

STATE OF WISCONSIN CLAIMS BOARD

The State of Wisconsin Claims Board conducted hearings at the State Capitol Building in Madison, Wisconsin, on October 11, 2011, upon the following claims:

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
1. Jessica & Tina Kosnar	University of Wisconsin	\$6,638.04
2. David J. Loveland	Wisconsin Court System	\$20,383.20
3. Rommain S. Isham	Innocent Convict Compensation	\$3,650,000.00
4. ABC for Health, Inc.	Insurance Commissioner	\$176,250.00

The following claims were considered and decided without hearings:

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
5. Jeff Jayko	Natural Resources	\$406.11
6. Christopher Burrowes	Innocent Convict Compensation	\$15,000.00

The following issues were considered by the board:

A. The applicability of standard waiver language to Compensation for Innocent Convict payments made pursuant to § 775.05, Stats. Following discussion, there was a motion to approve using revised waiver language on checks issued pursuant to § 775.05 Stats., such that the general language will be "Acceptance of this check releases the state, its employees, agents and officers from any further liability under Wis. Stat. § 775.05 related to this claim."

B. Whether or not to reissue previous payment awarded to Chaunte Ott on May 18, 2010, in light of the Board's decision regarding of standard waiver language to Compensation for Innocent Convict payments made pursuant to § 775.05, Stats. Following discussion, the board directed reissue of the payment awarded to Chaunte Ott using the revised release language set forth above.

The Board Finds:

1. **Jessica and Tina Kosnar** of Madison, Wisconsin claim \$6,638.04 for cost of veterinary care and value of their pet dog, Cookie, who died while under the care of the UW Veterinary Teaching Hospital (VTH). The claimants state that when they brought Cookie to VTH on May 19, 2010, he was generally healthy with no life-threatening conditions. The claimants state that VTH staff requested approval to conduct a liver biopsy and gallbladder needle aspirate in order to further investigate results from prior testing. The claimants allege that VTH staff failed to fully inform them of the risks associated with the procedures, including the possibility that if Cookie's gallbladder was not normal, the puncture from the aspirate might not seal itself off, causing bile to leak into Cookie's abdomen. The claimants state VTH also failed to inform them that a safer, laparoscopic procedure was available. The claimants state that after the aspirate procedure, VTH staff saw, via ultrasound, that there was fluid leaking into Cookie's abdomen but that the ultrasound did not allow them to determine the source or type of the fluid. The claimants note that if VTH had conducted the laparoscopic procedure, the staff would have clearly seen that Cookie's gallbladder was abnormal and was the source of the leaking fluid. Instead, after the procedure, Cookie was left untreated and in pain until six to eight hours later when VTH staff noticed his worsening condition, indicative of infection and fluid in the abdomen, and conducted emergency surgery to remove his gallbladder. Cookie survived the surgery but died the next morning. The claimants believe that Cookie's death was caused by an unreasonable delay in diagnosis and treatment by VTH staff. The claimants note that Cookie's procedure was conducted at 4:45 p.m. and that his pathology slides were not read until the next day because the pathology staff left for the evening. The claimants believe that if VTH staff had reviewed Cookie's pathology sample sooner, they would have immediately

seen that Cookie's gallbladder was abnormal and needed to be removed. The claimants also believe it was irresponsible to leave unsupervised residents in charge of VTH's Critical Care Unit and that a more experienced veterinarian should have been called in as Cookie's condition worsened. The claimants believe that VTH staff was negligent and that their treatment of Cookie failed to meet the standard of reasonable veterinary care.

UW recommends denial of this claim. UW states that it is incorrect that Cookie was brought to VTH on May 19, 2010, for "routine care". UW states that Cookie was 10 years old and had a history of serious health conditions. The May 19 visit was to conduct an ultrasound to investigate elevated liver enzymes found at a visit the week before. Based on the results of the ultrasound, VTH staff recommended a liver biopsy and gallbladder aspirate. UW states that VTH staff fully explained the risks of the procedure and that Jessica Kosnar signed a consent form indicating these risks. UW notes that the small amount of fluid leaking into the abdomen was observed via ultrasound after the procedure but that ultrasound imagery is not able to distinguish between blood and bile. UW states that it was entirely plausible that the fluid observed was a small amount of blood from the liver biopsy (which would not be cause for concern) as opposed to bile leaking from the gallbladder (which would cause concern). UW states that VTH staff is very experienced doing ultrasound guided aspirates and that serious complications from this procedure are exceedingly rare. UW notes that the 4th year resident who conducted the procedure was board certified in radiology. UW notes that, although the laparoscopic procedure was a possibility, that procedure is actually more invasive and was therefore not considered an appropriate option. VTH staff denies leaving Cookie untreated and in pain. Cookie's medical records show that he was given pain medication and continually monitored. The claimants allege that if the gallbladder removal had occurred sooner, Cookie would not have died. UW states that all that can be known for certain is that Cookie was much sicker than the claimants realized when they brought him to VTH. UW believes there is no way to know whether Cookie's prognosis would have been any better had VTH staff conducted the surgery earlier in the evening. UW notes that, as a result of Cookie's complications, VTH has changed its procedures and no longer conducts these types of tests after 3 p.m. UW states that the supervision of residents at VTH meets the standards set by the national Veterinary Medicine Association, and that these standards allow for consultation with a board certified veterinarian by phone, as occurred in Cookie's case. The UW believes that the claimants have provided no evidence that the care provided by VTH staff was in any way inappropriate or sub-standard based on prevailing standards of veterinary care.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

2. David J. Loveland of Baraboo, Wisconsin claims \$20,383.20 for lost income due to the his wrongful incarceration allegedly caused by an error made by Waukesha County Circuit Court. In August 2003, the claimant pled guilty to a 5th offense OWI in Waukesha County. The claimant was charged as a fifth-time offender based on the his prior OWI convictions in 1995, 1996, 1998 and 2000. Waukesha County Circuit Court sentenced him as a fifth offender to 2 years confinement plus 3 years extended supervision. In August 2009, the claimant's extended supervision was revoked based on a new OWI charge in Milwaukee County and he was ordered re-confined. In March 2010, Milwaukee County Circuit Court sentenced him for 4th offense OWI because the court did not count the 1995 and 1996 OWI convictions. The claimant filed a post-conviction motion alleging that the Waukesha County Circuit Court also should not have counted these earlier convictions against him in 2003. In April 2010, based on a stipulation between parties, Waukesha County Circuit Court adjusted the claimant's 2003 conviction to 4th offense OWI, reduced his sentence to one year-the maximum for that charge- and ordered him released. By that time the claimant had served two years, 10 months and 24 days based on the original sentence and supervision revocation. He requests reimbursement for one year, 10 months and 24 days spent in confinement. The claimant has based the amount of his claim on \$894 per month, the amount he receives in Social Security Disability.

DOJ, representing the State Court System, recommends denial of this claim. DOJ states that the state is not legally liable for this claim. DOJ also states that it is not clear that the claimant's 2003 conviction for 5th offense OWI involved any negligence on the part of Waukesha County Circuit Court. Although it appears that the claimant's 1995 and 1996 OWI

convictions were vacated sometime before his 2010 OWI conviction in Milwaukee County, the claimant has failed to present any evidence that those convictions were vacated in 2003 at the time the Waukesha County Court sentenced him for 5th offense OWI. DOJ notes that the claimant was represented by counsel at all court proceeding in Waukesha County in 2003 and at no time did he or his counsel object to the charge or sentence of 5th offense OWI. DOJ notes that the claimant never raised an objection to this sentence until after his March 2010 conviction for 4th offense OWI in Milwaukee County. Finally, DOJ notes that the claimant is not entitled to compensation as an Innocent Convict pursuant to § 775.05, Stats. He has not presented any evidence that he was innocent of the 2003 OWI and in fact, pled guilty to the charge, making him ineligible to receive compensation under § 775.05, Stats.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

3. Rommain Steven Isham of Duluth, Minnesota claims \$3,650,000.00 for compensation pursuant to § 775.05, Wis. Stats. On July 19, 1990, the claimant was convicted of sexually assaulting an 8 year old child and served 10 years in prison as a result of his conviction. The claimant states that he suffered severe physical and sexual abuse while in prison due to his label as a "child molester". The claimant states that he served his entire sentence in prison because he refused to attend sex offender treatment, which would have made him eligible for an earlier release. The claimant states that he refused this treatment because of his innocence. In 2009, while investigating a different case, DOJ Division of Criminal Investigation Special Agent James Ohm had cause to speak with the claimant's ex-girlfriend, the mother of his alleged victim. The mother told Agent Ohm that the claimant was not guilty of the crime of which he'd been convicted and that her son recanted his testimony when he was 13 years old. The son confirmed this information to Agent Ohm via telephone. Agent Ohm contacted the Douglas County District Attorney's Office and was told to investigate the matter. Agent Ohm discovered that several years after recanting to his mother, the victim made a formal statement to the Sheboygan County Sheriff's Department recanting his testimony. Agent Ohm interviewed the victim in person and found him credible. Agent Ohm also corroborated the victim's recantation with his brother and ex-girlfriend. Based on Agent Ohm's investigation the Douglas County DA filed a motion to vacate the claimant's conviction. A hearing was held in May 2010, during which Agent Ohm and the former victim, Jeremy Kaseno, then 28 years old, testified. Mr. Kaseno testified that he was very young when he made the charges and that he became caught up in the lie and was afraid to tell the truth. He also testified that his life was in turmoil at the time, having been in foster care and then suffering the death of his grandfather with whom he lived for a short time. He also testified that he felt pressured by his abusive father to maintain the lie. Mr. Kaseno expressed remorse for his lie and support for overturning the claimant's conviction. The conviction was vacated on May 11, 2010. The claimant requests reimbursement in the amount of \$1,000 per day of his incarceration.

The Douglas County District Attorney's Office declined to respond to this claim.

The Board concludes that there is clear and convincing evidence the claimant was innocent of the crime for which he was convicted and that pursuant to § 775.05, Stats., the claim should be paid in the amount of \$25,000.00 from the Claims Board appropriation § 20.505 (4)(d), Stats.

4. ABC for Health, Inc. of Madison, Wisconsin claims \$176,250.00 for damages related to termination of a contract with OCI pursuant to a federal Consumer Assistance Program grant through the US Department of Health and Human Services. The claimant states that in July 2010, OCI solicited its assistance in applying for the grant. The claimant states that it provided substantial assistance to OCI in planning for and drafting the grant application. Upon notice of receipt of the grant in November 2010, OCI contracted with the claimant to complete the grant objectives. On February 9, 2011, OCI notified the claimant that it was terminating the contract effective March 12, 2011. The claimant alleges that OCI terminated the grant for invalid reasons, basing the decision to terminate on information that failed to accurately measure the claimant's progress on the grant objectives. The claimant also alleges that OCI decided to terminate the grant based on political, not policy reasons and that the decision to terminate the contract was made without any meaningful evaluation of the project's

value or impact. The claimant further states that OCI's summary termination of the contract diminishes the trust and credibility of the state and constitutes an abuse of agency power. Finally, the claimant alleges that OCI's termination of the contract violated the claimant's right to due process of law. The claimant states that it was solicited as a grant partner and expended considerable resources to develop the grant proposal and implement grant-related programs. In doing so, the claimant believes that it developed a reasonable expectation of property interest in the grant and that OCI violated the claimant's due process rights when it terminated the grant without allowing the claimant to challenge the termination. The claimant believes that the Claims Board should grant the claim based on equity and fairness.

OCI recommends denial of this claim. OCI was awarded the Consumer Assistance Program grant in October 2010. In November 2010, OCI entered into a sub-grant agreement with the claimant. OCI points to Article 12 of that agreement, which states: "OCI may terminate this Agreement with or without cause by delivering written notice to ABC...no less than thirty (30) days prior to the effective date of the termination." OCI states that its notification of contract termination met the requirements set forth in Article 12 of the Agreement. OCI states that the claimant agreed to a contract allowing termination without cause and that the claimant's due process argument has no merit because the contract was for a fixed term and specifically allowed termination without cause. OCI believes the claimant did not have a property interest in the grant sufficient to require OCI to give the claimant an opportunity to challenge the termination.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles. *(Member Hagedorn not participating.)*

5. Jeff Jayko of Johnsburg, Illinois claims \$406.11 for damage to his boat motor allegedly caused by an incident at Little St. Germain Lake in St. Germain, Wisconsin. On July 31, 2011, the claimant was launching his boat at the recently renovated boat launch on Little St. Germain Lake. As the claimant proceeded to back the boat away from the launch into the lake, the boat's motor suddenly stopped and the steering locked up. The claimant checked his motor and found thick, black matting wrapped around the propeller and out drive. With the assistance of friends he was able to cut the matting away from the propeller and out drive. He then attempted to restart the motor but discovered that the shift cable, which is part of the linkage between the control lever and the transmission, was severely stretched and would not operate properly. The claimant contacted DNR several days later and was given information on how to file a claim. The claimant received a repair estimate of \$406.11 to repair the shift cable damage and requests reimbursement for that amount.

DNR recommends denial of this claim. DNR points to Wisconsin's Recreational Immunity Law, § 895.52, Stats., which provides immunity to the state for property damage incurred during recreational activities on public land, unless the damage is caused by a malicious act. DNR states that there was no malicious act in this instance. DNR notes that the Little St. Germain Lake boat launch had been renovated in the spring of 2010. As part of that renovation, landscape fabric was placed under heavy rock at the end of the landing to hold the lakebed in place. DNR states that some boat owners "power load" their boats instead of winching them onto their trailers. This practice of power loading creates a blowback thrust that can shift the rock away, causing the fabric to float up. DNR therefore believes that if there is any blame to be assigned, it should go to the claimant's fellow boaters who engage in this practice. In addition, DNR's mechanic staff does not believe that the lakebed matting caught in the claimant's propeller would have caused the shift cable to stretch. Staff point to safety features inside the prop which would have been more likely to take the impact of the prop being fouled, before any impact would have been carried up to the shift cable. DNR staff notes that because of the regular stresses of recreational boating, shift cables will fail with time. DNR staff believes it is more likely that the shift cable on the claimant's boat was simply at the end of its useful life. Finally, DNR believes the estimate provided by the claimant is somewhat suspect because it does not appear to come from a legitimate marina or dealership. Based on these reasons, DNR believes there is no legal or equitable basis for paying this claim.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

6. **Christopher Burrowes** of Milwaukee, Wisconsin claims \$15,000.00 compensation pursuant to § 775.05, Wis. Stats. On February 7, 2007, the claimant was convicted of first degree sexual assault of a child. In December 2009, the alleged victim, Denise Beck, recanted her testimony and admitted to Milwaukee County District Attorney's Office investigators that she had lied during her testimony. Ms. Beck told the investigators that she had been involved in a sexual relationship with her adult uncle when she was 11 years old. She stated that when her mother became suspicious, she made the sexual assault accusation against the claimant, an acquaintance of hers, in order to protect her uncle. The investigators found Ms. Beck's December 2009 statement credible and the Milwaukee County District Attorney's Office filed a Motion to Vacate Conviction and Dismiss Charges. Based on this new evidence, the court vacated the claimant's conviction on December 16, 2009. The claimant requests reimbursement at the statutory rate of \$5,000 per year for the three years he served in prison.

The Milwaukee County District Attorney's Office declined to respond to this claim.

The Board concludes that there is clear and convincing evidence the claimant was innocent of the crime for which he was convicted and that pursuant to § 775.05, Stats., the claim should be paid in the amount of \$15,000.00 from the Claims Board appropriation § 20.505 (4)(d), Stats.

The Board concludes:

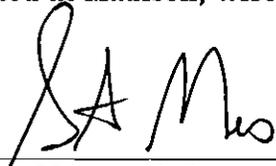
That the following identified claimants are denied:

Jessica and Tina Kosnar
David J. Loveland
ABC for Health, Inc.
Jeff Jayko

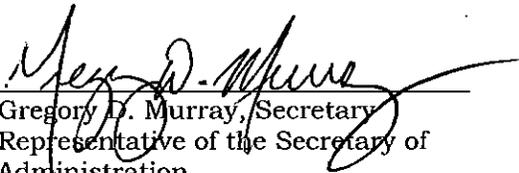
That payment of the below amount to the identified claimant from the following statutory appropriation is justified under § 16.007, Stats:

Rommain S. Isham \$25,000.00 § 20.505 (4)(d), Wis. Stats.
Christopher Burrowes \$15,000.00 § 20.505 (4)(d), Wis. Stats.

Dated at Madison, Wisconsin this 26th day of October, 2011.



Steve Means, Chair
Representative of the Attorney General



Gregory D. Murray, Secretary
Representative of the Secretary of
Administration



Pamela Galloway
Senate Finance Committee



Patricia Strachota
Assembly Finance Committee



Brian Hagedorn
Representative of the Governor