

1999 DRAFTING REQUEST

Bill

Received: 12/09/1999

Received By: kuesejt

Wanted: Soon

Identical to LRB:

For: Sheryl Albers 6-1743

By/Representing: Patricia Reardon - Claims Board

This file may be shown to any legislator: NO

Drafter: kuesejt

May Contact:

Alt. Drafters:

Subject: State Finance - claims agnst st

Extra Copies:

Pre Topic:

No specific pre topic given

Topic:

Robert and Dorothy Messner claim

Instructions:

Per board recommendation, 10/19/99.

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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FE Sent For:

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# state of Wisconsin • CLAIMS BOARD

101 E. Wilson Street • Post Office Box 7864 • Madison, Wisconsin 53707-7864 • 608-264-9595 • Patricia.Reardon@doa.state.wi.us

DATE: December 6, 1999

TO: Jeffrey Kuesel  
Legislative Reference Bureau

FROM: Patricia A. Reardon  
Program Assistant

RE: Drafting of Claims Legislation

Attached, please find a copy of the proceedings from the meeting held by the State Claims Board on October 7, 1999. At that time, the Board recommended that the following claims be paid:

Robert & Dorothy Messner	\$9,926.00
City of West Allis	\$13,785.25
City of West Allis	\$56,300.00
Walworth County	\$76,150.00

The Claims Board members would appreciate it if you would draft the necessary legislation for this claim. Representative Sheryl Albers will sponsor the bill. Thank you for your assistance in this matter.

states that PEFCA claimants frequently claim only a portion of the charges on an individual invoice, therefore, it was not at all unusual that the canceled check submitted did not cover the entire invoice. The Department's claim reviewer would have had no way of knowing that another cancelled check existed, which was mistakenly not included in the claim. The Department would have had no reason to call the claim preparer looking for another check as the claimant believes it should. Furthermore, if the Department made a call to every claimant whose claim appeared as though it might not be complete, it would cause substantial delays in the processing of PEFCA claim. The check was not included due to the claimants' own error and the state should not be held responsible for that error or for interest costs already covered by a previous settlement. 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 not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles. *Member Albers dissenting.*

4. **Robert and Dorothy Messner** of Brownsville, Wisconsin claim **\$9,926.00** for damages to apple trees in their orchard allegedly caused by road salt application to Hwy. 49 by the Department of Transportation. The claimants state that they have 136 trees with damage ranging from complete destruction to 25% loss of production, with the most severely damaged trees occurring in the rows closest to Hwy. 49. The claimants submit a letter from Plant Pathologist and UW Professor Patricia McManus, who concurs with the claimants' assertion that their damage was caused by road salt on Hwy. 49. The claimants state that they have lost thousands of dollars in production losses due to road salt damage since they purchased the orchard in 1980. The Department of Transportation recommends denial of this claim. The claimants have provided the written opinion of UW Plant Pathologist Patricia McManus, in which she concluded that the observed damage to the orchard is consistent with salt damage and therefore must have been caused by road salt. Ms. McManus reports that at the time she visited the orchard she observed "no signs or symptoms indicating that insects or disease were responsible for the decline and death of trees". However her report fails to offer evidence or sampling results in support of this theory. The claimants have submitted production and tax records showing an alleged drop in production and income, however, they have submitted no proof to show that the drop is directly and solely caused by the use of road salt on Hwy. 49. The DOT has a duty to maintain the roadways and remove and control ice and snow as a service to the public. The Department believes that businesses must exercise prudent planting practices when planting fruit trees close to a heavily traveled state highway. In some cases, this may include the planting of a "barrier" of salt tolerant plants or bushes to stop the uncontrolled flow of airborne salt spray from reaching the fruit trees. When the DOT became aware of the claimants' concerns, every attempt was made to reduce the amount of salt used on Hwy. 49 without compromising the safety of the motoring public. Within one mile of the orchard is a business that requires a heavy volume of semi tractor-trailer traffic daily, emphasizing the need for road salt as a safety factor to the public and an aid in maintaining an open road to the business. Discontinuing road salt on Hwy. 49 is not a viable option. The DOT believes that the board should consider the long-term implications of paying this claim and setting a precedent for future annual claims at this site and others around the state. The board recommends that the claim be paid in the amount of **\$9,926.00** based on equitable principles.

5. The City of West Allis, Wisconsin claims **\$13,785.25** for damages related to an error made by a DOT employe related to a road improvement project. The project agreement split various costs of the project with the State and the Federal Highway Administration (**FWHA**) paying 80% and the City paying 20%. When the right-of-way acquisition began, the claimant understood that all state and federal approvals were in place. However, the request for federal authorization of real estate funds was inadvertently never submitted by the DOT. The DOT employe responsible for submitting the authorization forms was apparently seriously ill at the time this oversight occurred. The claimant

years later, when the county attempted to seek reimbursement. This claim has been fully investigated by the DOT and negligence has been found on the part of a DOT employe. However, it has been determined that the DOT does not have legal authority to directly reimburse the county for these costs. The Department therefore requests that the Claims Board reimburse the claimant for their real estate costs. The board recommends that the claim be paid in the amount of **\$76,150.00 based** on equitable principles.

**The Board concludes:**

**1. The claims of the following claimants should be denied:**

Madison Metro/Great Lakes Electrical  
Garver Feed & Supply  
Nemec Barningham Foster Care  
Reuben Johnson & Son, Inc.  
Scott & Faith Fechrneyer

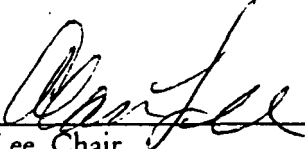
**2. Payment of the following amounts to the following claimants is justified under s. 16.007, Stats:**

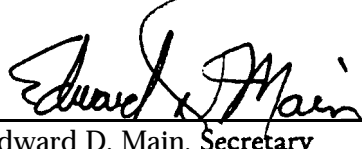
Julie Nickel \$251.62

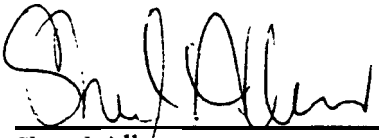
**The Board recommends:**

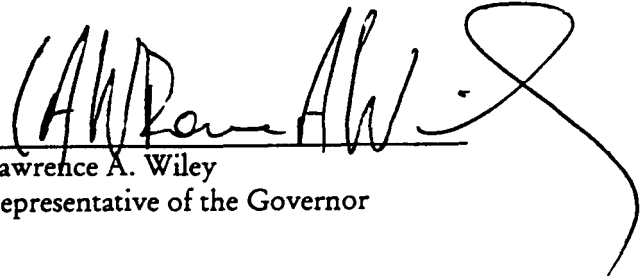
1. Payment of **\$9,926.00** to Robert and Dorothy Messner for damages to their orchard.
2. Payment of **\$13,785.25** to the City of **West Allis**, Wisconsin for real estate costs.
3. Payment of **\$56,300.00** to the City of **West Allis**, Wisconsin for real estate costs.
4. Payment of **\$76,150.00** to Walworth County, Wisconsin for real estate costs.

**Dated at Madison, Wisconsin this 19 th day of October, 1999.**

  
 \_\_\_\_\_  
 Alan Lee, Chair  
 Representative of the Attorney General

  
 \_\_\_\_\_  
 Edward D. Main, Secretary  
 Representative of the Secretary of Administration

  
 \_\_\_\_\_  
 Sheryl Albers  
 Assembly Finance Committee

  
 \_\_\_\_\_  
 Lawrence A. Wiley  
 Representative of the Governor

1999-2000 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-4052/lins

JTK...:....

*king*

**AN ACT relating to:** expenditure of \$9,926 from moneys appropriated to the department of transportation in payment of a claim against the state made by Robert and Dorothy Messner.

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*Insert Analysis*  
**The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:**

**SECTION 1. Claim against the state.** There is directed to be expended from the appropriation under section 20.395 (3) (eq) of the statutes, as affected by the acts of 1999, \$9,926 in payment of a claim against the state made by Robert and Dorothy Messner, Brownsville, Wisconsin, as reimbursement for losses incurred in 1998 as the result of damage to the claimants' apple orchard caused by salt spray from *S.T.H.* 49, to which the department of transportation applied road salt. Acceptance of this payment releases this state and its officers, employes and agents from any further liability resulting from damage to the claimants' property incurred in 1998.

**(END)**

1999-2000 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-4052/lins2  
JTK.....

*Analysis*

This bill directs expenditure of \$9,926 from moneys appropriated to the department of transportation (DOT) for the 1999-2001 fiscal biennium for maintenance and repair of state highways and certain related programs in payment of a claim against DOT by Robert and Dorothy Messner. The claimants operate an apple orchard adjacent to S.T.H. 49 near Brownsville (Dodge county). In 1998, the claimants had 136 dead, dying or damaged apple trees near the highway, which a plant pathologist determined to be caused by salt spray. Based on average net income for the years 1994 to 1997, the claimants estimated that the damage resulted in \$9,926 in net loss of income for 1998. DOT asserts that it attempted to reduce the amount of salt applied to the highway in response to the claimants' concerns, but that it has a duty to maintain the roadway in a safe condition for the traveling public, and that discontinuing the use of salt is not a viable option DOT also asserts that the claimants should exercise prudent planting practices in areas near the highway. On October 19, 1999, the claims board recommended payment of this claim (see *Senate Journal*, p. 307).

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

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**§ SUBMITTAL  
FORM**

**LEGISLATIVE REFERENCE BUREAU  
Legal Section Telephone: 266-3561  
5th Floor, 100 N. Hamilton Street**

The attached draft is submitted for your inspection. Please check each part carefully, proofread each word, and **sign** on the appropriate line(s) below.

**Date:** 12/22/1999

To: Representative Albers

**Relating to LRB drafting number: LRB-4052**

**Topic**

Robert and Dorothy Messner claim

**Subject(s)**

State Finance - claims agnst st

1. **JACKET** the draft for introduction SA  
in the **Senate** or the **Assembly** X (check only one). Only the requester under whose name the drafting request is entered in the LRB's drafting records may authorize the draft to be submitted. Please allow one day for the preparation of the required copies.

2. **REDRAFT.** See the changes indicated or attached \_\_\_\_\_  
A revised draft will be submitted for your approval with changes incorporated.

3. Obtain **FISCAL ESTIMATE NOW**, prior to introduction \_\_\_\_\_

If the analysis indicates that a fiscal estimate is required because the proposal makes an appropriation or increases or decreases existing appropriations or state or general local government fiscal liability or revenues, you have the option to request the fiscal estimate prior to introduction. If you choose to introduce the proposal without the fiscal estimate, the fiscal estimate will be requested automatically upon introduction. It takes about 10 days to obtain a fiscal estimate. Requesting the fiscal estimate prior to introduction retains your flexibility for possible redrafting of the proposal.

If you have any questions regarding the above procedures, please call 266-3561. If you have any questions relating to the attached draft, please feel free to call me.

Jeffery T. Kuesel, Managing Attorney  
Telephone: (608) 266-6778