. Traf-Mark is registered to conduct business in the State of Arkansas, and can be served through its registered agent for service of process in Arkansas, which is The Corporation Company, 124 West Capitol Avenue, Suite 1900, Little Rock, Arkansas 72201; or through its registered agent for service of process in the State of Tennessee, which is Michael W. Tabor, at 280 Mann Drive, Piperton, Tennessee 28017.

#### **JURISDICTION**

5. This court has proper jurisdiction of the subject matter and the parties of this action pursuant to the provisions of 28 U.S.C. § 1332 (Federal Diversity Statute) in that there exists complete diversity among the parties to this action and the amount sought for relief exceeds the jurisdictional limit of \$75,000.00.

6. Venue is proper in this Court pursuant to the provisions of 28 U.S.C. 1391(a), as the events from which plaintiff's cause of action arise occurred entirely within this judicial district.

#### **FACTUAL ALLEGATIONS**

7. Upon information and belief, and at all times relative to this action, defendant Avery Dennison ("Avery") was a corporation organized and existing under the laws of the State of Delaware and was engaged in the design, development, manufacture, sale, and distribution of reflective highway pavement markers identified as "Stimsonite Model 101" snow-plowable pavement markers, (hereinafter referred to as "pavement markers"), which were sold in and to



the State of Arkansas for use as pavement markers on the highways of the State of Arkansas.

8. Upon information and belief, and at all times relative to plaintiff's complaint, defendant Epoplex ("Epoplex") was a subsidiary of Stonhard, L.P. ("Stonhard"), a limited partnership organized and existing under the laws of the State of New Jersey and was engaged in the development, manufacture, protocols and specifications, sale and distribution of the Epoplex MA50 epoxy adhesive (hereinafter referred to as the "epoxy"), which epoxy was sold in and to the State of Arkansas for use as an adhesive in the installation of the aforementioned pavement markers.

9. Upon information and belief, and at all times relative to plaintiff's complaint, Traf-Mark Industries, LLC ("Traf-Mark") was a limited liability company organized and existing under the laws of the State of Tennessee and was engaged by sub-contract for the Arkansas Highway and Transportation Department for the purpose of installing the pavement markers which caused plaintiff's injuries as hereinafter described.

10. Upon information and belief, Traf-Mark, as sub-contractor for the Arkansas Highway and Transportation Department, installed the pavement markers that caused plaintiff's injuries as described below in May 2003.

11. On or about the first week of March, 2011, plaintiff Mitchell, along with his coach and another member of Mitchell's wrestling team ("hereinafter referred to as the "group") traveled from Utah to the State of Georgia to participate in a college varsity sports tournament.

12. On March 8, 2011, the group was returning to Utah from the sports tournament in Georgia, and was traveling in the right most lane, in a westerly direction along Interstate 40, after having just crossed the state line from Tennessee into Arkansas at the Hernando DeSoto bridge.



At this time, the vehicle, a blue 1994 Buick Regal, was being driven by the owner of the vehicle, and Mitchell's team mate, Zackary Walker ("Walker"). Mitchell's coach was riding in the front passenger seat, and Mitchell was a passenger sitting in the left rear seat of the automobile.

13. On or about that same time, the automobile approached mile marker 271 on Interstate 40 in Crittenden County, Arkansas, when another vehicle which was traveling in the westbound center lane of traffic changed lanes in the highway, moving from left to right into the same lane in which the Walker's Buick was traveling.

14. As the other vehicle crossed the centerline of traffic, the other vehicle ran over a Stimsonite Model 101 pavement marker which was installed and situated on or near the line separating the lanes of traffic on Interstate 40. At that same time, the pavement marker became detached from the surface of the roadway, and was propelled into the air toward the Buick operated by Walker and which was occupied by Mitchell.

15. The pavement marker impacted the front windshield of the Buick directly in front of the driver's position, and penetrated the windshield and entered the passenger compartment of the Buick. After penetrating the windshield of Walker's Buick, the pavement marker traveled past Walker's head, missing him, and into the rear of the passenger compartment, where it struck Mitchell in the forehead.

16. As a result of the impact, Mitchell sustained a severe, life altering head trauma, to include a severe penetrating laceration to the forehead, skull fracture, brain hemorrhage, and neurological damage, from all of which Mitchell has suffered and will continue in the future to suffer, increasingly severe headaches, severe pain in the frontal lobe region, lack of mental concentration, inability to sit upright for long periods of time, depression, anxiety, detachment,

along with other physical and emotional effects. As a result of the aforementioned injuries, plaintiff has been required to seek, and did obtain, the aid of physicians, hospitals, and nurses, and has incurred medical expenses, and will continue to incur similar expenses in the future, all in a sum as yet undetermined, but in excess of that required for federal diversity jurisdiction.

17. Prior to the injury, Mitchell was a promising university student undertaking a course of study in biology and mathematics. Since the infliction of the injuries above, Mitchell has been unable to complete his college studies due to the effects of the injuries, such that he has been forced to withdraw from his studies. Since the infliction of his injury he can no longer concentrate on and complete complex mathematical problems required for the course of study he was pursuing, nor can he sit upright in a classroom for extended periods of time without suffering from severe headache. It is likely that Mitchell will continue to suffer the effects of his injuries for the remainder of his life. As a direct result of his inability to continue his studies and the subsequent inability to pursue the occupation for which he was preparing, plaintiff has suffered continuing economic damages in an amount as yet undetermined, but in no wise less than that required for federal diversity jurisdiction, and plaintiff will continue to suffer similar economic damages for the remainder of his natural life.

#### **FIRST CAUSE OF ACTION**

##### **STRICT PRODUCTS LIABILITY AGAINST AVERY DENNISON - DAMAGES BASED ON DEFECT IN DESIGN - STRICT LIABILITY**

18. Plaintiff restates, realleges, and incorporates herein by reference thereto each and every paragraph 1 - 18 above as if each were set forth herein specifically and word for word.

19. Upon information and belief, defendant Avery Dennison designed, manufactured,

assembled, inspected, tested, advertised, distributed and sold the subject pavement marker, which pavement marker struck and injured Mitchell, to the State of Arkansas. Furthermore, and based upon information and belief, Avery Dennison developed the procedures and specifications for installation and maintenance of the aforesaid pavement markers.

20. When plaintiff sustained the injuries alleged above, the Avery Dennison pavement markers were in a defective design condition unreasonably dangerous to the plaintiff and the general public, in that the pavement markers were to be held in place only by an epoxy adhesive, without any anchors or other reinforcing mechanism to hold the pavement markers in place on the highway pavement. As a result, the pavement markers were subject to the likelihood of being dislodged from the pavement and projected into the air as a missile traveling at speeds up to and more than 70 miles per hour. As such, the pavement markers were unfit for sustained use as highway markers as they were intended and posed a serious risk of injury to plaintiff and others using the public highways.

21. Upon information and belief, Avery Dennison knew or should have known of the unsafe and dangerous condition of the pavement markers and that the pavement markers were likely to become detached from the roadway and be projected as missiles, posing a substantial risk to plaintiff and others traversing the highways where these pavement markers were installed.

22. Such defective design and condition was not observable by the plaintiff, who relied on the duty of Avery to design, manufacture, market and deliver pavement markers in a condition fit for use for the purpose intended and in a safe and operable condition.

23. The pavement marker as designed by Avery Dennison remained unchanged and was in the same condition at the time of the injury herein alleged as it had been at the time it was



designed, manufactured, marketed, and sold to the State of Arkansas.

24. The breach of the duty by Avery Dennison to design, develop, manufacture, inspect and deliver the aforementioned pavement markers in a condition fit for their intended use was a proximate cause of the injuries sustained by plaintiff and described above.

## **SECOND CAUSE OF ACTION**

### **NEGLIGENCE AS TO AVERY DENNISON**

25. Plaintiff restates, realleges and incorporates herein by reference thereto each and every paragraph 1 - 25 above as if each were set forth herein specifically and word for word.

26. Defendant Avery Dennison designed and manufactured the pavement marker described above. Accordingly, defendant owed to plaintiff and others transiting the highways where the marker was installed a duty to ensure that the pavement markers were designed and manufactured in such a way that made the system safe for its intended purpose.

27. Avery knew or should have known when designing and manufacturing these pavement markers that they were designed defectively, in that they were not adequately anchored or secured to the roadway surface so as to prevent them from becoming detached and projected into the air as a missile, creating an unreasonable risk of injury to the plaintiff and others.

28. Avery was negligent in failing to properly design, manufacture, install, maintain, and communicate the defect in the system to the user, creating a clear and immediate risk of serious injury to plaintiff and other motorists transiting the highways.

29. As an actual and proximate result of Avery's negligence, the plaintiff sustained damages consisting of the injuries described above, for all of which Avery is liable in an amount as yet undetermined but in no wise less than that required for federal diversity jurisdiction.

**THIRD CAUSE OF ACTION**  
**NEGLIGENT MISREPRESENTATION**  
**AS TO AVERY DENNISON**

30. Plaintiff restates, realleges, and incorporates herein by reference thereto each and every paragraph 1 - 30 above as if each were set forth herein specifically and word for word.

31. Upon information and belief, plaintiff alleges that Avery knew that the pavement markers designed and manufactured by Avery were defective and dangerous in the manner alleged above; that Avery knew that because of the defects the pavement markers could not be safely used for the purpose for which they were intended; and that defendant Avery, knowing that the pavement markers were defective and dangerous, instead represented to the State of Arkansas and the unknowing public that the pavement markers were safe for the purpose for which they were designed, and that they were actually necessary to improve the overall safety of the public highways.

32. Avery, acting through its officers, agents, servants, representatives, or employees, negligently and recklessly misrepresented the following material facts regarding the quality and character of the pavement markers.

- a) That the Stimsonite Model 101 marker is "ingeniously designed";
- b) That the Stimsonite Model 101 marker is "built to last the life of the road."
- c) That the Stimsonite Model 101 marker casting has a life span of approximately 6 - 10 years.

- d) That the Stimsonite Model 101 marker is a safe for high traffic roads.

33. The above misrepresentations were made under circumstances in which Avery,

acting through its officers, agents, servants, representatives, or employees, either knew or in the exercise of reasonable care should have known, that the various facts of those misrepresentations were not true or were not known to be true.

34. The misrepresentations alleged above were further reiterated and disseminated by Avery's officers, agents, servants, representatives or employees acting within the course and scope of their authority to merchandise and market the pavement markers.

35. These misrepresentations concerning the pavement markers were set forth in advertising circulars delivered by Avery to the general public, including the Arkansas Highway and Transportation Department, in the State of Arkansas.

36. The State of Arkansas, in reliance on the truth of the misrepresentations in Avery's advertising, purchased the pavement markers on or about May 2003.

37. While using the pavement markers in accordance with Avery's printed instructions, the Arkansas Highway and Transportation Department installed the pavement markers upon the highways and roadways throughout the State of Arkansas, including the location wherein plaintiff was injured herein.

38. The product designed, manufactured and advertised by Avery was a direct and proximate cause of the above injuries sustained by Mitchell. Except for Avery's representations concerning the safety of the product, plaintiff would never have been put in risk of the injuries described above.

39. As a direct and proximate result of Avery's negligent misrepresentations regarding the safety of the pavement markers, plaintiff sustained injuries as described above, and for which Avery is liable in an amount as yet undetermined but in no wise less than that required for federal



diversity jurisdiction.

### **THIRD CAUSE OF ACTION**

#### **EXEMPLARY DAMAGES AS TO DEFENDANT AVERY DENNISON**

40. Plaintiff restates, realleges, and incorporates herein by reference thereto each and every paragraph 1 - 40 above as if each were set forth herein specifically and word for word.

41. Upon information and belief, plaintiff alleges that Avery knew that the pavement markers designed, manufactured, and sold by it were defective and dangerous in the manner alleged above.

42. Upon information and belief, plaintiff alleges that Avery further knew that because of the afore stated defect(s), the pavement marker could not safely be used for the purpose(s) for which they were intended.

43. Upon information and belief, and despite that Avery, knew or should have known that the pavement markers were defective and dangerous, continued to manufacture, market, sell and distribute the subject pavement markers, without making any improvements to eliminate the inherent defects, in willful and conscious disregard for the safety of the public.

44. Avery's actions as described above, which were the actual and proximate cause of plaintiff's injuries as described herein, were willful, wanton, and grossly negligent, such that malice can be inferred, and for all of which Mitchell is entitled to recover from Avery exemplary or punitive damages.

### **FOURTH CAUSE OF ACTION**

#### **STRICT PRODUCTS LIABILITY AGAINST EPOPLEX - DAMAGES BASED ON**

### **DEFECT IN DESIGN - STRICT LIABILITY**

45. Plaintiff restates, realleges, and incorporates herein by reference thereto each and every allegation contained in paragraphs 1 - 45 above as if each were set forth herein specifically and word for word.

46. Upon information and belief, defendant Epoplex designed, manufactured, tested, advertised, distributed and sold an epoxy adhesive (hereinafter referred to as the "epoxy") used in the installation of the Avery pavement markers described above and which were installed at the location wherein Mitchell's injuries occurred.

47. When plaintiff sustained the injuries alleged above, Epoplex's epoxy was of a defective design condition unreasonably dangerous to the plaintiff and the general public, in that it was subject to failure which led to the pavement markers which were installed in the location wherein plaintiff was injured to become detached from the surface of the roadway. The epoxy, which was advertised to adequately secure the pavement markers to the roadway was unfit for the purpose for which it was intended, and its failure posed a serious risk of injury to plaintiff and others using the public highways.

48. Upon information and belief, Epoplex knew or should have known of the unsafe and dangerous conditions created by the inadequate epoxy and that the pavement markers were likely to become detached from the roadway as a result of the failure of the epoxy, and be projected as missiles, posing a substantial risk to plaintiff and others traversing the highways where this adhesive was used to install pavement markers.

49. Such defective design and condition was not observable by the plaintiff, who relied on the duty of Epoplex to design, manufacture, market and deliver an adhesive adequate under

the conditions existing and fit for use for the purpose intended.

50. The epoxy designed by Epoplex remained unchanged and was in the same condition at the time of the injury herein alleged as it had been at the time it was designed, manufactured, marketed, and sold to the State of Arkansas.

51. The breach of the duty by Epoplex to design, develop, manufacture, inspect and deliver the aforementioned epoxy in a condition fit for its intended use was a proximate cause of the injuries sustained by plaintiff and described above.

#### **CAUSE OF ACTION FIVE**

##### **NEGLIGENCE AS TO DEFENDANT TRAF-MARK INDUSTRIES, LLC**

52. Plaintiff restates, realleges, and incorporates herein by reference thereto each and every paragraph 1 - 52 above as if each were set forth herein specifically and word for word.

53. At all times relevant to plaintiff's complaint, defendant Traf-Mark Industries, Inc. ("Traf-Mark") was a Tennessee limited liability company and was the sub-contractor hired by the Arkansas Highway and Transportation Department to install the pavement markers described above. Based upon information and belief, Traf-Mark installed the pavement markers during May of 2003.

54. Upon information and belief, Traf-Mark had a duty to properly install the pavement markers described above according to specific standards set forth by the Arkansas Highway and Transportation Department and by defendants Avery and Epoplex.

55. In addition to its duty to ensure that the pavement markers were properly installed, Traf-Mark had a duty to supervise its employees and inspect their work to ensure that the



installation was carried out exactly according to specifications, and to ensure that any pavement markers that were improperly placed were reinstalled in an alternate location and properly reinstalled.

56. Traf-Mark negligently failed to properly install the pavement markers according to the instructions and specifications set forth by the Arkansas Highway and Transportation Department and defendants Avery and Epoplex. Further, Traf-Mark failed to properly inspect and supervise to ensure that the installation of each marker was according to the specifications of the manufacturer and the Arkansas Highway and Transportation Department, and to ensure that any defective pavement markers or defective installations were corrected.

57. As a direct and proximate result of Traf-Mark's negligence in failing to properly install the pavement markers as described above, and to properly supervise and inspect the work of its employees, plaintiff sustained injuries as described above, for all of which Traf-Mark is liable for negligence in an amount as yet undetermined, but in excess of that required for federal diversity jurisdiction.

#### **CAUSE OF ACTION SIX**

#### **EXEMPLARY DAMAGES AS TO DEFENDANT TRAF-MARK**

58. Plaintiff restates, realleges, and incorporates herein by reference thereto each and every paragraphs 1 - 58 above as if each were set forth herein specifically and word for word.

59. The negligent acts and omissions of Traf-Mark, as described above, were willful and grossly reckless, such that malice may be inferred, and for which plaintiff is entitled to exemplary and punitive damages in an amount as yet undetermined, but in no wise less than that required

for federal diversity jurisdiction.

**WHEREFORE, PREMISES CONSIDERED**, plaintiff prays that:

1. He be awarded judgment in his favor and against defendant Avery Dennison Corporation for strict liability in tort his injuries sustained as the result of the defective pavement markers designed, manufactured, advertised, sold and distributed by defendant Avery Dennison Corporation in an amount as yet undetermined, but in no wise less than that required for federal diversity jurisdiction;

2. He be awarded judgment in his favor and against defendant Avery Dennison Corporation for negligent misrepresentation in an amount as yet undetermined, but in no wise less than that required for federal diversity jurisdiction;

3. He be awarded judgment in his favor and against defendant Avery Dennison Corporation for exemplary and punitive damages for its willful and grossly reckless disregard in an amount as yet undetermined, but in no wise less than that required for federal diversity jurisdiction;

4. He be awarded judgment in his favor and against defendant Epoplex for strict liability in tort for his injuries sustained as a result of the defective epoxy adhesive that was designed, manufactured, sold and distributed by defendant Epoplex in an amount as yet undetermined, but in no wise less than that required for federal diversity jurisdiction;

5. He be awarded judgment in his favor and against defendant Traf-Mark Industries, LLC for his injuries incurred as a result of the negligent acts of defendant Traf-Mark Industries, LLC in an amount as yet undetermined, but in no wise less than that required for federal diversity jurisdiction;

6. He be awarded judgment in his favor and against defendant Traf-Mark Industries, LLC for exemplary and punitive damages for their willful and grossly reckless acts as described above in an amount as yet undetermined, but in no wise less than that required for federal diversity jurisdiction;

7. He be awarded judgment against the defendants, jointly and severally for his reasonable attorney fees and for his costs incurred;

8. He be awarded any and all further relief to which he may be entitled under law.

9. Plaintiff demands a trial by jury on all justiciable facts.

Respectfully submitted,



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Arkansas  
State Claims Commission

MAR 07 2014

RECEIVED



MAR 14 2016

**BEFORE THE ARKANSAS STATE CLAIMS COMMISSION  
OF THE STATE OF ARKANSAS**

**RECEIVED**

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**SHELDON MITCHELL**

**CLAIMANT**

**v.**

**CLAIM NO.: 14-0673-C**

**ARKANSAS STATE HIGHWAY AND  
TRANSPORTATION DEPARTMENT**

**RESPONDENT**

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**CLAIMANT'S FIRST AMENDED CLAIM**

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**COMES THE CLAIMANT**, Sheldon Lee Mitchell, by and through his lawyer, Michael D. Snell, and for his Claim for Damages for Injuries against the Arkansas State Highway and Transportation Department, states as follows:

1. Claimant restates, realleges, and incorporates herein by reference thereto, each and every allegation contained in his original Claim as if each were set forth herein specifically and word for word.

**PARTIES AND JURISDICTION**

2. Sheldon Lee Mitchell ("Mitchell") is a resident citizen of the State of Utah, and resides at 1450 Southwest Temple, Apt. G-104, Salt Lake City, Utah.

3. The Arkansas State Highway and Transportation Department ("AHTD") is an agency of the State of Arkansas. As such, the AHTD is responsible for the design, construction, inspection, and maintenance of all public highways in the State of Arkansas.

4. The Arkansas State Claims Commission (hereinafter referred to as "the Commission") has jurisdiction of this matter pursuant to the provisions of Ark. Code Ann. § 19-10-204.

5. This matter arises out of an injury sustained by Mitchell, due to the negligence of the AHTD, which occurred on March 8<sup>th</sup>, 2011 in Crittenden County, Arkansas. An original claim was timely filed in this Commission on March 7, 2014 prior to the expiration of the three-year Statute of Limitations. This amended claim relates back to the original claim under the provisions of Ark.R.Civ.P. 15(c)(1).

6. Claimant has exhausted all other available remedies, including those against insurers and other alleged tortfeasors.

### **FACTUAL ALLEGATIONS**

7. On or about March 8, 2011, Mitchell was traveling from the State of Utah the State of Georgia to participate in a college wrestling match. Mitchell was in the back left side passenger seat of a 1994 Buick Regal owned and driven by Zackary Walker, a team-mate.

8. At or about that same time and date, Walker and Mitchell were traveling eastbound in the right-hand, outside lane on Interstate Highway 40 ("I-40") near Mile Marker 271 in Crittenden County, Arkansas, when another vehicle traveling in front of Walker's vehicle changed lanes from the inside left lane to the outside, right lane. Upon crossing over the center line, the vehicle ran over a Stimsonite-101 snowplowable raised pavement marker (hereinafter referred to interchangeably as "RPM" or "PPM"), which detached from the surface of the highway and became airborne.

9. The airborne RPM fully penetrated the front windshield of Walker's vehicle on the left, driver's side of the vehicle, proceeded past the left side of Walker's head, impacted the support column on the left side of the vehicle between the front and rear left side windows, and continuing on, struck Mitchell in the forehead, causing a severe penetrating injury which resulted in a depressed skull fracture and right frontal subarachnoid hemorrhage ("SAH").

10. The RPM which struck Mitchell was installed in May, 2003 during a construction project (Job Number B-10101) in which that portion of I-40 which encompasses Mile Marker 271 was resurfaced. The RPM was installed by Traf-Mark, Inc. ("Traf-Mark"), a Tennessee corporation, hired as a subcontractor on the project, with the approval of the AHTD.

11. Among the specifications provided to Traf-Mark and AHTD was the requirement that RPMs not be installed on or adjacent to the seam of the pavement which runs near the centerline of the highway.

12. Between May, 2003 and April, 2009, there existed no program or protocol within AHTD to inspect or maintain the RPMs that were installed along the highways in Arkansas.

13. At some time before April 19, 2009, an accident occurred near Ozark, Arkansas in which an RPM became detached from the highway and after being propelled into the air, penetrated the windshield of a vehicle traveling on I-40. Another incident occurred on or about November 10, 2010 wherein a vehicle was struck while driving along Interstate 540 ("I-540") near West Fork, Arkansas. There were at least four (4) incidents in 2009 of RPMs becoming detached and striking automobiles; all of which incidents AHTD had knowledge.

14. After the accident in April, 2009 near Ozark, Arkansas, Joe Shipman ("Shipman"), the District Maintenance Engineer for AHTD District 4, sent a memorandum to Tony Sullivan ("Sullivan"), the State Maintenance Engineer for AHTD, which discussed the April, 2009 accident which occurred near Ozark, Arkansas. (See copy of memorandum attached hereto as Exhibit "1" and incorporated herein by reference thereto.) The memorandum warned that approximately ten to fifteen percent of the RPMs installed between log miles 30.6 and 37.4 were missing from the pavement. Shipman's memorandum also pointed out that "deteriorated pavement and loss of aggregate around the pavement markers appears to allow them [RPMs] to



become dislodged under traffic. Shipman recommended, "based on the number of pavement markers that have dislodged and the condition of the pavement", that the "remainder of the pavement markers by [sic] removed...".

15. As a result of the above mentioned incidents involving RPMs on Arkansas highways, the AHTD began, after April 2009, an inspection program which consisted only of "sounding" the RPMs; whereby an individual would walk the highway once per year and tap the RPMs with a hammer to check whether or not they were loose. If the RPM were found to be loose during this once per year inspection, it was removed. There was no other protocol or instruction given for inspecting the RPMs, and there was no more frequent inspection conducted to locate and remove "loose" RPMs.

16. Despite Shipman's April 19<sup>th</sup>, 2009 memorandum; which specifically pointed out that the RPMs were becoming dislodged due to deteriorating pavement, there was never any process or protocol instituted or conducted to inspect or maintain the pavement immediately around the RPMs to ensure that RPMs would not become dislodged as a result of pavement deterioration during the year between the inspections.

17. On or about February 3, 2011, just thirty-three days prior to Mitchell's injury", a "sounding" was conducted along I-40 between mile markers 270 and 272, in which it was revealed that at least thirty-one (31) RPMs were missing.

#### **CAUSE OF ACTION NEGLIGENCE**

18. Claimant restates, realleges, and incorporates herein each and every paragraph 1-17 above as if each were set forth herein specifically and word for word.

19. The Arkansas State Highway Department ("AHTD") is charged with proper care in the design, construction, and maintenance of highways and roadways in the State of Arkansas.

As such, at the time of Mitchell's injuries as described above, the AHTD had a duty to Mitchell and other motorists to exercise reasonable diligence to maintain the highways in a reasonably safe condition for their common use, to include a duty to inspect, warn of unsafe conditions, and to make reasonable repairs to remove unsafe conditions.

20. The AHTD breached their duty as described above by the following acts or omissions:

- a. The AHTD negligently failed to ensure that the Stimsonite 101 Raised Pavement Markers ("RPMs") installed on Interstate 40 in Crittenden County, Arkansas were properly installed according to the manufacturer's specifications.
- b. The AHTD negligently failed to conduct reasonable and periodic inspections of the RPMs and the surface of the highway into which the RPMs were installed, despite their knowledge that the RPMs posed a significant hazard, in that numerous RPMs had become detached and had struck other vehicles, so as to reasonably prevent RPMs from becoming dislodged, thereby creating a significant risk of injury to Mitchell and other motorists traveling Arkansas highways.
- c. The AHTD negligently failed to ensure that the RPMs installed on Arkansas highways were reasonably maintained to prevent their becoming dislodged, despite AHTD's knowledge as detailed above, thereby creating a significant risk that the RPMs would become dislodged and injure Mitchell and other motorists traveling Arkansas highways.

- d. Despite knowing that RPMs had become dislodged from Arkansas highways and had struck vehicles, and despite prior recommendations that the RPMs be removed as they posed a significant risk to Mitchell and other motorists, the AHTD negligently failed to remove the remaining RPMs, thereby creating a risk of significant injury to Mitchell and other motorists.

21. As a direct and proximate result of the negligence of the AHTD as described above, Mitchell sustained damages, to include physical and emotional injury, pain and suffering, humiliation, reasonable and necessary medical costs, damages for future care, loss of future wages; more specifically, Mitchell suffered a painful depressed skull fracture and right frontal subarachnoid hemorrhage ("SAH"), for which Mitchell will suffer permanent and life-altering effects, to include permanent scarring, loss of memory, loss of ability to concentrate, daily extreme and excruciatingly painful headaches, loss or severe impairment of executive functioning, and numerous other debilitating and permanent effects of his injuries.

22. Mitchell's damages, as described above, were the direct and proximate result of the AHTD's negligent acts or omissions as described above, for all of which the AHTD is liable for negligence in an amount to be determined at trial, but in no wise less than Twenty-Five Million Dollars (\$25,000,000.00), or greater.

23. Claimant reserves the right to amend his Claim, to include asserting any additional causes of action that may arise and be revealed by further discovery in this action.

**WHEREFORE, PREMISES CONSIDERED,** Claimant prays that:

1. He be granted judgment in his favor and against the Arkansas State Highway and Transportation Department ("AHTD") for his damages arising from the AHTD's negligence as



set out above in an amount to be determined at trial, but in no wise less than Twenty-Five Million Dollars (\$25,000,000.00) or greater;

2. He be awarded any and all further relief available under Arkansas law.

Respectfully submitted,



---

Michael D. Snell (Ark. Bar # 07153)  
P.O. Box 1280  
Marion, AR 72364  
(870) 739-8487  
(870) 739-8491 (FAX)  
Email: [mdsnell@aol.com](mailto:mdsnell@aol.com)

#### **CERTIFICATE OF SERVICE**

I, Michael D. Snell, do hereby certify that I have served upon counsel of record for Respondent herein a true and complete copy of the foregoing First Amended Claim, by placing a copy thereof for delivery by U.S. Mail, postage prepaid, and addressed as follows:

Mr. David Dawson, Esq.  
Staff Attorney, AHTD  
P.O. Box 2261  
10324 Interstate 30  
Little Rock, AR 72203

This 9<sup>th</sup> day of March, 2016.



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Michael D. Snell

STATE CLAIMS COMMISSION OPINION

Amount of Claim \$ 5,850,000.00

Claim No. 14-0673-CC

Attorneys

Sheldon Lee Mitchell Claimant

Michael D. Snell, Attorney Claimant

vs.

AR Highway Department Respondent

David Dawson, Staff Attorney Respondent

State of Arkansas

Date Filed March 7, 2014

Type of Claim Personal Injury, Pain & Suffering,  
Mental Anguish, Negligence &  
Refund of Expenses

FINDING OF FACTS

The Claims Commission hereby unanimously grants the joint "Motion to Hold in Abeyance." Therefore, this claim will be held in abeyance pending the exhaustion of alternative remedies.

IT IS SO ORDERED.

(See Back of Opinion Form)

CONCLUSION

The Claims Commission hereby unanimously grants the joint "Motion to Hold in Abeyance." Therefore, this claim will be held in abeyance pending the exhaustion of alternative remedies.

Date of Hearing

Date of Disposition

*H. A. Moore*

Chairman

*B. A. Moore*

Commissioner

*Bill Lancaster*

Commissioner

STATE CLAIMS COMMISSION L JACKET  
OPINION

Amount of Claim \$ 5,850,000.00

Claim No. 14-0673-CC

Attorneys

Sheldon Lee Mitchell Claimant  
vs.

Michael D. Snell, Attorney Claimant

AR Highway Dept. Respondent

David Dawson, Attorney Respondent

State of Arkansas

Date Filed March 7, 2014

Type of Claim Personal Injury, Pain & Suffering  
Mental Anguish, Negligence, Refund  
of Expenses

FINDING OF FACTS

The Claims Commission hereby unanimously denies and dismisses the Respondent's "Motion to Dismiss" and orders this claim to be set for hearing. Therefore this claim will be scheduled for hearing and all parties notified accordingly.

IT IS SO ORDERED.

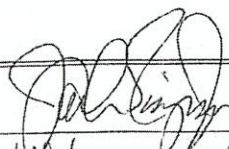
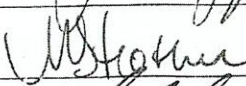
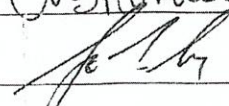
(See Back of Opinion Form)

CONCLUSION

The Claims Commission hereby unanimously denies and dismisses the Respondent's "Motion to Dismiss" and orders this claim to be set for hearing. Therefore this claim will be scheduled for hearing and all parties notified accordingly.

Date of Hearing April 14, 2016

Date of Disposition April 14, 2016

  
Chairman  
  
Commissioner  
  
Commissioner



**BEFORE THE ARKANSAS STATE CLAIMS COMMISSION**

**SHELDON MITCHELL**

**CLAIMANT**

**V.**

**CLAIM NO. 14-0673-CC**

**ARKANSAS DEPARTMENT OF  
TRANSPORTATION**

**RESPONDENT**

**ORDER**

Now before the Arkansas State Claims Commission (the "Claims Commission") is the claim of Sheldon Mitchell (the "Claimant") against the Arkansas Department of Transportation (the "Respondent"). At the hearing held June 14, 2018, Claimant was present, along with his attorney of record, Michael Snell. David Dawson appeared on behalf of Respondent.

**Background**

1. On March 7, 2014, Claimant filed a claim against Respondent, seeking damages in the amount of \$5,850,000.00 related an injury that he suffered in March 2011 when a pavement marker detached from the roadway, penetrated the windshield, and struck Claimant in the forehead.
2. The claim was held in abeyance to permit Claimant to pursue his claim against the manufacturers of the pavement marker.
3. On March 14, 2016, Claimant filed an amended complaint, in which Claimant changed the amount of damages sought to no less than \$25,000,000.00.
4. Respondent thereafter filed a motion to dismiss, which was denied by the Claims Commission on April 14, 2016.
5. Once the parties concluded discovery, the claim was set for hearing. In Claimant's pre-hearing brief, Claimant clarified that he was seeking \$6,893,613.00 in damages.

### **Pre-Hearing Motions**

6. Respondent filed a motion to exclude testimony and evidence regarding Joseph A. Filippino, P.E. The parties argued the motion, and the Claims Commission agreed with Respondent that excluding Mr. Filippino's testimony and report was appropriate.

7. Respondent also moved to exclude the testimony and evidence of Amy Mackenzie and Brian Piper. The parties argued the motion, and the Claims Commission ultimately agreed to admit their report (Claimant did not proffer any testimony by these witnesses).

8. Respondent also moved to exclude the testimony of Claimant's father, Kevin Mitchell. The parties argued the motion, and the Claims Commission held that Mr. Mitchell could testify.

### **Witness Testimony**

9. Claimant testified about his life after the injury. He stated that he was no longer able to wrestle at the collegiate level for Utah State University and transferred to the University of Utah to be closer to his family. He stated that, immediately after the accident, he dropped some classes. He took some time off from school but eventually graduated in December 2017 with a sociology degree and in May 2018 with an economics degree. On cross examination, Claimant testified that he saw Dr. Yonemura in March 2011 after the injury and again in March 2013, at which time Dr. Yonemura told him that he was doing fine and did not prescribe any medications for him. Claimant stated that he takes over-the-counter medication for daily headaches.

10. Dr. Randal Benson, the medical director for the Center for Neurological Studies, testified regarding the report that he prepared regarding Claimant's injury. He testified that he did a neuro-behavioral exam of Claimant in March 2016. Based upon the exam, Dr. Benson concluded that Claimant has a permanent brain injury, which has decreased his quality of life. On cross examination, Dr. Benson stated that he was not Claimant's treating physician and was not sure if

Claimant had a treating physician. Dr. Benson emphasized Claimant's high grade point average in high school to show the differences between Claimant's abilities pre- and post-injury. On redirect, Dr. Benson testified that Claimant's injury caused the psychological symptoms and that Claimant's concussion was "not uncomplicated."

11. Claimant's father, Kevin Mitchell, testified that Claimant is less confident after his injury and that, while Claimant does not complain of pain, Mr. Mitchell can tell Claimant is in pain. On cross examination, Mr. Mitchell admitted that he lives in Dallas and that his son still lives in Utah.

12. Dr. Gary Souheaver, a neuropsychologist, testified as to the report that he prepared regarding Claimant's injury. He testified that he evaluated Claimant in 2016 and found that Claimant has no lingering effects from his mild brain injury, other than the treatable symptoms of Claimant's emotional distress, including Claimant's headaches. Dr. Souheaver also testified as to the ability of the brain to heal itself.

13. Dr. Tonya Rutherford Owen, a life care planner and counselor, testified regarding the report that she prepared regarding Claimant's injury and in critique of the report prepared by Dr. Ronald T. Luke, Dr. Amy B. Mackenzie, and Dr. Brian Piper (the "Luke/Mackenzie/Piper Report"). Dr. Owen detailed in her report how Claimant was injured. Dr. Owen testified that she did not agree with multiple aspects of the Luke/Mackenzie/Piper Report, including future medical expenses and the vocational assessment.

### **Findings of Fact**

14. The Claims Commission finds that Claimant was injured when a pavement marker used by Respondent on Interstate 40 became dislodged, flew through the windshield of the vehicle in which Claimant was riding, and struck Claimant in the forehead.

15. The Claims Commission finds that the pavement marker is a heavy piece of metal.



16. The Claims Commission finds that the pavement marker struck Claimant in the forehead, causing a skull fracture and bleeding in Claimant's brain.

17. The Claims Commission finds that Claimant stayed in the hospital for observation for two days before being discharged.

18. The Claims Commission finds that Claimant sought treatment for headaches from Dr. Yonemura in March 2011 after the injury and in March 2013.

19. The Claims Commission finds that there was no evidence presented that Claimant had out-of-pocket expenses related to his medical bills.

20. The Claims Commission finds that Claimant does not currently have a treating physician. No testimony or evidence was presented at the hearing regarding any doctor visits since 2013, other than with the expert witnesses identified in this claim.

21. The Claims Commission finds that Claimant does not take any medication for his symptoms other than over-the-counter medications.

22. The Claims Commission finds that Claimant took time off from school after the injury but that Claimant has since achieved bachelor's degrees in sociology and economics.

23. The Claims Commission finds that all of the witnesses were credible, especially Dr. Souheaver and Dr. Owen.

### **Conclusions of Law**

24. While the testimony regarding the incident that resulted in Claimant's injury was remarkably scant, the Claims Commission finds, under a preponderance of the evidence standard, that Claimant's injury was caused by the negligence of Respondent.

25. Pursuant to Ark. Code Ann. § 19-10-302, Claimant is only entitled to recover out-of-pocket expenses related to his medical bills. Because no out-of-pocket expenses were presented to the Claims Commission, the Claims Commission cannot make an award for past medical bills.

26. Upon consideration of the testimony and evidence presented in this claim, as well as the other damages claimed by Claimant, the Claims Commission unanimously AWARDS Claimant \$115,000.00 and refers this claim to the General Assembly for review and placement upon an appropriations bill pursuant to Ark. Code Ann. § 19-10-215(b).

IT IS SO ORDERED.



ARKANSAS STATE CLAIMS COMMISSION  
Henry Kinslow, Co-Chair



ARKANSAS STATE CLAIMS COMMISSION  
Bill Lancaster



ARKANSAS STATE CLAIMS COMMISSION  
Mica Strother

DATE: June 27, 2018

**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(b). 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(b)(3). A decision of the Claims Commission may only be appealed to the General Assembly. Ark. Code Ann. § 19-10-211(a).
- (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(b). 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).

JUL 06 2018

RECEIVED

IN THE STATE CLAIMS COMMISSION FOR THE STATE OF ARKANSAS

SHELDON LEE MITCHELL

CLAIMANT

V.

CLAIM NO.: 14-0673-CC

ARKANSAS DEPARTMENT OF TRANSPORTATION  
("ArDOT"); fka ARKANSAS HIGHWAY AND  
TRANSPORTATION DEPARTMENT ("AHTD")

RESPONDENT

NOTICE OF APPEAL TO THE ARKANSAS GENERAL ASSEMBLY

Comes claimant, Sheldon Lee Mitchell, by and through his lawyer, Michael D. Snell, and pursuant to the provisions of Ark. Code Ann. § 19-10-211, hereby appeals the determination and Order of the Arkansas State Claims Commission entered herein on June 27<sup>th</sup>, 2018 to the Arkansas General Assembly.

Respectfully submitted,



Michael D. Snell (07153)  
P.O. Box 1280  
Marion, AR 72364  
(870) 739-8487

CERTIFICATE OF SERVICE

I, Michael D. Snell, do hereby certify that I have served upon counsel of record for ArDOT a true and complete copy of the foregoing Notice of Appeal, by placing a copy thereof for delivery by U.S. Mail, postage prepaid on this the 3<sup>rd</sup> day of July 2018.



Michael D. Snell