

ARKANSAS STATE CLAIMS COMMISSION  
-Claim Form-

Arkansas  
State Claims Commission  
OCT 30 2021  
RECEIVED

Please note that all sections must be completed, or this form will be returned to you, which will delay the processing of your claim.

**1. Claimant's Legal Counsel -** ☒ (If representing yourself (Pro Se) please check this box and proceed to section 2)

Botteicher Dylan djbotteicher@csmfir.com  
(last name) (first name) (email)  
8712 Counts Massie Rd. North Little Rock AR 72113 501-954-8073  
(address) (city) (state) (zip) (primary phone)

Arkansas Bar Number: 2017170 If not licensed to practice law in Arkansas, please contact the Claims Commission for more information.

**2. Claimant**

Pelfrey Kenena [REDACTED]  
(title/last name/first name or company) (email)  
[REDACTED]  
(address) (city) (state) (zip) (primary phone)

**3. State Agency Involved: (must be an Arkansas state agency. The Arkansas Claims Commission has no jurisdiction over county, city, or other municipalities)**

Highway Department

(state agency involved)

**4. Incident Date**

December 2015 - Present

**5. Claim Type**

Please provide a brief explanation of your claim. If additional space is required please attach additional statements to this form.

5a. Check here if this claim involves damage to a motor vehicle. ☒

5b. Check here if this claim involves damage to property other than a motor vehicle. ☒

All property damage claims require a copy of your insurance declarations covering the property or motor vehicle at the time of damage.

I did not have insurance covering my property/motor vehicle at the time of damage. ☒

All property damage claims require ONE of the following (please attach):

1. Invoice(s) documenting repair costs, OR
2. Three (3) estimates for repair of the damaged property, OR
3. An explanation why repair bill(s) or estimate(s) cannot be provided.

6. Was a state vehicle involved? (If Yes, please complete the following section)

N/A  
 (type of state vehicle involved) (license number) (driver)

7. Check here if this claim involves personal injury.

All personal injury claims require a copy of your medical insurance information and relevant medical bills in place at the time of the incident.

I do not have health insurance ☒

8. Amount Sought: \$568,000

The undersigned certifies that to the best of my knowledge, information, and belief, this claim is not being presented for any improper purpose; this claim is warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law; and the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

Kenena Pelfrey  
 Claimant

ACKNOWLEDGEMENT

State of Arkansas  
 County of Johnson

On this the 21<sup>st</sup> day of Oct, 2021, before me, the undersigned notary, personally appeared Kenena Pelfrey known to me (or satisfactorily proven) to be the person whose name is subscribed to this instrument and acknowledged that he/she executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

Lela McChesney  
 Signature of Notary Public

My Commission expires: 8-23-28



Arkansas  
State Claims Commission  
OCT 30 2021  
RECEIVED

On December 15, 2015, our two-story home was hit by a landslide resulting from a dumpsite that was placed improperly above our home. We had to vacate our home on that day, moving as many of our belongs that were not destroyed by mud and water from the house with the help of many of our neighbors. We lost approximately \$33,000 in furniture in personal belongings. The back wall was knocked out resulting in the second story sagging. Initially, a county employee tried using his machinery to remove the weight of the mud, hoping to reconstruct the home. As he removed the mud it started the rolling again. We were never able to return to that home as it continued to be pushed down the mountain. It currently sits approximately 50-60 feet past where it was.

We built this 3,600 square foot home ourselves without a traditional loan, paying for it as we could and doing the majority of the work ourselves. It was our dream home, our retirement plan, and it was built on family land that was invaluable to my husband. Finally, after taking that devastating of a financial loss, we could easily list the house for \$450,000.00, we decided to downsize and build a log cabin as we were now empty nesters. Because land is so expensive in NW Arkansas, and because of the importance of the place to my husband, we built on the place again ignorant to the fact that the slide was still active because of the water that is being drained on it.

My husband and his brother and my brother had three sawmills on the property. They would log the trees, bring them back to the mills, and saw them. We constructed our second home with the same principle of building as we go, doing the work ourselves and trying to avoid a 30-year mortgage.

In 2020, we noticed that the road in out of the Pelfrey property appeared to be sinking. Within the next few months not only did the road collapse, the slide began to take down trees, we lost electric, water, and phone lines, over and over again and to our disbelief the slide began to knock our new cabin off its footing even though it was located away from the initial slide. Our beautiful cabin was approximately 1500 square foot worth at least \$250,000.00. At this point, we had no choice but to leave.

The county built us an emergency road over the top of the mountain, and we were able to get the mills out and sold because we no longer had a way to get timber in and lumber out. However, as is obvious, we lost that part of our business. In addition, our son and his wife had a new mobile home that is "trapped" in there. They moved, due to their jobs, before the emergency road was built because we had no way in and out except on 4-wheelers and with the deep crevices and dangerous terrain, we worried about trying to cross the destruction to make it out of the property. They are currently still trying to make a payment on this as well as a house payment.

As of today, the slide continues and the destruction is growing. Our ten acres is totally destroyed. Nearby land is going for six to seven thousand an acre.

We have lost so much from something that we believe was preventable.

Kenena Pelfrey

**From:** [ASCC New Claims](#)  
**To:** ["Looney, Rita S."; "Trella.Sparks@ardot.gov"; "Blakley, Sharon"](#)  
**Cc:** ["Kathryn Irby"](#)  
**Subject:** CLAIM: Kenena Pelfrey v. ArDOT, Claim No. 220574  
**Date:** Friday, November 19, 2021 11:17:00 AM  
**Attachments:** [Kenena Pelfrey ArDOT agency ltr.pdf](#)  
[Kenena Pelfrey Claim.pdf](#)

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Please see attached. Contact Kathryn Irby with any questions.

Thank you,  
Caitlin

**Caitlin McDaniel**

*Administrative Specialist II*

**Arkansas State Claims Commission**

101 East Capitol Avenue Suite 410

Little Rock, 72201

(501) 682-1619

**Caitlin.McDaniel@arkansas.gov**



## ARKANSAS STATE CLAIMS COMMISSION

(501)682-1619  
FAX (501)682-2823



KATHRYN IRBY  
DIRECTOR

101 EAST CAPITOL AVENUE  
SUITE 410  
LITTLE ROCK, AR 72201-3823

November 19, 2021

Ms. Rita Looney  
Arkansas Department of Transportation  
Post Office Box 2261  
Little Rock, Arkansas 72209

(via email)

RE: ***Kenena Pelfrey v. Arkansas Department of Transportation***  
**Claim No. 220574**

---

Dear Ms. Looney,

Enclosed please find a copy of the above-styled claim filed against the Arkansas Department of Transportation. Pursuant to the Arkansas Rules of Civil Procedure, as well as Claims Commission Rule 2.2, you have **thirty days from the date of service** in which to file a responsive pleading.

Your responsive pleading should include your agency number, fund code, appropriation code, and activity/section/unit/element that this claim should be charged against, if liability is admitted, or if the Claims Commission approves this claim for payment. This information is necessary even if your agency denies liability.

Sincerely,

Kathryn Irby

ES: cmcdaniel

cc: Dylan Botteicher, *counsel for Claimant* (w/o encl.) (via email)

<p><b><u>Note to Claimant or Claimant's counsel:</u></b> The Claims Commission copied you on this correspondence to provide you with confirmation that your claim has been processed and served upon the respondent agency.</p>
---

**From:** [ASCC New Claims](#)  
**To:** ["djbotteicher@csmfirm.com"](mailto:djbotteicher@csmfirm.com)  
**Bcc:** ["Kathryn Irby"](#)  
**Subject:** Kenena Pelfrey v. ArDOT, Claim No. 220574  
**Date:** Friday, November 19, 2021 11:17:00 AM  
**Attachments:** [Kenena Pelfrey ArDOT agency ltr.pdf](#)

---

Dear Mr. Botteicher,

Attached please find a copy of the letter sent with your claim to the Arkansas Department of Transportation.

Thank you,  
Caitlin

**Caitlin McDaniel**

*Administrative Specialist II*

**Arkansas State Claims Commission**

101 East Capitol Avenue Suite 410

Little Rock, 72201

(501) 682-1619

**[Caitlin.McDaniel@arkansas.gov](mailto:Caitlin.McDaniel@arkansas.gov)**

**From:** [Blakley, Sharon](#)  
**To:** [ASCC Pleadings](#)  
**Cc:** [Sparks, Trella A.](#)  
**Subject:** Pelfrey v ARDOT Claim 220574 ANS-MTD  
**Date:** Tuesday, December 14, 2021 10:45:31 AM  
**Attachments:** [image002.jpg](#)  
[Pelfrey.220574.\(ANS-MTD\).2021.12.14.pdf](#)  
[Pelfrey.220574.\(cvr ltr ANS\).2021.12.14.pdf](#)

---

Please acknowledge receipt of the attached Answer & Motion to Dismiss for the referenced claim.

- \* Attachments confirmed
- \* Claimant copies mailed

**Sharon D. Blakley**  
Legal Office Manager/Tax Intercept Unit Administrator  
Arkansas Department of Transportation  
(501) 569-2022  
(501) 569-2164 *fax*  
[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)





## ARKANSAS DEPARTMENT OF TRANSPORTATION

AR<sub>DOT</sub>.gov | IDriveArkansas.com | Lorie H. Tudor, P.E., Director

LEGAL DIVISION | Trella A. Sparks, Staff Attorney | Trella.Sparks@ardot.gov

10324 Interstate 30 | P.O. Box 2261 | Little Rock, AR 72203-2261 | Phone: 501.569.2157 | Fax: 501.569.2164

December 14, 2021

Ms. Kathryn Irby, Director  
 Arkansas State Claims Commission  
 101 East Capitol Avenue, Suite 410  
 Little Rock, AR 72201-3823

*(via email)*

Re: *Kenena Pelfrey v. Arkansas Department of Transportation*  
*Claim No. 220574*

Dear Ms. Irby:

Please find attached Respondent's Answer to the above-referenced claim.

Please confirm receipt at your earliest convenience.

Very truly yours,  
*Trella A. Sparks*

Trella A. Sparks  
 Staff Attorney for  
 Arkansas Department of Transportation  
 501-569-2022

TAS/sdb

cc: Dylan Botteicher  
 Cox, Sterling, McClure &  
 Vandiver, PLLC  
 8712 Counts Massie Road  
 North Little Rock, AR 72113



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

**KENENA PELFREY**

**CLAIMANT**

**V.**

**CLAIM NO. 220574**

**ARKANSAS DEPARTMENT OF TRANSPORTATION**

**RESPONDENT**

**ANSWER AND MOTION TO DISMISS**

**COMES THE RESPONDENT**, by and through its Staff Attorney, Trella A. Sparks, and for its Answer and its Motion to Dismiss hereby states:

1. The Respondent denies all allegations of the Complaint.
2. Respondent specifically denies negligence, although Claimant has even stated a claim for negligence against Respondent, and states that any damage the Claimant may have sustained may have resulted from the negligence of a third party.
3. The Claimant's damage, if any, cannot be verified as having been caused by negligence of the Arkansas Department of Transportation or its employees. Claimant has not filed her complaint to include “a statement of facts sufficiently clear to identify the Claimant, *the Respondent state agency or agencies, the circumstances giving rise to the claim* and the amount of monetary damages sought” as is required under Rule 2.1 of the Arkansas State Claims Commission Rules and Regulations.
4. It is unclear whether this is a negligence claim or something else, because no allegations have been made against the Arkansas Department of Transportation. It is akin to a doctor giving a list of symptoms rather than a diagnosis. It is impossible to sort through the narrative and determine what it is that is being claimed.
5. Claimant states there was a dump site, but she neither indicates that it belongs to the Arkansas Department of Transportation nor gives its location. Nor does she state any cognizable claim for liability as to how the dump site created a landslide.

6. Affirmatively pleading, the Respondent states that any injuries or damages sustained by the Claimant were proximately caused by Claimant's own contributory fault or negligence, which fault or negligence should bar or mitigate the Claimant's recovery in this case. Claimant admits to rebuilding on a site of an alleged previously, and potentially continuously active land slide without benefit of professional surveyors, geologists, etc.

7. The State is not a no-fault insurer of the general public. Without any claim and proof of negligence on the part of the Respondent, it should not be liable for Claimant's damages.

8. It is unclear which incident or exactly what damages are the subject of the claim. It should be noted that Claimant's Complaint states on its face "On December 15, 2015, our two story home was hit by a landside..."

9. The Statute of limitations in Arkansas is three years. A.C.A. § 16-56-105.

10. More than three years have passed from 12/15/15, the date of the alleged original property damage, to 10/30/2021, the date of this Complaint; therefore, Claimant's claim for the original damage is barred by the applicable statute of limitations.

11. Because the applicable statute of limitations expired December 15, 2018, and this matter was filed with the Claims Commission on October 30, 2021, this claim is time-barred and should be denied and dismissed with prejudice.

12. It is unclear which incident is the basis of the claim. If the Claimant is attempting to make a claim for her son, she does not have standing to do so.

13. Finally, a claimant against a state agency is required to exhaust all remedies, including her own insurance, prior to bringing a claim against the state.

A.C.A. §19-10-302. Claimant has not provided proof of homeowner's insurance, nor has

she signed the affidavit regarding insurance which is required by statute. A.C.A. § 19-10-302(b).

14. Because Claimant has failed to state a legally cognizable cause of action against the Respondent and has failed to state facts supporting an alleged cause of action, this matter should be denied and dismissed pursuant to Arkansas Rules of Civil Procedure, Rule 12(b)(6).

**RESPECTFULLY SUBMITTED,  
ARKANSAS DEPARTMENT OF TRANSPORTATION**

*Trella A. Sparks*

By: \_\_\_\_\_  
Trella A. Sparks  
Arkansas Bar No. 2004-105  
Staff Attorney  
ArDOT, Legal Division  
P. O. Box 2261  
Little Rock, AR 72203-2261  
(501) 569-2022

**CERTIFICATE OF SERVICE**

I, Trella A. Sparks, certify that I have served the foregoing Answer and Motion to Dismiss upon the Claimant by mailing a true copy of same this 14th of December, 2021 to:

Dylan Botteicher  
Cox, Sterling, McClure & Vandiver, PLLC  
8712 Counts Massie Road  
North Little Rock, AR 72113

*Trella A. Sparks*

\_\_\_\_\_  
Trella A. Sparks

**COX, STERLING, MCCLURE & VANDIVER, PLLC**  
ATTORNEYS AT LAW

CADE L. COX  
[clcox@csmfir.com](mailto:clcox@csmfir.com)  
ATTORNEY

8712 COUNTS MASSIE RD.  
NORTH LITTLE ROCK, ARKANSAS 72113

DYLAN J. BOTTEICHER  
[djbotteicher@csmfir.com](mailto:djbotteicher@csmfir.com)  
ATTORNEY

BRIAN A. VANDIVER  
[bavandiver@csmfir.com](mailto:bavandiver@csmfir.com)  
ATTORNEY

TELEPHONE (501) 954-8073  
FACSIMILE (501) 954-7856  
WEB: [www.csmfir.com](http://www.csmfir.com)

GRAHAM P. WHITSETT  
[gprawhitsett@csmfir.com](mailto:gprawhitsett@csmfir.com)  
LEGAL ASSISTANT

December 28, 2021

Arkansas  
State Claims Commission

JAN 03 2022

RECEIVED

**VIA US MAIL**

Ms. Kathryn Irby, Director  
Arkansas State Claims Commission  
101 East Capitol Avenue, Suite 410  
Little Rock, AR 72201-3823

**RE: Kenena Pelfrey v. Arkansas Department of Transportation  
Claim No. 220574**

Ms. Irby,

Please find enclosed Claimant's Response to Respondent's Motion to Dismiss. Thank you for your attention and please reach out to me with any questions.

Sincerely,

COX, STERLING, MCCLURE  
& VANDIVER, PLLC

By: /s/ Dylan J. Botteicher  
DYLAN J. BOTTEICHER



Arkansas  
State Claims Commission

JAN 03 2022

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

**DOUGLAS PELFREY and  
KENENA PELFREY**

**CLAIMANTS** RECEIVED

**VS.**

**CLAIM NO. 220574**

**ARKANSAS DEPARTMENT  
OF TRANSPORTATION**

**RESPONDENT**

**CLAIMANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS**

Comes now the Claimants, Douglas Pelfrey and Kenena Pelfrey (the "Pelfreys"), by and through counsel, Cox, Sterling, McClure & Vandiver, PLLC, and for their Response to Respondent's Motion to dismiss, states as follows:

1. The Complaint clearly alleges that Respondent was negligent in having its agents take actions on Claimants' land that caused a landslide.

2. The Complaint states plainly the damages sought.

3. The Complaint explicitly states that the landslide was caused by a dumpsite placed near the Claimants' land and the Complaint identifies the Highway Department as the actor responsible for the dumpsite's placement. The dumpsite was placed above the Claimants' land and it caused the water to drain down toward Claimants' land and cause a mudslide.

4. Respondent claims that Claimants built on the same site, but the Complaint states that the second building was built on a different part of land that did not appear to have an active slide. The damage is ongoing, and the entire property is useless as the slide grows in size.

5. Under the Arkansas Rules of Civil Procedure, the Complaint must give notice of the facts, which it has done so.

6. Respondent is incorrect that this claim is barred by the applicable statute of limitations. The landslide is ongoing even years later, and therefore the statute of limitations does

not bar this action due to the continuing nature of the landslide. *Jones v. Sewer Improv. Dist.*, 119 Ark. 166, 174, 177 S.W. 888, 889 (1915). Arkansas law routinely recognizes that the statute of limitations tolls when continuing damages occur. *Fleming v. Vest*, 2015 Ark. App. 636, ¶ 1, 475 S.W.3d 576, 578 (2015).

7. Claimants signed the form that stated that insurance did not cover this claim, and the signature was notarized. Claimants have further attached a letter from her insurance company stating that she did not have coverage for the landslide incident. *See* letter regarding coverage, attached as Exhibit “A”.

8. Arkansas courts construe pleadings liberally and deem them sufficient if they advise the other party of its obligations and alleges a breach of them. *Bethel Baptist Church v. Church Mut. Ins. Co.*, 54 Ark. App. 262, 265 (1996). All reasonable inferences must be resolved in favor of the complaint when testing the sufficiency of the pleading on a motion to dismiss. *Perry v. Baptist Health*, 358 Ark. 238, 241 (2004). In considering a motion to dismiss under Ark. R. Civ. P. 12(b)(6), Arkansas courts must treat the facts alleged in the complaint as true and viewed in the light most favorable to the party seeking relief. *Deitsch v. Tillery*, 309 Ark. 401, 405 (1992). Under this standard, the Claimants’ pleading is more than sufficiently plead.

WHEREFORE, Claimants respectfully request that the Complaint be granted for the above reasons; that she be awarded costs and attorneys’ fees, and all other relief deemed appropriate.

Respectfully Submitted,

COX, STERLING, MCCLURE &  
VANDIVER, PLLC  
8712 Counts Massie Road  
North Little Rock, Arkansas 72113

(501) 954-8073

By: /s/ Dylan J. Botteicher  
Dylan J. Botteicher (ABN# 2017170)

*ATTORNEY FOR CLAIMANTS*

**CERTIFICATE OF SERVICE**

I, Dylan J. Botteicher, do hereby certify that a true and correct copy of the foregoing was served on the following person(s) through the U.S. mail service on this 28th day of December, 2021:

Trella A. Sparks  
ArDOT, Legal Division  
PO Box 2261  
Little Rock, AR 72203-2261

By: /s/ Dylan J. Botteicher  
Dylan J. Botteicher (ABN# 2017170)

**Farmers Mutual** *since 1902*  
**INSURANCE COMPANY**

P.O. Box 129  
585 S. GENTRY BLVD.  
GENTRY, AR 72734  
(479) 736-2400 (PHONE)  
(479) 736-8822 (FAX)  
FMIC@CENTURYTEL.NET

12/20/2021

Name of Insured: Douglas and Kenena Pelfrey

Address of Property: [REDACTED]

Insurance Policy #: [REDACTED]

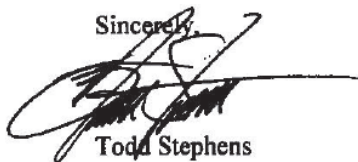
Date of Loss: 12/27/2015

Cause of Loss: Landslide

To Whom It May Concern:

Please accept this letter as confirmation that coverage was denied and no insurance proceeds were paid by Farmers Mutual Insurance Company relating to the above described loss.

Sincerely,



Todd Stephens  
General Manager  
Farmers Mutual Insurance Company—Gentry, AR

Ex A



**COX, STERLING, MCCLURE & VANDIVER, PLLC**  
ATTORNEYS AT LAW

CADE L. COX  
clcox@csmfirm.com  
ATTORNEY

8712 COUNTS MASSIE RD.  
NORTH LITTLE ROCK, ARKANSAS 72113

DYLAN J. BOTTEICHER  
djbotteicher@csmfirm.com  
ATTORNEY

BRIAN A. VANDIVER  
bavandiver@csmfirm.com  
ATTORNEY

TELEPHONE (501) 954-8073  
FACSIMILE (501) 954-7856  
WEB: www.csmfirm.com

GRAHAM P. WHITSETT  
gpwhitsett@csmfirm.com  
LEGAL ASSISTANT

Arkansas  
State Claims Commission

April 13, 2022

APR 14 2022

**VIA US MAIL**

Ms. Kathryn Irby, Director  
Arkansas State Claims Commission  
101 East Capitol Avenue, Suite 410  
Little Rock, AR 72201-3823

**RECEIVED**

**RE: Kenena Pelfrey v. Arkansas Department of Transportation  
Claim No. 220574**

Ms. Irby,

Our firm represents the Claimant in the above referenced matter. A complaint was filed and Respondent filed a motion to dismiss. Claimant responded on December 28, 2021. Claimant respectfully requests a hearing on the pending Motion to Dismiss at the earliest convenience. Thank you for your attention and please reach out to me with any questions.

Sincerely,

COX, STERLING, MCCLURE  
& VANDIVER, PLLC

By: /s/ Dylan J. Botteicher  
DYLAN J. BOTTEICHER

cc: Trella A. Sparks  
ArDOT, Legal Division  
PO Box 2261  
Little Rock, AR 72203-2261

**From:** [Kathryn Irby](#)  
**To:** [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com); [Sparks, Trella A.](#); [Blakley, Sharon](#)  
**Subject:** HEARING LTR: Pelfrey v. ArDOT, Claim No. 220574  
**Date:** Friday, April 15, 2022 9:08:00 AM  
**Attachments:** [Pelfrey v. ArDOT -- 220574 -- hearing on pending motion.pdf](#)

---

Mr. Botteicher and Ms. Sparks, please see attached hearing letter and Zoom invitation.

Thanks,  
Kathryn Irby

**Kathryn Irby**  
**Arkansas State Claims Commission**  
101 East Capitol Avenue, Suite 410  
Little Rock, Arkansas 72201  
(501) 682-2822

## ARKANSAS STATE CLAIMS COMMISSION

(501) 682-1619  
FAX (501) 682-2823



KATHRYN IRBY  
DIRECTOR

101 EAST CAPITOL AVENUE  
SUITE 410  
LITTLE ROCK, ARKANSAS  
72201-3823

April 15, 2022

Mr. Dylan J. Botteicher  
Cox, Sterling, McClure & Vandiver, PLLC  
8712 Counts Massie Road  
North Little Rock, Arkansas 72113

(via email)

Ms. Trella A. Sparks  
Arkansas Department of Transportation  
Post Office Box 2261  
Little Rock, Arkansas 72203-2261

(via email)

RE: ***Kenena Pelfrey v. Arkansas Department of Transportation***  
Claim No. 220574

Dear Mr. Botteicher and Ms. Sparks,

The Claims Commission has scheduled a hearing on the pending motion to dismiss on **Thursday, May 12, 2022**, beginning at 9:00 a.m. This hearing will be held via Zoom, and the Zoom invitation is enclosed.

As this is a motion hearing, no additional prehearing materials are requested.

Sincerely,

Kathryn Irby

ES: kmirby

The Claims Commission is inviting you to a scheduled Zoom meeting.

Topic: Claims Commission -- hearings

Time: May 12, 2022 09:00 AM Central Time (US and Canada)

Join Zoom Meeting

<https://us06web.zoom.us/j/81603889456?pwd=VlRXbC8wejNJQzJFdEZETHVaNW9xZz09>

Meeting ID: 816 0388 9456

Passcode: 9QHqxx

One tap mobile

+19294362866,,81603889456#,,, \*514525# US (New York)

+13017158592,,81603889456#,,, \*514525# US (Washington DC)

Dial by your location

+1 929 436 2866 US (New York)

+1 301 715 8592 US (Washington DC)

+1 312 626 6799 US (Chicago)

+1 669 900 6833 US (San Jose)

+1 253 215 8782 US (Tacoma)

+1 346 248 7799 US (Houston)

Meeting ID: 816 0388 9456

Passcode: 514525

Find your local number: <https://us06web.zoom.us/j/keJL2jE0PH>



**From:** [Kathryn Irby](#)  
**To:** [Sparks, Trella A.](#); [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com); [Blakley, Sharon](#)  
**Subject:** RE: HEARING LTR: Pelfrey v. ArDOT, Claim No. 220574  
**Date:** Friday, April 15, 2022 11:20:00 AM  
**Attachments:** [Pelfrey -- claim docs.pdf](#)  
[CLAIM Kenena Pelfrey v. ArDOT Claim No. 220574.msg](#)  
[Pelfrey -- agency ltr sent to Cl.pdf](#)  
[Pelfrey v ARDOT Claim 220574 ANS-MTD.msg](#)  
[Pelfrey -- response to MTD.pdf](#)  
[Pelfrey -- hearing request.pdf](#)

---

Attached, thanks.

Kathryn

---

**From:** Sparks, Trella A. <[Trella.Sparks@ardot.gov](mailto:Trella.Sparks@ardot.gov)>  
**Sent:** Friday, April 15, 2022 10:16 AM  
**To:** Kathryn Irby <[Kathryn.Irby@arkansas.gov](mailto:Kathryn.Irby@arkansas.gov)>; [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com); [Blakley, Sharon](#) <[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)>  
**Subject:** RE: HEARING LTR: Pelfrey v. ArDOT, Claim No. 220574

Kathryn,  
 Can I please get a copy of everything in this file? Electronic is fine if that's feasible.

Thank you,  
 Trella Sparks

---

**From:** Kathryn Irby <[Kathryn.Irby@arkansas.gov](mailto:Kathryn.Irby@arkansas.gov)>  
**Sent:** Friday, April 15, 2022 9:09 AM  
**To:** [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com); Sparks, Trella A. <[Trella.Sparks@ardot.gov](mailto:Trella.Sparks@ardot.gov)>; [Blakley, Sharon](#) <[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)>  
**Subject:** HEARING LTR: Pelfrey v. ArDOT, Claim No. 220574

**CAUTION:** This email originated from outside of ARDOT. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Mr. Botteicher and Ms. Sparks, please see attached hearing letter and Zoom invitation.

Thanks,  
 Kathryn Irby

**Kathryn Irby**  
**Arkansas State Claims Commission**  
 101 East Capitol Avenue, Suite 410  
 Little Rock, Arkansas 72201  
 (501) 682-2822



**From:** [Dylan Botteicher](#)  
**To:** [Kathryn Irby](#); [Sparks, Trella A.](#); [Blakley, Sharon](#)  
**Subject:** RE: HEARING LTR: Pelfrey v. ArDOT, Claim No. 220574  
**Date:** Friday, April 15, 2022 10:59:57 AM

---

All,

I was able to move my 5/12 conflict. I will be able to attend the hearing.

Thank you,

Dylan Botteicher  
 COX, STERLING, McCLURE & VANDIVER, PLLC  
 8712 Counts Massie Road  
 North Little Rock, Arkansas 72113  
 (501) 954-8073 Office  
 (501) 954-7856 Fax  
[djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com) Email  
[www.csmfirm.com](http://www.csmfirm.com) Website

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---

**From:** Dylan Botteicher  
**Sent:** Friday, April 15, 2022 9:11 AM  
**To:** Kathryn Irby <[Kathryn.Irby@arkansas.gov](mailto:Kathryn.Irby@arkansas.gov)>; Sparks, Trella A. <[Trella.Sparks@ardot.gov](mailto:Trella.Sparks@ardot.gov)>; Blakley, Sharon <[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)>  
**Subject:** RE: HEARING LTR: Pelfrey v. ArDOT, Claim No. 220574

All,

I have a conflict that day. Can you provide alternative dates?

Thanks so much,

Dylan Botteicher  
 COX, STERLING, McCLURE & VANDIVER, PLLC  
 8712 Counts Massie Road  
 North Little Rock, Arkansas 72113  
 (501) 954-8073 Office  
 (501) 954-7856 Fax  
[djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com) Email  
[www.csmfirm.com](http://www.csmfirm.com) Website

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---

**From:** Kathryn Irby <[Kathryn.Irby@arkansas.gov](mailto:Kathryn.Irby@arkansas.gov)>

**Sent:** Friday, April 15, 2022 9:09 AM

**To:** Dylan Botteicher <[djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com)>; Sparks, Trella A. <[Trella.Sparks@ardot.gov](mailto:Trella.Sparks@ardot.gov)>;  
Blakley, Sharon <[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)>

**Subject:** HEARING LTR: Pelfrey v. ArDOT, Claim No. 220574

Mr. Botteicher and Ms. Sparks, please see attached hearing letter and Zoom invitation.

Thanks,  
Kathryn Irby

**Kathryn Irby**  
**Arkansas State Claims Commission**  
101 East Capitol Avenue, Suite 410  
Little Rock, Arkansas 72201  
(501) 682-2822

**From:** [Sparks, Trella A.](#)  
**To:** [Kathryn Irby](#); [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com); [Blakley, Sharon](#)  
**Subject:** RE: HEARING LTR: Pelfrey v. ArDOT, Claim No. 220574  
**Date:** Friday, April 15, 2022 11:24:08 AM

---

Received, thank you.

---

**From:** Kathryn Irby <[Kathryn.Irby@arkansas.gov](mailto:Kathryn.Irby@arkansas.gov)>  
**Sent:** Friday, April 15, 2022 11:21 AM  
**To:** Sparks, Trella A. <[Trella.Sparks@ardot.gov](mailto:Trella.Sparks@ardot.gov)>; [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com); Blakley, Sharon <[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)>  
**Subject:** RE: HEARING LTR: Pelfrey v. ArDOT, Claim No. 220574

**CAUTION:** This email originated from outside of ARDOT. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Attached, thanks.

Kathryn

---

**From:** Sparks, Trella A. <[Trella.Sparks@ardot.gov](mailto:Trella.Sparks@ardot.gov)>  
**Sent:** Friday, April 15, 2022 10:16 AM  
**To:** Kathryn Irby <[Kathryn.Irby@arkansas.gov](mailto:Kathryn.Irby@arkansas.gov)>; [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com); Blakley, Sharon <[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)>  
**Subject:** RE: HEARING LTR: Pelfrey v. ArDOT, Claim No. 220574

Kathryn,

Can I please get a copy of everything in this file? Electronic is fine if that's feasible.

Thank you,  
Trella Sparks

---

**From:** Kathryn Irby <[Kathryn.Irby@arkansas.gov](mailto:Kathryn.Irby@arkansas.gov)>  
**Sent:** Friday, April 15, 2022 9:09 AM  
**To:** [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com); Sparks, Trella A. <[Trella.Sparks@ardot.gov](mailto:Trella.Sparks@ardot.gov)>; Blakley, Sharon <[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)>  
**Subject:** HEARING LTR: Pelfrey v. ArDOT, Claim No. 220574

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Mr. Botteicher and Ms. Sparks, please see attached hearing letter and Zoom invitation.

Thanks,  
Kathryn Irby

**Kathryn Irby**  
**Arkansas State Claims Commission**  
101 East Capitol Avenue, Suite 410  
Little Rock, Arkansas 72201  
(501) 682-2822

**From:** [Sparks, Trella A.](#)  
**To:** [Dylan Botteicher](#); [Kathryn Irby](#); [Blakley, Sharon](#)  
**Subject:** Re: HEARING TIME CHANGED: Pelfrey v. ArDOT, Claim No. 220574  
**Date:** Monday, May 9, 2022 2:01:37 PM

---

I'll make it work, thank you!  
 Trella Sparks

Sent via the Samsung Galaxy S20 FE 5G, an AT&T 5G smartphone  
 Get [Outlook for Android](#)

---

**From:** Dylan Botteicher <djbotteicher@csmfirm.com>  
**Sent:** Monday, May 9, 2022 1:58:48 PM  
**To:** Kathryn Irby <Kathryn.Irby@arkansas.gov>; Sparks, Trella A. <Trella.Sparks@ardot.gov>; Blakley, Sharon <Sharon.Blakley@ardot.gov>  
**Subject:** RE: HEARING TIME CHANGED: Pelfrey v. ArDOT, Claim No. 220574

**CAUTION:** This email originated from outside of ARDOT. Do not click links or open attachments unless you recognize the sender and know the content is safe.

All,

I can do it at 8 a.m. if that works for Ms. Sparks.

Thanks,

Dylan Botteicher  
 COX, STERLING, VANDIVER & BOTTEICHER, PLLC  
 8201 Cantrell Road, Suite 230  
 Little Rock, Arkansas 72227  
 (501) 954-8073 Office  
 (501) 954-7856 Fax  
[djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com) Email  
[www.csmfirm.com](http://www.csmfirm.com) Website

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---

**From:** Kathryn Irby <Kathryn.Irby@arkansas.gov>  
**Sent:** Monday, May 9, 2022 12:49 PM  
**To:** Dylan Botteicher <djbotteicher@csmfirm.com>; Sparks, Trella A. <Trella.Sparks@ardot.gov>; Blakley, Sharon <Sharon.Blakley@ardot.gov>  
**Subject:** HEARING TIME CHANGED: Pelfrey v. ArDOT, Claim No. 220574

Mr. Botteicher and Ms. Sparks, the Claims Commission needs to change the hearing date on Thursday from 9am to 8am. If that will be an issue, please let me know. Otherwise, the same Zoom invitation will work. I'm also setting it out below.

Thanks,  
Kathryn Irby

The Claims Commission is inviting you to a scheduled Zoom meeting.

Topic: Claims Commission -- hearings  
Time: May 12, 2022 08:00 AM Central Time (US and Canada)

Join Zoom Meeting

<https://us06web.zoom.us/j/81603889456?pwd=VlRXbC8wejNlQzJFdEZETHVaNW9xZz09>

Meeting ID: 816 0388 9456

Passcode: 9QHQxx

One tap mobile

+19294362866,,81603889456#,,,,\*514525# US (New York)

+13017158592,,81603889456#,,,,\*514525# US (Washington DC)

Dial by your location

+1 929 436 2866 US (New York)

+1 301 715 8592 US (Washington DC)

+1 312 626 6799 US (Chicago)

+1 669 900 6833 US (San Jose)

+1 253 215 8782 US (Tacoma)

+1 346 248 7799 US (Houston)

Meeting ID: 816 0388 9456

Passcode: 514525

Find your local number: <https://us06web.zoom.us/j/81603889456?pwd=VlRXbC8wejNlQzJFdEZETHVaNW9xZz09>

---

**From:** Kathryn Irby

**Sent:** Friday, April 15, 2022 9:09 AM

**To:** [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com); Sparks, Trella A. <[Trella.Sparks@ardot.gov](mailto:Trella.Sparks@ardot.gov)>; Blakley, Sharon <[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)>

**Subject:** HEARING LTR: Pelfrey v. ArDOT, Claim No. 220574

Mr. Botteicher and Ms. Sparks, please see attached hearing letter and Zoom invitation.

Thanks,  
Kathryn Irby



**Kathryn Irby**  
**Arkansas State Claims Commission**  
101 East Capitol Avenue, Suite 410  
Little Rock, Arkansas 72201  
(501) 682-2822

**BEFORE THE ARKANSAS STATE CLAIMS COMMISSION****KENENA PELFREY****CLAIMANT****V.****CLAIM NO. 220574****ARKANSAS DEPARTMENT OF  
TRANSPORTATION****RESPONDENT****ORDER**

Now before the Arkansas State Claims Commission (the “Claims Commission”) is a motion filed by the Arkansas Department of Transportation (the “Respondent”) to dismiss the claim filed by Kenena Pelfrey (the “Claimant”). At the hearing held May 12, 2021, Claimant was represented by Dylan Botteicher. Trella A. Sparks appeared on behalf of Respondent.

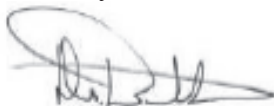
At the hearing, Claimant disagreed with the motion filed by Respondent but agreed to amend the complaint to provide more facts within two weeks of receiving this Order. In response to Respondent’s concern regarding Claimant’s exhaustion of remedies, the Claims Commission recommended that Claimant include information about this issue in the amended complaint. The Claims Commission noted that Respondent can raise that issue in response to the amended complaint, if applicable.

As such, the Claims Commission will deny Respondent’s motion as moot and will give Claimant two weeks from the date of this Order to amend the complaint.

IT IS SO ORDERED.



ARKANSAS STATE CLAIMS COMMISSION  
Courtney Baird



ARKANSAS STATE CLAIMS COMMISSION  
Dexter Booth



ARKANSAS STATE CLAIMS COMMISSION  
Paul Morris, Chair

DATE: May 25, 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).

**From:** [Kathryn Irby](#)  
**To:** [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com); [Sparks, Trella A.](#); [Blakley, Sharon](#)  
**Subject:** ORDER: Pelfrey v. ArDOT, Claim No. 220574  
**Date:** Wednesday, May 25, 2022 10:27:00 AM  
**Attachments:** [Pelfrey -- 220574 -- hearing -- order.pdf](#)

---

Mr. Botteicher and Ms. Sparks, please see attached order entered by the Claims Commission today.

Thanks,  
Kathryn Irby

**Kathryn Irby**  
**Arkansas State Claims Commission**  
101 East Capitol Avenue, Suite 410  
Little Rock, Arkansas 72201  
(501) 682-2822

**BEFORE THE ARKANSAS STATE CLAIMS COMMISSION****KENENA PELFREY****CLAIMANT****V.****CLAIM NO. 220574****ARKANSAS DEPARTMENT OF  
TRANSPORTATION****RESPONDENT****ORDER**

Now before the Arkansas State Claims Commission (the “Claims Commission”) is a motion filed by the Arkansas Department of Transportation (the “Respondent”) to dismiss the claim filed by Kenena Pelfrey (the “Claimant”). At the hearing held May 12, 2021, Claimant was represented by Dylan Botteicher. Trella A. Sparks appeared on behalf of Respondent.

At the hearing, Claimant disagreed with the motion filed by Respondent but agreed to amend the complaint to provide more facts within two weeks of receiving this Order. In response to Respondent’s concern regarding Claimant’s exhaustion of remedies, the Claims Commission recommended that Claimant include information about this issue in the amended complaint. The Claims Commission noted that Respondent can raise that issue in response to the amended complaint, if applicable.

As such, the Claims Commission will deny Respondent’s motion as moot and will give Claimant two weeks from the date of this Order to amend the complaint.

IT IS SO ORDERED.




---

ARKANSAS STATE CLAIMS COMMISSION  
Courtney Baird




---

ARKANSAS STATE CLAIMS COMMISSION  
Dexter Booth




---

ARKANSAS STATE CLAIMS COMMISSION  
Paul Morris, Chair

DATE: May 25, 2022

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

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- (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).

**From:** [Dylan Botteicher](#)  
**To:** [Kathryn Irby](#); [Sparks, Trella A.](#); [Blakley, Sharon](#)  
**Subject:** Pelfrey v. ArDOT, Claim No. 220574-Amended Claim  
**Date:** Wednesday, June 8, 2022 1:42:39 PM  
**Attachments:** [Amended Pelfrey Claim 6.8.2022.pdf](#)  
[Coverage Denial Letter.pdf](#)  
[IMG\\_2799.heic](#)

---

All,

Please see attached Ms. Pelfrey's amended claim.

Thank you,

Dylan Botteicher  
 COX, STERLING, VANDIVER & BOTTEICHER, PLLC  
 8201 Cantrell Road, Suite 230  
 Little Rock, Arkansas 72227  
 (501) 954-8073 Office  
 (501) 954-7856 Fax  
[djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com) Email  
[www.csmfirm.com](http://www.csmfirm.com) Website

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My name is Kenena Pelfrey. In 2015, I lived at [REDACTED] with my husband, Doug Pelfrey, and my son [REDACTED]. I bring these claims with my husband. At some point, Highway 295 by my property began to slide, and so the Highway Department hired L&M Construction Company ("L&M") to repair the highway. During this process, L&M put all the debris and trash from the repair project above our property, which resulted in the side of the mountain above our property beginning to slide. Originally, the dirt and debris were not supposed to be piled up above our property in order to avoid a slide, but the Highway Department and contractor moved away from that plan and instead put the dirt and debris in a location that was big enough to land a helicopter. The Highway Department knew, or should have known, that this action put our property at risk. Furthermore, the Highway Department and L&M put drains from their project in a location that forced all of the water on our property, which worsened the slide. The Highway Department knew, or should have known, that this action would harm our property.

We became aware that our property was being destroyed by the slide on December 28, 2015. At that time, our home was destroyed when the debris came crashing into it. From 2015 to early 2016, we lost four acres of our land to the slide's destruction. We thought that was the extent of the damage. Our 3,600 square foot house was destroyed because of the slide. It was valued at \$350,000.00 at the time.

We went to a different section of our property away from the landslide in order to build a new house in 2018. We moved five acres away in order to avoid the landslide. In 2020, we realized that the slide was continuing and that fifteen to eighteen more acres had been destroyed. The utility poles began to move and our new home was knocked off of its foundation. It was worth approximately \$225,000.00. The slide is continuing to this day with fifteen to eighteen more acres having been destroyed. I have attached a photo to this claim to show the destruction of structures on the property.

In 2020, the slide destroyed the roads leading to two of the lumber mills that we had on the property. We used those mills to buy logs from loggers and saw into lumber to sell to lumberyards, and we lost that business when the slide continued. To this date, we have lost \$120,000 due to the damage to the roads that inhibited access to the mills.

None of this damage would have occurred if the Highway Department and L&M did not place the debris and dirt above our property in an unreasonable manner. Then, they failed to take steps to stop the slide when they were notified of the problems they had caused. We waited over three years to build on a separate part of our property to avoid the slide, only to have that property also be destroyed in 2020. The slide continues to destroy acreage to this day. I am seeking damages for the value of my property that was destroyed by the Highway Department's actions, including the loss of value of the mills.

I do not currently have repair bills or estimates for the vast amount of damage that occurred because the damage has continued and is difficult to quantify. I am continuing to try to acquire repair bills and estimates for all the different categories of damages. I reincorporate my sworn claim previously filed and my response to the motion to dismiss, including the attached coverage denial letter that evidences that I exhausted my remedies against my insurer.

/s/ Kenena Pelfrey

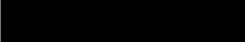


**Farmers Mutual** *since 1902*  
**INSURANCE COMPANY**

P.O. Box 129  
585 S. GENTRY BLVD.  
GENTRY, AR 72734  
(479) 736-2400 (PHONE)  
(479) 736-8822 (FAX)  
FMIC@CENTURYTEL.NET

12/20/2021

Name of Insured: Douglas and Kenena Pelfrey  
Address of Property: 

Insurance Policy #: 

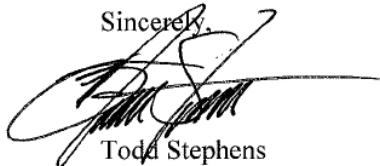
Date of Loss: 12/27/2015

Cause of Loss: Landslide

To Whom It May Concern:

Please accept this letter as confirmation that coverage was denied and no insurance proceeds were paid by Farmers Mutual Insurance Company relating to the above described loss.

Sincerely,



Todd Stephens  
General Manager  
Farmers Mutual Insurance Company—Gentry, AR



**From:** [Blakley, Sharon](#)  
**To:** [ASCC Pleadings](#)  
**Cc:** [Sparks, Trella A.](#); [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com)  
**Subject:** Pelfrey v ARDOT Claim 220574  
**Date:** Monday, June 27, 2022 3:19:27 PM  
**Attachments:** [image001.png](#)  
[Pelfrey.220547 \(ANS-MTD\).2022.06.27.pdf](#)

---

Please acknowledge receipt of the attached Answer to Amended Claim and Amended Motion to Dismiss for the referenced claim.

Sharon D. Blakley  
ARDOT - Legal Office Manager  
Tax Intercept Unit Administrator  
(501) 569-2022 fax (501)569-2164  
[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)

ArDOT Logo (email)



## IN THE ARKANSAS STATE CLAIMS COMMISSION

DOUGLAS PELFREY AND  
KENENA PELFREY

CLAIMANTS

VS.

CLAIM NO. 220574

ARKANSAS DEPARTMENT OF TRANSPORTATION

RESPONDENT

**ANSWER TO AMENDED CLAIM AND  
AMENDED MOTION TO DISMISS**

COMES NOW the Respondent, Arkansas Department of Transportation, by and through undersigned counsel, and for its Answer to Amended Claim and Amended Motion to Dismiss states the following:

1. Respondent denies each and every allegation of the Complaint not specifically admitted herein.

**RES JUDICATA**

1. Respondent affirmatively pleads that this claim appears to be related to a lawsuit filed by the Doug Pelfrey and Kenena Pelfrey against L & N Construction, Inc. and John Does 1-10, in the Circuit Court of Madison County, Arkansas, on or about September 11, 2017, and the following is a timeline of the case:

09-11-2017	Civil Lawsuit Filed
01-29-2021	Motion for Summary Judgment Filed
05-10-2021	Motion for Summary Judgment Denied
08-03-2021	Order of Dismissal with Prejudice Filed, based on a settlement between the

parties

2. The matter of the Doug Pelfrey and Kenena Pelfrey against L & N Construction, Inc. and John Does 1-10, was settled by the parties and dismissed with prejudice by the court on August 3, 2021. **See Ex. A attached.**
3. The claim for damages against ARDOT is barred by res judicata. Res judicata or claim preclusion prevents relitigation of a subsequent suit when (1) the first suit resulted in a final

judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; and (5) both suits involve the same parties or their privies. In addition, when a case is based on the same events as the subject matter of a previous lawsuit, res judicata will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies. *Id.* The key question regarding the application of res judicata is whether the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question. *White v. Gregg Agric. Enters.*, 72 Ark.App. 309, 37 S.W.3d 649 (2001). The Arkansas Supreme Court has held that repetitive litigation of the same claims violates principles of public policy. In *McCarroll, Commissioner of Revenues v. Farrar*, 199 Ark. 320, 134 S.W.2d 561 (1939).

4. If Doug and Kenena Pelfrey made a full and final settlement of all issues with L& N Construction, they have been made whole. They cannot now make a claim against ARDOT for the same damages for which they already received full and final settlement from a third party.
5. Claimant has failed to state a claim upon which relief can be granted, and this Claim should be dismissed pursuant to Ark. R. Civ. Pro. 12(b)(6).

#### **EXHAUSTION OF REMEDIES**

6. Claimant states that their homeowner's insurance would not cover a landslide.
7. The commission shall hear no claim until the claimant has exhausted all remedies against insurers, including the claimant's insurer. Ark. Code Ann. §19-10-302
8. Furthermore, Every claim filed with the Commission shall be accompanied by a sworn affidavit on a form to be provided by the commission, signed by the claimant and witnessed by the claimant's insurer and legal counsel, if any, that the claimant has exhausted all remedies

against insurers, including claimant's insurer. The affidavit shall further state the total amount of insurance benefits paid to the claimant. A mere statement from the insurance company that the property was not covered for landslides does not mean insurance has been exhausted.

9. Claimant has failed to state a claim against the Respondent for which relief can be granted. This matter should be denied and dismissed pursuant to Arkansas Rules of Civil Procedure, Rule 12(b)(6).

**WHEREFORE**, the Respondents pray for an Order of the Claims Commission dismissing the Claimant's Claim pursuant to Ark. R. Civ. Pro. 12(b)(6) based on res judicata; and awarding it its fees and costs; and for all other proper relief to which it may be entitled.

**RESPECTFULLY SUBMITTED,  
ARKANSAS DEPARTMENT OF TRANSPORTATION**

Trella A. Sparks

Trella A. Sparks, Bar #2004-105  
Deputy Chief Counsel  
P.O. Box 2261  
Little Rock, AR 72203-2261  
501-569-2157  
[trella.sparks@ardot.gov](mailto:trella.sparks@ardot.gov)

**CERTIFICATE OF SERVICE**

I, Trella A. Sparks, do hereby certify that I have on this 27TH day of June, 2022, duly served a copy of the foregoing via email and regular U.S. Mail with sufficient postage attached upon the following:

Dylan Botteicher  
Cox, Sterling, McClure & Vandiver, PLLC  
8712 Counts Massie Road  
North Little Rock, AR 72113  
Dylan Botteicher [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com)

Trella A. Sparks

Trella A. Sparks





C202100989

FILED FOR RECORD

CASE# CV-2021-508-1 ~ 08-03-2021 02:49:05 PM

JUDGE: DOUG MARTIN

JUDY FOSTER

MADISON CO, AR CIRCUIT CLERK AND RECORDER

IN THE CIRCUIT COURT OF MADISON COUNTY, ARKANSAS  
CIVIL DIVISION

DOUG PELFREY and KENENA PELFREY

PLAINTIFFS

VS.

NO. 44CV-17-136-1

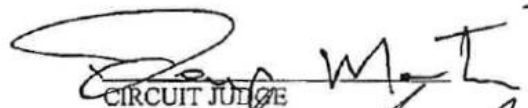
L & N CONSTRUCTION, INC. and  
JOHN DOES 1-10

DEFENDANTS

ORDER OF DISMISSAL

On joint motion of the parties, and it appearing to the Court that this matter has been settled, this case is hereby dismissed with prejudice. Each party is to bear their own attorney's fees and costs.

IT IS SO ORDERED.

  
CIRCUIT JUDGE  
8/3/21  
DATE

*Prepared By:*

Michael McCarty Harrison  
Friday Eldredge & Clark LLP  
400 W. Capitol Ave. Ste. 2000  
Little Rock, AR 72201  
*Attorney for Defendants*

*Approved by:*


  
TIMOTHY MYERS, *Attorney for Plaintiffs*

Exhibit "A"

**From:** [Graham Whitsett](#)  
**To:** [Dylan Botteicher](#); [Kathryn Irby](#); [Trella.Sparks@ardot.go](mailto:Trella.Sparks@ardot.go); [Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)  
**Subject:** Pelfrey v. ArDOT, Claim No. 220574- Response to Motion to Dismiss  
**Date:** Tuesday, July 5, 2022 4:10:48 PM  
**Attachments:** [Response to MTD Amended Claim \(1\).pdf](#)  
[EX A.pdf](#)

---

You don't often get email from [gwhitsett@csmfir.com](mailto:gwhitsett@csmfir.com). [Learn why this is important](#)

All,

Please see the attached Response to Respondent's Motion to Dismiss the Amended Claim and Exhibit A.

Thank you,

***Graham P. Whitsett***

Legal Assistant

Cox, Sterling, Vandiver & Botteicher, PLLC

8201 Cantrell Rd. Ste #230

Little Rock, AR 72207

Phone: [\(501\) 954-8073](tel:(501)954-8073)

Fax: [\(501\) 954-7856](tel:(501)954-7856)



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

**DOUGLAS PELFREY and  
KENENA PELFREY**

**CLAIMANTS**

**VS.**

**CLAIM NO. 220574**

**ARKANSAS DEPARTMENT  
OF TRANSPORTATION**

**RESPONDENT**

**CLAIMANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS  
THE AMENDED CLAIM**

Comes now the Claimants, Douglas Pelfrey and Kenena Pelfrey (the "Pelfreys"), by and through counsel, Cox, Sterling, McClure & Vandiver, PLLC, and for their Response to Respondent's Motion to dismiss, states as follows:

1. Claimants signed the form that stated that insurance did not cover this claim, and the signature was notarized. Claimants have further attached a letter from her insurance company stating that she did not have coverage for the landslide incident. *See* letter regarding coverage, attached as Exhibit "A".

2. Arkansas courts construe pleadings liberally and deem them sufficient if they advise the other party of its obligations and alleges a breach of them. *Bethel Baptist Church v. Church Mut. Ins. Co.*, 54 Ark. App. 262, 265 (1996). All reasonable inferences must be resolved in favor of the complaint when testing the sufficiency of the pleading on a motion to dismiss. *Perry v. Baptist Health*, 358 Ark. 238, 241 (2004). In considering a motion to dismiss under Ark. R. Civ. P. 12(b)(6), Arkansas courts must treat the facts alleged in the complaint as true and viewed in the light most favorable to the party seeking relief. *Deitsch v. Tillery*, 309 Ark. 401, 405 (1992). Under this standard, the Claimants' pleading is more than sufficiently plead.

3. The motion to dismiss the amended claim contained exhibits that were not

attached to the amended claim, which is impermissible under Rule 12.

4. The attached order to dismiss does not specifically dismiss claims for continuing violations created by the landslide.

WHEREFORE, Claimants respectfully request that the motion be denied for the above reasons; that they be awarded costs and attorneys' fees, and all other relief deemed appropriate.

Respectfully Submitted,

COX, STERLING, VANDIVER &  
BOTTEICHER, PLLC  
8201 Cantrell Road, Suite 230  
Little Rock, Arkansas 72227  
(501) 954-8073

By: /s/ Dylan J. Botteicher  
Dylan J. Botteicher (ABN# 2017170)

*ATTORNEY FOR CLAIMANTS*

### **CERTIFICATE OF SERVICE**

I, Dylan J. Botteicher, do hereby certify that a true and correct copy of the foregoing was served on the following person(s) through the U.S. mail service on this 5<sup>th</sup> day of July, 2022:

Trella A. Sparks  
ArDOT, Legal Division  
PO Box 2261  
Little Rock, AR 72203-2261

By: /s/ Dylan J. Botteicher  
Dylan J. Botteicher (ABN# 2017170)

**Farmers Mutual** *since 1902*  
**INSURANCE COMPANY**

P.O. Box 129  
585 S. GENTRY BLVD.  
GENTRY, AR 72734  
(479) 736-2400 (PHONE)  
(479) 736-8822 (FAX)  
FMIC@CENTURYTEL.NET

12/20/2021

Name of Insured: Douglas and Kenena Pelfrey  
Address of Property:



Insurance Policy #:

Date of Loss: 12/27/2015

Cause of Loss: Landslide

To Whom It May Concern:

Please accept this letter as confirmation that coverage was denied and no insurance proceeds were paid by Farmers Mutual Insurance Company relating to the above described loss.

Sincerely,

A handwritten signature in black ink, appearing to read "Todd Stephens", with a long horizontal flourish extending to the right.

Todd Stephens  
General Manager  
Farmers Mutual Insurance Company—Gentry, AR

EXHIBIT A

**From:** [Kathryn Irby](#)  
**To:** [Graham Whitsett](#); [Dylan Botteicher](#); [Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)  
**Cc:** [Sparks, Trella A.](#)  
**Subject:** RE: Pelfrey v. ArDOT, Claim No. 220574- Response to Motion to Dismiss  
**Date:** Wednesday, July 6, 2022 11:25:00 AM

---

Oh goodness – I noted the email issue but didn’t fix it in my last email. Now I’m resending in a way that should actually reach Ms. Sparks. Sorry for the multiple emails.

Kathryn

---

**From:** Kathryn Irby  
**Sent:** Wednesday, July 6, 2022 11:17 AM  
**To:** Graham Whitsett <[gpwhitsett@csmfir.com](mailto:gpwhitsett@csmfir.com)>; Dylan Botteicher <[djbotteicher@csmfir.com](mailto:djbotteicher@csmfir.com)>; Trella.Sparks@ardot.go; Sharon.Blakley@ardot.gov  
**Subject:** RE: Pelfrey v. ArDOT, Claim No. 220574- Response to Motion to Dismiss

Resending this because the “v” at the end of Ms. Sparks’ email was not included in the original email, so my “reply all” email bounced back to me.

Kathryn

---

**From:** Kathryn Irby  
**Sent:** Wednesday, July 6, 2022 11:15 AM  
**To:** Graham Whitsett <[gpwhitsett@csmfir.com](mailto:gpwhitsett@csmfir.com)>; Dylan Botteicher <[djbotteicher@csmfir.com](mailto:djbotteicher@csmfir.com)>; [Trella.Sparks@ardot.go](mailto:Trella.Sparks@ardot.go); [Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)  
**Subject:** RE: Pelfrey v. ArDOT, Claim No. 220574- Response to Motion to Dismiss

Received on July 5, thanks.

For any future filings, please send to [ascpleadings@arkansas.gov](mailto:ascpleadings@arkansas.gov) for electronic filing. I’m always happy to be copied on a filing, but you will usually get a quicker confirmation of receipt if it’s sent to the ascpleadings email.

Thanks,  
Kathryn Irby

---

**From:** Graham Whitsett <[gpwhitsett@csmfir.com](mailto:gpwhitsett@csmfir.com)>  
**Sent:** Tuesday, July 5, 2022 4:11 PM  
**To:** Dylan Botteicher <[djbotteicher@csmfir.com](mailto:djbotteicher@csmfir.com)>; Kathryn Irby <[Kathryn.Irby@arkansas.gov](mailto:Kathryn.Irby@arkansas.gov)>; [Trella.Sparks@ardot.go](mailto:Trella.Sparks@ardot.go); [Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)  
**Subject:** Pelfrey v. ArDOT, Claim No. 220574- Response to Motion to Dismiss

You don't often get email from [gpwhitsett@csmfir.com](mailto:gpwhitsett@csmfir.com). [Learn why this is important](#)

All,

Please see the attached Response to Respondent's Motion to Dismiss the Amended Claim and Exhibit A.

Thank you,

***Graham P. Whitsett***

Legal Assistant

Cox, Sterling, Vandiver & Botteicher, PLLC

8201 Cantrell Rd. Ste #230

Little Rock, AR 72207

Phone: [\(501\) 954-8073](tel:(501)954-8073)

Fax: [\(501\) 954-7856](tel:(501)954-7856)

**From:** [Blakley, Sharon](#)  
**To:** [ASCC Pleadings](#)  
**Cc:** [Sparks, Trella A.](#); [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com); [gpwhitsett@csmfirm.com](mailto:gpwhitsett@csmfirm.com)  
**Subject:** Pelfrey v ARDOT Claim 220574 - Reply to Claimant's Response to MTD Amended Claim  
**Date:** Tuesday, July 12, 2022 9:27:53 AM  
**Attachments:** [image001.png](#)  
[Pelfrey.220574.cvr ltr Reply to Response.2022.07.12.pdf](#)  
[Pelfrey.220574 \(Reply to CL Response to MTD\)2022.07.12.pdf](#)

---

Please acknowledge receipt of the attached Respondent's Reply to Claimant's Response to Motion to Dismiss the Amended Claim as referenced.

Sharon D. Blakley  
ARDOT - Legal Office Manager  
Tax Intercept Unit Administrator  
(501) 569-2022 fax (501)569-2164  
[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)

ArDOT Logo (email)





# ARKANSAS DEPARTMENT OF TRANSPORTATION

[ARDOT.gov](http://ARDOT.gov) | [IDriveArkansas.com](http://IDriveArkansas.com) | Lorie H. Tudor, P.E., Director

LEGAL DIVISION | Trella A. Sparks, Deputy Chief Counsel | [Trella.Sparks@ardot.gov](mailto:Trella.Sparks@ardot.gov)  
 10324 Interstate 30 | P.O. Box 2261 | Little Rock, AR 72203-2261 | Phone: 501.569.2157 | Fax: 501.569.2164

July 12, 2022

Ms. Kathryn Irby, Director  
 Arkansas State Claims Commission  
 101 East Capitol Avenue, Suite 410  
 Little Rock, AR 72201-3823

(via email)

Re: *Kenena Pelfrey and Douglas Pelfrey vs. Arkansas Department of Transportation*  
*Claim No.: 220574*

Dear Ms. Irby:

Please find attached Respondent's Reply to Claimant's Response to Motion to Dismiss the Amended Claim.

Please confirm receipt at your earliest convenience.

Very truly yours,

*Trella A. Sparks*

Trella A. Sparks  
 Deputy Chief Counsel

TAS\sdb  
 Enclosures

cc: Dylan Botteicher  
 Cox, Sterling, McClure & Vandiver, PLLC  
 8201 Cantrell Road, Suite 230  
 Little Rock, AR 72227

## IN THE ARKANSAS STATE CLAIMS COMMISSION

DOUGLAS PELFREY AND  
KENENA PELFREY

CLAIMANTS

VS.

CLAIM NO. 220574

ARKANSAS DEPARTMENT OF TRANSPORTATION

RESPONDENTS

**RESPONDENT'S REPLY TO CLAIMANT'S RESPONSE TO  
MOTION TO DISMISS THE AMENDED CLAIM**

COMES NOW the Respondent, Arkansas Department of Transportation, by and through undersigned counsel, and for its Reply to Claimant's Response to Respondent's Motion to Dismiss the Amended Claim and states the following:

1. By settling their claim against L&N for less than policy limits, Claimants did not exhaust their remedies. For Claimant to recover additional damages through the Claims Commission, Claimant would have had to obtain policy limits on L&N's policy and to establish that the policy limits did not make them whole. Because Claimants settled for less than policy limits, the Claims Commission has held and should now hold that Claimants cannot seek additional funds through the Claims Commission. *See e.g. Larry Virgil v. Arkansas Department of Transportation, Claim No. 16-0515CC.*

2. Further, the statute uses the word "exhaust," to which the Claims Commission should give full import. Exhaust means to pursue as fully as possible. Claimant would have to sue its own insurance company, Farmers Mutual Insurance Company, in order to "exhaust" its remedies. Merely stating that the insurance company has denied coverage and providing a letter from the company does not exhaust remedies as contemplated by the A.C.A. §19-10-302.

3. The Arkansas Statute must be interpreted using the ordinary meaning of the word "exhaust." The law dictionary.org defines exhaustion of remedies as: the principle that states that you should do everything possible in order to correct the situation before seeking help from a court. Claimants have not done everything possible to correct the situation. They have not appealed the denial of their claim. They have not filed a lawsuit against the proper insurance company.



4. Claimants have not shown that they have *not* been made whole by the previous settlement of the very damages at issue in this claim. If they did not include continuing violations in the previous lawsuit and settlement, those claims are now barred.

**WHEREFORE**, the Respondents pray for an Order of the Claims Commission dismissing the Claimant's Claim pursuant to Ark. R. Civ. Pro. 12(b)(6) and (7), awarding it its fees and costs, and for all other proper relief to which it may be entitled.

**RESPECTFULLY SUBMITTED,  
ARKANSAS DEPARTMENT OF TRANSPORTATION**

*Trella A. Sparks*

Trella A. Sparks, Bar #2004-105  
Deputy Chief Counsel  
P.O. Box 2261  
Little Rock, AR 72203-2261  
501-569-2157  
[trella.sparks@ardot.gov](mailto:trella.sparks@ardot.gov)

**CERTIFICATE OF SERVICE**

I, Trella A. Sparks, do hereby certify that I have on this 12th day of July, 2022, duly served a copy of the foregoing via email and regular U.S. Mail with sufficient postage attached upon the following:

Dylan Botteicher  
Cox, Sterling, McClure & Vandiver, PLLC  
8201 Cantrell Road, Suite 230  
Little Rock, AR 72227

*Trella A. Sparks*

Trella A. Sparks

**COX, STERLING, VANDIVER & BOTTEICHER, PLLC**  
ATTORNEYS AT LAW

CADE L. COX  
[clcox@csmfirm.com](mailto:clcox@csmfirm.com)  
ATTORNEY

8201 CANTRELL ROAD, SUITE 230  
LITTLE ROCK, ARKANSAS 72227

DYLAN J. BOTTEICHER  
[djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com)  
ATTORNEY

BRIAN A. VANDIVER  
[bavandiver@csmfirm.com](mailto:bavandiver@csmfirm.com)  
ATTORNEY

TELEPHONE (501) 954-8073  
FACSIMILE (501) 954-7856  
WEB: [www.csmfirm.com](http://www.csmfirm.com)

GRAHAM P. WHITSETT  
[gwhitsett@csmfirm.com](mailto:gwhitsett@csmfirm.com)  
LEGAL ASSISTANT

Arkansas  
State Claims Commission

September 27, 2022

SEP 28 2022

**VIA US MAIL**

Ms. Kathryn Irby, Director  
Arkansas State Claims Commission  
101 East Capitol Avenue, Suite 410  
Little Rock, AR 72201-3823

RECEIVED

**RE: Kenena Pelfrey v. Arkansas Department of Transportation  
Claim No. 220574**

Ms. Irby,

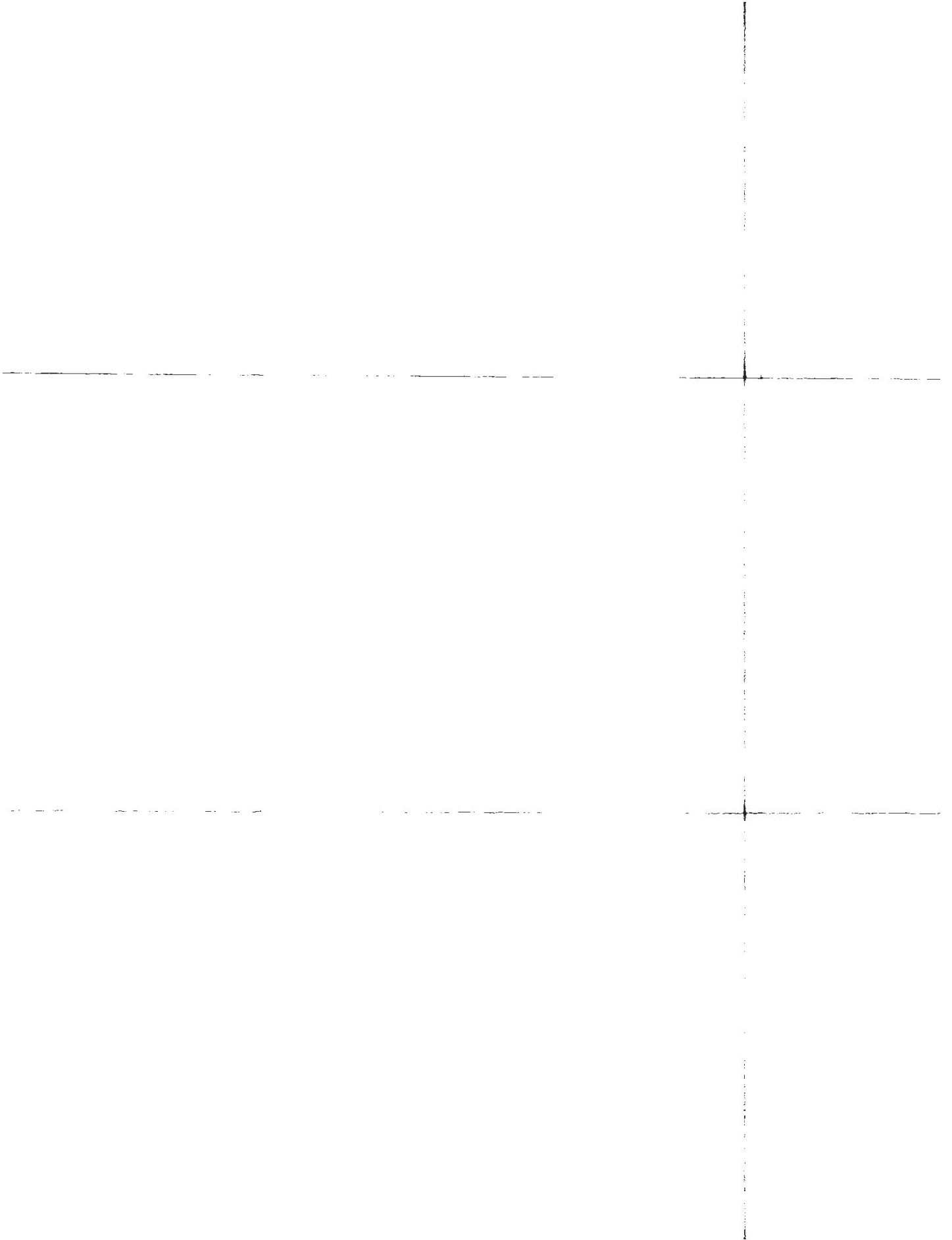
Our firm represents the Claimant in the above referenced matter. An amended complaint was filed and Respondent filed a motion to dismiss. Claimant responded to the motion to dismiss. Claimant respectfully requests a ruling on the pending Motion to Dismiss at the earliest convenience. Thank you for your attention and please reach out to me with any questions.

Sincerely,

COX, STERLING, VANDIVER  
& BOTTEICHER, PLLC

By: /s/ Dylan J. Botteicher  
DYLAN J. BOTTEICHER

cc: Trella A. Sparks  
ArDOT, Legal Division  
PO Box 2261  
Little Rock, AR 72203-2261



**From:** [Kathryn Irby](#)  
**To:** [Dylan Botteicher](#); [Sparks, Trella A.](#); [Blakley, Sharon](#)  
**Cc:** [Graham Whitsett](#)  
**Subject:** HEARING SCHEDULED: Pelfrey v. ArDOT, Claim No. 220574  
**Date:** Thursday, September 29, 2022 2:19:00 PM  
**Attachments:** [Pelfrey v. ArDOT -- 220574 -- hearing on pending amended MTD.pdf](#)  
[Affidavit re exhaustion of insurance remedies.pdf](#)

---

Resending one more time because when I sent it the second time, I put the wrong email for Mr. Botteicher. Goodness gracious, sorry y'all.

Kathryn Irby

---

**From:** Dylan Potts <[dpotts@gill-law.com](mailto:dpotts@gill-law.com)>  
**Sent:** Thursday, September 29, 2022 2:12 PM  
**To:** Kathryn Irby <[Kathryn.Irby@arkansas.gov](mailto:Kathryn.Irby@arkansas.gov)>  
**Subject:** RE: HEARING SCHEDULED: Pelfrey v. ArDOT, Claim No. 220574

Think you sent this to the wrong Dylan, just an fyi

Dylan H. Potts  
 Gill Ragon Owen, P.A.  
 Direct: (501) 801-3808

---

**From:** Kathryn Irby <[Kathryn.Irby@arkansas.gov](mailto:Kathryn.Irby@arkansas.gov)>  
**Sent:** Thursday, September 29, 2022 12:59 PM  
**To:** Dylan Potts <[dpotts@gill-law.com](mailto:dpotts@gill-law.com)>; Sparks, Trella A. <[Trella.Sparks@ardot.gov](mailto:Trella.Sparks@ardot.gov)>; Blakley, Sharon <[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)>  
**Cc:** Graham Whitsett <[gpwhitsett@csmfirm.com](mailto:gpwhitsett@csmfirm.com)>  
**Subject:** FW: HEARING SCHEDULED: Pelfrey v. ArDOT, Claim No. 220574

Resending this to provide a copy to Mr. Botteicher's legal assistant, per his out-of-office message.

Thanks,  
 Kathryn Irby

---

**From:** Kathryn Irby  
**Sent:** Thursday, September 29, 2022 12:57 PM  
**To:** Dylan Botteicher <[djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com)>; Sparks, Trella A. <[Trella.Sparks@ardot.gov](mailto:Trella.Sparks@ardot.gov)>  
**Cc:** Blakley, Sharon <[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)>  
**Subject:** HEARING SCHEDULED: Pelfrey v. ArDOT, Claim No. 220574

Mr. Botteicher and Ms. Sparks, please see attached hearing letter and Zoom invitation.

Thanks,  
 Kathryn Irby

**Kathryn Irby**  
**Arkansas State Claims Commission**  
101 East Capitol Avenue, Suite 410  
Little Rock, Arkansas 72201  
(501) 682-2822

## ARKANSAS STATE CLAIMS COMMISSION

(501) 682-1619  
FAX (501) 682-2823



KATHRYN IRBY  
DIRECTOR

101 EAST CAPITOL AVENUE  
SUITE 410  
LITTLE ROCK, ARKANSAS  
72201-3823

September 29, 2022

Mr. Dylan J. Botteicher  
Cox, Sterling, McClure & Vandiver, PLLC  
8712 Counts Massie Road  
North Little Rock, Arkansas 72113

(via email)

Ms. Trella A. Sparks  
Arkansas Department of Transportation  
Post Office Box 2261  
Little Rock, Arkansas 72203-2261

(via email)

RE: ***Kenena Pelfrey v. Arkansas Department of Transportation***  
Claim No. 220574

Dear Mr. Botteicher and Ms. Sparks,

The Claims Commission has scheduled a hearing on the pending motion to dismiss on **Friday, February 10, 2023**, beginning at 9:00 a.m. This hearing will be held via Zoom, and the Zoom invitation is enclosed.

As this is a motion hearing, no additional prehearing materials are requested.

Sincerely,

Kathryn Irby

ES: kmirby

The Claims Commission is inviting you to a scheduled Zoom meeting.

Topic: Claims Commission -- hearings

Time: Feb 10, 2023 09:00 AM Central Time (US and Canada)

Join Zoom Meeting

<https://us06web.zoom.us/j/87579091104?pwd=bkRDL2lFUnZUclhSUE8wS2ZLOGVpZz09>

Meeting ID: 875 7909 1104

Passcode: 6EPTmJ

One tap mobile

+13092053325,,87579091104#,,, \*124942# US

+13126266799,,87579091104#,,, \*124942# US (Chicago)

Dial by your location

+1 309 205 3325 US

+1 312 626 6799 US (Chicago)

+1 646 931 3860 US

+1 929 436 2866 US (New York)

+1 301 715 8592 US (Washington DC)

+1 719 359 4580 US

+1 253 215 8782 US (Tacoma)

+1 346 248 7799 US (Houston)

+1 386 347 5053 US

+1 564 217 2000 US

+1 669 444 9171 US

+1 669 900 6833 US (San Jose)

Meeting ID: 875 7909 1104

Passcode: 124942

Find your local number: <https://us06web.zoom.us/j/kd3oe4TIYF>

## AFFIDAVIT REGARDING EXHAUSTION OF INSURANCE REMEDIES

**Ark. Code Ann. § 19-10-302(b):** Every claim filed with the commission shall be accompanied by a sworn affidavit, on a form to be provided by the commission, signed by the claimant and witnessed by the claimant's insurer and legal counsel, if any, that the claimant has exhausted all remedies against insurers, including the claimant's insurer. The affidavit shall further state the total amount of insurance benefits paid to the claimant.

*\*\*\*Please attach additional pages, if needed, to provide the information requested.\*\*\**

State of \_\_\_\_\_

County of \_\_\_\_\_

I, \_\_\_\_\_, swear under oath that I have **taken the following actions to exhaust my remedies against insurers**, including my insurer:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

I hereby state that I have **received the following payments from insurers**:

\_\_\_\_\_

\_\_\_\_\_

I hereby state under oath that the foregoing statements are true and correct to the best of my knowledge.

\_\_\_\_\_  
Signature of Affiant

Witnessed by \_\_\_\_\_, \_\_\_\_\_ with \_\_\_\_\_.  
(print name) (title) (Claimant's insurer)

\_\_\_\_\_  
(signature)

*If you did not have insurance coverage for the applicable person, vehicle, or property, write N/A on these blanks.*

Witnessed by \_\_\_\_\_, legal counsel for Claimant, if any.  
(print name)

\_\_\_\_\_  
(signature)

*If you are not represented by an attorney, write N/A on these blanks.*

Subscribed and sworn to me on \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Signature of Notary Public

My commission expires: \_\_\_\_\_.



**From:** [Graham Whitsett](#)  
**To:** [Kathryn Irby](#); [Sparks, Trella A.](#)  
**Subject:** Kenena Pelfrey v. Arkansas Department of Transportation Claim No. 220574  
**Date:** Friday, November 4, 2022 11:51:15 AM  
**Attachments:** [11.22 Letter RE Insurance .pdf](#)  
[Affidavit RE Insurance.pdf](#)

---

Ms. Irby and Ms. Sparks,

Please see the attached Affidavit Regarding Exhaustion of Insurance Remedies in the above referenced matter and the attached Letter RE: Same. Thank you for your attention and please reach out with any questions.

***Graham P. Whitsett***

Legal Assistant

Cox, Sterling, Vandiver & Botteicher, PLLC

8201 Cantrell Rd. Ste #230

Little Rock, AR 72227

Phone: [\(501\) 954-8073](tel:(501)954-8073)

Fax: [\(501\) 954-7856](tel:(501)954-7856)

**COX, STERLING, VANDIVER & BOTTEICHER, PLLC**  
ATTORNEYS AT LAW

CADE L. COX<sup>1</sup>  
[clcox@csmfirm.com](mailto:clcox@csmfirm.com)

BRIAN A. VANDIVER  
[bavandiver@csmfirm.com](mailto:bavandiver@csmfirm.com)

8201 CANTRELL RD. STE 230  
LITTLE ROCK, ARKANSAS 72227

TELEPHONE (501) 954-8073  
FACSIMILE (501) 954-7856  
WEB: [www.csmfirm.com](http://www.csmfirm.com)

DYLAN J. BOTTEICHER  
[djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com)

GRAHAM WHITSETT  
[GPWHITSETT@CSMFIRM.COM](mailto:GPWHITSETT@CSMFIRM.COM)

<sup>1</sup>ALSO ADMITTED IN TN

November 4, 2022

**VIA EMAIL**

Ms. Kathryn Irby, Director  
Arkansas State Claims Commission  
[Kathryn.Irby@arkansas.gov](mailto:Kathryn.Irby@arkansas.gov)

Ms. Trella Sparks, Deputy Chief Counsel  
Arkansas Department of Transportation  
[Trella.sparks@ardot.gov](mailto:Trella.sparks@ardot.gov)

**RE: Kenena Pelfrey v. Arkansas Department of Transportation  
Claim No. 220574**

Dear Ms. Irby and Ms. Sparks,

Please see the attached Affidavit Regarding Exhaustion of Insurance Remedies on behalf of Mrs. Pelfrey.

Sincerely,

COX, STERLING, VANDIVER  
& BOTTEICHER, PLLC

By: /s/ Graham Whitsett  
GRAHAM WHITSETT

# AFFIDAVIT REGARDING EXHAUSTION OF INSURANCE REMEDIES

Ark. Code Ann. § 19-10-302(b): Every claim filed with the commission shall be accompanied by a sworn affidavit, on a form to be provided by the commission, signed by the claimant and witnessed by the claimant's insurer and legal counsel, if any, that the claimant has exhausted all remedies against insurers, including the claimant's insurer. The affidavit shall further state the total amount of insurance benefits paid to the claimant.

\*\*\*Please attach additional pages, if needed, to provide the information requested.\*\*\*

State of Arkansas

County of Madison

I, Kenora Pelfrey, swear under oath that I have taken the following actions to exhaust my remedies against insurers, including my insurer:

Farm Bureau Mutual Insurance Company of AR  
& Farmers Mutual Insurance Company

I hereby state that I have received the following payments from insurers:

N/A. I received NO <sup>160</sup> payments from insurers

I hereby state under oath that the foregoing statements are true and correct to the best of my knowledge.

Kenora Pelfrey  
 Signature of Affiant

Witnessed by Todd STEPHENS  
 (print name)

General Mgr with Farmers Mutual Ins. Co.  
 (title) (Claimant's insurer)

[Signature]  
 (signature)

If you did not have insurance coverage for the applicable person, vehicle, or property, write N/A on these blanks.

Witnessed by Rylan Botteicher, legal counsel for Claimant, if any.  
 (print name)

[Signature]  
 (signature)

If you are not represented by an attorney, write N/A on these blanks.



Subscribed and sworn to me on 31<sup>st</sup> day of October, 2022

Lela McChesney  
 Signature of Notary Public

My commission expires: 8/23/28

**From:** [Sparks, Trella A.](#)  
**To:** [Graham Whitsett](#); [Kathryn Irby](#)  
**Cc:** [Blakley, Sharon](#); [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com)  
**Subject:** RE: Kenena Pelfrey v. Arkansas Department of Transportation Claim No. 220574  
**Date:** Friday, November 4, 2022 12:05:51 PM

---

Kathryn,

This is unacceptable. It does not list actions taken. There needs to be a verb. Remedies have NOT been exhausted.

ArDOT will be filing a formal objection/motion to strike this affidavit and ANOTHER motion to dismiss the claim,

which perhaps can added to the hearing already on the docket for February, this being the SECOND HEARING already on the insufficiency of the pleadings in this baseless claim.

I am a bit shocked that this law firm allows its client to fill out forms herself while purporting to represent her!

Sincerely,  
 Trella Sparks

---

**From:** Graham Whitsett <gpwhitsett@csmfirm.com>  
**Sent:** Friday, November 4, 2022 11:51 AM  
**To:** Kathryn Irby <Kathryn.Irby@arkansas.gov>; Sparks, Trella A. <Trella.Sparks@ardot.gov>  
**Subject:** Kenena Pelfrey v. Arkansas Department of Transportation Claim No. 220574

**CAUTION:** This email originated from outside of ARDOT. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Ms. Irby and Ms. Sparks,

Please see the attached Affidavit Regarding Exhaustion of Insurance Remedies in the above referenced matter and the attached Letter RE: Same. Thank you for your attention and please reach out with any questions.

***Graham P. Whitsett***

Legal Assistant  
 Cox, Sterling, Vandiver & Botteicher, PLLC  
 8201 Cantrell Rd. Ste #230  
 Little Rock, AR 72227  
 Phone: [\(501\) 954-8073](tel:(501)954-8073)  
 Fax: [\(501\) 954-7856](tel:(501)954-7856)

**From:** [Blakley, Sharon](#)  
**To:** [ASCC Pleadings](#)  
**Cc:** [Sparks, Trella A.](#); [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com); [Graham Whitsett](#)  
**Subject:** Pelfrey v ARDOT Claim 220574 Respondent's Motion to Strike Affidavit and 2nd Amended Motion to Dismiss  
**Date:** Friday, November 4, 2022 2:27:36 PM  
**Attachments:** [image001.png](#)  
[Pelfrey.220547 \(Motion to Strike Affidavit\).2022.11.04.pdf](#)  
[Pelfrey.220547 \(2nd Amended Motion to Dismiss\).2022.11.04.pdf](#)  
[Pelfrey.220547.cvr ltr Motion to Strike and 2nd Amended Motion to Dismiss.2022.11.04.pdf](#)

---

Please acknowledge receipt of the attached Respondent's Motion to Strike Affidavit and 2nd Amended Motion to Dismiss.

Sharon D. Blakley  
ARDOT - Legal Office Manager  
Tax Intercept Unit Administrator  
(501) 569-2022 fax (501)569-2164  
[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)

ArDOT Logo (email)



## IN THE ARKANSAS STATE CLAIMS COMMISSION

DOUGLAS PELFREY AND  
KENENA PELFREY

CLAIMANTS

VS.

CLAIM NO. 220574

ARKANSAS DEPARTMENT OF TRANSPORTATION

RESPONDENT

MOTION TO STRIKE AFFIDAVIT

COMES NOW the Respondent, Arkansas Department of Transportation, by and through undersigned counsel, and for its Motion to Strike Affidavit states the following:

1. On November 4, 2022, Claimants filed an Affidavit regarding exhaustion of insurance remedies, however it should be stricken for failing to comply with the simplest requirements – to state what actions they have taken to exhaust remedies. Ark. Code Ann. §19-10-302.

3. Ark. Code Ann. §19-10-302 - Exhaustion of remedies against insurer provides that:

- (a) The Arkansas State Claims Commission shall not dismiss a claim with prejudice on grounds that the claimant has received or is due benefits under a policy of insurance. However, the commission shall hear no claim until the claimant has exhausted all remedies against insurers, including the claimant's insurer.
- (b) Every claim filed with the commission shall be accompanied by a sworn affidavit on a form to be provided by the commission, signed by the claimant and witnessed by the claimant's insurer and legal counsel, if any, that the claimant has exhausted all remedies against insurers, including claimant's insurer. The affidavit shall further state the total amount of insurance benefits paid to the claimant.

4. That the Commission should strike the Claimants' Affidavit and require that a new Affidavit of Exhaustion of Insurance when Claimants have fully exhausted their remedies against their insurer, Farm Bureau Mutual Insurance Company of AR and Farmers Mutual Insurance Company, including, but not limited to the filing of a civil lawsuit in the appropriate Circuit Court for wrongful denial of insurance.

**WHEREFORE**, Respondent respectfully requests that Claimants' Affidavit be stricken, and the Respondent prays for an Order of the Claims Commission dismissing the Claimants' Claim

pursuant to Ark. R. Civ. Pro. 12(b)(6); and awarding it its fees and costs; and for all other proper relief to which it may be entitled.

**RESPECTFULLY SUBMITTED,  
ARKANSAS DEPARTMENT OF TRANSPORTATION**

*Trella A. Sparks*

Trella A. Sparks, Bar #2004-105

Deputy Chief Counsel

P. O. Box 2261

Little Rock, AR 72203-2261

501-569-2157

[trella.sparks@ardot.gov](mailto:trella.sparks@ardot.gov)

**CERTIFICATE OF SERVICE**

I, Trella A. Sparks, do hereby certify that I have on this 4th day of November, 2022, duly served a copy of the foregoing via email and regular U.S. Mail with sufficient postage attached upon the following:

Dylan Botteicher  
Cox, Sterling, McClure & Vandiver, PLLC  
8712 Counts Massie Road  
North Little Rock, AR 72113  
Dylan Botteicher [djbotteicher@csmfir.com](mailto:djbotteicher@csmfir.com)

*Trella A. Sparks*

Trella A. Sparks

## IN THE ARKANSAS STATE CLAIMS COMMISSION

DOUGLAS PELFREY AND  
KENENA PELFREY

CLAIMANTS

VS.

CLAIM NO. 220574

ARKANSAS DEPARTMENT OF TRANSPORTATION

RESPONDENT

**SECOND AMENDED MOTION TO DISMISS**

**COMES NOW** the Respondent, Arkansas Department of Transportation, by and through undersigned counsel, and for its Second Amended Motion to Dismiss states the following:

1. The Claimants have failed to state a legally cognizable cause of action against the Respondent for which relief can be granted and have failed to state facts supporting an alleged cause of action. This matter should be denied and dismissed pursuant to Arkansas Rules of Civil Procedure, Rule 12(b)(6).

2. Claimant has the burden of going forward and have failed to do so at every step of the claims process, including an insufficient complaint, and an insufficient Affidavit of Exhaustion of Remedies.

**WHEREFORE**, Respondent prays for an Order of the Claims Commission dismissing the Claimants' Claim pursuant to Ark. R. Civ. Pro. 12(b)(6) for failure to state a claim for which relief can be granted and for failure to prosecute their claim; and awarding it its fees and costs; and for all other proper relief to which it may be entitled.

**RESPECTFULLY SUBMITTED,**  
**ARKANSAS DEPARTMENT OF TRANSPORTATION**

*Trella A. Sparks*

\_\_\_\_\_  
Trella A. Sparks, Bar #2004-105

Deputy Chief Counsel

P. O. Box 2261

Little Rock, AR 72203-2261

501-569-2157

[trella.sparks@ardot.gov](mailto:trella.sparks@ardot.gov)



**CERTIFICATE OF SERVICE**

I, Trella A. Sparks, do hereby certify that I have on this 4th day of November, 2022, duly served a copy of the foregoing via email and regular U.S. Mail with sufficient postage attached upon the following:

Dylan Botteicher  
Cox, Sterling, McClure & Vandiver, PLLC  
8712 Counts Massie Road  
North Little Rock, AR 72113  
Dylan Botteicher [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com)

*Trella A. Sparks*  
\_\_\_\_\_  
Trella A. Sparks



## ARKANSAS DEPARTMENT OF TRANSPORTATION

ArDOT.gov | IDriveArkansas.com | Lorie H. Tudor, P.E., Director

LEGAL DIVISION | Trella A. Sparks, Deputy Chief Counsel | Trella.Sparks@ardot.gov  
 10324 Interstate 30 | P.O. Box 2261 | Little Rock, AR 72203-2261 | Phone: 501.569.2157 | Fax: 501.569.2164

November 4, 2022

Ms. Kathryn Irby, Director  
 Arkansas State Claims Commission  
 101 East Capitol Avenue, Suite 410  
 Little Rock, AR 72201-3823

(via email)

Re: *Kenena Pelfrey and Douglas Pelfrey vs. Arkansas Department of Transportation*  
*Claim No.: 220574*

Dear Ms. Irby:

Please find attached Respondent's Motion to Strike Affidavit and Second Amended Motion to Dismiss the Claim.

Please confirm receipt at your earliest convenience.

Very truly yours,  
*Trella A. Sparks*

Trella A. Sparks  
 Deputy Chief Counsel

TAS\sdb  
 Enclosures

cc: Dylan Botteicher  
 Cox, Sterling, McClure & Vandiver, PLLC  
 8201 Cantrell Road, Suite 230  
 Little Rock, AR 72227

**From:** [Kathryn Irby](#)  
**To:** [Dylan Botteicher](#); [Graham Whitsett](#); [Sparks, Trella A.](#); [Blakley, Sharon](#)  
**Subject:** HEARING INFO: Pelfrey v ARDOT Claim 220574 Respondent's Motion to Strike Affidavit and 2nd Amended Motion to Dismiss  
**Date:** Monday, November 7, 2022 3:17:00 PM  
**Attachments:** [image001.png](#)  
[HEARING SCHEDULED Pelfrey v. ArDOT Claim No. 220574.msg](#)

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The Claims Commission will hear argument on these motions at the 2-10-2023 hearing. The parties are welcome to fully brief the attached motions within the time periods established by the Arkansas Rules of Civil Procedure. The Zoom invitation for the 2-10-2023 hearing is in the hearing letter (the transmittal email is attached hereto).

Thanks,  
 Kathryn Irby

**Kathryn Irby**  
**Arkansas State Claims Commission**  
 101 East Capitol Avenue, Suite 410  
 Little Rock, Arkansas 72201  
 (501) 682-2822

---

**From:** Blakley, Sharon <[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)>  
**Sent:** Friday, November 4, 2022 2:27 PM  
**To:** ASCC Pleadings <[ASCCPleadings@arkansas.gov](mailto:ASCCPleadings@arkansas.gov)>  
**Cc:** Sparks, Trella A. <[Trella.Sparks@ardot.gov](mailto:Trella.Sparks@ardot.gov)>; [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com); Graham Whitsett <[gpwhitsett@csmfirm.com](mailto:gpwhitsett@csmfirm.com)>  
**Subject:** Pelfrey v ARDOT Claim 220574 Respondent's Motion to Strike Affidavit and 2nd Amended Motion to Dismiss

Please acknowledge receipt of the attached Respondent's Motion to Strike Affidavit and 2nd Amended Motion to Dismiss.

[Sharon D. Blakley](#)  
 ARDOT - Legal Office Manager  
 Tax Intercept Unit Administrator  
 (501) 569-2022 fax (501)569-2164  
[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)  
 ArDOT Logo (email)



**From:** [Dylan Botteicher](#)  
**To:** [Blakley, Sharon](#); [ASCC Pleadings](#)  
**Cc:** [Sparks, Trella A.](#); [Graham Whitsett](#)  
**Subject:** RE: Pelfrey v ARDOT Claim 220574 Respondent's Motion to Strike Affidavit and 2nd Amended Motion to Dismiss  
**Date:** Wednesday, November 16, 2022 9:38:43 AM  
**Attachments:** [image001.png](#)  
[Claimants' Response to Amended MTD and Motion to Strike Affidavit .pdf](#)

You don't often get email from [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com). [Learn why this is important](#)

All,

Please see attached the Response to these motions. I hope you all have a great rest of your week and an excellent Thanksgiving.

Best regards,

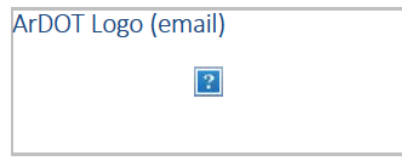
Dylan Botteicher  
 COX, STERLING, VANDIVER & BOTTEICHER, PLLC  
 8201 Cantrell Road, Suite 230  
 Little Rock, Arkansas 72227  
 (501) 954-8073 Office  
 (501) 954-7856 Fax  
[djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com) Email  
[www.csmfirm.com](http://www.csmfirm.com) Website

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**From:** Blakley, Sharon <[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)>  
**Sent:** Friday, November 4, 2022 2:27 PM  
**To:** ASCC Pleadings <[ASCCPleadings@arkansas.gov](mailto:ASCCPleadings@arkansas.gov)>  
**Cc:** Sparks, Trella A. <[Trella.Sparks@ardot.gov](mailto:Trella.Sparks@ardot.gov)>; Dylan Botteicher <[djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com)>; Graham Whitsett <[gpwhitsett@csmfirm.com](mailto:gpwhitsett@csmfirm.com)>  
**Subject:** Pelfrey v ARDOT Claim 220574 Respondent's Motion to Strike Affidavit and 2nd Amended Motion to Dismiss

Please acknowledge receipt of the attached Respondent's Motion to Strike Affidavit and 2nd Amended Motion to Dismiss.

Sharon D. Blakley  
 ARDOT - Legal Office Manager  
 Tax Intercept Unit Administrator  
 (501) 569-2022 fax (501)569-2164  
[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)



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

**DOUGLAS PELFREY and  
KENENA PELFREY**

**CLAIMANTS**

**VS.**

**CLAIM NO. 220574**

**ARKANSAS DEPARTMENT  
OF TRANSPORTATION**

**RESPONDENT**

**CLAIMANTS' RESPONSE TO RESPONDENT'S AMENDED MOTION TO DISMISS  
THE AMENDED CLAIM AND RESPONDENT'S MOTION TO STRIKE AFFIDAVIT**

Comes now the Claimants, Douglas Pelfrey and Kenena Pelfrey (the "Pelfreys"), by and through counsel, Cox, Sterling, Vandiver & Botteicher, PLLC, and for their Response to Respondent's Amended Motion to Dismiss and Motion to Strike Affidavit, states as follows:

1. Claimants signed the form that stated that insurance did not cover this claim, and the signature was notarized. Claimants have further attached a letter from her insurance company stating that she did not have coverage for the landslide incident. *See* letter regarding coverage, attached as Exhibit "A" to the Response to the Motion to Dismiss the Amended Claim.

2. Claimants have provided documentation from the insurer that explain that they have exhausted their insurance remedies, signed sworn statements that they have exhausted their insurance remedies, and given explanations of the damage that they incurred.

3. Arkansas courts construe pleadings liberally and deem them sufficient if they advise the other party of its obligations and alleges a breach of them. *Bethel Baptist Church v. Church Mut. Ins. Co.*, 54 Ark. App. 262, 265 (1996). All reasonable inferences must be resolved in favor of the complaint when testing the sufficiency of the pleading on a motion to dismiss. *Perry v. Baptist Health*, 358 Ark. 238, 241 (2004). In considering a motion to dismiss under Ark. R. Civ. P. 12(b)(6), Arkansas courts must treat the facts alleged in the complaint as true and viewed in the

light most favorable to the party seeking relief. *Deitsch v. Tillery*, 309 Ark. 401, 405 (1992). Under this standard, the Claimants' pleading is more than sufficiently plead.

4. The motion to dismiss the amended claim contained exhibits that were not attached to the amended claim, which is impermissible under Rule 12.

5. The attached order to dismiss the amended claims attached to the original motion to dismiss the amended claim does not specifically dismiss claims for continuing violations created by the landslide.

6. The second amended motion to dismiss does not raise any arguments except to say that the affidavit is insufficient. The affidavit is viewed in the light most favorable to Claimants, and therefore should be found to be sufficient. Furthermore, the affidavit just reiterates information that has been provided in previous pleadings.

7. The motion to strike should be denied as it is not an appropriate remedy. Respondent claims that the affidavit is insufficient, but at this stage all documentation is to be viewed in the light most favorable to the Claimant. Respondent does not cite any law to support its argument that a motion to strike is warranted, and Arkansas law does not approve of motions to strike when there is not new information in the document that the movant seeks to strike. *Ark. State Police Ret. Sys. v. Sligh*, 2017 Ark. 209, ¶ 14, 516 S.W.3d 241, 249. The affidavit does not provide any new information, and therefore the motion to strike should be denied.

WHEREFORE, Claimants respectfully request that the motions be denied for the above reasons; that they be awarded costs and attorneys' fees, and all other relief deemed appropriate.

Respectfully Submitted,

COX, STERLING, VANDIVER &  
BOTTEICHER, PLLC  
8201 Cantrell Road, Suite 230  
Little Rock, Arkansas 72227  
(501) 954-8073

By: /s/ Dylan J. Botteicher  
Dylan J. Botteicher (ABN# 2017170)

*ATTORNEY FOR CLAIMANTS*

**CERTIFICATE OF SERVICE**

I, Dylan J. Botteicher, do hereby certify that a true and correct copy of the foregoing was served on the following person(s) through email service on this 16th day of November, 2022:

Trella A. Sparks  
ArDOT, Legal Division  
PO Box 2261  
Little Rock, AR 72203-2261

By: /s/ Dylan J. Botteicher  
Dylan J. Botteicher (ABN# 2017170)



**From:** [Blakley, Sharon](#)  
**To:** [ASCC Pleadings](#)  
**Cc:** [Sparks, Trella A.](#); [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com)  
**Subject:** Pelfrey v ARDOT Claim 220574 Respondent's Reply to Response to Amended Motion and Reply to Response to Motion to Strike  
**Date:** Wednesday, November 23, 2022 7:04:23 AM  
**Attachments:** [image001.png](#)  
[Pelfrey.220547.cvr ltr Reply to Response.2022.11.22.pdf](#)  
[Pelfrey.220574.Respondent's Reply to Response to Amended Motion to Dismiss and Motion to Strike.2022.11.22.pdf](#)

---

Please acknowledge receipt of the attached Respondent's Reply to Response to Amended Motion and Reply to Response to Motion to Strike for the referenced claim.

Sharon D. Blakley  
ARDOT - Legal Office Manager  
Tax Intercept Unit Administrator  
(501) 569-2022 fax (501)569-2164  
[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)

ArDOT Logo (email)





## ARKANSAS DEPARTMENT OF TRANSPORTATION

[ARDOT.gov](http://ARDOT.gov) | [IDriveArkansas.com](http://IDriveArkansas.com) | Lorie H. Tudor, P.E., Director

LEGAL DIVISION | Trella A. Sparks, Deputy Chief Counsel | [Trella.Sparks@ardot.gov](mailto:Trella.Sparks@ardot.gov)  
 10324 Interstate 30 | P.O. Box 2261 | Little Rock, AR 72203-2261 | Phone: 501.569.2157 | Fax: 501.569.2164

November 23, 2022

Ms. Kathryn Irby, Director  
 Arkansas State Claims Commission  
 101 East Capitol Avenue, Suite 410  
 Little Rock, AR 72201-3823

(via email)

Re: *Kenena Pelfrey and Douglas Pelfrey vs. Arkansas Department of Transportation*  
*Claim No.: 220574*

Dear Ms. Irby:

Please find attached *Respondent's Reply to Response to Amended Motion to Dismiss; Reply to Response to Motion to Strike Insurance Affidavit* for the referenced claim.

Please confirm receipt at your earliest convenience.

Very truly yours,

*Trella A. Sparks*

Trella A. Sparks  
 Deputy Chief Counsel

TAS\sdb  
 Enclosures

cc: Dylan Botteicher  
 Cox, Sterling, McClure & Vandiver, PLLC  
 8201 Cantrell Road, Suite 230  
 Little Rock, AR 72227  
[djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com)

## IN THE ARKANSAS STATE CLAIMS COMMISSION

DOUGLAS PELFREY AND  
KENENA PELFREY

CLAIMANTS

VS.

CLAIM NO. 220574

ARKANSAS DEPARTMENT OF TRANSPORTATION

RESPONDENT

**REPLY TO RESPONSE TO AMENDED MOTION TO DISMISS; REPLY TO RESPONSE  
TO MOTION TO STRIKE INSURANCE AFFIDAVIT**

COMES NOW the Respondent, Arkansas Department of Transportation, by and through undersigned counsel, and for its Reply to Response to Amended Motion to Dismiss and Reply to Response to Motion to Strike Insurance Affidavit, states the following:

**REPLY TO RESPONSE TO AMENDED MOTION TO DISMISS**

Respondent denies all allegations in Claimant's Response to Respondent's Amended Motion to Dismiss the Amended Claim and Respondent's Motion to Strike Affidavit.

Claimant argues that the Second Amended Motion to Dismiss does not raise any arguments. That is false. Respondent's Second Amended Motion to Dismiss states that Claimants have failed to state a legally cognizable cause of action (12b6), and that they have failed to meet their burden of going forward at every step of the claims process (insufficient insurance affidavit and complaint) which has now been pending for over a year.

Claimant appears to argue in Paragraphs 4 and 5 of its Response to Respondent's Amended Motion to Dismiss, unresponsive, redundant, and frivolous statements regarding the original Motion to Dismiss, for which the time to respond has already passed, and those paragraphs should therefore be stricken as unresponsive, redundant, and frivolous statements, designed to waste the Arkansas State Claims Commission's valuable time.

**REPLY TO RESPONSE TO MOTION TO STRIKE INSURANCE AFFIDAVIT**

Our Courts will strike a filing when it contains any insufficient defense or any redundant, immaterial, impertinent or scandalous matter. A.R.Civ.P. 12(f)

Claimant **incorrectly** cites *Ark. State Police. Ret. Sys. V. Sligh*, 2017 Ark. 209, **and** misstates the law. The cited case involved a Motion to Strike a Reply Brief because it raised new arguments and cited new authority. This is very specific case law regarding Reply Briefs, and does not, as Claimant argues, impose a more general Arkansas law that Motions to Strike will not be granted “when there is not new information in the document the movant seeks to strike.” This is a misstatement of the law.

While it may seem obvious, it is worth stressing that the proper purpose of a reply brief is to reply, not to present new arguments or matters at a time when the other party can no longer respond to them. Raising a new substantive issue of law for the first time in a reply brief is improper. *State Farm Fire and Casualty Co. v. LiMauro* decision, 103 A.D.2d 514 (2d Dept. 1984), *aff’d*, 65 N.Y.2d 369 (1985), This is one of the principal grounds for motion practice concerning the proper scope of reply briefs. **Reply Briefs: Having an Effective Last Word**, By Thomas R. Newman and Steven J. Ahmuty Jr., January 13, 2020, *New York Law Journal*[https://www.duanemorris.com/articles/reply\\_briefs\\_having\\_effective\\_last\\_word\\_0120](https://www.duanemorris.com/articles/reply_briefs_having_effective_last_word_0120)

The law of Reply Briefs does not apply universally to all pleadings. Respondent seeks to strike the Affidavit of Exhaustion of Insurance pursuant to A.R.Civ.P. 12(f).

**WHEREFORE**, the Respondent prays for an Order of the Arkansas State Claims

Commission:

- 1) Dismissing this action for failure to state a claim and failure to prosecute (meet their burden of going forward) A.R.Civ.P. 12(b)(6);
- 2) Striking the Affidavit of Exhaustion of Insurance pursuant to A.R.Civ.P. 12(f);
- 3) Striking Paragraphs 4 and 5 of the Claimant's Response to Respondent's Amended Motion to Dismiss the Amended Claim and Respondent's Motion to Strike Affidavit.
- 4) And for all other good and proper relief to which it may be entitled.

**RESPECTFULLY SUBMITTED,  
ARKANSAS DEPARTMENT OF TRANSPORTATION**

*Trella A. Sparks*

\_\_\_\_\_  
Trella A. Sparks, Bar #2004-105  
Deputy Chief Counsel  
P. O. Box 2261  
Little Rock, AR 72203-2261  
501-569-2157 telephone  
501-569-2164 facsimile  
trella.sparks@ardot.gov

**CERTIFICATE OF SERVICE**

I, Trella A. Sparks, do hereby certify that I have on this 23rd day of November, 2022, duly served a copy of the foregoing via email and regular U.S. Mail with sufficient postage attached upon the following:

Dylan Botteicher  
Cox, Sterling, McClure & Vandiver, PLLC  
8201 Cantrell Road, Suite 230  
Little Rock, AR 72227  
djbotteicher@csmfirm.com

*Trella A. Sparks*

\_\_\_\_\_  
Trella A. Sparks

**From:** [Kathryn Irby](#)  
**To:** [Dylan Botteicher](#); [Graham Whitsett](#); [Sparks, Trella A.](#); [Blakley, Sharon](#)  
**Subject:** HEARING DATE CHANGE: Pelfrey v ARDOT Claim 220574 Respondent's Motion to Strike Affidavit and 2nd Amended Motion to Dismiss  
**Date:** Tuesday, January 31, 2023 1:31:00 PM  
**Attachments:** [image001.png](#)

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Mr. Botteicher and Ms. Sparks, due to a scheduling conflict, this motion hearing has been moved to April 20, 2023, at 9:00 a.m. The new Zoom invitation is set out below.

Please let me know if there are any questions.

Thanks,  
 Kathryn Irby

Kathryn Irby -- Claims Commission is inviting you to a scheduled Zoom meeting.

Topic: Claims Commission -- hearings  
 Time: Apr 20, 2023 09:00 AM Central Time (US and Canada)

Join Zoom Meeting  
<https://us06web.zoom.us/j/82839269580?pwd=ckNGN1M3a0ZNbVNpM09ad0xjem5qUT09>

Meeting ID: 828 3926 9580  
 Passcode: H5p9j6  
 One tap mobile  
 +13017158592,,82839269580#,,,,\*028061# US (Washington DC)  
 +13052241968,,82839269580#,,,,\*028061# US

Dial by your location

- +1 301 715 8592 US (Washington DC)
- +1 305 224 1968 US
- +1 309 205 3325 US
- +1 312 626 6799 US (Chicago)
- +1 646 931 3860 US
- +1 929 436 2866 US (New York)
- +1 719 359 4580 US
- +1 253 205 0468 US
- +1 253 215 8782 US (Tacoma)
- +1 346 248 7799 US (Houston)
- +1 360 209 5623 US
- +1 386 347 5053 US
- +1 507 473 4847 US
- +1 564 217 2000 US
- +1 669 444 9171 US
- +1 669 900 6833 US (San Jose)

+1 689 278 1000 US  
 Meeting ID: 828 3926 9580  
 Passcode: 028061  
 Find your local number: <https://us06web.zoom.us/j/kpMSm425o>

---

**From:** Kathryn Irby

**Sent:** Monday, November 7, 2022 3:18 PM

**To:** Dylan Botteicher <djbotteicher@csmfirm.com>; Graham Whitsett <gpwhitsett@csmfirm.com>; Sparks, Trella A. <Trella.Sparks@ardot.gov>; Blakley, Sharon <Sharon.Blakley@ardot.gov>

**Subject:** HEARING INFO: Pelfrey v ARDOT Claim 220574 Respondent's Motion to Strike Affidavit and 2nd Amended Motion to Dismiss

The Claims Commission will hear argument on these motions at the 2-10-2023 hearing. The parties are welcome to fully brief the attached motions within the time periods established by the Arkansas Rules of Civil Procedure. The Zoom invitation for the 2-10-2023 hearing is in the hearing letter (the transmittal email is attached hereto).

Thanks,  
 Kathryn Irby

**Kathryn Irby**  
**Arkansas State Claims Commission**  
 101 East Capitol Avenue, Suite 410  
 Little Rock, Arkansas 72201  
 (501) 682-2822

---

**From:** Blakley, Sharon <[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)>

**Sent:** Friday, November 4, 2022 2:27 PM

**To:** ASCC Pleadings <[ASCCPleadings@arkansas.gov](mailto:ASCCPleadings@arkansas.gov)>

**Cc:** Sparks, Trella A. <[Trella.Sparks@ardot.gov](mailto:Trella.Sparks@ardot.gov)>; [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com); Graham Whitsett <[gpwhitsett@csmfirm.com](mailto:gpwhitsett@csmfirm.com)>

**Subject:** Pelfrey v ARDOT Claim 220574 Respondent's Motion to Strike Affidavit and 2nd Amended Motion to Dismiss

Please acknowledge receipt of the attached Respondent's Motion to Strike Affidavit and 2nd Amended Motion to Dismiss.

**Sharon D. Blakley**  
 ARDOT - Legal Office Manager  
 Tax Intercept Unit Administrator

(501) 569-2022 fax (501)569-2164

[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)

ArDOT Logo (email)





**From:** [Kathryn Irby](#)  
**To:** [Sparks, Trella A.](#)  
**Subject:** RE: Arkansas State Claims Commission -- April 2023 hearing information  
**Date:** Monday, April 10, 2023 8:25:00 AM

---

I will add Pelfrey back to the April 20 docket.

Thanks.

---

**From:** Sparks, Trella A. <Trella.Sparks@ardot.gov>  
**Sent:** Monday, April 10, 2023 8:01 AM  
**To:** Kathryn Irby <Kathryn.Irby@arkansas.gov>  
**Subject:** RE: Arkansas State Claims Commission -- April 2023 hearing information

Kathryn,

Can Pelfrey remain on the docket for a motion hearing? I did not send a request for continuance on it, and Mr. Botteicher would not have had notice that it was being removed from the docket.

Thank you,  
Trella

---

**From:** Kathryn Irby <[Kathryn.Irby@arkansas.gov](mailto:Kathryn.Irby@arkansas.gov)>  
**Sent:** Saturday, April 8, 2023 11:25 AM  
**To:** Rich Rosen <[Rich.Rosen@dhs.arkansas.gov](mailto:Rich.Rosen@dhs.arkansas.gov)>; OCC Claims Commission Cases <[OCC.ClaimsCommCases@dhs.arkansas.gov](mailto:OCC.ClaimsCommCases@dhs.arkansas.gov)>; Brent Gasper <[Brent.Gasper@dhs.arkansas.gov](mailto:Brent.Gasper@dhs.arkansas.gov)>; Vu Ritchie <[Vu.Ritchie@governor.arkansas.gov](mailto:Vu.Ritchie@governor.arkansas.gov)>; Looney, Rita S. <[Rita.Looney@ardot.gov](mailto:Rita.Looney@ardot.gov)>; Jewell, Kimberly K. <[Kimberly.Jewell@ardot.gov](mailto:Kimberly.Jewell@ardot.gov)>; Sparks, Trella A. <[Trella.Sparks@ardot.gov](mailto:Trella.Sparks@ardot.gov)>; Wilkins, Jay D. <[Jay.Wilkins@ardot.gov](mailto:Jay.Wilkins@ardot.gov)>; Andrews, Amanda J. <[Amanda.Andrews@ardot.gov](mailto:Amanda.Andrews@ardot.gov)>; Walker, Evin E. <[Evin.Walker@ardot.gov](mailto:Evin.Walker@ardot.gov)>; Blakley, Sharon D. <[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)>; Thomas Burns (DOC) <[Thomas.Burns@arkansas.gov](mailto:Thomas.Burns@arkansas.gov)>; Leslie Browning (DOC) <[Leslie.Browning@arkansas.gov](mailto:Leslie.Browning@arkansas.gov)>; Hugh Finkelstein <[hugh.finkelstein@asp.arkansas.gov](mailto:hugh.finkelstein@asp.arkansas.gov)>; Tess Bradford <[tess.bradford@asp.arkansas.gov](mailto:tess.bradford@asp.arkansas.gov)>; Joan Shipley <[joan.shipley@asp.arkansas.gov](mailto:joan.shipley@asp.arkansas.gov)>; Doug House <[douglas.house@arkansasag.gov](mailto:douglas.house@arkansasag.gov)>; Desikan, Suba <[desikans@blr.arkansas.gov](mailto:desikans@blr.arkansas.gov)>; Seaton, Gina <[seatong@blr.arkansas.gov](mailto:seatong@blr.arkansas.gov)>; Renae Hudson <[renae.hudson@arkansasag.gov](mailto:renae.hudson@arkansasag.gov)>; Kate Donovan <[kate.donoven@arkansasag.gov](mailto:kate.donoven@arkansasag.gov)>; Katie Wilson <[katie.wilson@arkansasag.gov](mailto:katie.wilson@arkansasag.gov)>; Patrick Hollingsworth <[phollingsworth@uasys.edu](mailto:phollingsworth@uasys.edu)>; Sarah Debusk <[Sarah.Debusk@dhs.arkansas.gov](mailto:Sarah.Debusk@dhs.arkansas.gov)>; Andrew Middlebrooks <[andrew.middlebrooks@arkansasag.gov](mailto:andrew.middlebrooks@arkansasag.gov)>; Mitch Rouse <[Mitch.Rouse2@dhs.arkansas.gov](mailto:Mitch.Rouse2@dhs.arkansas.gov)>  
**Cc:** Mika Tucker <[Mika.Tucker@arkansas.gov](mailto:Mika.Tucker@arkansas.gov)>  
**Subject:** Arkansas State Claims Commission -- April 2023 hearing information

**CAUTION:** This email originated from outside of ARDOT. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Attached please find information relating to the Claims Commission's April 2023 hearings. If there are any questions, please do not hesitate to call or email me.

Kathryn Irby

**Kathryn Irby**

**Arkansas State Claims Commission**

101 East Capitol Avenue, Suite 410

Little Rock, Arkansas 72201

(501) 682-2822

**From:** [Sparks, Trella A.](#)  
**To:** [ASCC Pleadings](#)  
**Cc:** [djbotteicher@csmfirm.com](#); [Blakley, Sharon D.](#); [Graham Whitsett](#); [Kathryn Irby](#)  
**Subject:** Exhibits for Pelfrey Hearing 220574  
**Date:** Tuesday, April 18, 2023 8:04:32 AM  
**Attachments:** [image001.png](#)  
[Complaint.pdf](#)  
[Order.pdf](#)

---

Please see attached exhibits I will use at the Hearing on the Motion to Dismiss Thursday.

**Trella A. Sparks, Deputy Chief Counsel**

Arkansas Department of Transportation

P.O. Box 2261

Little Rock, AR 72203-2261

(501) 569-2157



## IN THE CIRCUIT COURT OF MADISON COUNTY, ARKANSAS

DOUG PELFREY and KENENA PELFREY

PLAINTIFFS

V.

NO. 44CV-17- 136-1L & N CONSTRUCTION, INC. and  
JOHN DOES 1-10

DEFENDANTS

COMPLAINT AT LAW

Comes now the Plaintiffs herein, Doug Pelfrey and Kenena Pelfrey, and for their Complaint against the Defendants, L&N Construction, Inc. and John Does 1-10, state and allege as follows:

1. That the Plaintiffs are citizens and residents of [REDACTED] Arkansas and were at the time of the events complained of herein.

2. That this cause of action arose out of an incident which occurred on or about December 28, 2015, in [REDACTED] Arkansas.

3. That the Defendant is an Arkansas Corporation licensed to do and doing business in the State of Arkansas at the time of the acts alleged herein with its principle place of business in Mountain View, Arkansas.

4. That John Does 1-10 are unknown at the present time. In accordance with Ark. Code Ann. § 16-56-125, attached to this Complaint at Law and filed with this Complaint at Law is the Affidavit of Plaintiffs' attorney stating the identity of separate Defendant John Does 1-10 are unknown at this time. Said John Does may be the liability insurance carrier for one or more of the parties and may be a tortfeasor (including, but not limited to, any other subcontractors or contractors involved in this incident) who breached a duty to the Plaintiffs or proximately caused damages to

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at 1:51 o'clock P M.

SEP 11 2017

PHYLIS VILLINES  
CLERK AND RECORDER  
MADISON COUNTY, ARKANSAS

the Plaintiffs. The Plaintiffs reserve the right to amend the Complaint to substitute the real party of interest for separate Defendants John Does 1-10.

5. That this Court has jurisdiction over this matter and venue is proper.

6. That the Defendant was the General Contractor for a highway construction and/or repair project which included an area at or near Crosses, Arkansas, in Madison County and had contracted with the Arkansas State Highway & Transportation Department to perform the repair work and construction in accordance with the Arkansas State Highway & Transportation Department Plans and Specifications and in compliance with the law and applicable standards and customs in the industry.

7. That the Defendant had a duty to complete the project which is the subject of this litigation in compliance with the contract, Arkansas State Highway & Transportation Department Plans and Specifications and in compliance with the law and applicable standards and customs in the industry.

8. That during the course of the work Defendant was completing under said contract, the Defendant, and/or persons at the Defendant's direction, dumped excess dirt and debris on land on a hill and land above Plaintiffs' property when they knew, or should have know, that said excess dirt and debris could cause damage to the Plaintiffs' property.

9. That on or about December 27, 2015, going into December 28, 2015, and some dates thereafter, a "mud slide" or "land slide" occurred above the property of the Plaintiffs, located at [REDACTED] [REDACTED] Arkansas, at the location where Defendant had dumped the excess dirt and debris as set forth above. As a result of the "mud slide" or "land slide", the Plaintiffs' home and real estate was entirely destroyed as well as personal property and other items.

10. That the “mud slide” was proximately caused by the negligence of the Defendants, individually, as well as jointly and severally, and/or their agents, servants and/or employees, said negligent acts include, but are not limited to, the following:

(a) Failing to properly comply with the Arkansas State Highway & Transportation Department plans and specifications when dumped the excess dirt and debris on this project ;

(b) Failing to complete a silt fence and/or wall needed to keep silt from washing to adjacent property in compliance with the plans and specifications as well as applicable standards in the trade and industry;

(c) Failing to comply with the Arkansas Department of Environmental Quality Rules and Regulations;

(d) Failing to properly dispose of fill and waste in accordance with Arkansas Law as well as the Arkansas State Highway & Transportation Department Rules and Regulations and applicable standards in the trade and industry;

(e) Failing to properly compact the embankment properly and in accordance with Arkansas State Highway & Transportation Department plans and specifications and applicable standards in the trade and industry; and

(e) Otherwise failing to complete their operations in a reasonable, safe and prudent manner in violation of other known, and unknown at this time, standards in the trade and industry.

9. That the negligence, and any of the negligent acts, complained of above performed by the employees, agents and/or servants of the separate Defendants, individually, as well as jointly and severally, is imputed to the separate Defendants.

11. As a proximate result of the negligence of the Defendants, individually, as well as jointly and severally, all as aforesaid, the Plaintiffs, Doug Pelfrey and Kenena Pelfrey, have suffered

the destruction of their residence, real property, as well as personal property, and have incurred incidental costs and expenses, all for an amount in excess of that required by federal jurisdiction in diversity of citizenship cases.

12. That the Plaintiffs reserve the right to amend their Complaint to cover other acts of negligence as discovery warrants.

13. That the Plaintiffs demand a trial by jury.

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs, Doug Pelfrey and Kenena Pelfrey, pray for damages as set forth above for an amount in excess of that required by federal jurisdiction in diversity of citizenship cases; pre-judgment interest, post-judgment interest, attorney fees, and for any and all other relief to which the Plaintiffs may prove themselves entitled.

Respectfully Submitted,

DOUG PELFREY and  
KENENA PELFREY, Plaintiffs

BY: 

TIMOTHY J. MYERS #93110  
TAYLOR LAW PARTNERS, LLP  
P.O. BOX 8310  
FAYETTEVILLE, AR 72703  
(479) 443-5222

## IN THE CIRCUIT COURT OF MADISON COUNTY, ARKANSAS

DOUG PELFREY and KENENA PELFREY

PLAINTIFFS

V.

NO. 44CV-17-\_\_\_\_\_

L & N CONSTRUCTION, INC. and  
JOHN DOES 1-10

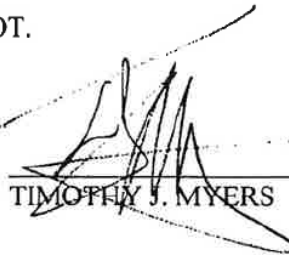
DEFENDANTS

**AFFIDAVIT**STATE OF ARKANSAS                    )  
  ) ss.  
COUNTY OF WASHINGTON            )

I, Timothy J. Myers, attorney for the Plaintiffs, Doug Pelfrey and Kenena Pelfrey, after first being duly sworn do state as follows:

1. That upon information and belief there are parties whose identity is unknown at this time.
2. That these unknown parties have been designated in the Plaintiffs' Complaint as John Does No. 1-10.

FURTHER, AFFIANT SAYETH NOT.

  
 \_\_\_\_\_  
 TIMOTHY J. MYERS

SUBSCRIBED and SWORN to before me, a Notary Public, on the 8<sup>th</sup> day of September, 2017.

  
 \_\_\_\_\_  
 NOTARY PUBLIC






C202100989  
 FILED FOR RECORD  
 CASE# CV-2021-508-1 ~ 08-03-2021 02:49:05 PM  
 JUDGE: DOUG MARTIN  
 JUDY FOSTER  
 MADISON CO, AR CIRCUIT CLERK AND RECORDER

IN THE CIRCUIT COURT OF MADISON COUNTY, ARKANSAS  
 CIVIL DIVISION

DOUG PELFREY and KENENA PELFREY

PLAINTIFFS

VS.

NO. 44CV-17-136-1

L & N CONSTRUCTION, INC. and  
 JOHN DOES 1-10

DEFENDANTS

ORDER OF DISMISSAL

On joint motion of the parties, and it appearing to the Court that this matter has been settled,  
 this case is hereby dismissed with prejudice. Each party is to bear their own attorney's fees and  
 costs.

IT IS SO ORDERED.

CIRCUIT JUDGE

DATE

*Prepared By:*

Michael McCarty Harrison  
 Friday Eldredge & Clark LLP  
 400 W. Capitol Ave. Ste. 2000  
 Little Rock, AR 72201  
 Attorney for Defendants

*Approved by:*

TIMOTHY MYERS, Attorney for Plaintiffs

Exhibit "A"

**From:** [Kathryn Irby](#)  
**To:** [Sparks, Trella A.](#)  
**Subject:** RE: UPDATE: Arkansas State Claims Commission -- April 2023 hearing information  
**Date:** Thursday, April 20, 2023 8:16:00 AM  
**Attachments:** [HEARING DATE CHANGE Pelfrey v ARDOT Claim 220574 Respondent's Motion to Strike Affidavit and 2nd Amended Motion to Dismiss.msg](#)

---

Trella, please see attached.

Thanks,  
 Kathryn

---

**From:** Sparks, Trella A. <[Trella.Sparks@ardot.gov](mailto:Trella.Sparks@ardot.gov)>  
**Sent:** Thursday, April 20, 2023 8:02 AM  
**To:** Kathryn Irby <[Kathryn.Irby@arkansas.gov](mailto:Kathryn.Irby@arkansas.gov)>  
**Subject:** RE: UPDATE: Arkansas State Claims Commission -- April 2023 hearing information

Kathryn,

Can you send me the zoom link for this morning's hearing please?

Thank you,  
 Trella Sparks

---

**From:** Kathryn Irby <[Kathryn.Irby@arkansas.gov](mailto:Kathryn.Irby@arkansas.gov)>  
**Sent:** Monday, April 10, 2023 8:33 AM  
**To:** Rich Rosen <[Rich.Rosen@dhs.arkansas.gov](mailto:Rich.Rosen@dhs.arkansas.gov)>; OCC Claims Commission Cases <[OCC.ClaimsCommCases@dhs.arkansas.gov](mailto:OCC.ClaimsCommCases@dhs.arkansas.gov)>; Brent Gasper <[Brent.Gasper@dhs.arkansas.gov](mailto:Brent.Gasper@dhs.arkansas.gov)>; Looney, Rita S. <[Rita.Looney@ardot.gov](mailto:Rita.Looney@ardot.gov)>; Jewell, Kimberly K. <[Kimberly.Jewell@ardot.gov](mailto:Kimberly.Jewell@ardot.gov)>; Sparks, Trella A. <[Trella.Sparks@ardot.gov](mailto:Trella.Sparks@ardot.gov)>; Wilkins, Jay D. <[Jay.Wilkins@ardot.gov](mailto:Jay.Wilkins@ardot.gov)>; Andrews, Amanda J. <[Amanda.Andrews@ardot.gov](mailto:Amanda.Andrews@ardot.gov)>; Walker, Evin E. <[Evin.Walker@ardot.gov](mailto:Evin.Walker@ardot.gov)>; Blakley, Sharon D. <[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)>; Thomas Burns (DOC) <[Thomas.Burns@arkansas.gov](mailto:Thomas.Burns@arkansas.gov)>; Leslie Browning (DOC) <[Leslie.Browning@arkansas.gov](mailto:Leslie.Browning@arkansas.gov)>; Hugh Finkelstein <[hugh.finkelstein@asp.arkansas.gov](mailto:hugh.finkelstein@asp.arkansas.gov)>; Tess Bradford <[tess.bradford@asp.arkansas.gov](mailto:tess.bradford@asp.arkansas.gov)>; Joan Shipley <[joan.shipley@asp.arkansas.gov](mailto:joan.shipley@asp.arkansas.gov)>; Doug House <[douglas.house@arkansasag.gov](mailto:douglas.house@arkansasag.gov)>; Desikan, Suba <[desikans@blr.arkansas.gov](mailto:desikans@blr.arkansas.gov)>; Seaton, Gina <[seatong@blr.arkansas.gov](mailto:seatong@blr.arkansas.gov)>; Renae Hudson <[renae.hudson@arkansasag.gov](mailto:renae.hudson@arkansasag.gov)>; Kate Donovan <[kate.donoven@arkansasag.gov](mailto:kate.donoven@arkansasag.gov)>; Katie Wilson <[katie.wilson@arkansasag.gov](mailto:katie.wilson@arkansasag.gov)>; Patrick Hollingsworth <[phollingsworth@uasys.edu](mailto:phollingsworth@uasys.edu)>; Sarah Debusk <[Sarah.Debusk@dhs.arkansas.gov](mailto:Sarah.Debusk@dhs.arkansas.gov)>; Andrew Middlebrooks <[andrew.middlebrooks@arkansasag.gov](mailto:andrew.middlebrooks@arkansasag.gov)>; Mitch Rouse <[Mitch.Rouse2@dhs.arkansas.gov](mailto:Mitch.Rouse2@dhs.arkansas.gov)>; Cortney Kennedy <[Cortney.Kennedy@governor.arkansas.gov](mailto:Cortney.Kennedy@governor.arkansas.gov)>  
**Cc:** Mika Tucker <[Mika.Tucker@arkansas.gov](mailto:Mika.Tucker@arkansas.gov)>  
**Subject:** UPDATE: Arkansas State Claims Commission -- April 2023 hearing information

**CAUTION:** This email originated from outside of ARDOT. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Attached please find an updated April 2023 hearing docket.

Thanks,  
Kathryn Irby

**Kathryn Irby**  
**Arkansas State Claims Commission**  
101 East Capitol Avenue, Suite 410  
Little Rock, Arkansas 72201  
(501) 682-2822

---

**From:** Kathryn Irby  
**Sent:** Saturday, April 8, 2023 11:25 AM  
**To:** Rich Rosen <[Rich.Rosen@dhs.arkansas.gov](mailto:Rich.Rosen@dhs.arkansas.gov)>; OCC Claims Commission Cases <[OCC.ClaimsCommCases@dhs.arkansas.gov](mailto:OCC.ClaimsCommCases@dhs.arkansas.gov)>; Brent Gasper <[Brent.Gasper@dhs.arkansas.gov](mailto:Brent.Gasper@dhs.arkansas.gov)>; Vu Ritchie <[Vu.Ritchie@governor.arkansas.gov](mailto:Vu.Ritchie@governor.arkansas.gov)>; Looney, Rita S. <[Rita.Looney@ardot.gov](mailto:Rita.Looney@ardot.gov)>; Jewell, Kim K. <[Kimberly.Jewell@ardot.gov](mailto:Kimberly.Jewell@ardot.gov)>; Sparks, Trella A. <[Trella.Sparks@ardot.gov](mailto:Trella.Sparks@ardot.gov)>; Wilkins, Jay D. <[Jay.Wilkins@ardot.gov](mailto:Jay.Wilkins@ardot.gov)>; Andrews, Amanda J. <[Amanda.Andrews@ardot.gov](mailto:Amanda.Andrews@ardot.gov)>; Walker, Evin E. <[Evin.Walker@ardot.gov](mailto:Evin.Walker@ardot.gov)>; Blakley, Sharon <[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)>; Thomas Burns (DOC) <[Thomas.Burns@arkansas.gov](mailto:Thomas.Burns@arkansas.gov)>; Leslie Browning (DOC) <[Leslie.Browning@arkansas.gov](mailto:Leslie.Browning@arkansas.gov)>; Hugh Finkelstein <[hugh.finkelstein@asp.arkansas.gov](mailto:hugh.finkelstein@asp.arkansas.gov)>; Tess Bradford <[tess.bradford@asp.arkansas.gov](mailto:tess.bradford@asp.arkansas.gov)>; Joan Shipley <[joan.shipley@asp.arkansas.gov](mailto:joan.shipley@asp.arkansas.gov)>; Doug House <[douglas.house@arkansasag.gov](mailto:douglas.house@arkansasag.gov)>; Desikan, Suba <[desikans@blr.arkansas.gov](mailto:desikans@blr.arkansas.gov)>; Seaton, Gina <[seatong@blr.arkansas.gov](mailto:seatong@blr.arkansas.gov)>; Renae Hudson <[renae.hudson@arkansasag.gov](mailto:renae.hudson@arkansasag.gov)>; Kate Donovan <[kate.donoven@arkansasag.gov](mailto:kate.donoven@arkansasag.gov)>; Katie Wilson <[katie.wilson@arkansasag.gov](mailto:katie.wilson@arkansasag.gov)>; Patrick Hollingsworth <[phollingsworth@uasys.edu](mailto:phollingsworth@uasys.edu)>; Sarah Debusk <[Sarah.Debusk@dhs.arkansas.gov](mailto:Sarah.Debusk@dhs.arkansas.gov)>; Andrew Middlebrooks <[andrew.middlebrooks@arkansasag.gov](mailto:andrew.middlebrooks@arkansasag.gov)>; Mitch Rouse <[Mitch.Rouse2@dhs.arkansas.gov](mailto:Mitch.Rouse2@dhs.arkansas.gov)>  
**Cc:** Mika Tucker <[Mika.Tucker@arkansas.gov](mailto:Mika.Tucker@arkansas.gov)>  
**Subject:** Arkansas State Claims Commission -- April 2023 hearing information

Attached please find information relating to the Claims Commission's April 2023 hearings. If there are any questions, please do not hesitate to call or email me.

Kathryn Irby

**Kathryn Irby**  
**Arkansas State Claims Commission**  
101 East Capitol Avenue, Suite 410  
Little Rock, Arkansas 72201  
(501) 682-2822

**From:** [Sparks, Trella A.](#)  
**To:** [ASCC Pleadings](#)  
**Cc:** [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com); [Blakley, Sharon D.](#); [Kathryn Irby](#)  
**Subject:** Pelfrey vs. ARDOT; Claim Number  
**Date:** Wednesday, April 26, 2023 1:57:42 PM  
**Attachments:** [image001.png](#)  
[COI L&N Construction.pdf](#)

---

Attached please find the Certificate of Insurance of ARDOT's contractor that offered to provide to the Commissioners at the hearing on the Motions 4/20/23.

Please be sure Commissioners Morris, Smith, and Kinslow receive this.

Thank you,

**Trella A. Sparks, Deputy Chief Counsel**

Arkansas Department of Transportation

P.O. Box 2261

Little Rock, AR 72203-2261

(501) 569-2157



DATE (MM/DD/YY)  
2/22/05

**PRODUCER**

**The Cashion Company, Inc.**  
P.O. Box 550  
Little Rock, AR 72203  
501-376-0716

**THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.**

### INSURERS AFFORDING COVERAGE

INSURED

L & N Construction, Inc.  
PO Box 1045  
Mountain View AR 72560

INSURER A: CNA Insurance Company

INSURER B: American Interstate

INSURER C:

INSURER D:

INSURER F:

## COVERAGES

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS	
A	GENERAL LIABILITY	224943122	2/22/05	2/22/06	EACH OCCURRENCE	\$ 1000000
	<input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY				FIRE DAMAGE (Any one fire)	\$ 100000
	<input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR				MED EXP (Any one person)	\$ 5000
					PERSONAL & ADV INJURY	\$ 1000000
					GENERAL AGGREGATE	\$ 2000000
	GEN'L AGGREGATE LIMIT APPLIES PER:				PRODUCTS - COMP/OP AGG	\$ 2000000
<input type="checkbox"/> POLICY <input type="checkbox"/> PRO- JECT <input type="checkbox"/> LOC						
A	AUTOMOBILE LIABILITY	224943170	2/22/05	2/22/06	COMBINED SINGLE LIMIT (Ea accident)	\$ 1000000
	<input checked="" type="checkbox"/> ANY AUTO				BODILY INJURY (Per person)	\$
	<input type="checkbox"/> ALL OWNED AUTOS				BODILY INJURY (Per accident)	\$
	<input type="checkbox"/> SCHEDULED AUTOS				PROPERTY DAMAGE (Per accident)	\$
	<input type="checkbox"/> HIRED AUTOS					
	<input type="checkbox"/> NON-OWNED AUTOS					
	GARAGE LIABILITY				AUTO ONLY - EA ACCIDENT	\$
<input type="checkbox"/> ANY AUTO					OTHER THAN EA ACC	\$
					AUTO ONLY: AGG	\$
A	EXCESS LIABILITY	224943251	2/22/05	2/22/06	EACH OCCURRENCE	\$ 1000000
	<input type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE				AGGREGATE	\$ 1000000
						\$
	<input type="checkbox"/> DEDUCTIBLE					\$
	<input checked="" type="checkbox"/> RETENTION \$ 10000					\$
B	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY	AVWCAR1342832005	2/22/05	2/22/06	<input checked="" type="checkbox"/> WC STATU- TORY LIMITS <input type="checkbox"/> OTH- ER	
	E.L. EACH ACCIDENT				\$ 1000000	
	E.L. DISEASE - EA EMPLOYEE				\$ 1000000	
	E.L. DISEASE - POLICY LIMIT				\$ 1000000	
	OTHER					

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS

RE: JOB #090195

**CERTIFICATE HOLDER**

**ADDITIONAL INSURED: INSURER LETTER:**

### CANCELLATION

ARKANSAS STATE HIGHWAY AND  
TRANSPORTATION DEPARTMENT  
P.O. BOX 2261  
LITTLE ROCK, AR 72203

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL SEND A LETTER BY MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT NO LATER THAN 30 DAYS BEFORE THE EXPIRATION DATE OF THE POLICY. IF THE POLICY IS CANCELLED FOR ANY REASON OTHER THAN THE EXPIRATION DATE, THE ISSUING INSURER WILL SEND A LETTER BY MAIL 30 DAYS BEFORE THE EXPIRATION DATE OF THE POLICY. IF THE POLICY IS CANCELLED FOR ANY REASON OTHER THAN THE EXPIRATION DATE, THE ISSUING INSURER WILL SEND A LETTER BY MAIL 30 DAYS BEFORE THE EXPIRATION DATE OF THE POLICY.

**AUTHORIZED REPRESENTATIVE**

AUTHORIZED REPRESENTATIVE  
*Matthew A. Cushing*

## BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

KENENA PELFREY

CLAIMANT

V.

CLAIM NO. 220574

ARKANSAS DEPARTMENT OF  
TRANSPORTATION

RESPONDENT

ORDER

Now before the Arkansas State Claims Commission (the “Claims Commission”) is the second amended motion filed by the Arkansas Department of Transportation (the “Respondent”) to dismiss the claim of Kenena Pelfrey (the “Claimant”). Also pending is Respondent’s motion to strike Claimant’s affidavit. At the hearing on April 20, 2023, Dylan Botteicher appeared on behalf of Claimant, and Trella A. Sparks appeared on behalf of Respondent. Based upon a review of Respondent’s motions, the arguments made therein, and the law of the State of Arkansas, the Claims Commission hereby finds as follows:

1. Claimant filed this claim on October 30, 2021, alleging \$568,000 in damages related to the placement of a dumpsite above Claimant’s home. Claimant alleged that the dumpsite caused a landslide that damages Claimant’s home and property.

2. Respondent filed a motion to dismiss, which was denied as moot by the Claims Commission following a May 2022 hearing. In the Claims Commission’s May 25, 2022, order, the Claims Commission gave Claimant two weeks to amend her complaint.

3. Claimant thereafter amended her complaint.

4. Respondent filed an answer to the amended complaint and denied liability. Respondent also moved to dismiss the amended complaint, arguing that Claimant’s claim is barred by *res judicata* (following the settlement of the Madison County Circuit Court lawsuit styled *Doug Pelfrey and Kenena Pelfrey v. L&N Construction, Inc.*, Case No. 44CV-17-136-1) and that

Claimant has not exhausted her remedies pursuant to Ark. Code Ann. § 19-10-302. Respondent's Amended Motion to Dismiss at ¶ 2–9.

5. Claimant responded, arguing that she has provided a letter from her insurance company confirming that there was no coverage for the landslide. As to Respondent's *res judicata* argument, Claimant responded that the order dismissing the *L&N Construction* lawsuit did not “specifically dismiss claims for continuing violations created by the landslide.” Claimant's Response at ¶¶ 1, 4.

6. Respondent replied, arguing that when Claimant settled its lawsuit against L&N Construction for less than policy limits, Claimant cannot now seek additional funds through the Claims Commission pursuant to *Virgil v. Arkansas Dept. of Transportation*, Claim No. 16-0515-CC. Respondent's Reply at ¶ 1, 4.

7. Claimant then submitted an affidavit regarding her exhaustion of insurance remedies.

8. Respondent moved to strike the affidavit for failing to state what actions Claimant took to exhaust her insurance remedies. Respondent's Motion to Strike at ¶ 1.

9. Respondent also filed a second amended motion to dismiss, arguing that Claimant has failed to state a legally cognizable cause of action, failed to state facts to support an alleged cause of action, and failed to meet her “burden of going forward . . . at every step of the claims process. . . .” Respondent's Second Amended MTD at ¶¶ 1–2.

10. Claimant responded to the motion to strike and second amended motion to dismiss, arguing, *inter alia*, that striking the affidavit is not an appropriate remedy and that the second amended motion to dismiss only argues that the affidavit is insufficient. Claimant's Response at ¶¶ 6–7.

11. Respondent filed a reply, arguing that the second amended motion to dismiss includes arguments regarding Claimant's failure to state a claim and Claimant's failure "to meet their burden of going forward at every step of the claims process . . . which has now been pending for over a year." Respondent's Reply at p. 1. Respondent also requested that the Claims Commission strike certain arguments in Claimant's response as "unresponsive, redundant, and frivolous." *Id.* As to the motion to strike, Respondent argued that the striking of the affidavit is appropriate under Ark. R. Civ. Proc. 12(f) and that Claimant misstated the law cited in its response. *Id.* at p. 2.

12. At the hearing, upon a question from a commissioner as to what causes of action are being alleged as to Respondent, Claimant explained that Respondent required L&N Construction to deviate from the construction plan and to move the location of the dumpsite.

13. At the hearing, Respondent argued the three bases of its motion to dismiss: (1) res judicata and claim preclusion (based on resolution of the related lawsuit involved L&N Construction, in which Claimant argued that L&N Construction failed to comply, *inter alia*, with Respondent's construction plan), (2) exhaustion of remedies (based on Claimant's failure to satisfy Ark. Code Ann. § 19-10-302 as to Claimant's homeowner insurance), and (3) the made whole doctrine (based on Claimant's settlement with L&N Construction in the related lawsuit for less than L&N Construction's liability insurance policy limits). As to Respondent's motion to strike, Respondent argued that the affidavit, which does not include reference to the L&N Construction settlement, is incomplete and needs to be stricken.

14. Claimant objected to Respondent's introduction of the L&N Construction complaint in Madison County Circuit Court, arguing that the complaint was not attached to Respondent's motion and that consideration of this complaint is improper under Ark. Civ. Proc. Rule 12. The Commission stated that it would take the objection under consideration.



15. Upon question from commissioner as to whether there was a final judgment in the circuit court, Respondent agreed that there was only an order of dismissal based on settlement.

16. Upon a question from a commissioner as to how far a claimant must go to exhaust its insurance remedies, Respondent agreed that filing a claim under auto insurance would be unnecessary but that a claimant might have to sue for wrongful denial of applicable insurance. Respondent asserted that one denial is not sufficient.

17. Upon a question from a commissioner as to the minimum amount of insurance that a contractor is required to have, Respondent stated that the information will be submitted to the Commission following the hearing.

18. Claimant argued that there was no final judgment in the underlying lawsuit, such that res judicata cannot apply. Claimant also argued that it submitted an affidavit to fulfill the requirements in Ark. Code Ann. § 19-10-302. As to the made whole argument, Claimant argued that there is nothing in the underlying lawsuit's order specifying what, if anything, that Claimant received.

19. Upon a question from a commissioner as to whether Claimant's current counsel represented Claimant in the underlying litigation, Claimant's counsel stated that he did not.

20. Upon a question from a commissioner as to whether a claimant who settles for less than policy limits has exhausted the insurance remedies, Claimant stated that would not be the case if, as here, there were unknown damages at the time of the settlement. Claimant also argued that it is not the proper time to adjudicate that issue.

21. Respondent replied, arguing that the Commission's procedure is to require claimants to use their insurance or to reduce an award by any insurance coverage and that additional disclosures need to be made. Respondent also noted that previous claims have been held in abeyance until insurance issues are sorted out.

22. The Commission hereby directs Claimant within 20 days of the date of this Order to re-plead this claim in a pleading form with specific causes of action set out, including the specifics of the underlying L&N Construction lawsuit. Claimant should include language from Claimant's homeowners' insurance policy OR attach the policy provision specifying the coverage for landslide damages OR outline the steps taken to obtain a copy of the policy.

23. The Commission further finds that Respondent's motion to dismiss is denied as to the res judicata and claim preclusion arguments and denied as moot as to the exhaustion arguments. Respondent's motion to strike the affidavit is denied as moot, as well.

IT IS SO ORDERED.




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ARKANSAS STATE CLAIMS COMMISSION  
Henry Kinslow




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ARKANSAS STATE CLAIMS COMMISSION  
Paul Morris, Chair




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ARKANSAS STATE CLAIMS COMMISSION  
Sylvester Smith

DATE: July 3, 2023

**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).

**From:** [Kathryn Irby](#)  
**To:** [Dylan Botteicher](#); [Graham Whitsett](#); [Sparks, Trella A.](#); [Blakley, Sharon](#)  
**Subject:** ORDER: Pelfrey v. ArDOT, Claim No. 220574  
**Date:** Monday, July 3, 2023 9:28:00 AM  
**Attachments:** [Pelfrey -- 220574 -- hearing -- order.pdf](#)

---

Mr. Botteicher and Ms. Sparks, please see attached order.

Thanks,  
Kathryn Irby

**Kathryn Irby**  
**Arkansas State Claims Commission**  
101 East Capitol Avenue, Suite 410  
Little Rock, Arkansas 72201  
(501) 682-2822

**From:** [Dylan Botteicher](#)  
**To:** [Kathryn Irby](#)  
**Cc:** [Sparks, Trella A.](#); [Blakley, Sharon](#); [Graham Whitsett](#)  
**Subject:** Pelfrey v. ArDOT, Claim No. 220574 Second Amended Complaint  
**Date:** Wednesday, July 19, 2023 9:53:50 AM  
**Attachments:** [Pelfrey Second Amended Complaint.pdf](#)

---

Ms. Irby,

Please find attached Claimants' Second Amended Complaint.

Thanks,

Dylan Botteicher  
 COX, STERLING, VANDIVER & BOTTEICHER, PLLC  
 8201 Cantrell Road, Suite 230  
 Little Rock, Arkansas 72227  
 (501) 954-8073 Office  
 (501) 954-7856 Fax  
[djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com) Email  
[www.csmfirm.com](http://www.csmfirm.com) Website

The information contained in this communication is privileged, confidential information prepared in the furtherance of the rendition of professional legal services and is not intended to be disclosed to persons other than the individual named. If the recipient of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this message in error, please notify the sender immediately and delete any electronic or physical copy of this message in your control or possession. IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS and other taxing authorities, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties that may be imposed on any taxpayer or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. Thank you

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

**DOUGLAS PELFREY and  
KENENA PELFREY**

**CLAIMANTS**

**VS.**

**CLAIM NO. 220574**

**ARKANSAS DEPARTMENT  
OF TRANSPORTATION**

**RESPONDENT**

**CLAIMANTS' SECOND AMENDED COMPLAINT**

Comes now the Claimants, Douglas Pelfrey and Kenena Pelfrey (the "Pelfreys"), by and through counsel, Cox, Sterling, Vandiver & Botteicher, PLLC, and for their Second Amended Complaint, state as follows:

1. Claimants are citizens and residents of [REDACTED] Arkansas and were at the times of the events complained of herein.
2. Respondent is a government department that is responsible for the maintenance performed on Highway 295.
3. Highway 295 is in close proximity to Claimants' property.
4. Respondent contracted with L&N Construction ("L&N") to repair the highway in 2015.
5. Respondent had a duty to prepare plans and specifications to L&N that would allow L&N to complete the work in a reasonable manner that would not threaten Claimants' property.
6. Respondent was responsible for overseeing L&N's work on the reparation project.
7. Respondent either instructed L&N to put debris and trash from the highway reparation project on the side of a mountain that sat above Claimants' property or approved of its L&N's actions. Respondent was aware that placing the dirt and debris on an incline would create a risk of a landslide onto Claimant's property, but Respondent still placed the dirt and debris in an

unsafe location.

8. Respondent either instructed, or assented to, its contractor placing enough dirt and debris above Claimants' property that a helicopter could land on it.

9. Respondent also instructed its agents to put drains for the reparation project in a location that forced water onto Claimants' property. This action intensified the sliding effects. Respondent knew, or should have known, that these actions would have harmed Claimant's property.

10. Respondent's actions caused a landslide that led to ten acres of Claimants' land being destroyed. Claimants' home, which was valued at \$350,000.00, was destroyed along with the rest of the acreage.

11. In 2018, Claimants began building a house on another section of their property that was not in proximity to the landslide at that time. Claimants 2018 build began approximately five acres away from the landslide.

12. In 2020, Claimants began to see the effects of the slide at the site of the new construction. The new construction was knocked off of its foundation and utility poles began to fall.

13. The new construction was totally destroyed. It was worth approximately \$225,000.00.

14. The landslide is continuing as of 2023. A substantial amount of land, between fifteen and eighteen acres, have been destroyed since 2020 due to the landslide.

15. Furthermore, Claimants owned lumber mills that were located on the damaged property. The roads to the mills were destroyed by the landslide in 2020.

16. Claimants have suffered \$120,000.00 in lost profits due to their inability to access the lumber mills since 2020.

17. Claimants' damages were proximately caused by the Highway Department when it did not take steps to stop the placement of debris and dirt in a dangerous location.

18. The Highway Department knew, or should have known, that the excessive amount of dirt and debris would cause damage to Claimants' land.

19. Claimants were denied insurance coverage related to the landslide because "Earth Movement" was listed as a General Exclusion. Claimants have attached a letter denying insurance provisions and the applicable policy provision, attached as Exhibit A, which explains the lack of coverage for landslide damages in accordance with the Commission's July 3, 2023 Order.

20. Claimants previously sued L&N for its role in the dumping of dirt and debris on a site that created the landslide. That complaint is attached as Exhibit B.

21. Respondent approved the location where the excess material was placed. Evidence of this approval is contained in the deposition of Flynn Norman, who testified on behalf of L&N in the previous lawsuit. Excerpts from this deposition are attached as Exhibit C.

#### COUNT I: NEGLIGENCE

22. Claimants reallege and reincorporate each and every paragraph contained in the Complaint as if stated word for word.

23. In performing and contracting the work done by Claimants property, Respondent undertook a duty of ordinary care.

24. Respondent drafted plans for the reparation project and oversaw L&N's activities in a negligent manner.



25. The negligence extends to a deficiency in design, planning, and supervision of the project.

26. The damages sustained by Claimants as pled herein were a foreseeable consequence of the negligence and failure to use ordinary care.

27. To the extent that Respondent claims that subcontractors or suppliers caused Claimants' damages, Respondent should be held liable for such conduct as the ultimate responsible party.

28. As a direct and proximate result of the negligent actions, Claimants have had their property destroyed and lost access to their lumber mill.

WHEREFORE, Claimants respectfully request that the motions be denied for the above reasons; that they be awarded costs and attorneys' fees, and all other relief deemed appropriate.

Respectfully Submitted,

COX, STERLING, VANDIVER &  
BOTTEICHER, PLLC  
8201 Cantrell Road, Suite 230  
Little Rock, Arkansas 72227  
(501) 954-8073

By: /s/ Dylan J. Botteicher  
Dylan J. Botteicher (ABN# 2017170)

*ATTORNEY FOR CLAIMANTS*

**CERTIFICATE OF SERVICE**

I, Dylan J. Botteicher, do hereby certify that a true and correct copy of the foregoing was served on the following person(s) through email service on this 19th day of July, 2023:

Trella A. Sparks  
ArDOT, Legal Division  
PO Box 2261  
Little Rock, AR 72203-2261

By: /s/ Dylan J. Botteicher  
Dylan J. Botteicher (ABN# 2017170)

*since 1902*  
**Farmers Mutual**  
**INSURANCE COMPANY**

P.O. BOX 129  
585 S. GENTRY BLVD.  
GENTRY, AR 72734  
(479) 736-2400 (PHONE)  
(479) 736-8822 (FAX)  
FMIC@CENTURYTEL.NET

12/20/2021

Name of Insured: Douglas and Kenena Pelfrey

Address of Property:



Insurance Policy #:

Date of Loss: 12/27/2015

Cause of Loss: Landslide

To Whom It May Concern:

Please accept this letter as confirmation that coverage was denied and no insurance proceeds were paid by Farmers Mutual Insurance Company relating to the above described loss.

Sincerely,

A handwritten signature in black ink, appearing to read "Todd Stephens".

Todd Stephens  
General Manager

Farmers Mutual Insurance Company—Gentry, AR

EXHIBIT A

## GENERAL EXCLUSIONS

We do not pay for loss if one or more of the following exclusions apply to the loss, regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as, or after the excluded causes or events.

1. **Business Interruption** - We do not pay for loss which results from interruption of business.

2. **Civil Authority** - We do not pay for loss which results from order of civil authority.

We pay for loss which results from acts of a civil authority to prevent the spread of fire. We do not pay if the fire was caused by an excluded peril.

3. **Earth Movement** - We do not pay for loss which results from earth movement whether the earth movement results from natural or artificial causes.

Earth movement includes but is not limited to:

a. earthquake;

b. landslide, subsidence, erosion;

c. mudflow;

d. earth sinking, rising, shifting, expanding, or contracting. This does not include Sinkhole Collapse as described under Coverage C - Perils Insured Against; or

e. volcanic explosion. Volcanic explosion does not include Volcanic Action as described under Coverage C - Perils Insured Against.

We do pay for direct loss caused by fire, explosion (other than a volcanic explosion) and, if covered by this policy, theft resulting from earth movement.

We do pay for the breakage of glass that is part of a covered structure resulting from earth movement.

4. **Intentional Acts** - We do not pay for loss which results from an act committed with intent to cause a loss:

a. by you or at your direction; or

b. by or at the direction of any other insured.

5. **Neglect** - We do not pay for loss which results from your neglect to use all reasonable means to save and preserve damaged property at and after the time of a loss.

6. **Nuclear Hazard** - We do not pay for loss which results from nuclear reaction, nuclear radiation, or radioactive contamination (whether controlled or uncontrolled).

FL-3 Ed 1.0

## IN THE CIRCUIT COURT OF MADISON COUNTY, ARKANSAS

DOUG PELFREY and KENENA PELFREY

PLAINTIFFS

V.

NO. 44CV-17- 136-1L & N CONSTRUCTION, INC. and  
JOHN DOES 1-10

DEFENDANTS

COMPLAINT AT LAW

Comes now the Plaintiffs herein, Doug Pelfrey and Kenena Pelfrey, and for their Complaint against the Defendants, L&N Construction, Inc. and John Does 1-10, state and allege as follows:

1. That the Plaintiffs are citizens and residents of [REDACTED] Arkansas and were at the time of the events complained of herein.

2. That this cause of action arose out of an incident which occurred on or about December 28, 2015, in Madison County, Arkansas.

3. That the Defendant is an Arkansas Corporation licensed to do and doing business in the State of Arkansas at the time of the acts alleged herein with its principle place of business in Mountain View, Arkansas.

4. That John Does 1-10 are unknown at the present time. In accordance with Ark. Code Ann. § 16-56-125, attached to this Complaint at Law and filed with this Complaint at Law is the Affidavit of Plaintiffs' attorney stating the identity of separate Defendant John Does 1-10 are unknown at this time. Said John Does may be the liability insurance carrier for one or more of the parties and may be a tortfeasor (including, but not limited to, any other subcontractors or contractors involved in this incident) who breached a duty to the Plaintiffs or proximately caused damages to

FILED FOR RECORD  
at 1:51 o'clock P. M.

SEP 11 2017

PHYLLIS VILLINES  
CLERK AND RECORDER  
MADISON COUNTY, ARKANSAS

EXHIBIT B

the Plaintiffs. The Plaintiffs reserve the right to amend the Complaint to substitute the real party of interest for separate Defendants John Does 1-10.

5. That this Court has jurisdiction over this matter and venue is proper.

6. That the Defendant was the General Contractor for a highway construction and/or repair project which included an area at or near Crosses, Arkansas, in Madison County and had contracted with the Arkansas State Highway & Transportation Department to perform the repair work and construction in accordance with the Arkansas State Highway & Transportation Department Plans and Specifications and in compliance with the law and applicable standards and customs in the industry.

7. That the Defendant had a duty to complete the project which is the subject of this litigation in compliance with the contract, Arkansas State Highway & Transportation Department Plans and Specifications and in compliance with the law and applicable standards and customs in the industry.

8. That during the course of the work Defendant was completing under said contract, the Defendant, and/or persons at the Defendant's direction, dumped excess dirt and debris on land on a hill and land above Plaintiffs' property when they knew, or should have know, that said excess dirt and debris could cause damage to the Plaintiffs' property.

9. That on or about December 27, 2015, going into December 28, 2015, and some dates thereafter, a "mud slide" or "land slide" occurred above the property of the Plaintiffs, located at [REDACTED] [REDACTED] Arkansas, at the location where Defendant had dumped the excess dirt and debris as set forth above. As a result of the "mud slide" or "land slide", the Plaintiffs' home and real estate was entirely destroyed as well as personal property and other items.

10. That the "mud slide" was proximately caused by the negligence of the Defendants, individually, as well as jointly and severally, and/or their agents, servants and/or employees, said negligent acts include, but are not limited to, the following:

(a) Failing to properly comply with the Arkansas State Highway & Transportation Department plans and specifications when dumped the excess dirt and debris on this project ;

(b) Failing to complete a silt fence and/or wall needed to keep silt from washing to adjacent property in compliance with the plans and specifications as well as applicable standards in the trade and industry;

(c) Failing to comply with the Arkansas Department of Environmental Quality Rules and Regulations;

(d) Failing to properly dispose of fill and waste in accordance with Arkansas Law as well as the Arkansas State Highway & Transportation Department Rules and Regulations and applicable standards in the trade and industry;

(e) Failing to properly compact the embankment properly and in accordance with Arkansas State Highway & Transportation Department plans and specifications and applicable standards in the trade and industry; and

(e) Otherwise failing to complete their operations in a reasonable, safe and prudent manner in violation of other known, and unknown at this time, standards in the trade and industry.

9. That the negligence, and any of the negligent acts, complained of above performed by the employees, agents and/or servants of the separate Defendants, individually, as well as jointly and severally, is imputed to the separate Defendants.

11. As a proximate result of the negligence of the Defendants, individually, as well as jointly and severally, all as aforesaid, the Plaintiffs, Doug Pelfrey and Kenena Pelfrey, have suffered

the destruction of their residence, real property, as well as personal property, and have incurred incidental costs and expenses, all for an amount in excess of that required by federal jurisdiction in diversity of citizenship cases.

12. That the Plaintiffs reserve the right to amend their Complaint to cover other acts of negligence as discovery warrants.

13. That the Plaintiffs demand a trial by jury.

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs, Doug Pelfrey and Kenena Pelfrey, pray for damages as set forth above for an amount in excess of that required by federal jurisdiction in diversity of citizenship cases; pre-judgment interest, post-judgment interest, attorney fees, and for any and all other relief to which the Plaintiffs may prove themselves entitled.

Respectfully Submitted,

DOUG PELFREY and  
KENENA PELFREY, Plaintiffs

BY: 

TIMOTHY J. MYERS #93110  
TAYLOR LAW PARTNERS, LLP  
P.O. BOX 8310  
FAYETTEVILLE, AR 72703  
(479) 443-5222

EXHIBIT B



## DOUG PELFREY and KENENA PELFREY

V.

NO. 44CV-17-\_\_\_\_\_


DEFENDANTS

STATE OF ARKANSAS )  
COUNTY OF WASHINGTON ) ss.

1. That upon information and belief there are parties whose identity is unknown at this

FURTHER, AFFIANT SAYETH NOT.

OT.



TIMOTHY J. MYERS

e, a Notary Public, on the 8th day

[Signature]  
NOTARY PUBLIC



117

MAR. 1. 2021 3:39PM TAYLOR LAW FIRM 4794437842

NO. 2978 P. 45  
FILED MAR 1 2021  
CLERK OF COURT

1 IN THE CIRCUIT COURT OF MADISON COUNTY, ARKANSAS  
2 CIVIL DIVISION

3 DOUG PELFREY and KENENA  
4 PELFREY,

5 PLAINTIFFS,

6 VS.

CASE NO. 44CV-17-136-1

7 L & N CONSTRUCTION, INC.,  
8 and JOHN DOES 1-10

9 DEFENDANTS.

10 DEPOSITION OF

11 FLYNN NORMAN

12 NOVEMBER 6, 2020

13  
14  
15 DEPOSITION OF FLYNN NORMAN, produced as a witness at the  
16 instance of the PLAINTIFF, and duly sworn, was taken in the  
17 above-styled and numbered cause on the 6th day of November,  
18 2020, from 11:41 a.m. to 1:03 p.m., before Ronda Brown, CCR in  
19 and for the State of Arkansas, reported by machine shorthand, at  
20 First Security Bank, 601 E. Main Street, Mountain View,  
21 Arkansas, pursuant to the Arkansas Rules of Civil Procedure.  
22  
23  
24  
25

EXHIBIT C

MAR. 1. 2021 3:39PM

TAYLOR LAW FIRM 4794437842

NO. 2978 P. 46

2

## A P P E A R A N C E S

## FOR THE PLAINTIFF:

MR. TIMOTHY J. MYERS

Taylor Law Partners, LLP

303 E. Millsap Road

P.O. Box 8310

Fayetteville, Arkansas 72703

479-443-5222

tmyers@taylorlawpartners.com

## FOR THE DEFENDANT:

MS. MICHAEL MCCARTY HARRISON

Friday Eldredge &amp; Clark, LLP

400 West Capitol Avenue

Suite 2000

Little Rock, Arkansas 72201

501-370-3324

Mharrison@fridayfirm.com

EXHIBIT C

1 do on this project? All those things you just described?

2 A. Yes.

3 Q. And then when you said you'd dig down to rock level, then  
4 what you were digging out, then, is what I -- what I'm going to  
5 refer to as spoil or fill that you would dump at an offsite --  
6 different location. Is that accurate?

7 A. Yes. Yes. Uh-huh.

8 Q. And it was that type of material that would have been  
9 dumped on the land that we're here today talking about?

10 A. Yes.

11 Q. Was Consolidated Engineers asked to go out and check the  
12 compaction or the soil consistency on the land where you were  
13 dumping the fill?

14 A. No. That was up to the Highway Department.

15 Q. You left that up to the Highway Department?

16 A. Yeah. I went out there and I went to the man that owned  
17 the property, which was a -- they told me who owned it. I went  
18 to him and got an agreement, either paid him -- on this one  
19 here, I think -- I can't find the letter. But I had to have a  
20 signed agreement between them and myself to present to the  
21 Highway Department.

22 And then I staked out how far I wanted to go out there.  
23 And then they sent an ADEQ, I guess -- I don't know. Anyway,  
24 that's what was on the papers, usually, in there and they  
25 inspected it. And then they would let us dump on it. But we

1 proposed waste area, is this a road?

2 A. It's a private road. Goes all the way around through here.

3 Q. Okay. And where it connects up here to the right of the

4 diagram on Exhibit 3, this would be 295?

5 A. Yeah.

6 Q. Okay.

7 A. And here was the end of the job and the beginning of the

8 job. Here's the beginning and here's the end of it.

9 Station -- I can't read them stations.

10 Q. That's okay.

11 A. But anyway.

12 Q. But what you hired -- if I understand you right, what you

13 had Consolidated Engineers to do was to come out and do the

14 markings for the highway?

15 A. Yes.

16 Q. Okay. But Consolidated, as I understand it, did not have

17 anything to do with checking the waste area?

18 A. No.

19 Q. Okay.

20 A. That was all -- that was all done by ADEQ and Arkansas

21 Highway Department.

22 Q. Okay. In your dealings, have you had, prior -- before

23 this, I assume you had some prior contracts with Arkansas State

24 Highway Department?

25 A. Oh, yes, for years.

EXHIBIT C

1 met ADEQ requirements. Arkansas Department of Environmental  
2 Equality. Right?

3 A. Yes.

4 Q. Do you have to get a permit or letter from them indicating  
5 that it meets their requirements?

6 A. I got one from the Highway Department.

7 Q. Okay. Did you get anything from ADEQ?

8 A. Huh-uh.

9 Q. I need you to say yes or no.

10 A. No.

11 Q. Okay. Well, let's go -- let's go over -- there's a work  
12 order. You recognize this?

13 A. Yeah.

14 Q. Okay. And tell me what this means. Looks like it has your  
15 total award amount of 1,687,112 on this project?

16 A. Yeah.

17 Q. Is this just the order to allow you to get started on the  
18 project?

19 A. Yeah. Uh-huh.

20 Q. Okay. And then if you flip over to the next page, there's  
21 a July 7, 2005, letter from the Highway Department. Correct?

22 A. Let's see.

23 Q. Right here.

24 A. Oh, okay. Yeah.

25 Q. Okay. And it says, "Cultural resources survey was

1 handwriting, is your handwriting?  
2 A. Yes.  
3 Q. Okay.  
4 A. I put that and that on there and they was a stake there and  
5 a stake there, there, and there. And I give that, with  
6 another -- with one of these others, to the Highway Department.  
7 Q. Okay.  
8 A. And then they come back with this letter saying it was  
9 approved.  
10 Q. Okay.  
11 A. I don't know. Did I put a date on that? I don't know if  
12 I --  
13 Q. Well, it's in some of those other documents. They have --  
14 let me ask you this. On this project, was it your  
15 responsibility to find a place to dump the waste? Or was that  
16 in the original contract and you could modify that?  
17 A. No. It was my responsibility to find a place for the  
18 waste.  
19 Q. Okay.  
20 A. But it was their responsibility to approve it or disapprove  
21 it.  
22 Q. So when you started this project, you didn't know where you  
23 were going to dump it until you actually got started and went  
24 and found somebody --  
25 A. That would let you put it there or wanted it. A lot of

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TAYLOR LAW FIRM 4794437842

NO. 2978 P. 57

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- 1 area we're here about today. You contracted with Mr.  
2 Shackelford to dump waste at this location. Correct?  
3 A. Agreed. Yeah. Uh-huh.  
4 Q. Okay. Prior to L & N Construction dumping at this  
5 location, I know you went out and you staked it out on the  
6 dimensions that you have stated here?  
7 A. Yes.  
8 Q. And you said you got Highway Department approval to then  
9 dump?  
10 A. Yes.  
11 Q. And then you started dumping in that location?  
12 A. Yes.  
13 Q. Did you have -- did you do anything to the dump area, as  
14 far as excavating it, before you started dumping on that  
15 location?  
16 A. I'm not sure. I think they might have been a -- I think --  
17 it was an old field. I remember that. And I think they may  
18 have been some little ole trees in there about the size of  
19 these bottles, but I'm not sure. I don't -- and we probably  
20 wouldn't have done nothing.  
21 Q. Okay.  
22 A. Just --  
23 Q. So you don't -- you wouldn't have gone in and dug a hole?  
24 A. Oh, no, there was no hole. No.  
25 Q. Or dug trenches?

EXHIBIT C



1 just a bigger --

2 Q. Are you familiar with OSHA requirements when it comes to

3 soil stockpiles like these waste areas?

4 A. No.

5 Q. Other than you, would there be anybody else back then with

6 L & N Construction that would have been familiar with the OSHA

7 regulations in regard to that?

8 A. Huh-uh.

9 Q. I need you to say yes or no.

10 A. Yes. No.

11 Q. Okay.

12 A. That yes was I was answering.

13 Q. And it's your testimony today that there was not a

14 designated dump area for this location on the original plans.

15 and specs at the time you started the job. Is that accurate?

16 A. Now, rephrase that. How --

17 Q. Okay. It's my understanding from your testimony that

18 there -- when it comes to the waste areas?

19 A. Okay.

20 Q. Where you're going to do dumping?

21 A. Yes.

22 Q. Okay. Is it your testimony that a different waste area

23 wasn't already designated by the Highway Department on the

24 plans and specs originally?

25 A. No, it was not. It wasn't designated by the Highway

1 Department. It's our problem to get the locations, and then  
2 they come in and inspect our locations.

3 Q. Okay. So you would have been given the plans and specs on  
4 the jobs ahead of time, I assume, when you start the project?

5 A. The plans --

6 Q. Or the specifications for the job.

7 A. Oh, when I bid it.

8 Q. Yeah, exactly.

9 A. Before I bid it, I got them.

10 Q. Okay. And in those, when you bid the job, do you have to  
11 identify the waste area prior to starting the job?

12 A. Huh-uh. No.

13 Q. Okay. And the plans and specifications that you would have  
14 had, would the Highway Department -- did the Highway Department  
15 have any proposed or designated waste areas already for you?

16 A. No. Huh-uh.

17 Q. I know you said the debris or spoil fill that was put at  
18 this waste area we're here about today would have been fill  
19 dirt, probably some asphalt, and things that you would have dug  
20 up when you were cleaning up the slide on the highway. Is that  
21 right?

22 A. Yes. It would have been the debris that come out of the  
23 highway that had asphalt and gravel on the top part and then  
24 dirt on the bottom.

25 Q. Were you ever contacted by the Highway Department to come

1 back out and fix anything after you guys had completely left  
2 the job site?

3 A. No. Other than the punch list.

4 Q. I know. But you left -- after you came back and did the  
5 punch list, I think you were last on the job in January 2006?

6 A. I don't remember the date but --

7 Q. Okay.

8 A. -- yeah.

9 Q. And after you did the punch list, you're done?

10 A. We were done. And I got a check shortly after that. I say  
11 shortly. I don't remember how long, but usually it's -- you  
12 get it within two or three months.

13 Q. You indicated that you had been out to where this slide  
14 occurred that landed up on the Pelfrey's house about a year-  
15 and-a-half ago, roughly?

16 A. I -- I don't know exact but --

17 Q. Sure. But you've been out there once?

18 A. I've been out there once, yeah.

19 Q. And you saw the slide where it occurred? Where the slide.  
20 was?

21 A. Yeah. Uh-huh.

22 Q. As you sit here today, do you have any idea what caused  
23 that?

24 A. Yeah.

25 Q. What?

**From:** [Allison, Evelyn T.](#)  
**To:** [ASCC Pleadings](#)  
**Cc:** [Black, Brian](#); [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com); [Blakley, Sharon D.](#)  
**Subject:** Pelfrey v ARDOT Claim 220574 Respondent's Answer to Second Amended Complaint & Respondent's Amended Motion to Dismiss & Incorporated Brief and Respondent's Brief in Support of Amended Motion to Dismiss  
**Date:** Tuesday, August 8, 2023 2:45:52 PM  
**Attachments:** [Pelfrey.220574.Final Answer & MTD.pdf.pdf](#)  
[Pelfrey.220574.Final Brief in Support of Amended MTD.pdf.pdf](#)

---

Please acknowledge receipt of the attached Respondent's Answer to Second Amended Complaint & Respondent's Amended Motion to Dismiss & Incorporated Brief and Respondent's Brief in Support of Amended Motion to Dismiss.

Thanks,  
Evelyn Allison  
Legal Assistant  
ARDOT, Legal Division  
(501) 569-2353  
Brian D. Black  
Staff Attorney

**IN THE ARKANSAS STATE CLAIMS COMMISSION**

**KENENA PELFREY**

**CLAIMANT**

**VS.**

**CLAIM NO. 220574**

**ARKANSAS DEPARTMENT OF TRANSPORTATION**

**RESPONDENTS**

**ANSWER TO SECOND AMENDED COMPLAINT  
AND RESPONDENT'S AMENDED MOTION TO DISMISS AND INCORPORATED  
BRIEF**

**COMES NOW** the Respondent, Arkansas Department of Transportation, by and through undersigned counsel, and for its Answer to Claimant's Second Amended Complaint, and for its Amended Motion to Dismiss the Second Amended Complaint, states the following:

**ANSWER**

1. Upon information and belief, Respondent admits that Doug and Kenena Pelfrey are residents of Madison County, Arkansas. Respondent denies that Doug Pelfrey is a Claimant in this case; the only Claimant in this case is Kenena Pelfrey. See Attachment 1 (Claim Form).

2. In response to the allegations of paragraph 2 of Claimant's Second Amended Complaint, Respondent admits that it is the duly constituted agency of the State of Arkansas charged by law with the construction and maintenance of the highways comprising the highway system of the State of Arkansas. Respondent denies any remaining allegations of paragraph 2 of the Second Amended Complaint.

3. The allegations of paragraph 3 of the Second Amended Complaint are too vague for Respondent to accurately respond, and Respondent therefore denies them.

4. Respondent denies that the allegations of paragraph 4 of the Second Amended Complaint fully or accurately reflect the nature of the project to which Claimant's claims

ostensibly relate, and therefore denies the same. Respondent admits that L&N Construction (“L&N”) was the contractor responsible for performing Job Number 090195.

5. Respondent denies the allegations of paragraph 5 of the Second Amended Complaint. Respondent further affirmatively pleads that Claimant did not own the property that is the subject of this claim in January of 2006, when all work was completed on Job Number 090195. See Attachment 2, Warranty Deed dated May 24, 2008 (filed July 14, 2008); see also Affidavit of Flynn Norman, attached as Exhibit B to Attachment 3, Defendant L&N Construction’s Motion for Summary Judgment in the case of Pelfrey v. L&N Construction, ¶ 4.

6. Respondent admits that it reviewed and approved the work performed by L&N on Job Number 090195. Respondent denies any remaining allegations of paragraph 6 of the Second Amended Complaint.

7. Respondent denies the allegations of paragraph 7 of the Second Amended Complaint. Respondent further affirmatively pleads that the Second Amended Complaint fails to allege any action on or to Claimant’s property, all allegations of the Second Amended Complaint describing actions taken on an adjacent parcel of land, and were taken with the express consent of the adjacent landowner. Respondent further affirmatively pleads that Claimant did not own the property that is the subject of this claim in January of 2006, when all work was completed on Job Number 090195.

8. Respondent denies the allegations of paragraph 8 of the Second Amended Complaint. Respondent further affirmatively pleads that Claimant did not own the property that is the subject of this claim in January of 2006, when all work was completed on Job Number 090195.

9. Respondent denies the allegations of paragraph 9 of the Second Amended Complaint. Respondent denies that it instructed anyone to put drains in a location that forced water onto Claimant's property. Respondent denies that any action on its part intensified any sliding effects, and denies that any actions on its part harmed Claimant's property. Respondent further affirmatively pleads that Claimant did not own the property that is the subject of this claim in January of 2006, when all work was completed on Job Number 090195.

10. Respondent denies that any action on its part caused a landslide that led to the destruction of Claimant's land. Respondent further affirmatively pleads that Claimant did not own the property that is the subject of this claim in January of 2006, when all work was completed on Job Number 090195. Respondent denies any remaining allegations of paragraph 10.

11. Respondent lacks sufficient information or knowledge to admit or deny the allegations of paragraph 11 of the Second Amended Complaint, and therefore denies the same. Respondent affirmatively pleads that Claimant's decision to construct a house on the same parcel of land following a landslide constitutes contributory negligence that bars recovery in this case. Respondent also notes that an acre is not a measure of distance.

12. Respondent lacks sufficient information or knowledge to admit or deny the allegations of paragraph 12 of the Second Amended Complaint, and therefore denies the same.

13. Respondent lacks sufficient information or knowledge to admit or deny the allegations of paragraph 13 of the Second Amended Complaint, and therefore denies the same.

14. Respondent lacks sufficient information or knowledge to admit or deny the allegations of paragraph 14 of the Second Amended Complaint, and therefore denies the same.

15. Respondent lacks sufficient information or knowledge to admit or deny the allegations of paragraph 15 of the Second Amended Complaint, and therefore denies the same.

16. Respondent lacks sufficient information or knowledge to admit or deny the allegations of paragraph 16 of the Second Amended Complaint, and therefore denies the same. Respondent responds affirmatively that lost profits are not compensable in this action, or in any action before the Claims Commission.

17. Respondent denies the allegations of paragraph 17 of the Second Amended Complaint. Respondent denies that it had any duty to Claimant.

18. Respondent denies the allegations of paragraph 18 of the Second Amended Complaint. Respondent further affirmatively pleads that Claimant did not own the property that is the subject of this claim in January of 2006, when all work was completed on Job Number 090195.

19. Respondent lacks sufficient information or knowledge to admit or deny the allegations of paragraph 19 of the Second Amended Complaint, and therefore denies the same.

20. In response to paragraph 20 of the Second Amended Complaint, Respondent admits that Claimant and her husband sued L&N. Respondent further responds that the copy of a complaint attached as Exhibit B to the Second Amended Complaint speaks for itself. Respondent affirmatively pleads that under principals of res judicata, Claimant's suit and settlement function as a bar to this action. Respondent denies any remaining allegations of paragraph 20 of the Claim.

21. Respondent denies the allegations of paragraph 21 of the Second Amended Complaint. Respondent denies that the document(s) attached as 13 C to the Second Amended Complaint fully or accurately reflect the deposition of Flynn Norman and deny that Mr. Norman



was qualified to make the representations therein. Respondent further responds that Respondent was not a party to the litigation in which that deposition was ostensibly taken, or that Respondent was afforded the opportunity to question or cross-examine Mr. Norman or to challenge his deposition testimony.

22. Respondent hereby restates and incorporates by reference each of the foregoing paragraphs as if stated verbatim.

23. The allegations of paragraph 23 of the Second Amended Complaint constitute a statement of law to which no response is required. To the extent a response is deemed required, Respondent denies that the allegations of paragraph 23 of the Second Amended Complaint accurately states the law. Respondent denies that it had any duty to the Claimant or that it undertook any duty to Claimant.

24. Respondent denies the allegations of paragraph 24 of the Second Amended Complaint. Respondent denies that it was negligent in any way relating to Job 090195 or to the Claimant. Respondent further responds that the allegations of negligence are defamatory as a matter of law.

25. Respondent denies the allegations of paragraph 25 of the Second Amended Complaint. Respondent denies that it was negligent in any manner, including with respect to the design, planning, or supervision of the Job 090195.

26. Respondent denies the allegations of paragraph 26 of the Second Amended Complaint. Respondent denies that Claimant sustained any damage as the result of any action by the Respondent.

27. The allegations of paragraph 27 of the Second Amended Complaint are a statement of law to which no response is required. To the extent a response is deemed required,

the allegations of paragraph 27 are a correct statement of law. The allegations of paragraph 27 do not have any basis in law or in fact.

28. Respondent denies the allegations of paragraph 28 of the Second Amended Complaint. Respondent denies that Claimant sustained any damage as the result of any action by the Respondent.

29. Respondent denies each and every allegation of the Second Amended Complaint not specifically admitted herein.

30. Respondent specifically pleads that the allegations of the Second Amended Complaint fail to state a claim of negligence for which relief can be granted.

31. Affirmatively pleading, the Respondent states that any injuries or damages sustained by the Claimant were proximately caused by Claimant's own contributory fault or negligence, which fault or negligence should bar or mitigate the Claimant's recovery in this case. Claimant admits to rebuilding on a site of an alleged previously, and potentially continuously active land slide without benefit of professional surveyors, geologists, etc.

32. The State is not a no-fault insurer of the general public. Without any claim and proof of negligence on the part of the Respondent, it should not be liable for Claimant's damages.

33. Arkansas Rule of Civil Procedure 8(a)(1) requires that a claimant plead facts—not mere conclusions, that demonstrate his entitlement to relief.

34. Only facts alleged in the complaint will be treated as true. The plaintiff's theories, speculation, or statutory interpretation are not afforded this treatment.

35. Under Arkansas law, in order to prevail on a claim of negligence, the plaintiff must prove that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach was the proximate cause of the plaintiff's injuries.

36. Respondent had no duty to Claimant and the Second Amended Complaint does not allege facts to show the existence of any duty to Claimant.

37. Respondent did not breach any duty to Claimant, and the Second Amended Complaint fails to allege facts sufficient to demonstrate the breach of any duty to Claimant.

38. Claim preclusion prevents relitigation of claim in a subsequent suit when:

- (a) the first suit resulted in a final judgment on the merits;
- (b) the first suit was based on proper jurisdiction;
- (c) the first suit was fully contested in good faith;
- (d) both suits involve the same claim or cause of action; and
- (e) both suits involve the same parties or their privies.

38. When a case is based on the same events as the subject matter of a previous lawsuit, res judicata will apply, even if the subsequent lawsuit raises new legal issues and seeks additional remedies.

39. On or about September 11, 2017, Claimant Kenena Pelfrey and her husband Doug Pelfrey filed a lawsuit against L & N Construction, Inc. ("L&N") and John Does 1-10, in the Circuit Court of Madison County, Arkansas, Civil Action Number 44CV-17-136.

40. This Claim is based on (and seeks relief for) the same events as the claims asserted in the Pelfreys' lawsuit against L&N.

41. Claimant's lawsuit against L&N Construction was dismissed with prejudice on August 3, 2021, pursuant to agreement between the parties.

42. The dismissal of the Claimant's lawsuit against L&N Construction precludes litigation of the claims asserted in this Claim.

43. Claimant did not own the land that forms the subject of this Claim until after the alleged negligence or trespass occurred.

44. A landowner cannot maintain an action for trespass that was complete before taking title.

45. Claimant lacks standing to bring this claim and it should be dismissed with prejudice.

46. The Statute of limitations applicable to the claims asserted in this case is three years. Ark. Code Ann. § 16-56-105.

47. More than three years have passed from the date of the alleged negligence (or of any implied trespass).

48. Claimant's claims as pled in this case are barred by the applicable statute of limitations. This claim is time- barred and should be denied and dismissed with prejudice.

49. Finally, a claimant against a state agency is required to exhaust all remedies, including her own insurance, prior to bringing a claim against the state.

50. Claimant received payment from L&N in settlement of their lawsuit.

51. Respondent is entitled to a reduction in any award to the Claimant corresponding to the amounts paid from Claimant's insurer(s), L&N Construction's insurers, L&N Construction, and any other person with respect to the losses alleged to stem from the actions alleged in the Second Amended Complaint.

52. Because Claimant has failed to state a legally cognizable cause of action against the Respondent and has failed to state facts supporting an alleged cause of action, this matter should be denied and dismissed pursuant to Arkansas Rules of Civil Procedure, Rule 12(b)(6).

**WHEREFORE**, the Respondent prays for dismissal of the Complaint, for cost, and all proper relief.

**RESPECTFULLY SUBMITTED,  
ARKANSAS DEPARTMENT OF TRANSPORTATION**

By: Brian D. Black  
Brian D. Black  
Staff Attorney  
ARDOT, Legal Division  
Arkansas Bar No. 2017-176  
P. O. Box 2261  
Little Rock, AR 72203-2261  
(501) 569-2003

**Certificate of Service**

I, Brian D. Black, certify that I have served the foregoing Motion to Dismiss upon the Claimant by mailing a true copy of same this 8th of August, 2023 to:

Dylan Botteicher  
Cox, Sterling, McClure & Vandiver, PLLC  
8712 Counts Massie Road  
North Little Rock, AR 72113

*Brian D. Black*

\_\_\_\_\_  
Brian D. Black

ARKANSAS STATE CLAIMS COMMISSION  
-Claim Form-

Arkansas  
State Claims Commission  
OCT 30 2021  
RECEIVED

Please note that all sections must be completed, or this form will be returned to you, which will delay the processing of your claim.

1. Claimant's Legal Counsel - ☒ (If representing yourself (Pro Se) please check this box and proceed to section 2)

Botteicher Dylan djbotteicher@csmfir.com  
(last name) (first name) (email)  
8712 Counts Massie Rd. North Little Rock AR 72113 501-954-8073  
(address) (city) (state) (zip) (primary phone)

Arkansas Bar Number: 2017170 If not licensed to practice law in Arkansas, please contact the Claims Commission for more information.

2. Claimant

Pelfrey Kenena [REDACTED]  
(title/last name/first name or company) (email)  
[REDACTED]  
(address) (city) (state) (zip) (primary phone)

3. State Agency Involved: (must be an Arkansas state agency. The Arkansas Claims Commission has no jurisdiction over county, city, or other municipalities)

Highway Department

(state agency involved)

4. Incident Date

December 2015 - Present

5. Claim Type

Please provide a brief explanation of your claim. If additional space is required please attach additional statements to this form.

5a. Check here if this claim involves damage to a motor vehicle. ☐

5b. Check here if this claim involves damage to property other than a motor vehicle. ☐

All property damage claims require a copy of your insurance declarations covering the property or motor vehicle at the time of damage.

I did not have insurance covering my property/motor vehicle at the time of damage. ☐

All property damage claims require ONE of the following (please attach):

1. Invoice(s) documenting repair costs, OR
2. Three (3) estimates for repair of the damaged property, OR
3. An explanation why repair bill(s) or estimate(s) cannot be provided.

6. Was a state vehicle involved? (If Yes, please complete the following section)

N/A  
 (type of state vehicle involved) (license number) (driver)

7. Check here if this claim involves personal injury.

All personal injury claims require a copy of your medical insurance information and relevant medical bills in place at the time of the incident.

I do not have health insurance ☒

8. Amount Sought: \$568,000

The undersigned certifies that to the best of my knowledge, information, and belief, this claim is not being presented for any improper purpose; this claim is warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law; and the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

Kenena Pelfrey  
 Claimant

ACKNOWLEDGEMENT

State of Arkansas  
 County of Johnson

On this the 21<sup>st</sup> day of Oct, 2021, before me, the undersigned notary, personally appeared Kenena Pelfrey known to me (or satisfactorily proven) to be the person whose name is subscribed to this instrument and acknowledged that he/she executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

Kelal Macchesney  
 Signature of Notary Public

My Commission expires: 8-23-28





Arkansas  
State Claims Commission  
OCT 30 2021  
RECEIVED

On December 15, 2015, our two-story home was hit by a landslide resulting from a dumpsite that was placed improperly above our home. We had to vacate our home on that day, moving as many of our belongs that were not destroyed by mud and water from the house with the help of many of our neighbors. We lost approximately \$33,000 in furniture in personal belongings. The back wall was knocked out resulting in the second story sagging. Initially, a county employee tried using his machinery to remove the weight of the mud, hoping to reconstruct the home. As he removed the mud it started the rolling again. We were never able to return to that home as it continued to be pushed down the mountain. It currently sits approximately 50-60 feet past where it was.

We built this 3,600 square foot home ourselves without a traditional loan, paying for it as we could and doing the majority of the work ourselves. It was our dream home, our retirement plan, and it was built on family land that was invaluable to my husband. Finally, after taking that devastating of a financial loss, we could easily list the house for \$450,000.00, we decided to downsize and build a log cabin as we were now empty nesters. Because land is so expensive in NW Arkansas, and because of the importance of the place to my husband, we built on the place again ignorant to the fact that the slide was still active because of the water that is being drained on it.

My husband and his brother and my brother had three sawmills on the property. They would log the trees, bring them back to the mills, and saw them. We constructed our second home with the same principle of building as we go, doing the work ourselves and trying to avoid a 30-year mortgage.

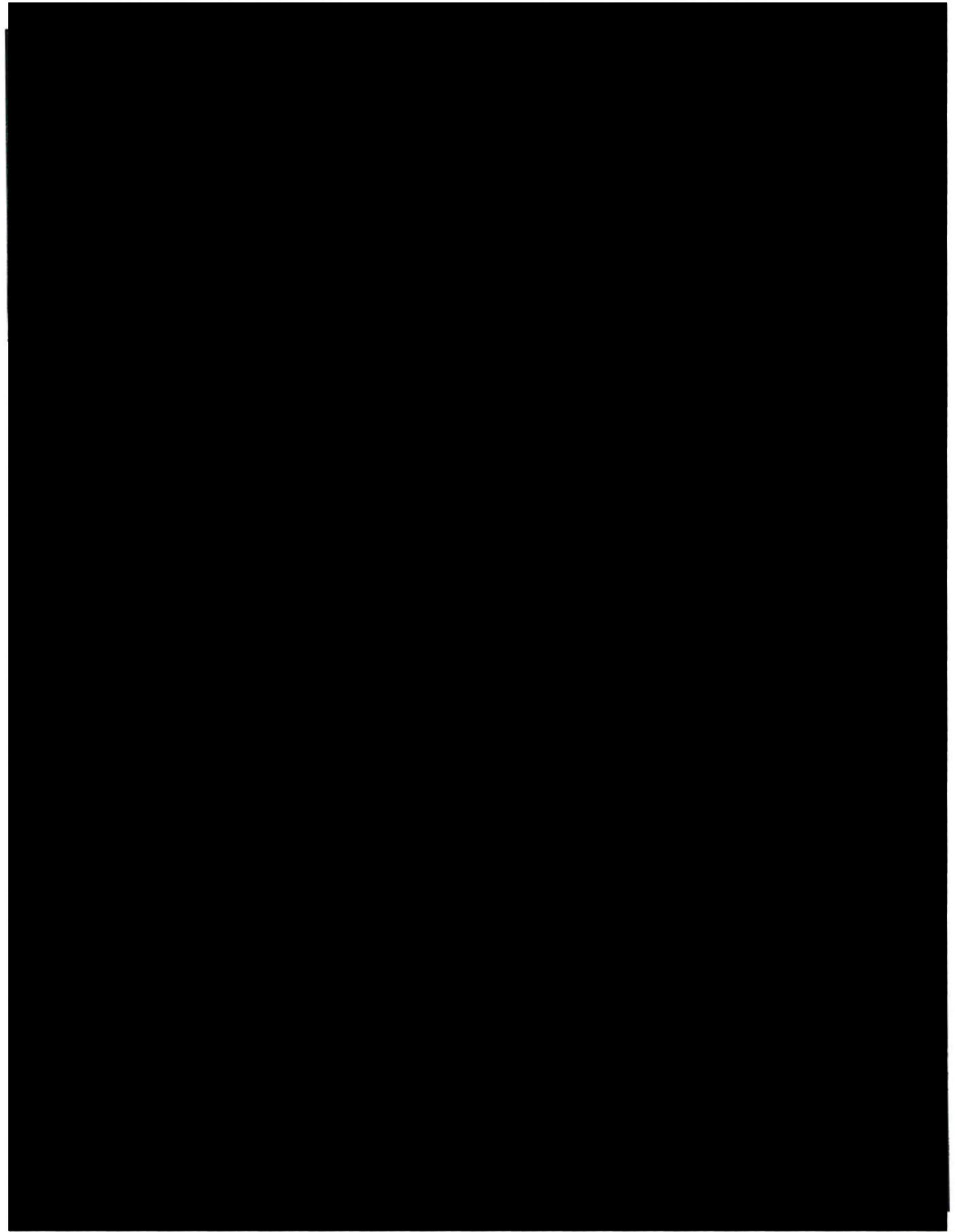
In 2020, we noticed that the road in out of the Pelfrey property appeared to be sinking. Within the next few months not only did the road collapse, the slide began to take down trees, we lost electric, water, and phone lines, over and over again and to our disbelief the slide began to knock our new cabin off its footing even though it was located away from the initial slide. Our beautiful cabin was approximately 1500 square foot worth at least \$250,000.00. At this point, we had no choice but to leave.

The county built us an emergency road over the top of the mountain, and we were able to get the mills out and sold because we no longer had a way to get timber in and lumber out. However, as is obvious, we lost that part of our business. In addition, our son and his wife had a new mobile home that is "trapped" in there. They moved, due to their jobs, before the emergency road was built because we had no way in and out except on 4-wheelers and with the deep crevices and dangerous terrain, we worried about trying to cross the destruction to make it out of the property. They are currently still trying to make a payment on this as well as a house payment.

As of today, the slide continues and the destruction is growing. Our ten acres is totally destroyed. Nearby land is going for six to seven thousand an acre.

We have lost so much from something that we believe was preventable.

Kenena Pelfrey



FILED FOR RECORD  
at 1:28 o'clock P.M.

OCT 28 2019

JUDY FOSTER  
CLERK AND RECORDER  
MADISON COUNTY, ARKANSAS

**IN THE CIRCUIT COURT OF MADISON COUNTY, ARKANSAS  
CIVIL DIVISION**

**DOUG PELFREY and KENENA PELFREY**

**PLAINTIFFS**

**VS.**

**NO. 44CV-17-136-1**

**L & N CONSTRUCTION, INC. and  
JOHN DOES 1-10**

**DEFENDANTS**

**DEFENDANT L & N CONSTRUCTION, INC.'S  
MOTION FOR SUMMARY JUDGMENT**

Comes now Defendant L & N Construction, Inc., ("L & N"), by and through its attorneys, Friday, Eldredge & Clark, and for its Motion for Summary Judgment, herein states:

1. Plaintiffs' claim involves a highway construction project. L & N performed a limited role in the construction and repair of the highway. The project work reports indicate that the project was substantially completed by September 30, 2005, and had ceased entirely by August 27, 2007. See Letter from the Arkansas State Highway and Transportation Department, attached hereto as Exhibit A; *see also* Affidavit of L & N President, Flynn Norman, attached hereto as Exhibit B. Further, the work reports provided by the Arkansas State Highway and Transportation Department indicate that the last day any work was on the project was August 27, 2007. See Excerpts of Daily Work Reports of Job No. 090195 Produced by the Arkansas Department of Transportation, attached hereto as Exhibit C.

2. On July 15, 2008, nearly a year after the conclusion of the project and after the conclusion of L & N's involvement in the construction, Plaintiffs purchased the property that is the subject of Plaintiffs' Complaint. See Madison County Assessor's Report, attached hereto as Exhibit D.

3. Plaintiffs' Complaint alleges that a mudslide destroyed their property on or about December 27, 2015, and December 28, 2015. Further, they allege that debris from the highway repair was negligently placed and caused the damage to Plaintiffs' property.

4. Summary judgment is warranted at this time. Summary judgment should be granted "when it is clear that there are no genuine issues of material fact to be litigated." *Clark v. Transcon. Ins. Co.*, 359 Ark. 340, 347, 197 S.W.3d 449, 453 (2004). Although the evidence must be viewed most favorably to the non-moving party, "[o]nce the moving party has established a *prima facie* entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact." *Id.* at 347, 197 S.W.3d at 453.

5. Under Arkansas law, negligence claims have a three-year statute of limitations period. See ARK. CODE ANN. § 16-56-105. Further, Arkansas follows the occurrence rule, which means that a plaintiff's claim arises from the final date of construction. See *Hill v. Hartness*, 2017 Ark. App. 664, at 5, 536 S.W.3d 649, 652.

6. The work reports indicate that the last date that any work took place was August 27, 2007, and therefore, that is the last date that any alleged

negligent act could have occurred. See Exhibit C. Plaintiffs' Complaint was not filed until September 11, 2017, well past the three-year statute of limitations. Accordingly, Plaintiffs' Complaint is barred, and summary judgment should be granted at this time.

7. Plaintiffs' Complaint is also barred by the statute of repose codified at ARK. CODE ANN. § 16-56-112. Arkansas courts have recognized that "a statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." *Ray & Sons Masonry Constrs., Inc. v. United States Fid. & Guar. Co.*, 353 Ark. 201, 218-19, 114 S.W.3d 189, 200 (2003).

8. Under Arkansas' statute of repose, Plaintiffs had five years from substantial completion of the project to bring suit. See ARK. CODE ANN. § 16-56-112(a). Here, the project was substantially completed by September 30, 2005. See Exhibits A & B. Accordingly, any right of action ceased to exist on September 22, 2010. Plaintiffs' Complaint was not filed until September 11, 2017, which is well past the expiration of the statute of repose. Therefore, summary judgment is appropriate at this time.

9. Finally, L & N owed no duty to Plaintiffs. Under Arkansas law, a claim for negligence requires that the plaintiff show that a duty was owed. See *Marlar v. Daniel*, 368 Ark. 505, 508, 247 S.W.3d 473, 476 (2007). The project was substantially completed by September 30, 2005. See Exhibits A & B. The work reports indicate that the project was completed in its entirety, with no further work being performed by anyone, on August 27, 2007. See Exhibit C.



Plaintiffs did not purchase the property that is the subject of their Complaint until July 15, 2008, nearly a year after all work had ceased. See Exhibit D. Plaintiffs had no ownership interest or rights to the land at the time of the complained of action. Moreover, the home at issue in Plaintiffs' Complaint was not even in existence at the time the project was substantially completed in 2005, having only been built in 2006. See Exhibit D. No relationship existed between Plaintiffs and L & N that would require L & N to owe Plaintiffs a duty of care at the time L & N's work was performed on the project. Because Plaintiffs are unable to show that L & N owed them any duty in this case, their claim for negligence must fail. Accordingly, L & N is entitled to summary judgment in its favor.

10. There are no issues of fact as to the date the work was performed by L&N, substantial completion of the project, the date Plaintiffs purchased the land at issue, or anything else necessary to a determination of these three basis for summary judgment in L & N's favor.

11. A Brief in Support of the instant Motion is being filed contemporaneously herewith and is incorporated by reference as if it were set forth herein word for word.

12. The following Exhibits are attached to this Motion:

Exhibit A: Letter from the Arkansas State Highway and Transportation Department

Exhibit B: Affidavit of L & N President, Flynn Norman

Exhibit C: Excerpts of Daily Work Reports of Job No. 090195 Created by the Arkansas Department of Transportation

Exhibit D: Madison County Assessor's Report

WHEREFORE, the Defendant, L & N Construction, Inc., respectfully requests that this Court grant its Motion for Summary Judgment, dismiss Plaintiffs' claims against it with prejudice, for its costs incurred herein, and all other relief to which it may be entitled.

Respectfully submitted,

**FRIDAY, ELDREDGE & CLARK, LLP**

400 West Capitol Avenue, Suite 2000

Little Rock, AR 72201

Phone: (501) 376-2011

Fax: (501) 376-2147

mharrison@fridayfirm.com

By: 

MICHAEL MCCARTY HARRISON (98201)

**CERTIFICATE OF SERVICE**

I, Michael McCarty Harrison, hereby certify that a copy of the above and foregoing pleading was mailed to the below on October 23, 2019:

Timothy J. Myers  
Taylor Law Partners LLP  
303 E. Millsap Rd.  
Fayetteville, AR 72703-8310

  
MICHAEL MCCARTY HARRISON

ARKANSAS STATE HIGHWAY  
AND  
TRANSPORTATION DEPARTMENT

Dan Flowers  
Director  
Telephone (501) 569-2000



P.O. Box 2261  
Little Rock, Arkansas 72203-2261  
Telefax (501) 569-2400

Harrison, AR 72601  
November 21, 2005

L&N Construction  
P.O. Box 1045  
Mt. View, AR 72560-1045

Re: Job No. 090195  
FAP No. ACSTP-4451(1) & FEMA  
Dist. 9 FFY 2004 Flood Damage Repair(S)  
Madison & Newton Counties

Dear Sir,

Attached, please find a list of items remaining to be completed on the above mentioned project. The project was substantially complete on 9/30/05. Please advise this office of your schedule for completing the items listed.

Timely completion of the work is an essential element of the contract and it is imperative that the work be pressed vigorously to completion.

If you have any questions, please call this office.

Sincerely,

Jeff Wheeler  
Resident Engineer

//dt

Construction  
District  
file





JOB 090195  
District 9 FFY 2004 Flood Damage Repair (S)

## PUNCHLIST

Location 7	Repair washed areas below ditch paving. Need test reports for asphalt.
Location 3	Remove construction signs.
Location 2	Remove construction signs.
Location 6 & 4	Pull sign posts. Fill curb joint. Place dirt around outlet protector. Place gravel around guardrail posts. Remove silt fence. Remove rock from ditch paving on Hwy. 123. Remove traffic drums.
Location 1	Remove sign posts. Remove traffic drums.

**IN THE CIRCUIT COURT OF MADISON COUNTY, ARKANSAS  
CIVIL DIVISION**

**DOUG PELFREY and KENENA PELFREY**

**PLAINTIFFS**

**VS.**

**NO. 44CV-17-136-1**

**L & N CONSTRUCTION, INC. and  
JOHN DOES 1-10**

**DEFENDANTS**

**AFFIDAVIT OF FLYNN NORMAN**

I, Flynn Norman, being of sound mind and lawful age, and after being duly sworn and on oath state the following facts are true and correct based upon my knowledge:

1.

My name is Flynn Norman. I am the President of L & N Construction, Inc. ("L & N").

2.

As the President, I have personal knowledge of all of the projects undertaken by L & N Construction, and specifically, I have personal knowledge about the highway repair work and construction performed under contract with the Arkansas Department of Transportation known as Job No. 090195, which is the subject of Plaintiffs' Complaint.



3.

This job was substantially completed on September 30, 2005. See Letter and Enclosed Punch List, attached hereto as Exhibit A.

4.

L & N received a letter from the Arkansas State Highway and Transportation Department concerning Job No. 090195 dated November 21, 2005, which included a punch list of items remaining for L & N to complete on the aforementioned job. See Exhibit A. The items listed were all completed by L & N on or before January 1, 2006, and no additional work was performed by L & N on Job No. 090195, which is the subject of Plaintiffs' Complaint.

FURTHER THE AFFIANT SAYETH NOT.

  
Flynn Norman  
President of L & N Construction, Inc.

ACKNOWLEDGMENT

STATE OF ARKANSAS    )  
                                       )  
 COUNTY OF                )       ss.

On this 21<sup>st</sup> day of October, 2019, before me, a notary public in and for the State and County aforesaid, personally appeared Flynn Norman, President of L & N Construction, Inc., satisfactorily proven to be the person whose name is subscribed to within the instrument, and acknowledged that he executed the same for the purposes therein contained.

In witness whereof, I hereunto set my hand and official seal.

Mary Elizabeth Flippo  
 Notary Public

My Commission Expires:

April 2, 2022



**DISTRICT 9 FFY 2004 FLOOD DAMAGE REPAIR (S)**

Job No. 090195

F. A. P. No. ACSTP-4451(1) &amp; FEMA

Madison County

December 15, 2004 to August 27, 2007

The fixed completion date for this contract is September 30, 2005.

---

**Wednesday December 15 1/ 260+30 Date Authorized: 1/31/2005 Authorized By: Jeff Wheeler**  
**Time Charged: Fixed Date Contract**

---

**DWR Created By:** Lotis Horton, Jr. **Date Authorized:** 1/31/2005  
**Weather:** AM: Clear PM: Partly Cloudy High: 50 Low: 30  
**Working Conditions:** Good. Wednesday. Work Order was effective 12/15/04.  
**Engineering Activities:** None required.  
**Roadway Work:**  
No work performed.

---

**Thursday December 16 2/ 260+30 Date Authorized: 1/6/2005 Authorized By: Diane Tomlinson**  
**Time Charged: Fixed Date Contract**

---

**DWR Created By:** Lotis Horton, Jr. **Date Authorized:** 1/6/2005  
**Weather:** AM: Clear PM: Partly Cloudy High: 50 Low: 20  
**Working Conditions:** Good. Thursday.  
**Engineering Activities:** None required.  
**Roadway Work:**  
No work performed.

---

**Friday December 17 3/ 260+30 Date Authorized: 1/6/2005 Authorized By: Diane Tomlinson**  
**Time Charged: Fixed Date Contract**

---

**DWR Created By:** Lotis Horton, Jr. **Date Authorized:** 1/6/2005  
**Weather:** AM: Clear PM: Partly Cloudy High: 55 Low: 28  
**Working Conditions:** Good. Friday.  
**Engineering Activities:** None required.  
**Roadway Work:**  
No work performed.

---

**Saturday December 18 4/ 260+30 Date Authorized: 1/6/2005 Authorized By: Diane Tomlinson**  
**Time Charged: Fixed Date Contract**

---

**DWR Created By:** Lotis Horton, Jr. **Date Authorized:** 1/6/2005  
**Weather:** AM: Clear PM: Partly Cloudy High: 55 Low: 22  
**Working Conditions:** Good. Saturday.  
**Engineering Activities:** None required.  
**Roadway Work:**  
No work performed.

December 15, 2004 to August 27, 2007

Job No. 090195

Page 179 of 179

**UNCLASSIFIED EXCAVATION**☒ ☒

Location 7

+00. 0

Project: 090195C

Item: 0010

0.050 CUYD

Remarks: To correct rounding error.

**GUARDRAIL (TYPE A)**☒ ☒

Location 7

+00. 0

Project: 090195C

Item: 0033

300.000 LF

Remarks: Actual Field Measured

13+50-16+50

Contractor shown for pay purposes only.

**TERMINAL ANCHOR POSTS (TYPE 1)**☒ ☒

Location 7

+00. 0

Project: 090195C

Item: 0034

2.000 EACH

Remarks: Actual Field Count

Sta. 13+50-16+50 Rt.

Contractor shown for pay purposes only.

**Work Force and Equipment**

Contractor

Supervisors Workers Hours Worked

L &amp; N CONSTRUCTION, INC.

**Monday August 27 311 / 260+30 Date Authorized: 8/27/2007 Authorized By: Robert A. Moore****No Time Charged: Fixed Date Contract****No Time Charged Reason: Project Substantially Complete.****DWR Created By: Diane Tomlinson****Date Authorized: 8/27/2007****Weather: AM:****PM:****High: 0 Low: 0****Work Items****Contractor: L & N CONSTRUCTION, INC.**

Auth	Paid	Location	From Station	To Station	Quantity	Unit
------	------	----------	--------------	------------	----------	------

**CLEARING**☒ ☒

Final Estimate

+00. 0

Project: 090195A

Item: 0001

0.000 STA

Remarks:

**Work Force and Equipment**

Contractor

Supervisors Workers Hours Worked

L &amp; N CONSTRUCTION, INC.

# Madison County Report

As of: 11/29/2018

## Property Owner

Name: PELFREY DOUG

Mailing Address:

Type: (AM) Agri U Misc Imps

Tax Dist: (1) HUNTSVILLE

Millage Rate: 41.10

Extended Legal

## Property Information

Physical Address:

Subdivision:

Block / Lot:

S-T-R:

Size (Acres):

## Market and Assessed Values

	Estimated Market Value	Full Assessed (20% Mkt Value)	Taxable Value
Land:	\$1,150	\$230	\$230
Building:	450	90	90
<b>Total:</b>	<b>\$1,600</b>	<b>\$320</b>	<b>\$320</b>

## Taxes

Estimated Taxes:	\$13
Homestead Credit:	\$0

Note: Tax amounts are estimates only. Contact the county/parish tax collector for exact amounts.

## Special Assessments

Assessment	Tax Amount
TIMBER TAX	\$1.40
<b>Total</b>	<b>\$1.40</b>

## Land

Land Use	Size	Units
Timber(09)	5.900	Acres
Pasture(11)	2.000	Acres
Timber(11)	1.500	Acres
Pasture(09)	0.600	Acres
<b>Total</b>	<b>10.000</b>	

## Deed Transfers

Deed Date	Book	Page	Deed Type	Stamps	Est. Sale	Grantee	Code	Type
7/15/2008	2008	2012	Warr. Deed			PELFREY DOUG	N/A	N/A
1/1/1997			N/A			PELFREY DOUG	N/A	N/A

## Reappraisal Value History

Tax Year	Total Value	Total Assessed
2015	\$138,700.00	\$27,740.00
2016	\$1,600.00	\$320.00
2017	\$1,600.00	\$320.00

## Details for Residential Card 1

**Not a Legal Document.**  
Subject to terms and conditions.  
[www.actDataScout.com](http://www.actDataScout.com)



Page 1

Parcel: [REDACTED]  
As of: 11/29/2018

## Madison County Report

Occupancy	Story	Construction	Total Liv	Grade	Year Built	Age	Condition	Beds
Single Family	ONE+	Frame Siding Std.	3,264	7	2006		Average	

**Exterior Wall:** WOOD

**Foundation:** Slab

**Floor Struct:** ElevSlab

**Floor Cover:** None

**Insulation:** Ceilings Walls

**Roof Cover:** Metal

**Roof Type:** Gable

**Plumbing:** Full: 3

**Fireplace:** N/A

**Heat / Cool:** Central

**Basement:** N/A

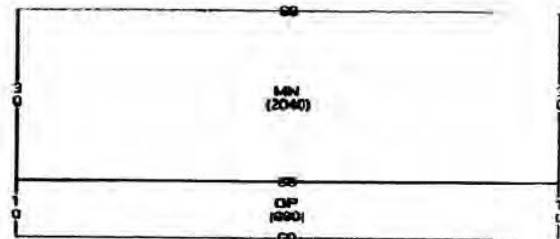
**Basement Area:**

**Year Remodeled:**

**Style:**



DataScout, LLC



### Base Structure

Item	Label	Description	Area
A	MN	Main Living Area	2040
B	OP	Porch, open	680
C	1+	1+, Upper Level	1224
D	BWL	Bay Window Low	1

### Outbuildings and Yard Improvements

Item	Type	Size/Dim	Unit Multi.	Quality	Age
Wall, masonry (brick or stone)			2		
Pole Shed		10	26		
Carport, Dirt Floor		18x20			

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[www.acldataScout.com](http://www.acldataScout.com)

Page 2



Parcel [REDACTED]

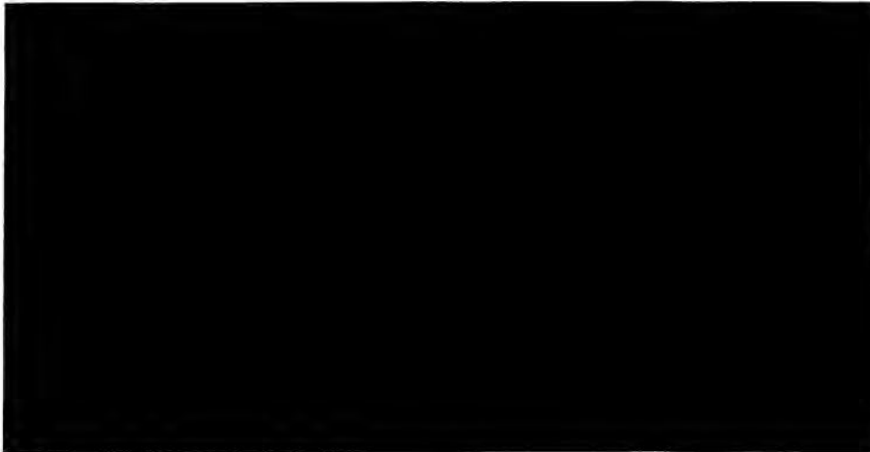
## Madison County Report

As of: 11/29/2018

## Other Adjustments

Code	Type	Quantity
FLOORC	O	1224

## Map



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Page 3

## IN THE CIRCUIT COURT OF MADISON COUNTY, ARKANSAS

DOUG PELFREY and KENENA PELFREY

PLAINTIFFS

V.

NO. 44CV-17- 136-1L & N CONSTRUCTION, INC. and  
JOHN DOES 1-10

DEFENDANTS

COMPLAINT AT LAW

Comes now the Plaintiffs herein, Doug Pelfrey and Kenena Pelfrey, and for their Complaint against the Defendants, L&N Construction, Inc. and John Does 1-10, state and allege as follows:

1. That the Plaintiffs are citizens and residents of [REDACTED] Arkansas and were at the time of the events complained of herein.

2. That this cause of action arose out of an incident which occurred on or about December 28, 2015, in Madison County, Arkansas.

3. That the Defendant is an Arkansas Corporation licensed to do and doing business in the State of Arkansas at the time of the acts alleged herein with its principle place of business in Mountain View, Arkansas.

4. That John Does 1-10 are unknown at the present time. In accordance with Ark. Code Ann. § 16-56-125, attached to this Complaint at Law and filed with this Complaint at Law is the Affidavit of Plaintiffs' attorney stating the identity of separate Defendant John Does 1-10 are unknown at this time. Said John Does may be the liability insurance carrier for one or more of the parties and may be a tortfeasor (including, but not limited to, any other subcontractors or contractors involved in this incident) who breached a duty to the Plaintiffs or proximately caused damages to

FILED FOR RECORD  
at 1:51 o'clock P M.

SEP 11 2017

PHYLIS VILLINES  
CLERK AND RECORDER  
MADISON COUNTY, ARKANSAS

Attachment 4

the Plaintiffs. The Plaintiffs reserve the right to amend the Complaint to substitute the real party of interest for separate Defendants John Does 1-10.

5. That this Court has jurisdiction over this matter and venue is proper.

6. That the Defendant was the General Contractor for a highway construction and/or repair project which included an area at or near Crosses, Arkansas, in Madison County and had contracted with the Arkansas State Highway & Transportation Department to perform the repair work and construction in accordance with the Arkansas State Highway & Transportation Department Plans and Specifications and in compliance with the law and applicable standards and customs in the industry.

7. That the Defendant had a duty to complete the project which is the subject of this litigation in compliance with the contract, Arkansas State Highway & Transportation Department Plans and Specifications and in compliance with the law and applicable standards and customs in the industry.

8. That during the course of the work Defendant was completing under said contract, the Defendant, and/or persons at the Defendant's direction, dumped excess dirt and debris on land on a hill and land above Plaintiffs' property when they knew, or should have know, that said excess dirt and debris could cause damage to the Plaintiffs' property.

9. That on or about December 27, 2015, going into December 28, 2015, and some dates thereafter, a "mud slide" or "land slide" occurred above the property of the Plaintiffs, located at [REDACTED] [REDACTED] Arkansas, at the location where Defendant had dumped the excess dirt and debris as set forth above. As a result of the "mud slide" or "land slide", the Plaintiffs' home and real estate was entirely destroyed as well as personal property and other items.

10. That the “mud slide” was proximately caused by the negligence of the Defendants, individually, as well as jointly and severally, and/or their agents, servants and/or employees, said negligent acts include, but are not limited to, the following:

(a) Failing to properly comply with the Arkansas State Highway & Transportation Department plans and specifications when dumped the excess dirt and debris on this project ;

(b) Failing to complete a silt fence and/or wall needed to keep silt from washing to adjacent property in compliance with the plans and specifications as well as applicable standards in the trade and industry;

(c) Failing to comply with the Arkansas Department of Environmental Quality Rules and Regulations;

(d) Failing to properly dispose of fill and waste in accordance with Arkansas Law as well as the Arkansas State Highway & Transportation Department Rules and Regulations and applicable standards in the trade and industry;

(e) Failing to properly compact the embankment properly and in accordance with Arkansas State Highway & Transportation Department plans and specifications and applicable standards in the trade and industry; and

(e) Otherwise failing to complete their operations in a reasonable, safe and prudent manner in violation of other known, and unknown at this time, standards in the trade and industry.

9. That the negligence, and any of the negligent acts, complained of above performed by the employees, agents and/or servants of the separate Defendants, individually, as well as jointly and severally, is imputed to the separate Defendants.

11. As a proximate result of the negligence of the Defendants, individually, as well as jointly and severally, all as aforesaid, the Plaintiffs, Doug Pelfrey and Kenena Pelfrey, have suffered

the destruction of their residence, real property, as well as personal property, and have incurred incidental costs and expenses, all for an amount in excess of that required by federal jurisdiction in diversity of citizenship cases.

12. That the Plaintiffs reserve the right to amend their Complaint to cover other acts of negligence as discovery warrants.

13. That the Plaintiffs demand a trial by jury.

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs, Doug Pelfrey and Kenena Pelfrey, pray for damages as set forth above for an amount in excess of that required by federal jurisdiction in diversity of citizenship cases; pre-judgment interest, post-judgment interest, attorney fees, and for any and all other relief to which the Plaintiffs may prove themselves entitled.

Respectfully Submitted,

DOUG PELFREY and  
KENENA PELFREY, Plaintiffs

BY: 

TIMOTHY J. MYERS #93110  
TAYLOR LAW PARTNERS, LLP  
P.O. BOX 8310  
FAYETTEVILLE, AR 72703  
(479) 443-5222

## IN THE CIRCUIT COURT OF MADISON COUNTY, ARKANSAS

DOUG PELFREY and KENENA PELFREY

PLAINTIFFS

V.

NO. 44CV-17-\_\_\_\_\_

L & N CONSTRUCTION, INC. and  
JOHN DOES 1-10

DEFENDANTS

**AFFIDAVIT**STATE OF ARKANSAS                    )  
  ) ss.  
COUNTY OF WASHINGTON            )

I, Timothy J. Myers, attorney for the Plaintiffs, Doug Pelfrey and Kenena Pelfrey, after first being duly sworn do state as follows:

1. That upon information and belief there are parties whose identity is unknown at this time.
2. That these unknown parties have been designated in the Plaintiffs' Complaint as John Does No. 1-10.

FURTHER, AFFIANT SAYETH NOT.

  
 \_\_\_\_\_  
 TIMOTHY J. MYERS

SUBSCRIBED and SWORN to before me, a Notary Public, on the 8th day of September, 2017.

  
 \_\_\_\_\_  
 NOTARY PUBLIC




C202100989  
 FILED FOR RECORD  
 CASE# CV-2021-508-1 ~ 08-03-2021 02:49:05 PM  
 JUDGE: DOUG MARTIN  
 JUDY FOSTER  
 MADISON CO, AR CIRCUIT CLERK AND RECORDER

IN THE CIRCUIT COURT OF MADISON COUNTY, ARKANSAS  
 CIVIL DIVISION

DOUG PELFREY and KENENA PELFREY

PLAINTIFFS

VS.

NO. 44CV-17-136-1

L & N CONSTRUCTION, INC. and  
 JOHN DOES 1-10

DEFENDANTS

ORDER OF DISMISSAL

On joint motion of the parties, and it appearing to the Court that this matter has been settled,  
 this case is hereby dismissed with prejudice. Each party is to bear their own attorney's fees and  
 costs.

IT IS SO ORDERED.

CIRCUIT JUDGE

DATE

*Prepared By:*

Michael McCarty Harrison  
 Friday Eldredge & Clark LLP  
 400 W. Capitol Ave. Ste. 2000  
 Little Rock, AR 72201  
 Attorney for Defendants

Attachment 5

*Approved by:*

TIMOTHY MYERS, Attorney for Plaintiffs

Exhibit "A"

## IN THE ARKANSAS STATE CLAIMS COMMISSION

KENENA PELFREY

CLAIMANT

VS.

CLAIM NO. 220574

ARKANSAS DEPARTMENT OF TRANSPORTATION

RESPONDENTS

**RESPONDENT'S BRIEF IN SUPPORT OF  
AMENDED MOTION TO DISMISS**

**COMES NOW** the Respondent, Arkansas Department of Transportation, by and through undersigned counsel, and in Support of its Amended Motion to Dismiss Claimant<sup>1</sup>'s Second Amended Complaint, states the following:

**A. The Second Amended Complaint Fails to Adequately Plead a Claim for Negligence.**

Under Arkansas law, in order to prevail on a claim of negligence, the plaintiff must prove that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach was the proximate cause of the plaintiff's injuries. *Shook v. Love's Travel Stops & Country Stores, Inc.*, 2017 Ark. App. 666, 536 S.W.3d 635. As discussed below, the allegations of the Second Amended Complaint fail to state a claim for negligence.

Arkansas is a fact-pleading state. *See* Ark. R. Civ. P. 8(a)(1); *see also DeSoto Gathering Co., LLC v. Smallwood*, 2010 Ark. 5, 362 S.W.3d 298. Arkansas Rule of Civil Procedure 8(a)(1) requires that a claimant plead facts—not mere conclusions, that demonstrate his entitlement to relief. *Worden v. Kirchner*, 2013 Ark. 509, 6, 431 S.W.3d 243, 247 (2013), *citing Born v. Hosto & Buchan, PLLC*, 2010 Ark. 292, 372 S.W.3d 324.

---

<sup>1</sup> Claimant's pleadings in this matter suggest that there are two claimants—Claimant and her husband. There is only one claimant; Claimant's husband did not join in the filing of the claim in this matter and is not a party hereto. See Attachment 1 (Claim Form).



Only facts alleged in the complaint will be treated as true. The plaintiff's theories, speculation, or statutory interpretation are not afforded this treatment. *Dockery v. Morgan*, 2011 Ark. 94, 380 S.W.3d 377.

**1. Claimant does not allege facts demonstrating the existence of any duty to the Claimant.**

Duty of care arises from the recognition that a relationship between parties may impose upon one a legal obligation to the other. *Lloyd v. Pier W. Prop. Owners Ass'n*, 2015 Ark. App. 487, 4, 470 S.W.3d 293, 297. The question of what (if any) duty is owed by one person to another is always a question of law; it is not for the jury. *Id.* (citing *Kowalski v. Rose Drugs of Dardanelle, Inc.*, 2011 Ark. 44, 378 S.W.3d 109; *Moses v. Bridgeman*, 355 Ark. 460, 139 S.W.3d 503 (2003)).

In this case, the Second Amended Complaint alleges “Respondent had a duty to prepare plans and specifications to L&N that would allow L&N to complete the work in a reasonable manner that would not threaten Claimants’ [*sic*] property.” Second Amended Complaint ¶ 5. It also alleges that “Respondent was responsible for overseeing L&N’s work on the reparation project.” Second Amended Complaint ¶ 6.

These allegations are nothing more than bald legal conclusions. Claimant asserts no facts to support these conclusions. She points to no manual, no statute, no regulation, nor any other authority whatsoever that ostensibly imposes upon the Respondent any duty to the Claimant.

Moreover, as discussed in more detail below, the Claimant’s own pleadings make clear that the construction on Job No. 090195 had been completed by early January of 2006. See Exhibit C to Second Amended Complaint (Excerpts from Deposition of Flynn Norman, CEO of L&N Construction), p. 55, lines 4-12 (last day of work on the job was January 6, 2006).

Claimant did not acquire ownership of the property that is the subject of this claim until months

after all work had been completed on Job Number 090195. See Attachment 2, Warranty Deed dated May 24, 2008 (filed July 14, 2008); see also Affidavit of Flynn Norman, attached as Exhibit B to Attachment 3 hereto, Defendant's Motion for Summary Judgment in the case of *Pelfrey v. L&N Construction* ¶ 4. Because work on Job Number 090195 was complete before Claimant acquired the subject property, Respondent could not, as a matter of law, have any duty to the Claimant.

Because the theory of liability underlying the instant claim is negligence, the existence of a duty of care on the part of the Respondent to the Claimant is crucial. The Second Amended Complaint does not allege any facts demonstrating the existence of any duty to the Claimant, and absent such a duty, the claims of the Second Amended Complaint fail as a matter of law. Respondent is entitled to dismissal.

**2. Claimant does not allege facts demonstrating the breach of any duty.**

As with the absence of any duty on the part of the Respondent to the Claimant, the Second Amended Complaint fails to allege facts sufficient to find the existence of any breach.

With respect to an alleged breach, the Second Amended Complaint alleges that Respondent had a duty to prepare plans and specifications to L&N that would allow L&N to complete the work in a reasonable manner that would not threaten Claimants' [sic] property." Second Amended Complaint ¶ 5. The implication of this allegation is that the plans and specifications for the Job somehow resulted in harm to Claimant's property.

The Second Amended Complaint itself, however, belies this implication. The selection of sites to place debris from the construction project was not part of the plans—it was the responsibility of the contractor. See Exhibit C to Second Amended Complaint (Excerpts from Deposition of Flynn Norman, CEO of L&N Construction), p. 53, lines 14-18 (responsibility for

locating site for waste was not part of the contract; it was L&N's responsibility to find a place for the waste).

The plans and specifications for Job Number 090195 did not identify the prospective location for the placement of any debris. They cannot form the basis for any alleged breach of any duty at all, much less to the Claimant. The Respondent is entitled to dismissal of this Claim as a matter of law.

**B. This Claim is barred by Res Judicata.**

Res judicata means that "a thing or matter has been definitely and finally settled and determined on its merits by the decision of a court of competent jurisdiction." *Beebe v. Fountain Lake Sch. Dist.*, 365 Ark. 536, 544, 231 S.W.3d 628, 635 (2006) (*citing Hunt v. Perry*, 355 Ark. 303, 138 S.W.3d 656 (2003)). Res judicata consists of two facets, one being issue preclusion and the other claim preclusion. *Carwell Elevator Co. v. Leathers*, 352 Ark. 381, 388, 101 S.W.3d 211, 216 (2003).

Claim preclusion prevents relitigation of claim in a subsequent suit when:

- (a) the first suit resulted in a final judgment on the merits;
- (b) the first suit was based on proper jurisdiction;
- (c) the first suit was fully contested in good faith;
- (d) both suits involve the same claim or cause of action; and
- (e) both suits involve the same parties or their privies.

*Beebe v. Fountain Lake Sch. Dist.*, 365 Ark. 536, 545, 231 S.W.3d 628, 635 (2006).

The Arkansas Supreme Court has held that repetitive litigation of the same claims violates principles of public policy. *See McCarroll, Commissioner of Revenues v. Farrar*, 199 Ark. 320, 134 S.W.2d 561 (1939). When a case is based on the same events as the subject matter

of a previous lawsuit, res judicata will apply, *even if the subsequent lawsuit raises new legal issues and seeks additional remedies. Id.*

Res judicata will apply to a settlement agreement after it is approved by the court and the case is dismissed with prejudice. *Brandon v. Western Ark. Gas Co.*, 76 Ark. App. 201, 210, 61 S.W.3d 193, 200 (2001), *citing Russell v. Nekoosa Papers, Inc.*, 261 Ark. 79-B, 547 S.W.2d 409 (1977).

On or about September 11, 2017, Claimant Kenena Pelfrey and her husband Doug Pelfrey filed a lawsuit against L & N Construction, Inc. (“L&N”) and John Does 1-10, in the Circuit Court of Madison County, Arkansas, Civil Action Number 44CV-17-136. See Exhibit B to Second Amended Complaint, Complaint in Civil Action No. 44CV-17-136, *Pelfrey v. L&N Construction*.

This Claim is based on (and seeks relief for) the same events as the claims asserted in the Pelfreys’ lawsuit against L&N. *Compare* Second Amended Complaint ¶¶ 7-8 (alleging piling of debris on property uphill from Claimant’s property) with Attachment 4 (Complaint at Law, *Pelfrey v. L&N Construction*, No. 44CV-17-136), ¶¶ 8-9 (same). *Compare* Second Amended Complaint ¶¶ 10-15 (alleging landslide that destroyed Claimant’s property) and Attachment 4, ¶¶ 9-10 (same).

On August 3, 2021, the Pelfreys’ lawsuit against L&N was dismissed based on the settlement of the claims between the parties. See Attachment 5, Order of Dismissal in Civil Action No. 44CV-17-136.

That lawsuit involved the same claims against L&N (an entity the Claimant not only concedes, but affirmatively asserts, was in privity with the Respondent), and was settled by an agreement approved by the court resulting in a dismissal with prejudice. As such, the agreement

and dismissal of the case function as a bar to the instant Claim. Respondent is entitled to dismissal of this Claim as a matter of law.

**C. The Claimant lacks standing to assert the claims presented in this Claim.**

The allegations of the Second Amended Complaint, while couched in negligence, also see to attempt to present a claim in the nature of trespass to land. For the reasons discussed herein, however, Claimant cannot maintain such a claim. Proof of ownership or the right to possession of property is a requirement to maintain an action for trespass to lands. *See Dugal Logging v. Ark. Pulpwood Co.*, 66 Ark. App. 22, 988 S.W.2d 25 (1999).

The Second Amended Complaint does not allege that Respondent entered onto her property. It alleges that L&N engaged in construction activities, and deposited debris, on someone else's land. See Exhibit C to Second Amended Complaint (Excerpts from Deposition of Flynn Norman, CEO of L&N Construction), p. 50, lines 1-3 (L&N contracted with Mr. Shackelford to deposit debris on his property).

It is well settled law that a landowner cannot maintain an action for trespass that was complete before taking title. *See Price v. Greer*, 89 Ark. 300, 116 S.W. 676 (1909); Restatement 2d of Torts, § 158. The right to sue for the injury to lands is a personal right belonging to the person owning the property at the time of the injury. *See, e.g., Cook v. Exxon Corp.*, 145 S.W.3d 776, 781 (Tex. App.--Texarkana 2004).

In this case, the alleged injury was complete when the construction on Job Number 090195 was complete—January of 2006. In the absence of concealment of the wrong, the tort is complete, not when it is discovered. *Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 935 S.W.2d 258 (1996); *Shelter Ins. Co. v. Arnold*, 57 Ark. App. 8, 940 S.W.2d 505 (1997) (statute of limitations for tort actions begins to run when the underlying tort is complete). *See*

also *State v. Diamond Lakes Oil Co.*, 347 Ark. 618, 623 (2002); *Cason v. Lambert*, 2015 Ark.App. 213, at \*3-\*4, 462 S.W.3d 681, 683.

In this case, there is not even a suggestion that there was any attempt to conceal either the construction project or the depositing of debris on the Shackelford property. To the contrary, Claimant affirmatively alleges that L&N “[placed] enough dirt and debris above Claimant’s property that a helicopter could land on it.” Second Amended Complaint ¶ 8. Thus, any trespass to land based on the facts alleged in this Claim was complete in January of 2006—months before Claimant acquired the land in question. Respondent is entitled to dismissal.

**D. This Claim is barred by the statute of limitations.**

The law in Arkansas is well-settled that a three-year statute of limitations applies to all tort actions not otherwise limited by law. Ark. Code Ann. § 16-56-105. This include actions for negligence. See *O’Mara v. Dykema*, 328 Ark. 310, 317, 942 S.W.2d 854, 858 (1997), *citing, inter alia*, *Burton v. Tribble*, 189 Ark. 58, 70 S.W.2d 503 (1934). The limitations period begins to run when the negligent act occurs. *Courtney v. First Nat’l Bank*, 300 Ark. 498, 780 S.W.2d 536 (1989).

While affirmative actions of concealment of a cause of action may toll the statute of limitations, see *Wilson v. General Elec. Capital Auto Lease, Inc.*, 311 Ark. 84, 841 S.W.2d 619 (1992), there are no allegations of any concealment in the present case. To the contrary, Claimant affirmatively alleges that “Respondent either instructed, or assented to, its contractor placing enough dirt and debris above Claimant’s property that a helicopter could land on it.” Second Amended Complaint ¶ 8.

The construction project to which this Claim relates was completed more than 15 years ago. *See* Exhibit C to Second Amended Complaint (Excerpts from Deposition of Flynn Norman, CEO of L&N Construction), p. 55, lines 4-12 (last day of work on the job was January 6, 2006).

The first landslide Claimant asserts resulted from the negligence of Respondent or its contractor (L&N) took place on or about December 27, 2015. Attachment 4(Complaint at Law in *Pelfrey v. L&N Construction*) to Second Amended Complaint, ¶ 9. Moreover, to the extent Claimant attempts to recast her Claim, the statute of limitations for actions of trespass is also three years. "All actions for trespass on lands" shall be brought within three years after the cause of action accrues. Ark. Code Ann. § 16-56-105(4).

The limitation period prescribed by Section 16-56-105 begins to run “when there is a complete and present cause of action, and, in the absence of concealment of the wrong, when the injury occurs, not when it is discovered.” *Cason v. Lambert*, 2015 Ark.App. 213, at \*3-\*4, 462 S.W.3d 681, 683. *See also Shelter Ins. Co. v. Arnold*, 57 Ark. App. 8, 940 S.W.2d 505 (1997) (statute of limitations for tort actions begins to run when the underlying tort is complete).

The Arkansas Supreme Court has consistently rejected the so-called continuing breach theory. *See Beckworth v. Diamante, a Private Membership Golf Club, LLC*, 2010 Ark. App. 815, at \*9—\*10, 379 S.W.3d 752 (rejecting continuing breach theory); *Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 906, 935 S.W.2d 258 (1996) (“[T]he continuing-tort theory is not recognized in Arkansas.”).

There is literally no theory under which the statute of limitations for this Claim has not run. The Claim should be dismissed with prejudice.

**E. Claimant has not exhausted her remedies.**

Section § 19-10-302 of the Arkansas Code requires a Claimant to exhaust all remedies against insurers, including its own insurer. Ark. Code Ann. § 19-10-302(a). Moreover, the Code further provides that

[e]very claim filed with the commission shall be accompanied by a sworn affidavit on a form to be provided by the commission, signed by the claimant and witnessed by the claimant's insurer and legal counsel, if any, that the claimant has exhausted all remedies against insurers, including the claimant's insurer. The affidavit shall further state the total amount of insurance benefits paid to the claimant.

Ark. Code Ann. § 19-10-302(b).

Claimant has failed to meet this requirement. Her claim should therefore be dismissed. Alternatively, Respondent is entitled to a reduction in any award to the Claimant corresponding to the amounts paid from Claimant's insurer(s), L&N Construction's insurers, L&N Construction, and any other person with respect to the losses alleged to stem from the actions alleged in the Second Amended Complaint.

**WHEREFORE**, the Respondents pray for an Order of the Claims Commission dismissing the Claimant's Claim pursuant to Ark. R. Civ. Pro. 12(b)(6), awarding it its fees and costs, and for all other proper relief to which it may be entitled.

**RESPECTFULLY SUBMITTED,  
ARKANSAS DEPARTMENT OF  
TRANSPORTATION**

*Brian D. Black*

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Brian D. Black, Bar No. 2017-176  
Staff Attorney  
P.O. Box 2261  
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501-569-2003  
[brian.black@ardot.gov](mailto:brian.black@ardot.gov)



**CERTIFICATE OF SERVICE**

I, Brian D. Black, do hereby certify that I have on this 8<sup>th</sup> day of August, 2023, duly served a copy of the foregoing via email and regular U.S. Mail with sufficient postage attached upon the following:

Dylan Botteicher  
Cox, Sterling, McClure & Vandiver, PLLC  
8712 Counts Massie Road  
North Little Rock, AR 72113

*Brian D. Black*  
\_\_\_\_\_  
Brian D. Black

**From:** [Dylan Botteicher](#)  
**To:** [ASCC Pleadings](#)  
**Cc:** [evelyn.allison@ardot.gov](#); [brian.black@ardot.gov](#); [Blakley, Sharon](#); [Graham Whitsett](#)  
**Subject:** Pelfreys v. ArDOT, Claim No. 220574 Claimants" Response to Motion to Dismiss Second Amended Claim  
**Date:** Tuesday, August 22, 2023 2:23:30 PM  
**Attachments:** [Claimants" Response to MTD Second Amended Complaint.pdf](#)

You don't often get email from [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com). [Learn why this is important](#)

Good afternoon,

Please find attached Claimants' Response to the Motion to Dismiss the Second Amended Complaint.

Thanks,

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

**DOUGLAS PELFREY and  
KENENA PELFREY**

**CLAIMANTS**

**VS.**

**CLAIM NO. 220574**

**ARKANSAS DEPARTMENT  
OF TRANSPORTATION**

**RESPONDENT**

**CLAIMANTS' RESPONSE TO RESPONDENT'S MOTION TO DISMISS  
THE SECOND AMENDED CLAIM**

Comes now the Claimants, Douglas Pelfrey and Kenena Pelfrey (the "Pelfreys"), by and through counsel, Cox, Sterling, Vandiver & Botteicher, PLLC, and for their Response to Respondent's Motion to Dismiss the Second Amended Complaint, states as follows:

**I. LEGAL STANDARD**

Arkansas courts construe pleadings liberally and deem them sufficient if they advise the other party of its obligations and alleges a breach of them. *Bethel Baptist Church v. Church Mut. Ins. Co.*, 54 Ark. App. 262, 265 (1996). All reasonable inferences must be resolved in favor of the complaint when testing the sufficiency of the pleading on a motion to dismiss. *Perry v. Baptist Health*, 358 Ark. 238, 241 (2004). In considering a motion to dismiss under Ark. R. Civ. P. 12(b)(6), Arkansas courts must treat the facts alleged in the complaint as true and viewed in the light most favorable to the party seeking relief. *Deitsch v. Tillery*, 309 Ark. 401, 405 (1992). Under this standard, Claimants' pleading is more than sufficiently plead.

**II. ARGUMENT**

**A. The Second Amended Complaint adequately pleads a claim of negligence.**

Respondent claims that Claimants cannot establish that Respondent owed a duty to Claimants, but it does not cite any law to support that position. Contractors are always held "to

both the standard of care of the contracting industry as well as the standard of care of a reasonably prudent person.” *First United Methodist Church of Ozark v. Harness Roofing, Inc.*, 474 S.W.3d 892, 895 (Ark. App. 2015) (citing *Dixon v. Ledbetter*, 262 Ark. 758, 760, 561 S.W.2d 294, 295 (1978); *Henderson v. Harbison*, 2012 Ark. App. 657, 425 S.W.3d 33 (2012)). The Arkansas Supreme Court has ruled that the principal who selects the contractor as its agent will be liable to third parties who have been damaged when the damage is the natural and probable result of the work performed. *Jackson v. Petit Jean Elec. Co-op*, 268 Ark. 1076, 1084, 599 S.W.2d 402, 406 (Ct. App. 1980).

Respondent, through its agent, owed a duty to act within the standard of care of the contracting industry. Flynn Norman, L&N’s representative, testified that Respondent approved the location where the excess material was placed that caused the damages. Respondent had a duty, both through its own actions in approving the dump site and via its agents actions on the dump site, to act as a reasonably prudent entity or person. The Second Amended Complaint clearly alleges that they did not do so. The Second Amended Complaint alleges that Respondent contracted with L&N and had a duty to prepare the plans. Compl. ¶¶ 4-5. Respondent was not aware of the dump site, but it approved it. Compl. ¶ 21. Claimants’ damages were proximately caused by the Highway Department when it approved the location of the dump site. Compl. ¶ 17. When taking these facts as true, Claimants have properly pleaded that Respondent had a duty to Claimants and that Respondent breached that duty.

B. This claim is not barred by res judicata.

The claims regarding the continuing damage from the landslide were not dismissed and therefore this claim is not barred. This is a different claim, with different damages, than the claim

that was brought against L&N. Therefore, res judicata does not bar this claim.

Furthermore, res judicata does not bar a subsequent action where a party was prohibited from asserting a claim in the earlier action. *Dorsett v. Buffington*, 2013 Ark. 345, ¶ 4, 429 S.W.3d 225, 228. Claimants were unable to assert any action against Respondent in circuit court because they are required to proceed in front of the Commission. It would be wholly unfair to force Claimants, or others like them, to be unable to proceed against a party at fault because they are required to seek remedies outside of circuit court by statute.

C. Claimants have standing to bring this Claim.

Claimants have not brought a claim for trespass. Claimants have brought a claim for negligence, and therefore the trespass law cited by Respondent is irrelevant. Respondent admits that the claim is for negligence, and they do not argue that Claimants have the ability to bring forth a negligence action for damage to Claimants' land. Any argument regarding Claimants' standing to bring a claim for trespass should be denied as moot since Claimants are not asserting a claim for trespass. A claimant that has a personal stake in the outcome of a controversy has standing. *Roggasch v. Sims*, 2016 Ark. App. 44, 481 S.W.3d 440, 444 (Ct. App.). Claimants certainly have a personal stake in the outcome of the controversy, and therefore the motion to dismiss should be denied.

D. The claim is not barred by the statute of limitations.

The landslide is ongoing even years later, and therefore the statute of limitations does not bar this action due to the continuing nature of the landslide. *Jones v. Sewer Improv. Dist.*, 119 Ark. 166, 174, 177 S.W. 888, 889 (1915). Arkansas law routinely recognizes that the statute of limitations tolls when continuing damages occur. *Fleming v. Vest*, 2015 Ark. App. 636, ¶ 1, 475

S.W.3d 576, 578 (2015). Respondent cannot rely on *Beckworth* because it involved a breach of contract action. *Chalmers*, including the cases it cites, involves medical malpractice actions in which a doctor is continuing to give treatment to a patient. Respondent has not cited any law that supersedes *Jones*, which states that continuing damage to property results in cases not being barred by a statute of limitations based on when the harm actually occurred.

E. Claimants have exhausted their remedies.

Respondent again argues that Claimants did not exhaust their remedies. Claimants have provided proof of their efforts that amount to an exhaustion of remedies numerous times and in numerous forms. Therefore, the motion to dismiss should be denied.

WHEREFORE, Claimants respectfully request that the motions be denied for the above reasons; that they be awarded costs and attorneys' fees, and all other relief deemed appropriate.

Respectfully Submitted,

COX, STERLING, VANDIVER &  
BOTTEICHER, PLLC  
8201 Cantrell Road, Suite 230  
Little Rock, Arkansas 72227  
(501) 954-8073

By: /s/ Dylan J. Botteicher  
Dylan J. Botteicher (ABN# 2017170)

**CERTIFICATE OF SERVICE**

I, Dylan J. Botteicher, do hereby certify that a true and correct copy of the foregoing was served on the following person(s) through email service on this 22nd day of August, 2023:

Brian Black  
ArDOT, Legal Division  
PO Box 2261  
Little Rock, AR 72203-2261

By: /s/ Dylan J. Botteicher  
Dylan J. Botteicher (ABN# 2017170)

**From:** [Blakley, Sharon D.](#)  
**To:** [ASCC Pleadings](#)  
**Cc:** [Black, Brian; "djbotteicher@csmfirm.com"](#)  
**Subject:** Pelfrey v ARDOT Claim 220574 Respondent's Reply to Claimant's Response  
**Date:** Tuesday, August 29, 2023 3:31:18 PM  
**Attachments:** [image001.png](#)  
[Pelfrey.220574.Respondent's Reply to Claimant's Response.2023.08.29.pdf](#)

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Please acknowledge receipt of the attached Respondent's Reply to Claimant's Response to Respondent's Amended Motion to Dismiss and Incorporated Brief for the referenced claim.

Sharon D. Blakley  
ARDOT - Legal Administrator  
(501) 569-2022 fax (501)569-2164  
[Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)  
ArDOT Logo (email)





## IN THE ARKANSAS STATE CLAIMS COMMISSION

KENENA PELFREY

CLAIMANT

VS.

CLAIM NO. 220574

ARKANSAS DEPARTMENT OF TRANSPORTATION

RESPONDENTS

**REPLY TO CLAIMANT’S RESPONSE TO  
RESPONDENT’S AMENDED MOTION TO DISMISS  
AND INCORPORATED BRIEF**

**COMES NOW** the Respondent, Arkansas Department of Transportation, by and through undersigned counsel, and for its Reply to Claimant’s response to its Amended Motion to Dismiss the Second Amended Complaint, states the following:

**ARGUMENT**

**A. Claimant’s Allegations of Negligence Fail as a Matter of Law.**

In her Response, Claimant cites a handful of cases establishing the standard of care applicable to a contractor. See Claimant’s Response, p. 2. None of those cases—*First United Methodist Church of Ozark v. Harness Roofing, Inc.*, 474 S.W.3d 892, 895 (Ark. App. 2015); *Dixon v. Ledbetter*, 262 Ark. 758, 760, 561 S.W.2d 294, 295 (1978); or *Henderson v. Harbison*, 2012 Ark. App. 657, 425 S.W.3d 33 (2012))—has any application to this claim. To the contrary, all of those cases address the standard of care (*e.g.*, performance in a workmanlike manner, etc.) a contractor owes to its client. None of those cases relates in any way to any standard applicable to third parties.

In an attempt to fabricate the existence of some duty, Claimant alleges in her Second Amended Complaint that “Respondent was responsible for overseeing L&N’s work on the reparation project.” Second Amended Complaint ¶ 6. In her Response, Claimant cites the case of *Jackson v. Petit Jean Elec. Co-op*, as support for the proposition that Respondent is somehow

liable for the alleged negligence of the contractor it retained to perform the construction work on Job Number 090195. But contrary to the inference Claimant seeks, the Arkansas Supreme Court held in *Jackson* that:

The retention by the employer of the right to supervise as to construction as distinguished from the rights to supervise as to the means by which the results should be obtained, does not affect the relationship between the parties. It is only when the employer goes beyond the limit of his contract and commits some affirmative act of negligence, as by some part in the performance of the work other than such general supervision as is necessary to insure its performance, that he is liable.

*Jackson v. Petit Jean Elec. Co-op*, 268 Ark. 1076, 1084, 599 S.W.2d 402, 405-406 (Ark. App.

1980). In this matter, L&N was, at all times, acting as an independent contractor.

**107.14 Responsibility for Damage Claims.** The Contractor shall indemnify and save harmless the Department and its officers and employees from all suits, actions, or claims of any character brought because of any injuries or damage received or sustained by any person, persons, or property on account of the operations of the Contractor; or on account of or in consequence of any neglect in safeguarding the work; or through use of unacceptable materials in constructing the work; or because of any act or omission, neglect, or misconduct of the Contractor; or because of any claims or amounts recovered from any infringement of patent, trademark, or copyright; or from any claims or amounts arising or recovered under the "Workman's Compensation Act," or any other law, ordinance, order, or decree; and so much of the money due the Contractor under and by virtue of the Contract as may be considered necessary by the Department for such purpose may be retained for the use of the Department; or in case no money is due, the Surety may be held until such suit or suits, action or actions, claim or claims for injuries or damages as aforesaid shall have been settled and suitable evidence to that effect furnished to the Department; except that money due the Contractor will not be withheld when the Contractor produces satisfactory evidence that adequate protection is provided by public liability and property damage insurance.

**It is specifically agreed between the parties executing the Contract that it is not intended by any of the provisions of any part of the Contract to create the public or any member thereof a third party beneficiary thereunder, or to authorize anyone not a party to the Contract to maintain a suit for personal injuries or property damage pursuant to the terms or provisions of the Contract.**

Standard Specifications for Highway Construction (2014 Ed.), § 107.14 (emphasis added).

Nothing in the Second Amended Complaint or in Claimant's Response to Respondent's Motion to Dismiss identifies any duty the Respondent has or had to the Claimant. Accordingly, the Claims Commission should dismiss this Claim.

**B. Claimant Has No Standing to Press the Instant Claim.**

In her response, Claimant asserts that "the claim is for negligence" and that "Claimants have the ability to bring a claim for damage to Claimants' land." Claimant's Response, p. 3. This assertion, while essentially true, completely ignores the issue presented here: **that neither the Claimant nor her husband (individually or collectively) owned the subject land at the time the alleged negligence took place.**

As Respondent explained in its Brief in Support of its Motion to Dismiss, the right to sue for the injury to lands is a personal right belonging to the person owning the property at the time of the injury. *See, e.g., Cook v. Exxon Corp.*, 145 S.W.3d 776, 781 (Tex. App.--Texarkana 2004). In Arkansas, the well-settled rule is that "an assignment of an interest in property does not, of itself, constitute an assignment of accrued causes of action for torts previously committed in reference to the property." *Travis Lumber Co. v. Deichman*, 2009 Ark. 299, 26, 319 S.W.3d 239, 256. *See, e.g., Wasson v. Taylor*, 191 Ark. 659, 87 S.W.2d 63 (1935).

In this case, the alleged tort was complete when the construction on Job Number 090195 was complete—January of 2006. *See* Exhibit C to Second Amended Complaint (Excerpts from Deposition of Flynn Norman, CEO of L&N Construction), p. 55, lines 4-12 (last day of work on the job was January 6, 2006). Claimant did not acquire ownership of the property that is the subject of this claim until months after all work had been completed on Job Number 090195. *See* Attachment 2 to Respondent's Answer and Motion to Dismiss Second Amended Complaint,

Warranty Deed dated May 24, 2008 (filed July 14, 2008). Nothing in that deed purports to convey any assignment of any cause of action, and Respondent is therefore entitled to dismissal.

**C. This Claim is Barred by the Statute of Limitations.**

Arkansas has a three-year statute of limitations for tort claims, including claims sounding in negligence and trespass. Ark. Code Ann. § 16-56-105. In this case, the Claimant argues that the limitations period has not run “due to the continuing nature of the landslide.” Claimant’s Response to Respondent’s Motion to Dismiss the Second Amended Claim (“Claimant’s Response”), p. 3. This argument is meritless.

Subject to certain narrowly drawn exceptions, none of which apply in this case, the courts of Arkansas have consistently and repeatedly rejected continuing-wrong theories. *See Cason v. Lambert*, 2015 Ark. App. 213, at \*4, 462 S.W.3d 681 (rejecting continuing trespass theory and listing Arkansas Supreme Court cases refusing to recognize “the theory of continuing tort”); *Beckworth v. Diamante, Private Membership Golf Club, LLC*, 2010 Ark. App. 815, at \*9—\*10, 379 S.W.3d 752 (rejecting continuing breach theory); *Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 906, 935 S.W.2d 258 (1996) (“[T]he continuing-tort theory is not recognized in Arkansas.”); *see also Highland Indus. Park Inc. v. BEI Def. Sys. Co.*, 357 F.3d 794, 797-98 (8th Cir. 2004) (applying Arkansas law).

The first case cited by Claimant in her Response relating to statutes of limitations, *Jones v. Sewer Improv. Dist. No. 3 of Rogers*, 119 Ark. 166, 177 S.W. 888 (1915), provides no support whatsoever for Claimant’s position that Arkansas recognizes the continuing tort theory. In *Jones*, the nature of the ongoing nuisance was not the construction of the sewer system—it was the alleged ongoing negligent operation and maintenance of the sewer system.<sup>1</sup> *Jones*, 119

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<sup>1</sup> Respondent notes the irony that Claimant cites a nuisance case in support of her claim, notwithstanding her insistence that this claim sounds in negligence.

Ark. at 173-174, 177 S.W. at 889. Here, Claimant alleges that the construction project was performed in a negligent manner. The undisputed fact, however, is that all construction on Job Number 090195 was completed in January of 2006. *See* Affidavit of Flynn Norman, attached as Exhibit B to Attachment 3, Defendant L&N Construction's Motion for Summary Judgment in the case of Pelfrey v. L&N Construction, ¶ 4. There is no suggestion whatsoever (nor can there be) that the Respondent "operated" anything thereafter. Thus, the allegation that the landslide was continuous in nature is insufficient, as a matter of law, to toll, extend, or otherwise modify the three-year limitations period that began to run not later than January of 2006.

Claimant then cites the case of *Fleming v. Vest*, 2015 Ark. App. 636, 475 S.W.3d 576, for the proposition that "Arkansas law routinely recognizes that the statute of limitations tolls when continuing damages occur." This statement is untrue at best and potentially misleading. The *Fleming* case applied the well-settled, and narrowly construed, continuous-course-of-treatment exception to the general rule. "This exception tolls the statute of limitations in medical-malpractice cases where there is medical negligence 'followed by a continuing course of treatment for the malady which was the object of the negligent treatment or act.'" *Fleming*, 115 Ark. App. 636 at 7, 475 S.W.3d at 581, *quoting Tullock v. Eck*, 311 Ark. 564, 571, 845 S.W.2d 517, 521 (1993). The continuous-course-of-treatment exception has no application whatsoever in this case, and the assertion that the *Fleming* decision demonstrates that "Arkansas law routinely recognizes that the statute of limitations tolls when continuing damages occur[.]" is a gross mischaracterization of the law. To the contrary, the *Fleming* decision demonstrates how narrow the exceptions to the rule actually are. And no such exception exists in this case.

**D. This Claim is Barred by Res Judicata.**

In her response, Claimant asserts that “res judicata does not bar a subsequent action where a party was prohibited from asserting a claim in the earlier action.” Again, while that statement is essentially correct, the case upon which she relies does not support her position. In *Dorsett v. Buffington*, 2013 Ark. 345, 429 S.W.3d 225, the Arkansas Supreme Court rejected a claim of res judicata where the court in the previous action was precluded by jurisdictional grounds from awarding the relief sought in the subsequent proceedings. 2013 Ark. 345, 429 S.W.3d 225, 228-229. In this case, the Claimant brought suit in the Circuit Court seeking the same relief for the same alleged tort. She has not been prevented from fully and fairly litigating that claim, and indeed has settled her claim. She should not now be allowed the opportunity to seek a double recovery for the same alleged wrong.

Indeed, the case cited by the Dorsett court as precedential support for its holding likewise does not support Claimant’s position. In *Cater v. Cater*, the Arkansas Supreme Court held that res judicata did not preclude a claim for physical injury where the circuit court, ruling on a divorce proceeding between the same parties refused to take jurisdiction over the wife’s tort claim against the husband in the divorce proceedings. Having been prevented from litigating the tort claim in the previous proceedings, the wife was not barred by res judicata from asserting the tort claim in a subsequent proceeding. *Cater v. Cater*, 311 Ark. 627, 632, 846 S.W.2d 173, 176 (1993). Claimant’s settlement and dismissal in the prior litigation bars her attempt at a double recovery in this matter. Respondent is entitled to dismissal of this Claim as a matter of law.

**E. Claimant Has Not Exhausted Her Remedies.**

In her Response, Claimant alleges that she has “provided proof of [her] efforts that amount to an exhaustion of remedies numerous times and in numerous forms.” She provides no

factual basis for this assertion. To the contrary, the Claimant has refused Respondent's repeated requests for the documentation of the settlement of Claimant's lawsuit against L&N Construction. The failure to provide that information is, standing alone, grounds for the Claims Commission to dismiss this claim.

**WHEREFORE**, the Respondents pray for an Order of the Claims Commission dismissing the Claimant's Claim pursuant to Ark. R. Civ. Pro. 12(b)(6), awarding it its fees and costs, and for all other proper relief to which it may be entitled. Should the Commission deem a hearing necessary or appropriate, Respondent requests that such hearing be scheduled at the Commission's earliest convenience.

**RESPECTFULLY SUBMITTED,  
ARKANSAS DEPARTMENT OF  
TRANSPORTATION**

*Brian D. Black*

---

Brian D. Black, Bar No. 2017-176

Staff Attorney

P.O. Box 2261

Little Rock, AR 72203-2261

501-569-2003

[brian.black@ardot.gov](mailto:brian.black@ardot.gov)

**CERTIFICATE OF SERVICE**

I, Brian D. Black, do hereby certify that I have on this 29<sup>th</sup> day of August, 2023, duly served a copy of the foregoing via email and regular U.S. Mail with sufficient postage attached upon the following:

Dylan Botteicher  
Cox, Sterling, McClure & Vandiver, PLLC  
8201 Cantrell Road, Suite 230  
Little Rock, AR 72227

*Brian D. Black*  
\_\_\_\_\_  
Brian D. Black



**From:** [Kathryn Irby](#)  
**To:** [Dylan Botteicher](#); [Black, Brian](#)  
**Cc:** [Blakley, Sharon](#)  
**Subject:** HEARING SCHEDULED: Pelfrey v. ArDOT, Claim No. 220574  
**Date:** Wednesday, September 13, 2023 4:31:00 PM  
**Attachments:** [Pelfrey v. ArDOT, 220574 -- hearing ltr \(Resp's amended MTD\).pdf](#)

---

Mr. Botteicher and Mr. Black, please see attached hearing letter and Zoom invitation.

Thanks,  
Kathryn Irby

**Kathryn Irby**  
**Arkansas State Claims Commission**  
101 East Capitol Avenue, Suite 410  
Little Rock, Arkansas 72201  
(501) 682-2822

## ARKANSAS STATE CLAIMS COMMISSION

(501) 682-1619  
FAX (501) 682-2823



KATHRYN IRBY  
DIRECTOR

101 EAST CAPITOL AVENUE  
SUITE 410  
LITTLE ROCK, ARKANSAS  
72201-3823

September 13, 2023

Mr. Dylan Botteicher  
Cox, Sterling, McClure & Vandiver, PLLC  
8712 Counts Massie Road  
North Little Rock, Arkansas 72113

(via email)

Mr. Brian Black  
Arkansas Department of Transportation  
Post Office Box 2261  
Little Rock, Arkansas 72203

(via email)

RE: ***Kenena Pelfrey v. Arkansas Department of Transportation***  
Claim No. 220574

Dear Mr. Botteicher and Mr. Black,

The Commission has scheduled a hearing on ArDOT's amended motion to dismiss for **Thursday, February 22, 2024**, beginning at 9:00 a.m. All parties will attend via Zoom. The new Zoom invitation is enclosed.

As this is a motion hearing, no prehearing materials are requested by the Commission.

If you have any questions, please do not hesitate to contact my office.

Sincerely,

Kathryn Irby

ES: kmirby

The Claims Commission is inviting you to a scheduled Zoom meeting.

Topic: Claims Commission -- hearings

Time: Feb 22, 2024 08:30 AM Central Time (US and Canada)

Join Zoom Meeting

<https://us06web.zoom.us/j/86739089258?pwd=ci9zNXNBRk02NE10UHNBOXMzK2RwUT09>

Meeting ID: 867 3908 9258

Passcode: LePP9w

---

One tap mobile

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---

Dial by your location

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- +1 929 436 2866 US (New York)
- +1 301 715 8592 US (Washington DC)
- +1 305 224 1968 US
- +1 309 205 3325 US
- +1 312 626 6799 US (Chicago)
- +1 360 209 5623 US
- +1 386 347 5053 US
- +1 507 473 4847 US
- +1 564 217 2000 US
- +1 669 444 9171 US
- +1 669 900 6833 US (San Jose)
- +1 689 278 1000 US
- +1 719 359 4580 US
- +1 253 205 0468 US
- +1 253 215 8782 US (Tacoma)
- +1 346 248 7799 US (Houston)

Meeting ID: 867 3908 9258

Passcode: 041564

Find your local number: <https://us06web.zoom.us/j/kfrA8m4pZ>

## BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

DOUGLAS PELFREY AND  
KENENA PELFREY

CLAIMANT

V.

CLAIM NO. 220574

ARKANSAS DEPARTMENT OF  
TRANSPORTATION

RESPONDENT

**ORDER**

Now before the Arkansas State Claims Commission (the “Commission”) is the motion filed by the Arkansas Department of Transportation (the “Respondent”) to dismiss the second amended complaint by Douglas Pelfrey and Kenena Pelfrey (collectively referred to herein as the “Claimant”). At the hearing on February 22, 2024, Dylan Botteicher appeared on behalf of Claimant, and Alexander Denker appeared on behalf of Respondent. Based upon a review of the claim file, including Respondent’s motion, the arguments made by the parties, and the law of the State of Arkansas, the Commission hereby finds as follows:

1. Claimant filed this claim on October 30, 2021, regarding damage to Claimant’s property caused by a landslide. Claimant amended the complaint on June 8, 2022, and on July 19, 2023.

2. Respondent moved to dismiss the second amended complaint, arguing, *inter alia*, that Claimant’s claim is barred by the applicable three-year statute of limitations in Ark. Code Ann. § 16-56-105.

3. Claimant responded to the motion, arguing that the continuing nature of the landslide tolls the statute of limitations.

4. Respondent filed a reply brief, arguing that all work performed by the contractor at Respondent's direction was completed in January 2006, which is when the three-year limitations period began to run.

5. At the hearing, the parties reiterated the arguments in their briefs.

6. Upon a question from a commissioner as to the application of *Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 935 S.W.2d. 258 (1996), Claimant argued that Claimant filed this claim within three years of learning of the specific damage alleged here.

7. A commissioner noted that Arkansas law does not allow a claimant to extend the statute of limitations simply due to a lack of knowledge of the alleged harm. The commissioner asked Claimant to provide some information to explain how Claimant did not become aware of the damage to Claimant's land for such a lengthy period of time. Claimant declined to provide any information.

8. Ark. Code Ann. § 16-56-105 provides for a three-year statute of limitations for negligence actions.

9. The Commission finds that there are no allegations of fraud or concealment of the harm to toll the statute of limitation. The Commission further finds that the Arkansas Supreme Court rejected the tolling of a statute of limitations based upon a continuing tort in *Chalmers*, holding that such a toll on the statute of limitations would be "inconsistent with the General Assembly's intent in stating that limitations begin to run at 'the date of the wrongful act complained of and no other time.'" 326 Ark. 895, 906, 935 S.W.2d 258, 264 (1996).

10. The Commission finds that the work performed by L&N Construction was complete in 2006 and that Claimant did not file the instant claim until 2021. The Commission finds that Claimant has presented no basis upon which the statute of limitations can be tolled and that this claim is barred by Ark. Code Ann. § 16-56-105.

11. As such, Claimant's claim is DENIED and DISMISSED.

IT IS SO ORDERED.



ARKANSAS STATE CLAIMS COMMISSION  
Henry Kinslow



ARKANSAS STATE CLAIMS COMMISSION  
Paul Morris, Chair



ARKANSAS STATE CLAIMS COMMISSION  
Sylvester Smith

DATE: February 27, 2024

**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).

**From:** [Kathryn Irby](#)  
**To:** ["djbotteicher@csmfirm.com"](mailto:djbotteicher@csmfirm.com); [Denker, Alexander C.](#)  
**Cc:** [Blakley, Sharon](#)  
**Subject:** ORDER: Pelfrey v. ArDOT, Claim No. 220574  
**Date:** Wednesday, February 28, 2024 2:37:00 PM  
**Attachments:** [Pelfrey -- 220574 -- order.pdf](#)

---

Mr. Botteicher and Mr. Denker, please see attached order entered by the Commission.

Thanks,  
Kathryn Irby

**Kathryn Irby**  
**Arkansas State Claims Commission**  
101 East Capitol Avenue, Suite 410  
Little Rock, Arkansas 72201  
(501) 682-2822

**From:** [Dylan Botteicher](#)  
**To:** [Kathryn Irby](#)  
**Cc:** [alexander.denker@ardot.gov](mailto:alexander.denker@ardot.gov); [Blakley, Sharon](#)  
**Subject:** Motion to Reconsider: Pelfrey v. ArDOT, Claim No. 220574  
**Date:** Tuesday, April 2, 2024 2:08:00 PM  
**Attachments:** [Motion to Reconsider.pdf](#)

---

Ms. Irby,

Please find attached a motion to reconsider in this matter.

Thank you,

Dylan Botteicher  
COX, STERLING, VANDIVER & BOTTEICHER, PLLC  
8201 Cantrell Road, Suite 230  
Little Rock, Arkansas 72227  
(501) 954-8073 Office  
(501) 954-7856 Fax  
[djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com) Email  
[www.csmfirm.com](http://www.csmfirm.com) Website

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

**DOUGLAS PELFREY and  
KENENA PELFREY**

**CLAIMANTS**

**VS.**

**CLAIM NO. 220574**

**ARKANSAS DEPARTMENT  
OF TRANSPORTATION**

**RESPONDENT**

**MOTION TO RECONSIDER**

Comes now the Claimants, Douglas Pelfrey and Kenena Pelfrey (the “Pelfreys”), by and through counsel, Cox, Sterling, Vandiver & Botteicher, PLLC, and for their Motion to Reconsider, state as follows:

1. A final order was entered on February 27, 2024.
2. The final order found that the claim was barred by Ark. Code Ann. § 16-56-105.
3. The final order also found that Claimants declined to explain how Claimants did not become aware of damage to Claimants’ land for a lengthy period of time.
4. The Second Amended Complaint provided a timeline that explained why Claimants were not aware of the damage. Specifically, the Second Amended Complaint alleged:
  - a. Claimants began to build a house five acres away from the effects of the landslide in 2018.
  - b. In 2020, the effects of the landslide began to be seen at the new construction site and the new construction as damaged.
  - c. The landslide had destroyed more acreage by 2023.
5. Claimants did provide information explaining why they became aware of the damage to their land that gave rise to this claim. Claimants filed their claim within three years of becoming aware of that damage.

6. Claimant respectfully requests that the Commission reconsider its ruling in light of the factual allegations detailed in the Second Amended Complaint.

Respectfully Submitted,

COX, STERLING, VANDIVER &  
BOTTEICHER, PLLC  
8201 Cantrell Road, Suite 230  
Little Rock, Arkansas 72227  
(501) 954-8073

By: /s/ Dylan J. Botteicher  
Dylan J. Botteicher (ABN# 2017170)

### **CERTIFICATE OF SERVICE**

I, Dylan J. Botteicher, do hereby certify that a true and correct copy of the foregoing was served on the following person(s) through email service on this 2nd day of April, 2024:

Alexander Denker  
alexander.denker@ardot.gov  
ArDOT, Legal Division  
PO Box 2261  
Little Rock, AR 72203-2261

By: /s/ Dylan J. Botteicher  
Dylan J. Botteicher (ABN# 2017170)

**From:** [Bob Ballinger](#)  
**To:** [Kathryn Irby](#)  
**Cc:** [alexander.denker@ardot.gov](mailto:alexander.denker@ardot.gov); [Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov); [djbotteicher@csmfir.com](mailto:djbotteicher@csmfir.com)  
**Subject:** Entry of Appearance - Pelfrey v. ArDOT, Claim No. 220574  
**Date:** Wednesday, May 22, 2024 5:38:01 PM  
**Attachments:** [ENTRY OF APPEARANCE.pdf](#)

---

You don't often get email from bob@ballingerlaw.net. [Learn why this is important](#)

Ms. Irby,  
Please find my attached Entry of Appearance in this matter.  
Thank you,  
Bob

-----

Bob Ballinger  
Attorney at Law  
C: 870.350.5175  
F: 888.505.7811  
1047 CR 5099, Ozark, AR 72949  
[www.BallingerLaw.net](http://www.BallingerLaw.net)  
Confidentiality Notice:

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

**DOUGLAS PELFREY and  
KENENA PELFREY**

**CLAIMANTS**

**VS.**

**CLAIM NO. 220574**

**ARKANSAS DEPARTMENT  
OF TRANSPORTATION**

**RESPONDENT**

**ENTRY OF APPEARANCE**

Comes now Robert A. Ballinger, Attorney at Law, and hereby enters his appearance as counsel for the Claimants, Douglas Pelfrey and Kenena Pelfrey (the “Pelfreys”), in the above-referenced matter, and for his entry of appearance states as follows:

1. Robert A. Ballinger, Attorney at Law has been retained as counsel by Claimants, Douglas Pelfrey and Kenena Pelfrey, in this action. Robert A. Ballinger respectfully requests that the Director of the Commission enter his name as an attorney of record in this claim.

2. That the Commission notifies me regarding this claim.

Respectfully Submitted this 22<sup>nd</sup> day of May 2024.

Respectfully submitted,

By: 

Robert A. Ballinger, AR Bar # 2005087  
P.O. Box 51  
Oark, AR 72852  
870.505.4448  
870.505.7811 (fax)  
Bob@BallingerLaw.net

**CERTIFICATE OF SERVICE**

I, Robert A. Ballinger, do hereby certify that a true and correct copy of the foregoing was served on the following person(s) through email service on this 22<sup>nd</sup> day of May 2024:

Alexander Denker  
alexander.denker@ardot.gov  
ArDOT, Legal Division  
PO Box 2261  
Little Rock, AR 72203-2261

By: 

Robert A. Ballinger, Attorney at Law

**From:** [Kathryn Irby](#)  
**To:** [Bob Ballinger](#)  
**Cc:** [alexander.denker@ardot.gov](#); [Sharon.Blakley@ardot.gov](#); [djbotteicher@csmfirm.com](#)  
**Subject:** RE: Entry of Appearance - Pelfrey v. ArDOT, Claim No. 220574  
**Date:** Tuesday, June 11, 2024 1:46:00 PM

---

Senator, thanks for your email. The Commission handles the motions in the order received, and we've had a huge influx of motions over the past four months. I expect that I will have an order to transmit to the parties in the next 30 days. Please reach out if you have not heard anything by July 15.

Thanks,  
 Kathryn Irby

---

**From:** Bob Ballinger <[bob@ballingerlaw.net](mailto:bob@ballingerlaw.net)>  
**Sent:** Tuesday, June 11, 2024 12:38 PM  
**To:** Kathryn Irby <[kathryn.irby@arkansas.gov](mailto:kathryn.irby@arkansas.gov)>  
**Cc:** [alexander.denker@ardot.gov](#); [Sharon.Blakley@ardot.gov](#); [djbotteicher@csmfirm.com](#)  
**Subject:** Re: Entry of Appearance - Pelfrey v. ArDOT, Claim No. 220574

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Ms. Irby,

When should we expect a response to our motion for reconsideration?

Thanks,  
 Bob

On 05/22/2024 5:37 PM CDT Bob Ballinger <[bob@ballingerlaw.net](mailto:bob@ballingerlaw.net)> wrote:

Ms. Irby,

Please find my attached Entry of Appearance in this matter.

Thank you,  
 Bob

-----

Bob Ballinger  
 Attorney at Law  
 C: 870.350.5175  
 F: 888.505.7811  
 1047 CR 5099, Ozark, AR 72949

[www.BallingerLaw.net](http://www.BallingerLaw.net)

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Bob Ballinger  
 Attorney at Law  
 C: 870.350.5175  
 F: 888.505.7811  
 1047 CR 5099, Ozark, AR 72949  
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**From:** [Kathryn Irby](#)  
**To:** [Bob Ballinger](#)  
**Cc:** [alexander.denker@ardot.gov](#); [Sharon.Blakley@ardot.gov](#); [djbotteicher@csmfirm.com](#)  
**Subject:** RE: Entry of Appearance - Pelfrey v. ArDOT, Claim No. 220574  
**Date:** Tuesday, June 11, 2024 1:46:00 PM

---

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Thanks,  
 Kathryn Irby

---

**From:** Bob Ballinger <[bob@ballingerlaw.net](mailto:bob@ballingerlaw.net)>  
**Sent:** Tuesday, June 11, 2024 12:38 PM  
**To:** Kathryn Irby <[kathryn.irby@arkansas.gov](mailto:kathryn.irby@arkansas.gov)>  
**Cc:** [alexander.denker@ardot.gov](#); [Sharon.Blakley@ardot.gov](#); [djbotteicher@csmfirm.com](#)  
**Subject:** Re: Entry of Appearance - Pelfrey v. ArDOT, Claim No. 220574

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Thanks,  
 Bob

On 05/22/2024 5:37 PM CDT Bob Ballinger <[bob@ballingerlaw.net](mailto:bob@ballingerlaw.net)> wrote:

Ms. Irby,

Please find my attached Entry of Appearance in this matter.

Thank you,  
 Bob

-----

Bob Ballinger  
 Attorney at Law  
 C: 870.350.5175  
 F: 888.505.7811  
 1047 CR 5099, Ozark, AR 72949



[www.BallingerLaw.net](http://www.BallingerLaw.net)

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-----

Bob Ballinger  
 Attorney at Law  
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 1047 CR 5099, Ozark, AR 72949  
[www.BallingerLaw.net](http://www.BallingerLaw.net)

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**From:** [Dylan Botteicher](#)  
**To:** [Kathryn Irby](#)  
**Cc:** [Blakley, Sharon](#); [Denker, Alexander C.](#); [Sen. Ballinger - Home](#)  
**Subject:** Motion to Withdraw - Pelfrey v. ArDOT, Claim No. 220574  
**Date:** Tuesday, June 11, 2024 1:50:59 PM  
**Attachments:** [Motion to Withdraw.pdf](#)

---

Ms. Irby,

Please see attached a motion to withdraw as Claimants' counsel in this matter. Mr. Ballinger will be their attorney going forward. Can you advise if you need anything else from me?

Thanks,

Dylan Botteicher  
 COX, STERLING, VANDIVER & BOTTEICHER, PLLC  
 8201 Cantrell Road, Suite 330  
 Little Rock, Arkansas 72227  
 (501) 954-8073 Office  
 (501) 954-7856 Fax  
[djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com) Email  
[www.csmfirm.com](http://www.csmfirm.com) Website

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

**DOUGLAS PELFREY and  
KENENA PELFREY**

**CLAIMANTS**

**VS.**

**CLAIM NO. 220574**

**ARKANSAS DEPARTMENT  
OF TRANSPORTATION**

**RESPONDENT**

**MOTION TO WITHDRAW AS COUNSEL**

Comes now Dylan Botteicher, an attorney of record for Claimants, Douglas Pelfrey and Kenena Pelfrey (the “Pelfreys”), and for his Motion to Withdraw as Counsel, states as follows:

1. Dylan Botteicher requests that he be allowed to withdraw as counsel of record for Claimants.
2. Bob Ballinger has entered an appearance as counsel of record for Claimants.
3. Reasonable steps have been taken to avoid any foreseeable prejudice to the rights of Claimants. A copy of the case file, as well as a copy of this motion, has been sent to Mr. Ballinger. Mr. Ballinger will serve as Claimants’ sole counsel of record going forward.

Respectfully Submitted,

COX, STERLING, VANDIVER &  
BOTTEICHER, PLLC  
8201 Cantrell Road, Suite 330  
Little Rock, Arkansas 72227  
(501) 954-8073

By: /s/ Dylan J. Botteicher  
Dylan J. Botteicher (ABN# 2017170)

**CERTIFICATE OF SERVICE**

I, Dylan J. Botteicher, do hereby certify that a true and correct copy of the foregoing was served on the following person(s) through email service on this 11th day of June, 2024:

Alexander Denker  
alexander.denker@ardot.gov  
ArDOT, Legal Division  
PO Box 2261  
Little Rock, AR 72203-2261

By: /s/ Dylan J. Botteicher  
Dylan J. Botteicher (ABN# 2017170)

**BEFORE THE ARKANSAS STATE CLAIMS COMMISSION****DOUGLAS PELFREY AND  
KENENA PELFREY****CLAIMANT****V.****CLAIM NO. 220574****ARKANSAS DEPARTMENT OF  
TRANSPORTATION****RESPONDENT****ORDER**

Now before the Arkansas State Claims Commission (the “Commission”) is the motion filed by Dylan Botteicher to withdraw as counsel for Douglas Pelfrey and Kenena Pelfrey (collectively referred to herein as the “Claimant”) in Claimant’s claim against the Arkansas Department of Transportation (the “Respondent”). Claimant is represented by new counsel, who has entered his appearance in this matter. As such, Mr. Botteicher’s motion is hereby GRANTED.

IT IS SO ORDERED.



ARKANSAS STATE CLAIMS COMMISSION  
Solomon Graves



ARKANSAS STATE CLAIMS COMMISSION  
Dee Holcomb



ARKANSAS STATE CLAIMS COMMISSION  
Henry Kinslow, chair

DATE: June 14, 2024

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

- (1) A party has forty (40) days from transmission 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 transmission 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).

## BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

DOUGLAS PELFREY AND  
KENENA PELFREY

CLAIMANT

V.

CLAIM NO. 220574

ARKANSAS DEPARTMENT OF  
TRANSPORTATION

RESPONDENT

**ORDER**

Now before the Arkansas State Claims Commission (the “Commission”) is a motion filed by Douglas Pelfrey and Kenena Pelfrey (collectively referred to herein as the “Claimant”) requesting reconsideration of the Commission’s February 27, 2024, decision dismissing Claimant’s claim against the Arkansas Department of Transportation (the “Respondent”) as time-barred. Based upon a review of the claim file and the law of the State of Arkansas, the Commission hereby unanimously finds as follows:

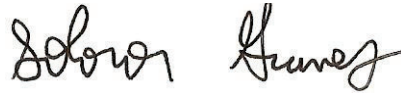
1. Claimant filed the instant claim alleging damage to Claimant’s property caused by a landslide. Claimant amended the complaint on June 8, 2022, and on July 19, 2023.
2. Respondent filed a motion to dismiss the second amended complaint, which was granted by the Commission on February 27, 2024.
3. On April 2, 2024, Claimant filed the instant motion, arguing that Claimant’s second amended complaint provided details about why Claimant was not aware of the damage.
4. Respondent did not file a response to the motion for reconsideration.
5. In analyzing a motion for reconsideration, Rule 7.1 of the Commission Rules and Regulations states that motions for reconsideration “will only be entertained if they set forth new or additional evidence which was not [previously] available . . . .”

6. The Commission finds that the motion does not set forth new or additional evidence not previously available. As stated in the Commission’s February 27, 2024, order, the Arkansas Supreme Court rejected the tolling of a statute of limitations based upon a continuous tort, holding that such a toll would be “inconsistent with the General Assembly’s intent in stating that limitations begin to run at ‘the date of the wrongful act complained of and no other time.’” *Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 906, 935 S.W.2d 258, 264 (1996).

7. As such, Claimant’s motion for reconsideration is DENIED, and the February 27, 2024, Commission order remains in effect.



IT IS SO ORDERED.



ARKANSAS STATE CLAIMS COMMISSION  
Solomon Graves



ARKANSAS STATE CLAIMS COMMISSION  
Dee Holcomb



ARKANSAS STATE CLAIMS COMMISSION  
Henry Kinslow, chair

DATE: June 14, 2024

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

- (1) A party has forty (40) days from transmission 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 transmission 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).

**From:** [Kathryn Irby](#)  
**To:** [Bob Ballinger](#)  
**Cc:** [alexander.denker@ardot.gov](mailto:alexander.denker@ardot.gov); [Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov); [djbotteicher@csmfirm.com](mailto:djbotteicher@csmfirm.com)  
**Subject:** ORDERS: Pelfrey v. ArDOT, Claim No. 220574  
**Date:** Friday, June 14, 2024 11:34:00 AM  
**Attachments:** [C69--Pelfrey v. ArDOT, 220574.pdf](#)  
[C161--Pelfrey v. ArDOT, 220574.pdf](#)

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Sen. Ballinger, Mr. Botteicher, and Mr. Denker, please see attached two orders entered by the Commission.

Thanks,  
Kathryn Irby

**Kathryn Irby**  
**Arkansas State Claims Commission**  
101 East Capitol Avenue, Suite 410  
Little Rock, Arkansas 72201  
(501) 682-2822

**From:** [Bob Ballinger](#)  
**To:** [Kathryn Irby](#)  
**Cc:** [alexander.denker@ardot.gov](mailto:alexander.denker@ardot.gov); [Sharon.Blakley@ardot.gov](mailto:Sharon.Blakley@ardot.gov)  
**Subject:** Notice of Appeal: Pelfrey v. ArDOT, Claim No. 220574  
**Date:** Wednesday, June 19, 2024 11:11:29 AM  
**Attachments:** [Notice of Appeal.pdf](#)

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Ms. Irby,  
 Please find our notice of appeal for the above-referenced matter.  
 Thanks,  
 Bob

On 06/14/2024 11:34 AM CDT Kathryn Irby <kathryn.irby@arkansas.gov> wrote:

Sen. Ballinger, Mr. Botteicher, and Mr. Denker, please see attached two orders entered by the Commission.

Thanks,

Kathryn Irby

**Kathryn Irby**

**Arkansas State Claims Commission**

101 East Capitol Avenue, Suite 410

Little Rock, Arkansas 72201

(501) 682-2822

---

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 Confidentiality Notice:

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

**DOUGLAS PELFREY and  
KENENA PELFREY**

**CLAIMANTS**

**VS.**

**CLAIM NO. 220574**

**ARKANSAS DEPARTMENT  
OF TRANSPORTATION**


**RESPONDENT**

**Notice of Appeal**

Comes now Robert A. Ballinger, Attorney at Law, on behalf of Claimants, Douglas Pelfrey and Kenena Pelfrey, hereby gives written Notice of Appeal of the order of the State Claims Commission entered on the 27<sup>th</sup> day of February 2024, and the order denying reconsideration entered on the 14<sup>th</sup> day of June 2024, in the above-referenced matter. This appeal is directed to the General Assembly of the State of Arkansas.

This Notice of Appeal is timely filed within twenty (20) days of the Commission's transmission of the order denying the motion for reconsideration, in accordance with Ark. Code Ann. § 19-10-211(b)(ii)(a).


Respectfully submitted,  
Claimants, Douglas Pelfrey and Kenena Pelfrey

By:   
Robert A. Ballinger, AR Bar # 2005087  
P.O. Box 51  
Oark, AR 72852  
870.505.4448  
870.505.7811 (fax)  
Bob@BallingerLaw.net

**CERTIFICATE OF SERVICE**

I, Robert A. Ballinger, do hereby certify that a true and correct copy of the foregoing was served on the following person(s) through email service on this 19<sup>th</sup> day of June 2024:

Alexander Denker  
alexander.denker@ardot.gov  
ArDOT, Legal Division  
PO Box 2261  
Little Rock, AR 72203-2261

By:   
Robert A. Ballinger, Attorney at Law