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Arkansas State Claims Commission

JAN 12 2016

BEFORE THE STATE CLAIMS COMMISSION Of the State of Arkansas

RECEIVED

Mr. Mrs. Ms. Miss Dayong Yang, as Special Administrator of the estate of, Claimant vs. Le Yang, deceased

Do Not Write in These Spaces Claim No. 16-0496-CC Date Filed January 12, 2016 Amount of Claim \$? Fund ADEM Wrongful Death, Negligence Failure to Follow Procedure

State of Arkansas, Respondent AR Dept. of Emergency Management Dayong Yang, as Special Administrator of the COMPLAINT estate of Le Yang, deceased

the above named Claimant, of [redacted] County of Pulaski represented by Carter C. Stein, McMath Woods P.A. of 711 West Third Street Little Rock AR 72201 (501) 396-5409 (501) 374-5118, says:

State agency involved: Arkansas Department of Emergency Management Amount sought: Amount to be determined by jury Month, day, year and place of incident or service: January 14, 2013; Capitol Hill Blvd. and Rushmore Ave. Little Rock, AR Explanation: This is an indemnification claim. Please see the attached typewritten explanation.

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

and that \$ was paid thereon: (2) Has any third person or corporation an interest in this claim? Yes; if so, state name and address City of Little Rock, 500 N. Markham St. Little Rock AR 72201 and that the nature thereof is as follows: City of Little Rock was called upon to assist State and ADEM in provision of all services and was acquired on January 14, 2013, in the following manner: City of Little Rock has been sued for their actions performed for State and ADEM.

THE UNDERSIGNED states on oath that he or she is familiar with the matters and things set forth in the above complaint, and that he or she verily believes that they are true. Dayong Yang, Special Administrator (Print Claimant/Representative Name) [Signature] (Signature of Claimant/Representative)

SWORN TO and subscribed before me at Little Rock AR on this 12th day of January, 2016. Sabrina Baker (Notary Public) My Commission Expires: February 22, 2021

SABRINA BAKER LONOKE COUNTY NOTARY PUBLIC - ARKANSAS My Commission Expires February 22, 2021 Commission No. 12381103

**BEFORE THE STATE CLAIMS COMMISSION
Of the State of Arkansas**

**DAYONG YANG,
as Special Administrator of the Estate of
LE YANG, deceased**

CLAIMANT

vs.

STATE OF ARKANSAS

RESPONDENT

Explanation (Continued from COMPLAINT form):

1. On the morning of January 14, 2013, Jinglei Yi and her then five year old son Le Yang were in a 2006 Ford Expedition headed east on Capitol Hill Boulevard.
2. Jinglei stopped at the stop sign at the intersection of Capitol Hill Boulevard and Pennsylvania Avenue/Rushmore Avenue.
3. As Jinglei proceeded through the intersection, she hit a patch of ice and lost control of her vehicle. Jinglei's vehicle continued east approximately 256 feet before going over the southbound curb line, leaving the roadway, striking a small tree, going down a hill, and entering a retaining pond on the south side of Capitol Hill Boulevard.
4. Jinglei used her cell phone to call Arkansas's 911 system at 7:55:25 a.m.
5. Jinglei's 911 call was answered by the Pulaski County Sheriff's 911 Communications Center. Jinglei told the female Pulaski County 911 call taker her vehicle had fallen in the water. She stated she was in the car with her child. The Pulaski County call taker asked Jinglei if she slid off into the pond and said "I see where you're at."
6. The Pulaski County call taker told Jinglei she was getting her to the correct agency to get its fire department to help Jinglei and Le. The Pulaski County call taker transferred Jinglei's 911 call to the Little Rock Police Department Communications Center because Jinglei and Yi were within the city limits.

7. The Pulaski County call taker, with Jinglei on the line, called Little Rock 911 at 7:56:03 a.m.
8. Candace Middleton, a Little Rock employee, answered the call.
9. The female Pulaski County 911 operator told Middleton that Jinglei and Le were in a pond just east of Rushmore Avenue on the south side of the road. The Pulaski County call taker told Jinglei she was letting her speak with Little Rock 911.
10. Jinglei told Middleton "I'm falling in a pond and I feel the water in my car right now." Jinglei told Middleton her location, confirmed Le was in the car with her, and spelled her name.
11. In response to Jinglei's 911 call about a vehicle sinking in a pond, Middleton failed to enter the call for police and fire dispatch.
12. Middleton did call MEMS to have an ambulance go to the scene.
13. MEMS personnel arrived at the scene at 8:20:18 a.m. but police and fire department personnel were not there.
14. MEMS personnel called MEMS dispatch to check status of police and fire units.
15. MEMS dispatch called Pulaski County Sheriff's 911 Communications Center to check status of police and fire units.
16. Pulaski County Sheriff's 911 Communications Center advised MEMS dispatch that the call in question was a Little Rock call.
17. MEMS dispatch called Little Rock 911 at 8:21 a.m. about the status of police and fire units. At this time it was discovered that the call had not been entered.
18. The call was entered by Little Rock 911 at 8:23:02 a.m.
19. Little Rock water rescue units arrived at 8:40:34 a.m.
20. Le Yang was extricated from the submerged vehicle at 8:50:25 a.m.

21. At 9:05:57, MEMS transferred an unconscious Le Yang to Arkansas Children's Hospital.
22. On the day of the incident, Le was treated for near drowning, hypothermia, and cardio pulmonary arrest. His initial in-patient stay at Arkansas Children's Hospital lasted for fifty days.
23. Le suffered from an anoxic brain injury and had spastic quadriplegia. He had a tracheostomy for breathing and a tube for feeding. His behavior and communication skills were that of a child less than four months old.
24. When he wasn't being treated in-patient at Arkansas Children's Hospital, Le lived at the Arkansas Pediatric Facility where he received around the clock care.
25. On January 19, 2015, Le died of pneumonia complicated by the anoxic encephalopathy which occurred in the near drowning event.
26. In the more than two years following the incident, Le incurred over \$1.3 million in medical expenses.
27. Le Yang's injuries and death were proximately caused by the negligence of the City of Little Rock who was acting on behalf of the State of Arkansas and the Arkansas Department of Emergency Management.
28. The City of Little Rock "shall be immune from liability and from suit for damages except to the extent that [it] may be covered by liability insurance." Ark. Code Ann. § 21-9-301(a).
29. However, an exception to the City of Little Rock's immunity exists when it is sued for actions it undertakes for the State of Arkansas. Ark. Code. Ann. § 21-9-304.
30. "When any city of the first class . . . and its employees are called upon to assist the state and its employees and, as a result, are sued for their actions performed under the supervision of a state official or employee, the Attorney General shall defend the city of the first class . . . and its employees." Ark. Code Ann. § 21-9-304(a).

31. Here, the City of Little Rock has been called upon by the State of Arkansas and the Arkansas Department of Emergency Management to operate a public service answering point in connection with the statewide 911 system. Ark. Code Ann. § 21-9-304(a); *See also* Ark. Code Ann. § 12-10-302.

32. Further, the actions of the City of Little Rock in hiring, training, supervising, and retaining Middleton, maintaining its computer aided dispatch system, adequately staffing its Communications Center, Middleton's response to Jinglei's 911 call, and the police and fire department's response were performed under the supervision of David Maxwell, the head of the Arkansas Department of Emergency Management who was appointed by the Governor of Arkansas as the State 911 Coordinator, and in furtherance of the State of Arkansas's desire to operate a statewide 911 system. Ark. Code Ann. § 21-9-304(a).

33. “***Should*** a judgment be rendered against the city of the first class . . . or its employees, the ***state shall pay*** actual, but not punitive, damages adjudged by a state or federal court, or entered by the court as a result of a compromise settlement approved and recommended by the Attorney General, based on an act or omission by the officer or employee while acting without malice and in good faith within the course and scope of his or her employment and in performance of his or her official duties.” Ark. Code Ann. § 21-9-304(a) (emphasis added).

34. Accordingly, ***if*** a judgment is rendered for Dayong Yang, as special administrator of the estate of Le Yang, deceased, against the City of Little Rock or its employees, then the ***state shall pay*** actual damages awarded by the jury.

35. The case against the City of Little Rock and MEMS is presently before the Arkansas Supreme Court and is styled *City of Little Rock, et al. v. Dayong Yang, as Special Administrator of the estate of Le Yang, deceased*; Arkansas Supreme Court, Case No. CV-15-1057, an appeal

from *Dayong Yang, as Special Administrator of the estate of Le Yang, deceased v. City of Little Rock, Arkansas, et al.*, Pulaski County Circuit Court, 6th Division, Case No. 60CV-13-3115.

36. The Arkansas Attorney General's Office argued the following in a filing in the above referenced circuit court case:

Similarly, Arkansas Code section 21-9-304 provides a source or mechanism for payment if and when each of its conditions is met. It does not expressly or impliedly provide for circuit court jurisdiction to determine its application in a particular case, much less a court action by an injured party.

This does not mean there is no forum in which a proper claim may be determined under section 21-9-304. The Arkansas Constitution provides that the General Assembly, not the courts, shall provide for payment of all just and legal debts of the State. Ark. Const. Art. 16, Section 2. The General Assembly created the Arkansas Claims Commission for this purpose and granted it exclusive jurisdiction over virtually all claims against the State. *Fireman's Insurance Co*, 301 Ark. at 456; *see also*, Ark. Code Ann. § 19-10-204. ***To the extent that a judgment in favor of the Plaintiff and against the City may be within the scope of section 21-9-304 the Claims Commission, not the courts, will have jurisdiction to determine the existence, nature and extent of the State's obligations.***

(emphasis added).

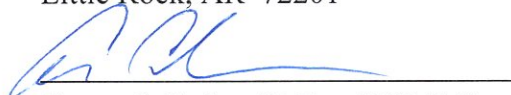
37. Yang is filing this indemnification claim now before the Arkansas State Claims Commission, prior to the running of the three year statute of limitations for negligence claims in Arkansas, so that if a judgment is rendered in his favor against the City of Little Rock and/or its employees he may then be able to present his indemnification claim to the Arkansas State Claims Commission for payment.

38. Additional pleadings and filings from the above referenced case, as well as other supporting documentation, will be provided to the Arkansas State Claims Commission.

Respectfully Submitted,

McMATH WOODS P.A.
711 West Third Street
Little Rock, AR 72201

By:

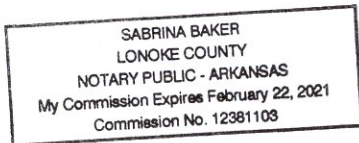


Carter C. Stein, AR Bar #2004049

Email: carter@mcmathlaw.com

*Attorney for Dayong Yang,
as special administrator of
the estate of Le Yang, deceased*

Sworn to and subscribed before me at Little Rock, Arkansas
on this 12th day of January, 2016.



Sabrina Baker

Notary Public

My commission expires: 2/22/21

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

**DAYONG YANG, AS SPECIAL
ADMINISTRATOR OF THE ESTATE
OF LE YANG, DECEASED**

CLAIMANT

V.

CLAIM NO. 16-0496-CC

**ARKANSAS DEPARTMENT OF
EMERGENCY MANAGEMENT**

RESPONDENT

ORDER

Now before the Arkansas State Claims Commission (the “Claims Commission”) is the renewed motion filed by the Arkansas Department of Emergency Management (the “Respondent”) for judgment on the pleadings filed by Dayong Yang, as special administrator of the Estate of Le Yang, deceased (the “Claimant”). At the hearing on the motion, Carter C. Stein appeared on Claimant’s behalf, and Vincent P. France appeared on behalf of Respondent. Based upon a review of the motion, the arguments made therein, and the law of Arkansas, the Claims Commission hereby finds as follows:

1. The Claims Commission has jurisdiction to hear this claim pursuant to Ark. Code Ann. § 19-10-204(a).

2. Claimant filed his indemnification claim on January 12, 2016, pursuant to Ark. Code Ann. § 21-9-304(a). At the time of filing, Claimant requested that the claim be held in abeyance until the underlying litigation was concluded. This claim relates to the failure of a City of Little Rock dispatcher, Candace Middleton, to send police and fire units to the scene of a one-vehicle accident, in which Jinglei Yi and her young son, Le Yang, ended up in a vehicle submerged in a pond. Jinglei Yi died as a result, and Le Yang suffered an anoxic brain injury and died two years later. As part of the underlying litigation, the Pulaski County Circuit Court entered a default judgment against Ms. Middleton in the amount of \$17,627,638.04.

3. After the underlying litigation was concluded, Respondent filed the instant motion, arguing that Claimant's claim is (1) barred by the doctrine of collateral estoppel, (2) prohibited by the Arkansas Constitution, and (3) not permitted by Ark. Code Ann. § 21-9-304.

4. Claimant filed a response, arguing that Respondent's collateral estoppel argument fails due to Respondent's inconsistent positions (Respondent argued to the circuit court that the Claims Commission has jurisdiction to determine Respondent's liability under Ark. Code Ann. § 21-9-304, and Respondent is now arguing to the Claims Commission that the circuit court had jurisdiction of the indemnification issue and adjudicated that issue) and the fact that the indemnification issue was not litigated or dismissed by the circuit court. As to the constitutional argument, Article 12 § 12 of the Arkansas Constitution provides an applicable exception to the rule against the state paying cities' liabilities. As to Respondent's argument regarding Ark. Code Ann. § 21-9-304, the facts in this claim satisfy the statutory requirements because the 911 system is a statewide system coordinated by and carried out under the supervision of State employees.

5. Respondent replied, arguing that it did not take inconsistent positions in the underlying litigation and the instant claim. If the circuit court had found that the facts supported state indemnification, Claimant's claim would be "ripe for adjudication" by the Claims Commission. In the underlying litigation, the City of Little Rock, its employees, and Ms. Middleton were not represented by the Arkansas Attorney General's Office because these defendants were not assisting the state and acting under the supervision of a state employee. Had they been, the Arkansas Attorney General would have been "statutorily obligated" to represent them.

6. At the hearing, Respondent argued that there is no statewide 911 operating system and pointed to Ark. Code Ann. §§ 12-10-302(e)(3)¹ and 12-10-304 as evidence that 911 systems are local. Respondent is not responsible for maintaining, operating, or running 911 centers. Ark. Code Ann. § 21-9-304 pertains to situations where the State calls for the assistance of local officials for help with a state issue and the local officials are sued as a result of assisting the state. Ms. Middleton was not assisting the state, and Respondent did not oversee her work. To permit Claimant to recover would open Pandora's box.

7. Claimant responded, arguing that Respondent is trying to read "direct supervision" into the requirements of Ark. Code Ann. § 21-9-304. The City of Little Rock was called upon by the state to operate a 911 center. Respondent wants the state to have a statewide 911 system for the benefits (David Maxwell, who was appointed to be the state's 911 coordinator, applied for and received federal funding for the state's 911 programs) but not the liabilities. The facts of this claim show a statewide 911 system, in that when Jinglei Yi called 911, Pulaski County dispatch answered the call and then transferred it to the City of Little Rock. The Claims Commission is the conscience of the State of Arkansas.

8. Upon a question by a commissioner, Claimant confirmed that Mr. Maxwell is the only state employee identified in this claim, although Claimant referenced some other state employees identified in the underlying litigation.

9. Upon a question by a commissioner as to the indicia of supervision by Mr. Maxwell over Ms. Middleton and whether Claimant's counsel could amend his complaint to provide any

¹ Ark. Code Ann. § 12-10-302(e)(3) provides that "It is found and declared necessary to [e]ncourage the political subdivisions to implement public safety answering points" Ark. Code Ann. § 12-10-304 permits the "chief executive of a political subdivision" to "[r]etain a dispatch center to serve both public safety answering point and dispatch functions."

further details regarding supervision, Claimant confirmed that Mr. Maxwell did not directly supervise Ms. Middleton and probably did not know her name.

10. Upon a question by a commissioner as to whether Claimant believes the state to be responsible for any negligence on the part of a 911 response, Claimant stated that an analysis must be done through Ark. Code Ann. §§ 21-9-301 and 21-9-304. As to the amount of the judgment, Claimant also noted that the state extricated itself from the underlying litigation and could have stayed in.

11. Upon a question from a commissioner as to the permissive language in Ark. Code Ann. § 12-10-302, Claimant stated that the permissiveness of the language does not matter because the City of Little did decide to operate a 911 center.

12. Ark. Code Ann. § 21-9-304 provides, in pertinent part, that:

- (a) When any city of the first class, city of the second class, incorporated town, county, and its employees are called upon to assist the state and its employees and, as a result, are sued for their actions performed under the supervision of a state official or employee, the Attorney General shall defend the city of the first class, city of the second class, incorporated town, county, and its employees.
- (b) Should a judgment be rendered against the city of the first class, city of the second class, incorporated town, county, or its employees, the state shall pay actual, but not punitive, damages adjudged by a state or federal court, or entered by the court as a result of a compromise settlement approved and recommended by the Attorney General, based on an act or omission by the officer or employee while acting without malice and in good faith within the course and scope of his or her employment and in performance of his or her official duties

(emphasis added).

13. The Claims Commission finds that there are no facts pled to support a claim that Mr. Maxwell was supervising Ms. Middleton. While the Claims Commission appreciates Claimant's counsel's diligent representation of his client, without specific guidance from the

Arkansas General Assembly, the Claims Commission is unwilling to find that the existence of a 911 coordinator means that the state is supervising every 911 dispatcher and emergency responder.

14. Because the Claims Commission finds that dismissal is appropriate pursuant to Ark. R. Civ. Proc. 12(c), it need not reach Respondent's collateral estoppel and constitutional arguments.

15. As such, the Claims Commission GRANTS Respondent's motion for judgment on the pleadings and DISMISSES Claimant's claim.

IT IS SO ORDERED.



ARKANSAS STATE CLAIMS COMMISSION
Courtney Baird



ARKANSAS STATE CLAIMS COMMISSION
Paul Morris, Chair



ARKANSAS STATE CLAIMS COMMISSION
Sylvester Smith

DATE: September 15, 2020

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).

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HENRY WOODS (1928-2002)
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September 18, 2020

Via Email kathryn.irby@arkansas.gov Only

Kathryn Irby, Director
Arkansas State Claims Commission
101 East Capitol Avenue
Suite 410
Little Rock, Arkansas 72201

Re: *Yang v. State*, No. 16-0496-CC

Kathryn:

With this correspondence, I am filing a notice of appeal to the General Assembly of the final order entered by the Arkansas State Claims Commission on September 15, 2020, a copy of which is enclosed.

As required by Arkansas Code Annotated § 19-10-211(a)(1)(A), this notice of appeal is being filed within 40 days of entry of the September 15, 2020 final order.

Thank you for your attention to this matter.

Feel free to call me to discuss this notice of appeal

Sincerely,

Carter C. Stein

CCS/

Enc.

cc (w/enc.): Dayong Yang (via email only)
Vincent France (via email vincent.france@arkansasag.gov only)
Thomas M. Carpenter (via email tcarpenter@littlerock.gov only)