STATE OF WEST VIRGINIA

Report

of the

Court of Claims

1977-1979

Volume

12

STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the Period from July 1, 1977

to June 30, 1979

By

CHERYLE M. HALL

CLERK

VOLUME XII

(Published by authority Code 14-2-25)

BJW PRINTERS, BECKLEY, WV

C-641

PERSONNEL
OF THE
STATE COURT OF CLAIMS

HONORABLE JOHN B. GARDEN ..... Presiding Judge

HONORABLE GEORGE S. WALLACE, JR. ..... Judge

HONORABLE DANIEL A. RULEY, JR. ..... Judge

CHERYLE M. HALL ..... Clerk

CHAUNCEY BROWNING, JR. ..... Attorney General

FORMER JUDGES

HONORABLE JULIUS W. SINGLETON, JR. ..... July 1, 1967
—July 31, 1968

HONORABLE A. W. PETROPLUS ..... August 1, 1968
—June 30, 1974

HONORABLE HENRY LAKIN DUCKER ..... July 1, 1967
—October 31, 1975

HONORABLE W. LYLE JONES ..... July 1, 1967
—June 30, 1976

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LETTER OF TRANSMITTAL

To His Excellency
The Honorable John D. Rockefeller, IV
Governor of West Virginia

Sir:

In conformity with the requirements of section twenty-five of the Court of Claims law, approved March eleventh, one thousand nine hundred sixty-seven, I have the honor to transmit herewith the report of the State Court of Claims for the period from July one, one thousand nine hundred seventy-seven to June thirty, one thousand nine hundred seventy-nine.

Respectfully submitted,

CHERYLE M. HALL,
Clerk

TERMS OF COURT

Two regular terms of court are provided for annually the second Monday of April and September.

STATE COURT OF CLAIMS LAW

CHAPTER 14 CODE

Article 2. Claims Against the State.

§14-2-1. Purpose.

The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the State that because of the provisions of section 35, article VI of the Constitution of the State, and of statutory restrictions, inhibitions or limitations, cannot be determined in the regular courts of the State; and to provide for proceedings in which the State has a special interest.

§14-2-2. Venue for certain suits and actions.

(a) The following proceedings shall be brought and prosecuted only in the circuit court of Kanawha county:

(1) Any suit in which the governor, any other state officer, or a state agency is made a party defendant, except as garnishee or suggestee.

(2) Any suit attempting to enjoin or otherwise suspend or affect a judgment or decree on behalf of the State obtained in any circuit court.

(b) Any proceeding for injunctive or mandamus relief involving the taking, title, or collection for or prevention of damage to real property may be brought and presented in the circuit court of the county in which the real property affected is situate.

This section shall apply only to such proceedings as are not prohibited by the constitutional immunity of the State from suit under section 35, article VI of the Constitution of the State.

§14-2-3. Definitions.

For the purpose of this article:

"Court" means the state court of claims established by section four [§14-2-4] of this article.

"Claim" means a claim authorized to be heard by the court in accordance with this article.

"Approved claim" means a claim found by the court to be one that should be paid under the provisions of this article.

"Award" means the amount recommended by the court to be paid in satisfaction of an approved claim.

"Clerk" means the clerk of the court of claims.

"State agency" means a state department, board, commission, institution, or other administrative agency of state government: Provided, that a "state agency" shall not be considered to include county courts, county boards of education, municipalities, or any other political or local subdivision of this State regardless of any state aid that might be provided.

§14-2-4. Creation of court of claims; appointment and terms of judges; vacancies.

The "court of claims" is hereby created. It shall consist of three judges, to be appointed by the president of the senate and the speaker of the house of delegates, by and with the advice and consent of the senate, one of whom shall be appointed presiding judge. Each appointment to the court shall be made from a list of three qualified nominees furnished by the board of governors of the West Virginia State bar.

The terms of the judges of this court shall be six years, except that the first members of the court shall be appointed as follows: One judge for two years, one judge for four years and one judge for six years. As these appointments expire, all appointments shall be for six year terms. Not more than two of the judges shall be of the same political party. An appointment to fill a vacancy shall be for the unexpired term.

§14-2-5. Court clerk and other personnel.

The court shall have the authority to appoint a clerk and a deputy clerk. The salary of the clerk and the deputy clerk shall be fixed by the joint committee on government and finance, and shall be paid out of the regular appropriation for the court. The clerk shall have custody of all records and proceedings of the court, shall attend meetings and hearings of the court, shall administer oaths and affirmations, and shall issue all official summonses, subpoenas, orders, statements and awards. The deputy clerk shall act in the place and stead of the clerk in the clerk's absence.

The joint committee on government and finance may employ other persons whose services shall be necessary to the orderly transaction of the business of the court, and fix their compensation.

§14-2-6. Terms of court.

The court shall hold at least two regular terms each year, on the second Monday in April and September. So far as possible, the court shall not adjourn a regular term until all claims then upon its docket and ready for hearing or other consideration have been disposed of.

Special terms or meetings may be called by the clerk at the request of the court whenever the number of claims awaiting consideration, or any other pressing matter of official business, make such a term advisable.

§14-2-7. Meeting place of the court.

The regular meeting place of the court shall be at the state capitol, and the joint committee on government and finance shall provide adequate quarters therefor. When deemed advisable, in order to facilitate the full hearing of claims arising elsewhere in the State, the court may convene at any county seat.

§14-2-8. Compensation of judges; expenses.

Each judge of the court shall receive one hundred seven dollars for each day actually served, and actual expenses incurred in the performance of his duties. The number of days served by each judge shall not exceed one hundred in any fiscal year, except by authority of the joint committee on government and finance. Requisitions for compensation and expenses shall be accompanied by sworn and itemized statements, which shall be filed with the auditor and preserved as public records. For the purpose of this section, time served shall include time spent in the hearing of claims, in the consideration of the record, in the preparation of opinions, and in necessary travel.

§14-2-9. Oath of office.

Each judge shall before entering upon the duties of his office, take and subscribe to the oath prescribed by section 5, article IV of the Constitution of the State. The oath shall be filed with the clerk.

§14-2-10. Qualifications of judges.

Each judge appointed to the court of claims shall be an attorney at law, licensed to practice in this State and shall have been so licensed to practice law for a period of not less than ten years prior to his appointment as judge. A judge shall not be an officer or an employee of any branch of state government, except in his capacity as a member of the court

and shall receive no other compensation from the State or any of its political subdivisions. A judge shall not hear or participate in the consideration of any claim in which he is interested personally, either directly or indirectly.

§14-2-11. Attorney general to represent State.

The attorney general shall represent the interests of the State in all claims coming before the court.

§14-2-12. General powers of the court.

The court shall, in accordance with this article, consider claims which, but for the constitutional immunity of the State from suit, or for some statutory restrictions, inhibitions or limitations, could be maintained in the regular courts of the State. No liability shall be imposed upon the State or any state agency by a determination of the court of claims approving a claim and recommending an award, unless the claim is (1) made under an existing appropriation, in accordance with section nineteen [§14-2-19] of this article, or (2) a claim under a special appropriation, as provided in section twenty [§14-2-20] of this article. The court shall consider claims in accordance with the provisions of this article.

Except as is otherwise provided in this article, a claim shall be instituted by the filing of notice with the clerk. In accordance with rules promulgated by the court, each claim shall be considered by the court as a whole, or by a judge sitting individually, and if, after consideration, the court finds that a claim is just and proper, it shall so determine and shall file with the clerk a brief statement of its reasons. A claim so filed shall be an approved claim. The court shall also determine the amount that should be paid to the claimant, and shall itemize this amount as an award, with the reasons therefor, in its statement filed with the clerk. In determining the amount of a claim, interest shall not be allowed unless the claim is based upon a contract which specifically provides for the payment of interest.

§14-2-13. Jurisdiction of the court.

The jurisdiction of the court, except for the claims excluded by section fourteen [§14-2-14], shall extend to the following matters:

1. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the State or any of its agencies, which the State as a sovereign commonwealth should in equity and good conscience discharge and pay.

2. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, which may be asserted in the nature of setoff or counterclaim on the part of the State or any state agency.

3. The legal or equitable status, or both, of any claim referred to the court by the head of a state agency for an advisory determination.

§14-2-14. Claims excluded.

The jurisdiction of the court shall not extend to any claim:

1. For loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the State.

2. For a disability or death benefit under chapter twenty-three [§23-1-1 et seq.] of this Code.

3. For unemployment compensation under chapter twenty-one-A [§21A-1-1 et seq.] of this Code.

4. For relief or public assistance under chapter nine [§9-1-1 et seq.] of this Code.

5. With respect to which a proceeding may be maintained against the State, by or on behalf of the claimant in the courts of the State.

§14-2-15. Rules of practice and procedure.

The court shall adopt and may from time to time amend rules of procedure, in accordance with the provisions of this article, governing proceedings before the court. Rules shall be designed to assure a simple, expeditious and inexpensive consideration of claims. Rules shall permit a claimant to appear in his own behalf or be represented by counsel.

Under its rules, the court shall not be bound by the usual common law or statutory rules of evidence. The court may

accept and weigh, in accordance with its evidential value, any information that will assist the court in determining the factual basis of a claim.

§14-2-16. Regular procedure.

The regular procedure for the consideration of claims shall be substantially as follows:

1. The claimant shall give notice to the clerk that he desires to maintain a claim. Notice shall be in writing and shall be in sufficient detail to identify the claimant, the circumstances giving rise to the claim, and the state agency concerned, if any. The claimant shall not otherwise be held to any formal requirement of notice.

2. The clerk shall transmit a copy of the notice to the state agency concerned. The state agency may deny the claim, or may request a postponement of proceedings to permit negotiations with the claimant. If the court finds that a claim is prima facie within its jurisdiction, it shall order the claim to be placed upon its regular docket for hearing.

3. During the period of negotiations and pending hearing, the state agency, represented by the attorney general, shall, if possible, reach an agreement with the claimant regarding the facts upon which the claim is based so as to avoid the necessity for the introduction of evidence at the hearing. If the parties are unable to agree upon the facts an attempt shall be made to stipulate the questions of fact in issue.

4. The court shall so conduct the hearing as to disclose all material facts and issues of liability and may examine or cross-examine witnesses. The court may call witnesses or require evidence not produced by the parties; may stipulate the questions to be argued by the parties; and may continue the hearing until some subsequent time to permit a more complete presentation of the claim.

5. After the close of the hearing the court shall consider the claim and shall conclude its determination, if possible, within thirty days.

§14-2-17. Shortened procedure.

The shortened procedure authorized by this section shall apply only to a claim possessing all of the following characteristics:

1. The claim does not arise under an appropriation for the current fiscal year.

2. The state agency concerned concurs in the claim.

3. The amount claimed does not exceed one thousand dollars.

4. The claim has been approved by the attorney general as one that, in view of the purposes of this article, should be paid.

The state agency concerned shall prepare the record of the claim consisting of all papers, stipulations and evidential documents required by the rules of the court and file the same with the clerk. The court shall consider the claim informally upon the record submitted. If the court determines that the claim should be entered as an approved claim and an award made, it shall so order and shall file its statement with the clerk. If the court finds that the record is inadequate, or that the claim should not be paid, it shall reject the claim. The rejection of a claim under this section shall not bar its resubmission under the regular procedure.

§14-2-18. Advisory determination procedure.

The governor or the head of a state agency may refer to the court for an advisory determination the question of the legal or equitable status, or both, of a claim against the State or a state agency. This procedure shall apply only to such claims as are within the jurisdiction of the court. The procedure shall be substantially as follows:

1. There shall be filed with the clerk, the record of the claim including a full statement of the facts, the contentions of the claimant, and such other materials as the rules of the court may require. The record shall submit specific questions for the court's consideration.

2. The clerk shall examine the record submitted and if he finds that it is adequate under the rules, he shall place the claim on a special docket. If he finds the record inadequate, he shall refer it back to the officer submitting it with the

request that the necessary additions or changes be made.

3. When a claim is reached on the special docket, the court shall prepare a brief opinion for the information and guidance of the officer. The claim shall be considered informally and without hearing. A claimant shall not be entitled to appear in connection with the consideration of the claim.

4. The opinion shall be filed with the clerk. A copy shall be transmitted to the officer who referred the claim.

An advisory determination shall not bar the subsequent consideration of the same claim if properly submitted by, or on behalf of, the claimant. Such subsequent consideration, if undertaken, shall be de novo.

§14-2-19. Claims under existing appropriations.

A claim arising under an appropriation made by the legislature during the fiscal year to which the appropriation applies, and falling within the jurisdiction of the court, may be submitted by:

1. A claimant whose claim has been rejected by the state agency concerned or by the state auditor.

2. The head of the state agency concerned in order to obtain a determination of the matters in issue.

3. The state auditor in order to obtain a full hearing and consideration of the merits.

The regular procedure, so far as applicable, shall govern the consideration of the claim by the court. If the court finds that the claimant should be paid, it shall certify the approved claim and award to the head of the appropriate state agency, the state auditor, and to the governor. The governor may thereupon instruct the auditor to issue his warrant in payment of the award and to charge the amount thereof to the proper appropriation. The auditor shall forthwith notify the state agency that the claim has been paid. Such an expenditure shall not be subject to further review by the auditor upon any matter determined and certified by the court.

§14-2-20. Claims under special appropriations.

Whenever the legislature makes an appropriation for the payment of claims against the State, then accrued or arising

during the ensuing fiscal year, the determination of claims and the payment thereof may be made in accordance with this section. However, this section shall apply only if the legislature in making its appropriation specifically so provides.

The claim shall be considered and determined by the regular or shortened procedure, as the case may be, and the amount of the award shall be fixed by the court. The clerk shall certify each approved claim and award, and requisition relating thereto, to the auditor. The auditor thereupon shall issue his warrant to the treasurer in favor of the claimant. The auditor shall issue his warrant without further examination or review of the claim except for the question of a sufficient unexpended balance in the appropriation.

§14-2-21. Periods of limitation made applicable.

The court shall not take jurisdiction of any claim, whether accruing before or after the effective date of this article [July 1, 1967], unless notice of such claim be filed with the clerk within such period of limitation as would be applicable under the pertinent provisions of the Code of West Virginia, one thousand nine hundred thirty-one, as amended, if the claim were against a private person, firm or corporation and the constitutional immunity of the State from suit were not involved and such period of limitation may not be waived or extended. The foregoing provision shall not be held to limit or restrict the right of any person, firm or corporation who or which had a claim against the State or any state agency, pending before the attorney general on the effective date of this article [July 1, 1967], from presenting such claim to the court of claims, nor shall it limit or restrict the right to file such a claim which was, on the effective date of this article [July 1, 1967], pending in any court of record as a legal claim and which, after such date was or may be adjudicated in such court to be invalid as a claim against the State because of the constitutional immunity of the State from suit.

§14-2-22. Compulsory process.

In all hearings and proceedings before the court, the evidence and testimony of witnesses and the production of documentary evidence may be required. Subpoenas may be issued by the

court for appearance at any designated place of hearing. In case of disobedience to a subpoena or other process, the court may invoke the aid of any circuit court in requiring the evidence and testimony of witnesses, and the production of books, papers and documents. Upon proper showing, the circuit court shall issue an order requiring witnesses to appear before the court of claims; produce books, papers and other evidence; and give testimony touching the matter in question. A person failing to obey the order may be punished by the circuit court as for contempt.

§14-2-23. Inclusion of awards in budget.

The clerk shall certify to the department of finance and administration, on or before the twentieth day of November of each year, a list of all awards recommended by the court to the legislature for appropriation. The clerk may certify supplementary lists to the governor to include subsequent awards made by the court. The governor shall include all awards so certified in his proposed budget bill transmitted to the legislature.

§14-2-24. Records to be preserved.

The record of each claim considered by the court, including all documents, papers, briefs, transcripts of testimony and other materials, shall be preserved by the clerk and shall be made available to the legislature or any committee thereof for the reexamination of the claim.

§14-2-25. Reports of the court.

The clerk shall be the official reporter of the court. He shall collect and edit the approved claims, awards and statements, shall prepare them for submission to the legislature in the form of an annual report and shall prepare them for publication.

Claims and awards shall be separately classified as follows:

1. Approved claims and awards not satisfied but referred to the legislature for final consideration and appropriation.

2. Approved claims and awards satisfied by payment out of regular appropriations.

3. Approved claims and awards satisfied by payment out of a special appropriation made by the legislature to pay claims arising during the fiscal year.

4. Claims rejected by the court with the reasons therefor.

5. Advisory determinations made at the request of the governor or the head of a state agency.

The court may include any other information or recommendations pertaining to the performance of its duties.

The court shall transmit its annual report to the presiding officer of each house of the legislature, and a copy shall be made available to any member of the legislature upon request therefor. The reports of the court shall be published biennially by the clerk as a public document. The biennial report shall be filed with the clerk of each house of the legislature, the governor and the attorney general.

§14-2-26. Fraudulent claims.

A person who knowingly and wilfully presents or attempts to present a false or fraudulent claim, or a state officer or employee who knowingly and wilfully participates or assists in the preparation or presentation of a false or fraudulent claim, shall be guilty of a misdemeanor. A person convicted, in a court of competent jurisdiction, of violation of this section shall be fined not more than one thousand dollars or imprisoned for not more than one year, or both, in the discretion of such court. If the convicted person is a state officer or employee, he shall, in addition, forfeit his office or position of employment, as the case may be.

§14-2-27. Conclusiveness of determination.

Any final determination against the claimant on any claim presented as provided in this article shall forever bar any further claim in the court arising out of the rejected claim.

§14-2-28. Award as condition precedent to appropriation.

It is the policy of the legislature to make no appropriation to pay any claims against the State, cognizable by the court, unless the claim has first been passed upon by the court.

§14-2-29. Severability.

If any provision of this article or the application thereof to any person or circumstance be held invalid, such invalidity shall not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are declared to be severable.

Rules of Practice and Procedure

of the

STATE COURT OF CLAIMS

(Adopted by the Court
September 11, 1967.

Amended February 18, 1970

Amended February 23, 1972

Amended August 1, 1978.)

TABLE OF RULES

Rules of Practice and Procedure

RULES OF PRACTICE AND PROCEDURE
OF THE
COURT OF CLAIMS
STATE OF WEST VIRGINIA

RULE 1. CLERK, CUSTODIAN OF PAPERS, ETC.

The Clerk shall be responsible for all papers and claims filed in his office; and will be required to properly file, in an index for that purpose, any paper, pleading, document, or other writing filed in connection with any claim. The Clerk shall also properly endorse all such papers and claims, showing the title of the claim, the number of the same, and such other data as may be necessary to properly connect and identify the document, writing or claim.

RULE 2. FILING PAPERS.

(a) Communications addressed to the Court or Clerk and all notices, petitions, answers and other pleadings, all reports, documents received or filed in the office kept by the Clerk of this Court, shall be endorsed by him showing the date of the receipt or filing thereof.

(b) The Clerk, upon receipt of a notice of a claim, shall enter of record in the docket book indexed and kept for that purpose, the name of the claimant, whose name shall be used as the title of the case, and a case number shall be assigned accordingly.

(c) No paper, exclusive of exhibits, shall be filed in any action or proceeding or be accepted by the Clerk for filing nor any brief, deposition, pleading, order, decree, reporter's transcript or other paper to be made a part of the record in any claim be received except that the same be upon paper measuring 8½ inches in width and 11 inches in length.

RULE 3. RECORDS.

The Clerk shall keep the following record books, suitably indexed in the names of claimants and other subject matter:

(a) Order Book, in which shall be recorded at large, on the day of their filing, all orders made by the Court in each case or proceeding.

(b) Docket Book, in which shall be entered each case or claim made and filed, with a file or case number corresponding to the number of the case, together with brief chronological notations of the proceedings had in each case.

(c) Financial Ledger, in which shall be entered chronologically, all administrative expenditures of the Court under suitable classifications.

RULE 4. FORM OF CLAIMS.

Verified notice in writing of each claim must be filed with the Clerk of the Court. The notice shall be in sufficient detail to identify the claimant, the circumstances giving rise to the claim, and the State Agency concerned, if any. The Court reserves the right to require further information before hearing, when, in its judgment, justice and equity may require. It is recommended that notice of claims be furnished in triplicate. A suggested form of notice of a claim may be obtained from the Clerk.

RULE 5. COPY OF NOTICE OF CLAIMS TO ATTORNEY GENERAL AND STATE AGENCY.

Upon receipt of a notice of claim to be considered by the Court, the Clerk shall forthwith transmit a copy of the notice to the State Agency concerned, if any, and a copy thereof to the office of the Attorney General of the State, and the Clerk shall make a notice of the time of such delivery.

RULE 6. PREPARATION OF HEARING DOCKET.

On and after the date of adoption of these rules by the Court, the Clerk shall prepare fifteen days previous to the regular terms of Court a docket listing all claims that are ready for hearing by the Court, and showing the respective dates, as fixed by the Court for the hearing thereof. The Court reserves the right to add to, rearrange or change said docket when in its judgment such addition, rearrangement or change would expedite the work of the term. Each claimant or his counsel of record and the Attorney General shall be notified as to the date, time, and place of the hearing.

RULE 7. PROOF AND RULES GOVERNING PROCEDURE.

(a) Claims asserted against the State, including all the allegations in a notice of claim, are treated as denied, and must be established by the claimant with satisfactory proof, or proper stipulation as hereinafter provided before an award can be made.

(b) The Court shall not be bound by the usual common law or statutory rules of evidence. The Court may accept and weigh, in accordance with its evidential value, any information that will assist the Court in determining the factual basis of the claim.

(c) The Attorney General shall within twenty days after a copy of the notice has been furnished his office file with the Clerk a notice in writing, either denying the claim, requesting postponement of proceedings to permit negotiations with the claimant, or otherwise setting forth reasons for further investigation of the claim, and furnish the claimant or his counsel of record a copy thereof. Otherwise, after said twenty-day period, the Court may order the claim placed upon its regular docket for hearing.

(d) It shall be the duty of the claimant or his counsel in claims under the regular procedure to negotiate with the Office of the Attorney General so that the claimant and the State Agency and the Attorney General may be ready at the

beginning of the hearing of a claim to read, if reduced to writing, or to dictate orally, if not reduced to writing, into the record such stipulations, if any, as the parties may have been able to agree upon.

(e) Where there is a controversy between a claimant and any State Agency, the Court may require each party to reduce the facts to writing, and if the parties are not in agreement as to the facts, the Court may stipulate the questions of fact in issue and require written answers to the said stipulated questions.

(f) Claims not exceeding the sum of $1,000.00 may be heard and considered, as provided by law, by one judge sitting individually.

RULE 8. APPEARANCES.

Any claimant may appear in his own behalf or have his claim presented by counsel, duly admitted as such to practice law in the State of West Virginia.

RULE 9. BRIEFS.

(a) Claimants or their counsel, and the Attorney General, may file with the Court for its consideration a brief on any question involved, provided a copy of said brief is also presented to and furnished the opposing party or counsel. Reply briefs shall be filed within fifteen days.

(b) All briefs filed with, and for the use of, the Court shall be in quadruplicate — original and three copies. As soon as any brief is received by the Clerk, he shall file the original in the Court file and deliver the three copies, one each, to the Judges of the Court.

RULE 10. CONTINUANCES: DISMISSAL FOR FAILURE TO PROSECUTE.

(a) After claims have been set for hearing, continuances are looked upon by the Court with disfavor, but may be allowed when good cause is shown.

(b) A party desiring a continuance should file a motion showing good cause therefor at the earliest possible date.

(c) Whenever any claim has been docketed for hearing for three regular terms of Court at which the claim might have been prosecuted, and the State shall have been ready to proceed with the trial thereof, the Court may, upon its own motion or that of the State, dismiss the claim unless good cause appear or be shown by the claimant why such claim has not been prosecuted.

(d) Whenever a claimant shall fail to appear and prosecute his claim on the day set for hearing and shall not have communicated with the Clerk prior thereto, advising of his inability to attend and the reason therefore, and if it further appear that the claimant or his counsel had sufficient notice of the docketing of the claim for hearing, the Court may, upon its own motion or that of the State, dismiss the claim.

(e) Within the discretion of the Court, no order dismissing a claim under either of the two preceding sections of this rule shall be vacated nor the hearing of such claim be reopened except by a notice in writing filed not later than the end of the next regular term of Court, supported by affidavits showing sufficient reason why the order dismissing such claim should be vacated, the claim reinstated and the trial thereof permitted.

RULE 11. ORIGINIAL PAPERS NOT TO BE WITHDRAWN: EXCEPTIONS.

No original paper in any case shall be withdrawn from the Court files except upon special order of the Court or one of the Judges thereof in vacation. When an official of a State Department is testifying from an original record of his department, a certified copy of the original record of such department may be filed in the place and stead of the original.

RULE 12. WITHDRAWAL OF CLAIM.

(a) Any claimant may withdraw his claim. Should the claimant later refile the claim, the Court shall consider its former status, such as previous continuances and any other matter affecting its standing, and may re-docket or refuse to re-docket the claim as in its judgment, justice and equity may require under the circumstances.

(b) Any department or State Agency, having filed a claim for the Court's consideration, under either the advisory determination procedure or the shortened procedure provision of the Court Act, may withdraw the claim without prejudice to the right of the claimant involved to file the claim under the regular procedure.

RULE 13. WITNESSES.

(a) For the purpose of convenience and in order that proper records may be preserved, claimants and State Departments desiring to have subpoenas for witnesses shall file with the Clerk a memorandum in writing giving the style and number of the claim and setting forth the names of such witnesses, and thereupon such subpoenas shall be issued and delivered to the person calling therefor or mailed to the person designated.

(b) Requests for subpoenas for witnesses should be furnished to the Clerk well in advance of the hearing date so that such subpoenas may be issued in ample time before the hearing.

(c) The payment of witness fees, and mileage where transportation is not furnished to any witness subpoenaed by or at the instance of either the claimant or the respondent State Agency, shall be the responsibility of the party by whom or at whose instance such witness is subpoenaed.

RULE 14. DEPOSITIONS.

(a) Depositions may be taken when a party desires the testimony of any person, including a claimant. The deposition shall be upon oral examination or upon written interrogatory. Depositions may be taken without leave of the Court. The attendance of witnesses may be compelled by the use of subpoenas as provided in Rule 13.

(b) To take the deposition of any designated witness, reasonable notice of time and place shall be given the opposite party or counsel, and the party taking such deposition shall pay the costs thereof and file an original and three copies of such deposition with the Court. Extra copies of exhibits will not be required; however, it is suggested that where exhibits

are not too lengthy and are of such a nature as to permit it, they should be read into the deposition.

(c) Depositions shall be taken in accordance with the provision of Rule 17 of this Court.

RULE 15. RE-HEARINGS.

A re-hearing shall not be allowed except where good cause is shown. A motion for re-hearing may be entertained and considered ex parte, unless the Court otherwise directs, upon the petition and brief filed by the party seeking the re-hearing. Such petition and brief shall be filed within thirty days after notice of the Court's determination of the claim unless good cause be shown why the time should be extended.

RULE 16. RECORDS OF SHORTENED PROCEDURE CLAIMS SUBMITTED BY STATE AGENCIES.

When a claim is submitted under the provisions of Chapter 14, Article 2, Paragraph 17 of the Code of West Virginia, concurred in by the head of the department and approved for payment by the Attorney General, the record thereof, in addition to copies of correspondence, bills, invoices, photographs, sketches or other exhibits, should contain a full, clear and accurate statement, in narrative form, of the facts upon which the claim is based. The facts in such record among other things which may be peculiar to the particular claim, should show as definitely as possible that:

(a) The claimant did not through neglect, default or lack of reasonable care, cause the damage of which he complains. It should appear he was innocent and without fault in the matter.

(b) The department, by or through neglect, default or the failure to use reasonable care under the circumstances caused the damage to claimant, so that the State in justice and equity should be held liable.

(c) The amount of the claim should be itemized and supported by a paid invoice, or other report itemizing the damages, and vouched for by the head of the department as to correctness and reasonableness.

RULE 17. APPLICATION OF RULES OF CIVIL PROCEDURE.

The Rules of Civil Procedure will apply in the Court of Claims unless the Rules of Practice and Procedure of the Court of Claims are to the contrary.

Adopted by Order of the Court of Claims, September 11, 1967.

Amended February 18, 1970.

Amended February 23, 1972.

Amended August 1, 1978.

CHERYLE M. HALL, Clerk

REPORT OF THE COURT OF CLAIMS

For the Period July 1, 1977 to June 30, 1979

(1) Approved claims and awards not satisfied but to be referred to the 1980 Legislature for final consideration and appropriation:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-76-9	Black Rock Contracting, Inc.	Department of Highways	$ 40,122.32	$ 8,067.79	3-29-79
CC-79-60	Capitol Business Interiors, Div. of Capitol Business Equipment, Inc.	Department of Finance & Administration	141.00	141.00	6-13-79
CC-79-22	Clinic Private Division, University of Virginia	Division of Vocational Rehabilitation	842.00	842.00	6-30-79
CC-79-94	Dill's Mountaineer Associates Inc.	Department of Health	2,406.00	2,406.00	6-30-79
CC-79-70	Greenlee, Drema D. & Stephen E. Greenlee	Department of Highways	54.00	54.00	6-13-79
CC-79-36	Heck's Inc.	Division of Vocational Rehabilitation	245.56	245.56	6-13-79
CC-77-155*	Metz, Lewis Dale	Department of Corrections	5,000.00	No Award	6-21-79
CC-79-150	Nationwide Insurance Co., subrogee of Phillip W. Alexander	Department of Highways	179.22	179.22	6-30-79
CC-78-259	Smith, Larry Keith	Department of Highways	296.30	296.30	6-30-79
CC-78-68	Spradling, Charles H., Jr.	Department of Highways	117.62	117.62	4-10-79
CC-78-270	Weber, Harold L., Jr.	Department of Health	10,144.22	9,791.91	3-23-79

* NOTE: A Motion to Dismiss certain named individuals was granted; the portion of the Motion to Dismiss as to the Department of Corrections and Board of Probation and Parole was denied. The Court ordered the claim be set for hearing at a later date.

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1977, to June 30, 1979:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-3	Abbott Laboratories	Board of Regents	$ 637.72	$ 637.72	3-23-79
CC-79-7	Ace Glass, Inc.	Board of Regents	71.49	71.49	3-23-79
CC-77-78	Adkins, William J. et al.	Department of Highways	13,820.00	2,000.00	10-23-78
CC-79-6	Air Products and Chemicals, Inc.	Board of Regents	204.37	204.37	3-23-79
CC-77-156	Alert Sanitation	Office of the Governor—Emergency Flood Disaster Relief	2,700.00	2,350.00	2-9-78
D-990	Alford, Elvin S.	Department of Highways	8,496.65	2,800.00	10-17-77
CC-77-110	Allison, Curtis	Department of Highways	429.00	244.85	2-10-78
CC-77-62	Alvis, David E.	Department of Highways	99.85	99.85	12-12-77
CC-78-265	American Hospital Supply	Department of Health	424.32	424.32	1-31-79
CC-76-66	Appalachian Power Co.	Department of Highways	2,359.94	2,303.35	8-8-77
CC-77-220	Arthritis Care Associates	Division of Vocational Rehabilitation	25.40	25.40	2-10-78
CC-78-224	Baker, Carl L., Jr.	Department of Health	6,975.46	6,975.46	1-26-79
CC-78-173	Barfield, Gladys	Office of the Governor—Emergency Flood Disaster Relief	700.16	700.16	1-9-79
CC-77-141	Barr, Frank G.	Department of Highways	595.68	595.68	1-6-78
CC-76-24	Bastin, Olie G. and Priscilla Bastin	Department of Highways	4,500.00	4,500.00	2-10-78
CC-78-276	Bayliss, Wayne	Department of Highways	251.83	251.83	1-31-79
CC-77-84	Belmont, Raymond N.	Department of Highways	124.50	80.00	12-22-77
CC-78-203	Bernhardt's Clothing Inc.	Department of Corrections	1,986.80	1,986.80	1-9-79

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1977, to June 30, 1979:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-78-251	Curry, H. M.	Department of Health	6,798.78	6,798.78	1-26-79
CC-77-86	Custer, George M.	Department of Motor Vehicles	302.00	300.00	12-12-77
CC-79-28	Cutter Laboratories, Inc.	Board of Regents	1,248.00	1,248.00	3-23-79
CC-78-88	Dalessio, Lillian	Board of Regents	300.00	300.00	1-9-79
D-996b	Davis, Billy Joe	Department of Highways	10,500.00	750.00	11-14-77
D-996a	Davis, Frank and Billy Joe Davis, d/b/a Davis Auto Parts	Department of Highways	135,000.00	21,125.00	11-14-77
CC-78-230 (a-c)	Davis Memorial Hospital	Department of Corrections	3,233.19	3,233.19	1-9-79
D-927g	DeWeese, Icy Mae	Division of Vocational Rehabilitation	4,504.80	202.50	11-16-78
CC-79-29	Diagnostic Isotopes, Inc.	Board of Regents	81.60	81.60	3-23-79
CC-77-151	Direct Mail Service Co.	Board of Regents	750.00	750.00	12-12-77
CC-79-4	Ehrenreich Photo-Optical Ind. Inc.	Board of Regents	388.95	388.95	3-23-79
CC-76-143	Eisenberg, Jacquelyn B., parent and next friend of Mark Harrold Eisenberg, an infant	Board of Regents	7,500.00	1,500.00	2-13-78
D-927e	Engegno, Ethel	Division of Vocational Rehabilitation	6,957.60	4,989.22	11-16-78
CC-79-8	Fairmont Supply Company	Board of Regents	20.40	20.40	3-23-79
CC-77-162	Fentress, Albert D. and Hazel S. Fentress	Department of Highways	122.68	122.68	2-10-78

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1977, to June 30, 1979:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-78-77	Fields, Rush	Department of Highways	1,142.18	1,142.18	6-22-78
CC-77-201	Frazier, Bradford G.	Department of Highways	160.48	160.48	1-6-78
CC-78-3	Fredlock, A.M., II	Department of Highways	235.20	235.20	10-23-78
CC-77-125	Friden Mailing Equipment Corporation	Department of Corrections	147.00	147.00	2-10-78
D-927f	Fury, Rondal	Division of Vocational Rehabilitation	5,778.48	4,296.92	11-16-78
CC-78-237	Garrett, Joseph Larry	Department of Public Safety	290.56	290.56	1-9-79
CC-78-153	Gillispie, Teresa K. & Johnny Wayne Gillispie	Department of Highways	99.13	99.13	1-9-79
CC-77-197	Gore, Charles R.	Department of Highways	332.49	332.49	8-10-78
CC-77-153	Gott, Peggy S.	Department of Health, Div. of Mental Health	4,332.00	4,332.00	2-10-78
CC-77-147	Grimmett, Timothy J.	Department of Highways	271.44	271.44	12-12-77
CC-78-244	Guyan Transfer and Sanitation, Inc.	Department of Finance & Administration	4,290.00	4,290.00	1-31-79
CC-78-264	Halliburton Services	Department of Highways	228.56	228.56	1-31-79
CC-78-260	Hamilton, Linda E.	Department of Highways	92.00	92.00	1-31-79
CC-78-226	Haney, Douglas	Department of Highways	309.50	309.50	1-9-79
CC-77-124	Hart, Michael J.	Department of Highways	46.49	46.49	12-12-77
CC-76-125	Hartford Accident & Indemnity Company	Department of Highways	26,667.95	21,826.50	11-14-77
CC-77-94	Hastings, Robert M. & Linda Hastings, d/b/a Hastings Stables	Department of Highways	365.00	365.00	12-8-77

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1977, to June 30, 1979:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-78-281	Haynes, Howard A.	Department of Highways	300.19	300.19	1-31-79
CC-78-130	Heater, Arnold G. & Geraldine Heater	Department of Highways	3,500.00	2,500.00	2-20-79
CC-77-190	Henry Elden & Associates	Department of National Resources	4,000.00	4,000.00	10-11-78
CC-78-269	Henry Elden & Associates	Department of Finance & Administration and Department of Health	71,889.00	71,889.00	1-11-79
CC-76-108	Herron, Ora T.	Department of Public Safety	18.00	18.00	1-31-79
CC-77-200	Hills, H. M., Jr. & Luis A. Loimil	Department of Public Safety	105.00	105.00	1-6-78
CC-77-134	Hogan Storage & Transfer Company	Department of Agriculture & Department of Health	8,000.00	6,000.00	2-10-78
CC-79-5	Hubbard Pump Co.	Board of Regents	20.89	20.89	3-23-79
CC-77-83	Hubbs, Kermit Reed	Department of Highways	435.90	435.90	12-6-77
CC-77-52	Hudnall, McHenry, Jr.	Department of Highways	147.73	147.73	11-1-77
CC-77-68	Hunter, Alvin O.	Department of Highways	223.00	223.00	10-23-78
CC-77-1	IBM Corporation	Department of Motor Vehicles	239.22	123.65	8-8-77
CC-78-172	Jarrell, R. L.	Department of Highways	291.42	291.42	3-23-79
CC-77-146	Johnson, Robert H.	Department of Highways	1,500.00	900.00	2-10-78
CC-77-207	Jones Printing Company, Inc	Governor's Office of Economic and Community Development	235.00	235.00	2-10-78

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1977, to June 30, 1979:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-77-212 (a-k)	Kanawha Valley Radiologists, Inc.	Division of Vocational Rehabilitation	109.00	109.00	2-10-78
D-927b	Keeling, Ralph	Division of Vocational Rehabilitation	4,593.88	4,593.88	11-16-78
CC-78-38	Keyser, Peggy	Department of Highways	113.56	113.56	10-23-78
CC-77-37	King, Forest Joe	Department of Highways	50,000.00	11,000.00	10-24-78
CC-77-37	Patricia Ann King	Department of Highways		20,000.00	10-24-78
CC-77-37	Forest Joe King, as father & next friend of Denny Joe King	Department of Highways		2,500.00	10-24-78
CC-77-37	Forest Joe King, as father & next friend of Beverly King	Department of Highways		2,500.00	10-24-78
D-1041	Korthals, Theodore & Emile Korthals	Department of Highways	12,000.00	3,500.00	12-12-77
CC-76-44	Lafferty, Eugene and Wanda Lafferty	Department of Highways	10,500.00	10,500.00	2-10-78
CC-77-193	Lambert, Thomas F.	Department of Welfare	457.60	457.60	2-10-78
D-927k	Leach, Paul	Division of Vocational Rehabilitation	3,831.39	2,394.65	11-16-78
CC-77-210	Linda Lester and Leon Lester	Department of Highways	199.63	187.63	2-10-78
CC-79-2	Light Gallery and Supply Co.	Board of Regents	31.00	31.00	3-23-79
CC-77-133	Lilly, Herman F.	Department of Highways	1,200.00	1,200.00	7-12-78
CC-77-228	Lively, Deloris J.	Department of Highways	98.88	98.88	7-12-78

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1977, to June 30, 1979:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-78-115	Long, Charles P.	Department of Highways	43.76	43.76	8-10-78
CC-78-253	Lucas, Harry Glenn, Jr.	Department of Public Safety	283.52	283.52	1-9-79
CC-77-175	Lynch, Gerald J.	Department of Highways	206.76	206.76	2-10-78
CC-77-221	McCloy Construction Company, Inc.	Department of Natural Resources	233,750.00	27,000.00	2-20-79
D-737	McIntyre, Rhoda Raynett	Department of Highways	10,000.00	500.00	10-24-78
CC-77-136	Mahaffee, Harold	Department of Highways	94.24	94.24	10-24-78
CC-76-65	Marcum, Alice	Department of Natural Resources	100,182.00	2,171.00	10-24-78
CC-77-199	Massie, Robert L. and Mae Massie	Office of the Governor—Emergency Flood Disaster Relief	465.00	465.00	2-9-78
CC-78-238	Maxey, Lowell J.	Department of Public Safety	265.80	259.20	1-9-79
CC-77-118	Mayfield, Hugh C.	Department of Highways	400.00	400.00	12-12-77
CC-76-71b	Maynard, Arthur & Mollie Maynard	Department of Highways	15,000.00	2,475.00	8-12-77
CC-76-71a	Maynard, Norman & Shirley Maynard	Department of Highways	10,000.00	1,250.00	8-12-77
CC-79-38	Memorial General Hospital	Department of Corrections	10,077.71	10,077.71	2-10-79
CC-78-23	Moore Business Forms, Inc.	Department of Motor Vehicles	195.97	195.97	2-20-78
CC-78-46	Moore Business Forms, Inc.	Department of Health, Div. of Mental Health	51.42	51.42	10-24-78
CC-78-36	Morrison Printing Co., Inc.	Department of Highways	3,000.00	3,000.00	5-1-78

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1977, to June 30, 1979:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-77-211	New Martinsville/Wetzel County Emergency Squad, Inc.	Division of Vocational Rehabilitation	162.00	162.00	2-10-78
D-936	Norvell, Helen L. Exec. of the Estate of Glenn Hartsel Norvell, dec.	Department of Highways	112,500.00	15,000.00	2-10-78
CC-76-109	Offutt, Arizona M.	Department of Highways	2,000.00	1,625.00	2-10-78
CC-78-96 (a-c)	Orkin Exterminating, Inc.	Department of Health, Div. of Mental Health	269.70	212.00	10-24-78
CC-78-169	Ostrin Electric Co.	Department of Natural Resources	1,397.50	997.50	2-1-79
CC-77-204	Otis Elevator Company	Department of Health, Div. of Mental Health	95.00	95.00	2-10-78
D-927a	Parker, Ralph	Division of Vocational Rehabilitation	4,302.96	2,070.77	11-16-78
CC-78-211	Patrick Plaza Dodge, Inc.	Office of the Treasurer	142.50	142.50	1-9-79
D-927d	Petts, Elva	Division of Vocational Rehabilitation	7,104.00	3,985.42	11-16-78
CC-77-131	Phillips, Anna Jane	Department of Highways	82.40	82.40	12-22-77
CC-77-107	Polis Brothers	Department of Health, Div. of Mental Health	239.90	239.90	2-10-78
CC-77-117	Positive Peer Culture, Inc.	Department of Corrections	26,341.15	26,341.15	1-31-79
D-927j	Preston, Gertrude	Division of Vocational Rehabilitation	6,822.80	5,771.49	11-16-78
D-927i	Preston, James	Division of Vocational Rehabilitation	6,754.80	5,888.75	11-16-78

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1977, to June 30, 1979:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-77-224	Private Diagnostic Clinic	Division of Vocational Rehabilitation	399.18	399.18	5-1-78
CC-78-223	Rader, Jack L.	Department of Health	5,488.05	5,488.05	1-26-79
CC-76-123	Raleigh Motor Sales, Inc.	Department of Natural Resources	1,952.36	1,452.36	11-1-77
CC-77-192	Ray, Alex	Office of the Governor—Emergency Flood Disaster Relief	1,175.00	1,175.00	2-9-78
CC-77-202	Rexrode, Jerry Austin	Department of Natural Resources	2,943.72	2,943.72	2-10-78
CC-79-19	Roche Laboratories, Inc.	Board of Regents	1,702.50	1,702.50	3-23-79
CC-77-138	Rosi, Anthony R.	Department of Motor Vehicles	271.60	271.60	2-10-78
CC-77-132	Ross, Franklin and Elsie M. Ross	Department of Highways	347.80	347.80	2-10-78
CC-78-147	Roton, Larry	Department of Highways	203.40	177.73	1-9-79
CC-78-81	Russell, Mae	Department of Highways	807.13	700.00	8-10-78
CC-77-189	Ryan, James and Joyce Ryan	Department of Highways	25,000.00	7,050.00	4-10-79
CC-77-119	S. B. Wallace & Co.	Department of Corrections	165.73	157.49	12-22-77
CC-77-74	Sanders Floor Covering, Inc.	Board of Regents	1,819.00	1,819.00	1-6-78
CC-76-131	Schooley, Charles E.	Department of Highways	7,550.05	7,000.00	11-1-77
D-669b	Shah, Saleem A. and Theresa A. Shah	Department of Highways	60,000.00	3,500.00	2-10-78
CC-77-66	Sharp, Mary Jo	Department of Health, Div. of Mental Health	458.00	458.00	2-10-78

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1977, to June 30, 1979:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-77-214	Sherwood, Carolyn Crisp	Department of Highways	237.00	237.00	2-10-78
CC-77-70	Shreve, Mary Jo	Department of Highways	288.00	100.00	8-19-77
CC-77-95	Siclair, Sam d/b/a Galion Canvas Products Company	Governor's Office of Economic & Community Development	808.80	808.80	10-17-77
CC-77-56	Skaggs, Lawrence Craig	Department of Highways	102.23	102.23	8-8-77
CC-78-290	Smith, Robert & Elizabeth Smith	Department of Highways	20,000.00	4,000.00	1-31-79
CC-78-134	Spagnuolo, A. A.	Department of Highways	480.00	480.00	8-10-78
CC-78-86	Spangler, Odlund Haney, Jr.	Department of Employment Security	88.50	88.50	6-15-78
CC-78-164	Spitzer, Barbara H.	Department of Highways	300.00	300.00	2-20-79
CC-77-79	State Chemical Manufacturing Company	Department of Highways	2,217.50	2,217.50	8-19-77
CC-78-162	State Farm Mutual Auto Insurance Co., subrogee of Dana Lee Selvig	Board of Regents	308.99	308.99	1-31-79
D-688	Stevens, Polly, Guardian of the Estate of James Walter Stevens and Timothy Stevens	Department of Highways	14,285.00	8,450.00	8-10-78
CC-78-177	Stone, Connie Ann	Department of Highways	176.73	176.73	1-9-79
CC-78-11	Stone, Thelma J.	Office of the Governor—Emergency Flood Disaster Relief	2,500.00	2,500.00	10-23-78
CC-79-14	Stuart's Drug & Surgical Supply Co.	Board of Regents	757.16	757.16	3-23-79

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1977, to June 30, 1979:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-18	Syva, Inc.	Board of Regents	80.48	80.48	3-23-79
CC-78-206	Taylor, Charles E. & Mary P. Taylor	Department of Highways	5,374.29	1,566.75	1-9-79
CC-77-158	Teets, Williard P., Attorney in Fact for Percy E. Teets	Department of Highways	16,016.50	3,000.00	10-23-78
D-669a	Testa, Fred K. and Claudia I. Testa	Department of Highways	65,000.00	4,500.00	2-10-78
CC-77-7	Thompson, Edith Ann & Roger Dale Thompson	Department of Natural Resources	$70,000.00	9,627.36	4-3-78
CC-77-177	Thompson's of Morgantown, Inc.	Board of Regents	901.77	901.77	1-6-78
CC-77-194	3M Business Products Sales, Inc.	Department of Motor Vehicles	957.50	957.50	2-10-78
CC-77-80	Tillinghast, John & Janet Tillinghast	Department of Highways	6,000.00	4,000.00	7-12-78
CC-78-4	Transport Motor Express, Inc.	Public Service Commission	837.00	837.00	10-11-78
CC-77-91	Travenol Laboratories, Inc.	Department of Health, Div. of Mental Health	53.52	53.52	12-22-77
CC-78-178	Tyre, Albert K.	Department of Corrections	178.10	178.10	1-9-79
CC-78-53	Uarco, Inc.	Board of Regents	713.18	713.18	6-22-78
D-914 D-918 (Par. C) D-993	Vecellio & Grogan, Inc.	Department of Highways	176,477.58	117,122.44	2-1-79

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1977, to June 30, 1979:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-78-204	Ware, Todd W. and Taylor Publishing Co.	Board of Regents	3,096.51	3,096.51	1-9-79
CC-79-9	Warren Associates	Board of Regents	23.20	23.20	3-23-79
CC-78-191	Webb, W. F.	Department of Highways	1,374.00	1,100.00	10-23-78
CC-77-229	Weber, John M.	Board of Regents	19,816.42	3,400.00	1-9-79
CC-77-219a	Weekly, Richard L.	Office of Emergency Services	1,025.85	1,025.85	3-8-78
CC-77-219b	Weekly, Richard L.	Office of Emergency Services	1,144.98	1,144.98	3-8-78
CC-77-184	Welch, Marvin Roy	Department of Highways	50.00	50.00	1-6-78
D-927c	Wells, Harry	Division of Vocational Rehabilitation	4,702.16	3,423.80	11-16-78
CC-77-205	West, Patrick	Department of Highways	4,000.00	950.00	10-11-78
D-927h	White, Arthur	Division of Vocational Rehabilitation	8,155.52	5,217.75	11-16-78
CC-78-139	White, Loraine & Velma White	Department of Highways	10,000.00	1,000.00	1-9-79
D-571	Whitmyer Brothers, Inc.	Department of Highways	450,000.00	110,082.53	9-26-77
CC-78-158	Wiersma, Silas C.	Department of Health, Div. of Mental Health	1,120.00	1,120.00	12-8-78
CC-77-92	Wilder, John R. and Norma J. Wilder	Department of Highways	233.36	233.36	10-17-77
CC-78-41	Wilson, Patricia, George P. Wilson, and Gladys V. Wilson	Office of the Governor—Emergency Flood Disaster Relief	1,200.00	1,200.00	2-1-79
CC-78-209	Wood County Bank	Department of Motor Vehicles	2,749.55	2,749.55	1-11-79

REPORT OF THE COURT OF CLAIMS (Continued)

(3) Approved claims and awards satisfied by payment out of a special appropriation made by the Legislature to pay claims arising during the fiscal year: (None).

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-78-83	Adkins, Arthur, Jr.	Department of Highways	$ 202.25	Disallowed	3-23-79
CC-78-132	Akers, Sadie Jean and Thomas E. Akers	Department of Highways	1,600.00	Disallowed	2-28-79
CC-76-56	Arthur, Ervin, Admin. of the Estate of Cecil C. Brumfield, dec.	Department of Health, Div. of Mental Health	115,000.00	Disallowed	4-3-78
CC-78-49	Bailey, Jack D. and Betty Louise Bailey	Department of Highways	521.00	Disallowed	3-23-79
CC-78-119	Banhart, James R.	Department of Highways	190.76	Disallowed	1-9-79
CC-78-1	Bolyard, Arnold W.	Department of Highways	1,377.30	Disallowed	6-30-79
CC-77-130a	Boone Remodeling Co.	Departments of Corrections	1,580.00	Disallowed	2-10-78
CC-78-30	Bradshaw, Cynthia Lou	Department of Highways	140.76	Disallowed	10-11-79
CC-77-26	Cavalier Crushing Company	Department of Highways	32,177.50	Disallowed	10-24-78
CC-78-63	Childers, Lawrence	Department of Highways	649.20	Disallowed	8-10-78
CC-78-79	Church, Arnell	Department of Highways	198.00	Disallowed	8-10-78
CC-76-102	Clark, Elwood, Admin. of the Estate of Sharon Marie Clark, deceased	State Fire Marshal	160,827.50	Disallowed	2-9-78
CC-77-114	Cooksey, Ilene Clark	Department of Highways	162.63	Disallowed	10-23-78
CC-76-77	Cummings, John F.	Department of Highways	120.90	Disallowed	12-22-77
C-78-91	DeLancey, Merton M.	Department of Highways	147.09	Disallowed	1-9-79

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-78-67	Dodrill, Aileen W.	Department of Highways	227.46	Disallowed	10-23-78
CC-78-225	Dykes, James L.	Department of Highways	68.86	Disallowed	6-30-79
CC-76-32	Econo-Car International, Inc.	Department of Highways	669.75	Disallowed	2-9-78
CC-77-127	Evans, Charles R. & Ernestine Evans	Department of Banking	7,712.95	Disallowed	8-10-78
CC-78-109	Evans Lumber Company	Department of Highways	892.27	Disallowed	1-9-79
CC-78-100	Ferguson, Lawrence & Claudette	Department of Highways	86.95	Disallowed	4-10-79
CC-77-89	Flaherty, Pauline E.	Department of Finance & Administration	646.00	Disallowed	12-12-77
CC-78-205	Giolitto, Larry A.	Department of Highways	417.84	Disallowed	1-9-79
CC-77-50	Griffing, William C.	Department of Highways	95.88	Disallowed	4-3-78
CC-77-75	Grose, Charles W.	Department of Highways	358.04	Disallowed	11-1-77
CC-77-191	Gwinn, Lloyd Harding	Department of Highways	517.00	Disallowed	4-3-78
C-77-2	Haddad, Nathan, Jr.	Dept. of Motor Vehicles & Dept. of Finance & Administration	Unliquidated	Disallowed	4-3-78
D-1025	Hall, Mary Jo	Board of Regents	50,000.00	Disallowed	12-8-78
CC-77-123	Haller, Karen	Department of Highways	1,700.00	Disallowed	4-10-79
CC-78-82	Hanson, William L., Sr. & William L. Hanson, Jr.	Department of Highways	1,000.00	Disallowed	10-23-78
CC-77-179	Heater, Robert A.	Department of Highways	2,038.00	Disallowed	5-1-78
CC-77-170	Hersom, Harold and Eleanore Hersom	Department of Natural Resources	444.29	Disallowed	2-20-79
CC-77-81	Heverley, Robert V., Jr. & Kathleen Heverley, d/b/a Frances Shoppe, Inc.	Department of Labor	85,000.00	Disallowed	1-9-79

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-78-78	Holstein, Lillian M.	Public Employees Retirement System	Unliquidated	Disallowed	7-12-78
CC-76-79	Hoskins, Patricia S.	Department of Highways	181.75	Disallowed	12-22-77
CC-77-188	Keith, James G.	Department of Highways	95.62	Disallowed	10-23-78
CC-78-54	Kratovil, James T.	Department of Health, Div. of Mental Health	140.00	Disallowed	10-23-78
CC-77-120	Larch, Frances J. & William E. Larch	Department of Natural Resources	100,000.00	Disallowed	2-1-79
CC-77-85	Lavender, John, Jr.	Department of Highways	186.44	Disallowed	12-12-77
CC-77-19	Lavinder, Gregory D.	Department of Highways	125.00	Disallowed	10-17-77
CC-77-53	Light, Daniel Lewis	Department of Highways	131.00	Disallowed	12-22-77
CC-78-48	Lipscomb, Gregory K.	Department of Highways	200.00	Disallowed	3-23-79
CC-78-144a	MacKnight, James C.	Department of Highways	53.00	Disallowed	6-13-79
CC-78-144b	MacKnight, James C.	Department of Highways	182.00	Disallowed	6-13-79
CC-76-33	McCarthy, Geraldine May, Admin. of the Estate of Robert Eugene McCarthy	Department of Highways	111,985.95	Disallowed	5-1-78
CC-77-215b	May, Harold F.	Department of Highways	50.00	Disallowed	7-12-78
CC-77-173	Mayse, David L.	Board of Regents	255.00	Disallowed	10-11-78
CC-78-33	Melling, Rodger C.	Department of Highways	99.73	Disallowed	8-10-78
CC-76-124	Miller, Connie Lynn	Department of Highways	6,300.35	Disallowed	5-1-78
CC-78-136	Pauley, Charles Edward	Department of Highways	203.39	Disallowed	10-24-78
CC-77-208	Pauley, Maxine V.	Department of Highways	206.05	Disallowed	5-1-78
CC-78-97	Poe, Dallas	Department of Highways	100.00	Disallowed	10-23-78
CC-78-122	Pratt, Robert M.	Department of Highways	377.36	Disallowed	8-10-78
CC-77-69	Proffit, Tom and Myrna Proffit	Department of Highways	154.85	Disallowed	10-17-77

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-76-47	Quigley, Charles C.	Department of Highways	2,500.00	Disallowed	8-12-77
CC-77-99	R. H. Bowman Distributing Co., Inc.	Department of Highways	1,410.77	Disallowed	7-12-78
CC-77-55	Rakes, Timothy, by his father and next friend, Andrew Rakes, and Andrew Rakes	Board of Education of Lincoln County	125,000.00	Disallowed	5-25-78
D-875	Rice, Meredith K., Adm. of the Estate of Syed Q. Abbas, decreased	Department of Highways	110,000.00	Disallowed	9-27-77
CC-77-213	Rick's Ambulance	Department of Welfare	898.75	Disallowed	1-9-79
CC-77-33	Robinson, Jeanne	Department of Highways	15,500.00	Disallowed	5-1-78
CC-77-36	Sadd, Marie T.	Department of Highways	600.00	Disallowed	12-22-77
CC-77-82	Samples, Randall I.	Department of Highways	10,739.05	Disallowed	10-24-78
CC-78-64	Sayre, Romie C.	Department of Highways	533.48	Disallowed	8-10-78
CC-76-80	Sheets, Patty, Admin. of the Estate of Ray Samuel Six, deceased	Department of Health, Div. of Mental Health	11,398.64	Disallowed	4-10-79
CC-76-129	Smith, Roy D.	Department of Highways	422.50	Disallowed	11-1-77
CC-77-51	Sowers, Joseph and Marie Sowers	Department of Highways	209.93	Disallowed	10-17-77
CC-77-145	Stanley, Hayes	Department of Highways	462.00	Disallowed	1-9-79
CC-76-120	Starcher, Foster	Department of Highways	293.91	Disallowed	7-12-78
CC-77-165	Tinsley, Gerald E. and Lois C. Tinsley	Department of Highways	6,000.00	Disallowed	4-3-78
D-1007	Toppings, Ruth Ann	Department of Highways	50,000.00	Disallowed	1-9-79
CC-77-215a	U.S.A.A. Insurance Co.	Department of Highways	184.89	Disallowed	7-12-78

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-77-218	Vannort, Arthur	Department of Veterans' Affairs & Adjutant General	10,500.00	Disallowed	1-9-79
CC-77-157	Vinson, Billy Joe & Paul F. Vinson	Department of Highways	60,000.00	Disallowed	10-24-78
D-750	W & H Contracting Co., Inc. and Burke-Parsons-Bowlby Corp.	Department of Highways	12,843.20	Disallowed	10-17-77
CC-77-161	Weddington, John Thomas	Department of Highways	109.55	Disallowed	7-12-78
CC-77-17	Welch, Dema Marie	Department of Highways	25,000.00	Disallowed	4-3-78
CC-78-170	Winer, Chrystine	Department of Highways	171.12	Disallowed	6-30-79
CC-77-140	Wotring, Bliss R.	Department of Highways	2,500.00	Disallowed	7-12-78

REPORT OF THE COURT OF CLAIMS (Continued)

(5) Advisory determinations made at the request of the Governor or the head of a State agency:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-78-43	Department of Employment Security	Department of Health	$ 2,426.57	$ 1,917.17	5-25-78
CC-78-2	Edward L. Nezelek, Inc.	Department of Finance & Administration	439,004.92	439,004.92	1-17-78

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriations by the Legislature in the 1977 and 1979 Legislative sessions:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-78-232	Alling & Cory	Department of Corrections	$ 4,401.40	Disallowed	1-9-79
CC-77-90	Ambrosio, Pedro N.	Department of Health, Div. of Mental Health	272.00	Disallowed	10-17-77
CC-77-148	C. H. James & Co., Div. of James Produce Co., Inc.	Department of Corrections	39.91	Disallowed	11-14-77
CC-77-108	Capitol Business Equipment, Inc.	Board of Regents	951.06	Disallowed	10-24-78
CC-78-283	Charleston Area Medical Center, Inc.	Department of Health	20,000.00	Disallowed	1-11-79
CC-77-109	County Commission of Mason County	Department of Public Safety	3,600.00	Disallowed	10-11-78
CC-77-65	Department of Highways	Department of Corrections	3,040.00	Disallowed	12-8-77
CC-78-112	Eastman Kodak Co.	Secretary of State	275.00	Disallowed	8-10-78
CC-77-35	Graves-Humphreys, Inc.	Department of Corrections	1,604.99	Disallowed	8-8-77
CC-78-277	IBM Corporation	Department of Corrections	3,962.30	Disallowed	1-31-79
CC-77-104	Pfizer Corporation, Roerig Division	Department of Health, Div. of Mental Health	608.00	Disallowed	12-8-77
CC-77-76	Physicians Fee Office	Department of Health, Div. of Mental Health	$2,145.23	Disallowed	10-17-77
CC-78-74	Physicians Fee Office	Department of Corrections	2,956.50	Disallowed	8-10-78
CC-78-174	Smith, R. L., d/b/a Architectural Associates	Department of Public Safety	879.91	Disallowed	10-24-78
CC-78-127	Texaco, Inc.	Secretary of State	33.09	Disallowed	8-10-78
CC-79-77	3M Company	Department of Motor Vehicles	3,000.00	Disallowed	6-30-79

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriations by the Legislature in the 1977 and 1979 Legislative sessions:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-77-172	W. Va. Public Employees Insurance Board	Department of Motor Vehicles	5,563.68	Disallowed	2-9-78

(7) Approved claims and awards satisfied by payment by the State agency through an opinion decided by the Court under the Shortened Procedure: (None).

OPINIONS

TABLE OF CASES REPORTED

Cases Submitted and Determined in the Court of Claims in the State of West Virginia

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Opinion issued August 8, 1977

APPALACHIAN POWER COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-66)

Charles W. Peoples, Jr., Attorney at Law, for the claimant.

Nancy J. Norman, Attorney at Law, for the respondent.

PER CURIAM:

Upon the stipulation of the parties to the effect that on February 28, 1975, blasting operations conducted by the respondent near Madison Creek Road in Cabell County, West Virginia, caused damage in the sum of $2,303.35 to the claimant's electrical distribution line and related electrical equipment, an award in that sum should be, and is hereby, made.

Award of $2,303.35.

Opinion issued August 8, 1977

GRAVES-HUMPHREYS, INC.

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. CC-77-35)

Louie A. Paterno, Jr., Attorney at Law, for the claimant.

Henry C. Bias, Jr., Deputy Attorney General, for the respondent.

RULEY, JUDGE:

Beginning in March, 1975, and ending in August, 1975, and pursuant to respondent's purchase order, claimant delivered to

the Huttonsville Correctional Center a lathe and various accessory equipment for a purchase price of $1,604.99. The respondent, by its counsel, has admitted that the purchase order was placed with the claimant and that the materials covered by it were received by the respondent. The only reason for non-payment was an insufficiency of funds appropriated in the pertinent fiscal year. Following the precedent of *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct. Cl. 180 (1971), it is apparent that the claim must be denied.

Claim disallowed.

Opinion issued August 8, 1977

IBM CORPORATION

vs.

DEPARTMENT OF MOTOR VEHICLES

(No. CC-77-1)

Thomas R. Bradley, Operations Analyst, for the claimant.

Henry C. Bias, Jr., Deputy Attorney General, for the respondent.

RULEY, JUDGE:

The claimant and the respondent entered into a written contract entitled "Extended Term Lease Plan", dated November 5, 1976, relating to a "word processing" unit composed of magnetic card typewriters and other machines. This claim subsequently was made for a transportation charge in the sum of $123.65 relating to typewriters, and a transportation charge in the sum of $115.57 relating to a copier. The copier was returned shortly after its delivery to the respondent, and from the evidence, it is apparent that there never was a meeting of minds between the parties as to whether the copier was or was not a part of the word processing unit. For that reason, the Court is of the opinion to deny the claim for the transportation charge related to the copier, and to allow the claim for the

Opinion issued August 12, 1977

NORMAN MAYNARD & SHIRLEY MAYNARD

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-71a)

and

ARTHUR MAYNARD & MOLLIE MAYNARD

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-71b)

Larry D. Taylor, Attorney at Law, for the claimants.

Nancy J. Norman, Attorney at Law, for the respondent.

WALLACE, JUDGE:

The above two claims grew out of the same land slippage. The respondent having admitted liability, the claims were consolidated and heard by the Court as to the issue of damages.

The parties filed with the Court their written stipulations indicating that the claimants, Arthur Maynard and Mollie Maynard, are the owners of a 30-acre tract of land south of Wayne, West Virginia, fronting 2000 feet on Ferguson Branch Road, which is Local Service Road 52/21 maintained by the respondent. It is a dirt and gravel base road. The claimants, Norman Maynard and Shirley Maynard, are the son and daughter-in-law of the Arthur Maynards. Their home is located on a parcel of land acquired from his parents, and fronts 200 feet on Local Service Road 52/21. It was further stipulated that the respondent maintained a drainage ditch parallel with the road across the road from claimants' property. Pipes were placed under the road to drain water from the drainage ditch. One of these pipes was installed under the road in front of the claimants' properties. In April and May of 1975, the drainpipe became stopped up, causing surface water to drain across the road onto the claimants' properties. The claimants notified the respondent, but no action was taken until a land slippage developed in an area between the homes of the claimants.

transportation charge related to the typewriters, inasmuch as there is provision for the same in the contract.

Award of $123.65.

Opinion issued August 8, 1977

LAWRENCE CRAIG SKAGGS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-56)

Lawrence Craig Skaggs, the claimant, in person.

Nancy J. Norman, Attorney at Law, for the respondent.

PER CURIAM:

Upon the stipulation of the parties to the effect that on February 26, 1977, the claimant's 1972 model Mercury automobile struck a metal plate that had become dislodged from a hole which it covered on W.Va.-U.S. Route 60 in Kanawha County, West Virginia; and that the claimant thereby sustained damage to his automobile in the sum of $102.23; an award in that sum should be, and is hereby, made.

Award of $102.23.

The respondent corrected the drainage problem. Neither residence was damaged.

Expert witnesses on behalf of the claimants and the respondent submitted appraisals of the properties showing the values before and after the slippage.

The Court, having considered the stipulations in both cases, photographs of the respective properties, and the record as it pertains to damages, assesses damages as follows: to Arthur Maynard and Mollie Maynard, $2,475.00, and to Norman Maynard and Shirley Maynard, $1,250.00.

Award of $2,475.00 to Arthur and Mollie Maynard.

Award of $1,250.00 to Norman and Shirley Maynard.

Opinion issued August 12, 1977

CHARLES C. QUIGLEY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-47)

Claimant appeared in person.

Nancy Loar, Attorney at Law, for respondent.

WALLACE, JUDGE:

Claimant was driving alone in his 1973 Caprice automobile the night of April 30, 1974, at approximately 9:40 p.m. in Charleston, West Virginia. It was raining and the streets were wet. He was proceeding from his home at Campbells Creek on U.S. Rt. 60 to his job in Parkersburg, West Virginia. His usual route was over Piedmont Road, crossing the Spring Street Bridge and entering Interstate 77 at the Westmoreland approach. On the night of the accident, due to construction, he proceeded westerly on Kanawha Boulevard intending to go from there to Pennsylvania Avenue. He turned off Kanawha Boulevard in a northerly direction onto relocated Columbia Avenue, which is a one-way street going north. For several blocks north of Kanawha Boulevard, Columbia Avenue

was a construction area in connection with its relocation and work on adjacent interstate bridge approaches. The claimant testified that he followed another car along the Avenue, crossing the intersections of Virginia Street and Randolph Street. After crossing Randolph Street, the car in front stopped and turned around because the road was blocked by a crane and construction material. The claimant was also forced to turn around. As he retraced his course, he re-entered, without stopping, the intersection of Randolph Street. As he drove into the intersection he was struck by an automobile coming from the east. The claimant contends that there were no signs or signals to warn of the danger.

The claimant testified that the owner of the car that struck him threatened to sue for damages, and to avoid litigation, he settled for $716.00. He further stated that repairs to his car amounted to $1,200.00, that he lost two weeks' work, and that he incurred medical expenses of $150.00 as the result of two or three broken ribs. No documentary proof of these damages was introduced, although the claimant was allowed additional time to supply the Court with the same.

Larry Allen Deitz, Project Engineer for the respondent, testified that, during the construction of the road, there were barricades and signs which were removed in December, 1974. He stated that the signs and barricades were moved from time to time for the movement of equipment, but that Columbia Avenue was not kept open because of various materials and equipment.

Danny Lee Lucas, an inspector for the Department of Highways, testified that in April, 1974, there were "Street Closed" signs on Columbia Avenue at its intersection with the Kanawha Boulevard, but there was ample room for a vehicle to go around. On Randolph Street there were "Construction Ahead" signs and amber flasher lights mounted on 55-gallon drums to warn of the construction. He also stated that the signs and barricades were so placed as to allow people who lived in the construction area a means of ingress and egress.

Willis J. Cox, the Superintendent of Construction for Bates and Rogers Construction Corporation, testified that he super-

vised the construction job from about 50 feet north of Kanawha Boulevard northerly to Washington Street. He stated that at the time of the accident, Columbia Avenue was paved, but there were barricades and signs which stated either "Street Closed" or "Road Closed", which signs remained until the road was opened for traffic. He further testified that, although equipment was parked on the Avenue, a portion was left open to allow local residents to come and go. Also, a fire lane was required to be left open in case of fire.

The Court finds that the record does not indicate any negligence on the part of the respondent that would warrant a recovery for the claimant. The record establishes that the claimant was driving in a construction area over an avenue that was closed to the public. The claimant testified that there were several factors that prevented him from knowing he was crossing the intersection; namely, it was raining, he was following another car, and he wasn't looking. It is apparent from the record that the claimant's negligence was the cause of the accident.

Accordingly, the Court hereby disallows the claim.

Claim disallowed.

Opinion issued August 19, 1977

MARY JO SHREVE

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-70)

Claimant appeared in person.

James W. Withrow, Attorney at Law, for respondent.

PER CURIAM:

The written stipulation of the parties reveals that in July of 1976, the respondent, through its Equipment Division, spray painted its building located at 101 Kerns Avenue in Elkins; that in so doing, the claimant's automobile was damaged be-

cause of an over-spray, and that the claimant's automobile was damaged to the extent of $100.00. Believing that liability exists and that the claimed damages are reasonable, the Court hereby makes an award in favor of the claimant in the amount of $100.00.

Award of $100.00.

Opinion issued August 19, 1977

STATE CHEMICAL MANUFACTURING CO.

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-79)

Claimant appeared by *Dave Carpenter,* its Territorial Manager.

Stuart Reed Waters, Jr., Attorney at Law, for the respondent.

PER CURIAM:

The written stipulation of the parties reveals that in January of 1977, respondent purchased from claimant 80,000 pounds of glycol treated urea for use in its ice control program. A price of 19 cents per pound for that quantity was agreed upon with the further understanding that claimant would also, free of charge, deliver 110 gallons of liquid ice chek activator. An emergency purchase order was thereupon issued for the above. Respondent thereafter decided to reduce the order in respect to the amount of glycol treated urea. It thereupon voided the original emergency purchase order and issued a new order without negotiating a new price per pound for the reduced order of glycol treated urea.

Ultimately, 39,000 pounds of glycol treated urea and 110 gallons of liquid ice chek activator were delivered by claimant to respondent, and claimant billed respondent 22 cents per pound for the glycol treated urea in lieu of the 19 cents per pound as originally agreed upon, and $1,237.50 for the 110 gallons of liquid ice chek activator. The respondent, in the stipulation, admits that it was improper for it to unilaterally

reduce the quantity of glycol treated urea ordered without renegotiating the price, and that the claimant is entitled to additional compensation in the amount of $2,217.50.

Being of opinion that the stipulation sets forth a fair and equitable resolution of this dispute, the Court hereby makes an award to the claimant in the above-stated amount.

Award of $2,217.50.

Opinion issued September 26, 1977

WHITMYER BROTHERS, INC.

vs.

DEPARTMENT OF HIGHWAYS

(No. D-571)

James K. Stewart, Attorney at Law, for the claimant.

Dewey B. Jones and *Stuart Reed Waters, Jr.,* Attorneys at Law, for the respondent.

RULEY, JUDGE:

This case involves a claim for damages in the sum of $450,000.00 growing out of performance of a contract requiring the claimant to construct approximately 190,000 linear feet of fence along the right of way of Interstate Route 64 in Kanawha, Cabell, Putnam, and Wayne Counties. Several items of the claim were eliminated by the Order heretofore entered on September 1, 1976, sustaining the respondent's motion to dismiss. Subsequently, the case was tried insofar as it related to the remaining items of the claim, viz.: (1) a claim for labor and material allegedly furnished incident to providing extra terminal posts; and (2) a claim for relief from liquidated damages asserted by the respondent.

To facilitate understanding of the claim relating to extra terminal posts, it must be understood that all fence posts may be classified as line posts (which require no bracing member) or as terminal posts (which require at least one bracing

member). Terminal posts may be sub-classified as end posts (which require one bracing member), pull posts (which require two bracing members), or corner posts (which require two bracing members). All terminal posts and their bracing members were required to be set in concrete and were larger and heavier than line posts, the purpose of the latter being only to support the fence between the terminal posts. The importance of the distinctions insofar as cost is concerned is apparent without further explanation.

The respondent's plans and drawings, which were incorporated into the contract, showed 854 terminal posts. The claimant's bid was based on a projected installation of 925 terminal posts, the increase representing an allowance for additional terminal posts at points where either the horizontal or vertical angle of the fence was 15° or more. In that connection, the preponderance of the evidence clearly established the trade practice or custom of not installing terminal posts at points where an angle in a fence is less than 15°. Based on the calculation of 925 terminal posts, the claimant's successful unit price bid was $1.79 per linear foot of fence — one cent lower than the respondent's estimate of $1.80. As the fence was constructed, the respondent required the claimant to install 1,927 terminal posts.

The contract specifications in the last two paragraphs of §2.131.3(F), apparently intending to relate to line posts and terminal posts, respectively, provided:

> "Posts shall be spaced in the line of fence as shown on the plans with tolerances of minus two (—2) feet. Spacing of post shall be as uniform as practicable under local conditions. Additional posts shall be set at each abrupt change in grade.
>
> Pull posts, as defined in these specifications, shall be placed approximately three hundred thirty (330) feet apart in straight runs and at each vertical angle point, all as directed by the engineer. Corner posts shall be placed at each horizontal angle point."

The patent inconsistency and ambiguity of these provisions (which literally would require both a line post and a pull post

at each vertical angle point) must be construed and resolved in the light of the proven trade practice and custom and common sense. *Raleigh Lumber Co. v. Wilson & Son,* 69 W.Va. 598, 72 S.E. 651 (1911); *Bragg v. Lumber Co.,* 102 W.Va. 587, 135 S.E. 841 (1926). In addition, broad delegations of power must be exercised in a reasonable manner under the particular circumstances of each case, and not in an arbitrary or capricious manner. *Tri-State Stone Corp. v. The State Road Commission of West Virginia,* 9 W.Va. Ct. Cl. 90, at 106 (1972). The evidence demonstrates that the claimant was required to install 641 terminal posts at horizontal or vertical angle points of less than 15°, with the vast majority at angles of less than 10° and a very substantial number at angles under 5° — none of these were points where end posts or maximum spacing terminals were necessary. From a preponderance of the evidence, it appears that those 641 terminal posts were unnecessary (that is, that line posts would have served just as well), and that their requirement was arbitrary. The undisputed evidence is that the additional cost to the claimant, above the cost of a line post, of each terminal post was $131.33. Accordingly, it appears that the claimant should be awarded the sum of $84,182.53 for extra terminal posts.

Turning to the matter of liquidated damages, it appears that the respondent assessed and imposed (withholding the sum from the claimant's final payment) $25,900.00 in liquidated damages calculated pursuant to the contractual formula at the rate of $100.00 per day for 259 days of alleged delay in performance of the contract. It is undisputed that the claimant failed to complete its work under the contract until 286 days after the contract completion date. The respondent granted an extension time of 27 days, leaving 259 days for which liquidated damages were assessed. Evidence respecting several reasons for the delay was offered by the claimant as bearing upon the issue of whether the delay should be excused, but the Court does not need to consider that issue because of the general rule enunciated in 22 Am. Jur. 2d "*Damages*", §233, p. 319, as follows:

> "The plaintiff cannot recover liquidated damages for a breach for which he is himself responsible *or to which he*

has contributed, and as a rule there can be no apportionment of liquidated damages where both parties are at fault. Hence, if the parties are mutually responsible for the delays, because of which the date fixed by the contract for completion is passed, the obligation under which another date can be substituted, cannot be revived." (emphasis supplied)

It could not be contended that the installation of 641 extra terminal posts did not contribute to cause the delay. In addition, there is no evidence as to the amount of actual damage, if any, sustained by the respondent as a result of the delay in constructing the right of way fence. For that reason, this case would seem to fall within the purview of the rule enunciated in *J. I. Hass Co., Inc. v. State Road Commission,* 7 W.Va. Ct. Cl. 209, at 212 (1969). Accordingly, the assessment by the respondent of liquidated damages must be rejected and the claimant awarded the additional sum of $25,900.00.

Award of $110,082.53.

Opinion issued September 27, 1977

MEREDITH K. RICE, ADM. OF THE ESTATE OF SYED Q. ABBAS, DECEASED

vs.

DEPARTMENT OF HIGHWAYS

(No. D-875)

K. Paul Davis and *Michael Bee,* Attorneys at Law, for the claimant.

Gregory W. Evers, Attorney at Law, for the respondent.

RULEY, JUDGE:

On February 18, 1974, Syed Q. Abbas, claimant's decedent, was killed in a single-car accident. The evidence in the case reveals that Mr. Abbas was travelling south on U. S. Route 119, south of the City of Marmet, at approximately 9:45 a.m., when his car crossed the northbound lane, left the highway,

and collided with a tree, killing him. After a night of heavy frost, the day was clear and cold. Although there was no precipitation on February 17 or on February 18, 1974, prior to the collision, the road in the vicinity of the place where the accident happened had a "dark glaze" of ice upon its paved surface. The highway and its berm near that place are bounded to the east by Lens Creek and to the west by a backwater pond, which drains under the highway into Lens Creek through a concrete flume located approximately 480 feet north of the tree which claimant's decedent struck.

The claimant alleges that the respondent was negligent in failing to provide adequate drainage for the backwater pond, thereby causing water from the pond to overflow and freeze upon the roadway, resulting in Mr. Abbas' accident and death.

Pursuant to an Opinion of this Court dated October 18, 1976, this hearing was conducted solely on the issue of liability.

This Court has held consistently that the State of West Virginia is not a guarantor nor insurer of the safety of persons who travel on its roads. See *Lowe v. Department of Highways,* 8 Ct. Cl. 210. Neither does the presence alone of ice on a roadway prove negligence on the part of the Department of Highways. *Bodo v. Department of Highways* (CC-76-28). In the case at hand, the evidence failed to establish flooding or any connection whatsoever between the water in the backwater pond and the ice on the highway. Absent any proof that the pond encroached on the roadway, this Court need not confront either the question of the respondent's alleged negligent response to an alleged drainage problem, or its affirmative defense of contributory negligence. The claimant has failed to prove that the respondent's alleged negligence caused the accident and death. Accordingly, the claim must be denied.

Claim disallowed.

Opinion issued October 17, 1977

ELVIN S. ALFORD

vs.

DEPARTMENT OF HIGHWAYS

(No. D-990)

No appearance by claimant.

Gregory W. Evers, Attorney at Law, for respondent.

PER CURIAM:

The claimant and the respondent filed a written stipulation indicating that on or about March 19, 1975, at approximately 2:30 p.m., the claimant was driving his 1972 Comet automobile on Smith Creek Road in Kanawha County, West Virginia, which road is part of the respondent's highway system. The claimant's vehicle struck a water-filled hole in the surface of the highway which was approximately 7½ inches deep and two to three feet wide. It was stipulated that the hole had existed for some time prior to the accident. The claimant's vehicle, upon striking the hole, went out of control, left the road, and went into a creek.

As a result, the claimant suffered damages both to his automobile and his person in the amount of $5,000.00. The claimant has received $2,200.00 from his insurance, which amount has been subrogated to his insurance carrier, United States Fidelity & Guaranty Company. The claimant sustained doctor bills in the amount of $364.40 and hospital and ambulance bills in the amount of $932.25.

The Court, believing that liability exists on the part of the respondent and that the damages are reasonable, hereby makes an award of $2,800.00 to the claimant.

Award of $2,800.00.

Opinion issued October 17, 1977

PEDRO N. AMBROSIO, M.D.

vs.

DEPARTMENT OF HEALTH
(DIVISION OF MENTAL HEALTH)

(No. CC-77-90)

No appearance on behalf of claimant.

Gregory W. Bailey, Assistant Attorney General, for respondent.

GARDEN, JUDGE:

The claimant is a physician from Spencer, West Virginia, who rendered professional services periodically from February 5, 1976, through June 29, 1976, to one Archie Hackett, a patient at Spencer State Hospital. Claimant's statement for services was not submitted to respondent until August 30, 1976, but, for some reason not apparent on the record, the statement was not paid.

Respondent, by its Amended Answer, admits the validity of the claim and that the services were necessary and reasonable in amount. The pleading further reveals that at the close of fiscal year 1976-77, the respondent expired the sum of $171.74 in the account from which claimant's statement should have been paid. The claim is thus controlled by this Court's decision in *Airkem Sales and Service v. Department of Mental Health,* 8 Ct. Cl. 180 (1971), and for the reasons set forth in that opinion, this claim must be denied.

Claim denied.

Opinion issued October 17, 1977

GREGORY D. LAVINDER

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-19)

Claimant appeared in person.

Nancy Norman, Attorney at Law, for respondent.

WALLACE, JUDGE:

On February 14, 1977, at approximately 9:25 p.m., the claimant, Gregory D. Lavinder, was driving his 1976 Ford Granada automobile in a westerly direction along Midland Drive, or Local Service Route 60/12, in the town of Rand in Kanawha County, West Virginia. Route 60/12 is a two-lane asphalt road maintained by the respondent. The claimant testified that he was driving at approximately 30 mph. It was dark and raining, and visibility was poor. This automobile struck a water-filled hole on the right-hand side of the highway. The right front wheel struck first and was undamaged. The rim of the right rear wheel was bent, and it was later determined that the tire was ruined. The claimant testified that after the accident, he drove his automobile into his driveway, which was approximately 500 to 600 feet from the scene of the accident. He stated that, although the accident occurred near his home, he rode to work with another person and had never noticed the hole before. He also stated that the road was in such bad shape he couldn't pinpoint any particular hole. Although an apparent defect existed in the road, there is no showing that the respondent had knowledge of the hole, or, if it did, that the hole was of such magnitude as to put respondent on notice of the possibility of an accident.

The law of West Virginia is well established that the State is not a guarantor of the safety of travelers on its roads. *Parsons v. State Road Commission,* 8 Ct. Cl. 35. The case of *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81, holds that:

"Every user of the highways travels at his own risk. The State does not, and cannot, assure him a safe journey.

The maintenance of highways is a governmental function and funds available for road improvements are necessarily limited."

In the opinion of the Court, the claimant has not proved such a positive neglect of duty on the part of the respondent as would impose a moral obligation on the State to pay the claimant's damages.

Accordingly, the Court is of the opinion to and does disallow the claim.

Claim disallowed.

Opinion issued October 17, 1977

PHYSICIANS FEE OFFICE

vs.

DEPARTMENT OF HEALTH
(DIVISION OF MENTAL HEALTH)

(No. CC-77-76)

No appearance on behalf of claimant.

Gregory W. Bailey, Assistant Attorney General, for respondent.

GARDEN, JUDGE:

The claimant is an organization that handles the billing and collection of charges for professional services rendered by physicians at the Medical Center at West Virginia University. From April 9, 1974, through May 8, 1974, various members of claimant's organization rendered professional services to one Roy Bryan, who was a patient of respondent's Lakin State Hospital. The total charge for these services was in an amount of $2,145.23, but the same was never paid.

Respondent filed an Amended Answer admitting the validity of the claim, and also filed as an exhibit a letter dated April 10, 1977, written by Jane B. Neal, Acting Director of the Division of Mental Health, stating that the services were neces-

sary and that the charge was reasonable. The letter explained that the charge did not come to the attention of respondent until December 3, 1974, after the close of the fiscal year during which the services were rendered. The letter further stated that, at the close of fiscal year 1973-74, the sum of $82.05 was expired from the account from which this claim would have been paid.

It would appear that, had payment of this claim been made during fiscal year 1973-74, it would have constituted an over-expenditure, and as such, would have been illegal. Consequently, based on the principles set forth in *Airkem Sales and Service v. Department of Mental Health*, 8 Ct. Cl. 180 (1971), we cannot make an award.

Claim denied.

Opinion issued October 17, 1977

TOM PROFFIT and MYRNA PROFFIT

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-69)

Claimant, *Myrna Proffit*, appeared in person.
Gregory W. Evers, Attorney at Law, for respondent.

GARDEN, JUDGE:

The claimants were the owners of a 1977 Grand Prix automobile which was damaged to the extent of $154.85 on the 11th of April, 1977, when it struck a pothole on U.S. Route 61 in Kanawha County, West Virginia. The testimony of the claimant, Myrna Proffit, revealed that she was proceeding in an easterly direction toward her home in Hansford around 10:00 p.m. at a speed of about 20 to 25 miles per hour; that the hole was from five to six inches in depth and extended from the center of the two-laned road into both lanes of travel; and that she was fully aware of the existence of this particular hole but was unable to straddle it, as she had done on prior occasions, by reason of the approach of a vehicle in the opposite lane.

The respondent is, of course, not an insurer of those using the highways of this State, but we have made awards in "pothole" claims under various factual situations. Here, however, and without deciding the issue of the respondent's negligence, we feel that it is clear from the testimony that the negligence of the claimant was the proximate cause, or, at least, a proximately contributing cause, of the accident and resultant damage to the automobile. With admitted knowledge of the existence of the condition of the road and of the particular pothole, claimant chose to approach the same at a speed of 20 to 25 miles per hour. We feel that this demonstrates a lack of due care on her part, and, for this reason, we must deny the claim.

Claim disallowed.

Opinion issued October 17, 1977

SAM SICLAIR, d/b/a GALION CANVAS PRODUCTS COMPANY

vs.

OFFICE OF ECONOMIC & COMMUNITY DEVELOPMENT

(No. CC-77-95)

Claimant appeared in person.

Gregory W. Bailey, Assistant Attorney General, for respondent.

WALLACE, JUDGE:

During the early part of 1976, the claimant was contacted by telephone by a William Milhorn, who, the evidence disclosed, was employed by the Research Division of the Office of Federal-State Relations (As of July 1, 1977, this agency ceased to exist and became a part of the Office of Economic & Community Development). Mr. Milhorn requested that the claimant, who is in the tent and awning business, make six tents which would be replicas of tents used by soldiers of the Continental Army during the American Revolution. Mr. Milhorn explained that these tents were to be used during the

celebration of the 1976 Bicentennial Year, and that, because it was a rush job, the usual purchase order could not be issued but the claimant would receive payment.

Claimant, who apparently had some expertise in the manufacture of such tents, agreed to do the work. Before starting the work, however, he made at least one call to the respondent's office in Charleston and was assured that indeed William Milhorn was employed in that office. The tents were manufactured by claimant and delivered to respondent, and claimant forwarded invoices in the total amount of $808.80 to "William Milhorn, Prickett's Fort Militia Research Division, Federal-State Relations, Charleston, West Virginia", but payment of the invoices was not made. Respondent, although admitting that the tents were received and used on at least one occasion at Prickett's Fort near Fairmont, contends that William Milhorn had no authority to order these tents, and that because no purchase order had ever been authorized or issued, claimant does not have an enforceable claim.

While it is true that a vendor dealing with a representative of a State agency is charged with the affirmative duty of ascertaining whether such representative has the authority to contract for that agency, and further that the existence of a valid purchase order is essential in order to bind the State, we are of the opinion that to deny an award to this claimant would be unconscionable. The respondent accepted and used these tents, and for it now to escape payment would constitute unjust enrichment. We therefore make an award to claimant in the amount of $808.80.

Award of $808.80.

Opinion issued October 17, 1977

JOSEPH and MARIE SOWERS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-51)

Claimants appeared in person.

James W. Withrow, Attorney at Law, for respondent.

GARDEN, JUDGE:

At approximately 9:00 p.m. on March 25, 1977, the claimants were proceeding in an easterly direction on old U.S. Route 60 in Kanawha County in their 1974 Cutlass automobile at a speed of 25 miles per hour when the right wheels of their automobile struck a pothole on the right-hand side of their lane of travel. Both right wheels were damaged, and the cost of their repair and the cost of a new tire amounted to $209.93. Prior to the accident, it had been raining hard, and, as a result, as we understand the testimony, certain portions of the highway were covered with water, including the area where the pothole was located.

The claimant, Marie Sowers, testified that she and her husband were familiar with the highway, generally travelling it several times a week. She also quite candidly admitted that they were aware of the existence and location of the pothole. Photographs taken several days after the accident portrayed the existence of a rather large hole on the southerly side of old U.S. Route 60, one which should have been apparent and which should have been repaired by respondent. However, even assuming that respondent was guilty of negligence in failing to repair the pothole, we are compelled to find that the claimants, knowing of the existence and location of the pothole, were guilty of contributory negligence in failing to exercise a proper lookout in order to avoid striking the hole. For these reasons, we must refuse to make an award.

Claim disallowed.

Opinion issued October 17, 1977

W & H CONTRACTING CO., INC. and
THE BURKE-PARSONS-BOWLBY CORP.

vs.

DEPARTMENT OF HIGHWAYS

(No. D-750)

Michael I. Spiker, Attorney at Law, for claimants.

Stuart Reed Waters, Jr., Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimants and the respondent entered into a written stipulation which was introduced into evidence as Joint Exhibit A. The parties stipulated that on or about August 5, 1969, the respondent awarded to the claimant, W & H Contracting Co., Inc., a contract for certain grading and paving for Project I-79-2 (35) 48 in Braxton County, West Virginia. On or about October 28, 1969, the claimant, W & H Contracting Co., Inc., entered into a contract with the claimant, The Burke-Parsons-Bowlby Corporation, as subcontractor for limestoning, fertilizing, seeding, and mulching the project, with the contract to cover 177 acres. As determined from the daily batch tickets, 170.35 acres were seeded. The respondent paid the claimant, W & H Contracting Co., Inc., for 142.43 acres, 27.92 acres being in dispute. It was further stipulated that if the Court found for the claimants, the recovery could not exceed $12,843.20.

The record reveals that the respondent was responsible for paying for all seeding and mulching within the construction limits. Any areas outside the construction limits or areas that had to be re-seeded were the responsibility of the claimants. The claimants contend that the entire 170.35 acres were within the construction limits, and that they should be compensated for the entire acreage.

The testimony and the evidence of the respondent disclosed that the construction limits were actually exceeded in some areas. Exact measurements and exact acreages were not introduced to the Court.

Pete I. Shaluta, the construction engineer on the job for the respondent, testified that he never actually computed the acreage seeded outside the construction limits, but knew that such acreage existed by checking the cross section measurement of the project. He further testified that the respondent's liability lay within the construction area, and it was not his responsibility to find the claimants' error. He stated that the 142.43 acres stipulated as the quantity paid for by the respondent was the actual acreage within the construction limits.

The parties introduced, as a joint exhibit, batch tickets showing the acreage seeded, location of areas, amount of seed, etc. These tickets set out the entire acreage seeded, but not the pay acreage. The claimants were paid on the respondent's measurements of the project which were from the "as built" plans.

The claimants were paid for 142.43 acres and claim that they are due compensation for an additional 27.92 acres. Witnesses for the respondent contend their calculations are correct and that the difference lies in areas outside the construction limits. The claimants contend, except for waste areas, that they did not exceed the construction limits.

The Court finds, from the testimony and the evidence, that certain seeded areas were outside the construction limits and that the evidence is not sufficient to show that the respondent's calculations are incorrect. Accordingly, the Court disallows the claim.

Claim disallowed.

Opinion issued October 17, 1977

JOHN R. WILDER
and NORMA J. WILDER

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-92)

No appearance by claimant.

James W. Withrow, Attroney at Law, for respondent.

PER CURIAM:

The claimant and respondent have filed a written stipulation indicating that on or about March 14, 1977, the respondent by and through its employees was blasting a rock which was resting on Local Service Route 19/2 in Jackson County, West Virginia. As a result of the blasting, pieces of rock were thrown against claimants' trailer, causing damage to the panels. It was stipulated that $233.36 is a fair and equitable estimate of the damage sustained by the claimants. Believing that liability exists on the part of the respondent and that the damages are reasonable, the Court hereby makes an award of $233.36 to the claimants.

Award of $233.36.

Opinion issued November 1, 1977

DONALD M. BONDURANT

vs.

WEST VIRGINIA TAX DEPARTMENT

(No. CC-77-142)

Donald M. Bondurant, the claimant, in person.

Henry C. Bias, Jr., Deputy Attorney General, for the respondent.

RULEY, JUDGE:

This claim in the sum of $5,585.34 was based upon a contract for personal services rendered by the claimant as a consultant

to the State Tax Department. At the hearing on October 14, 1977, the respondent conceded the validity of the claim and moved to withdraw the defense pleaded in its Answer based on the doctrine of *Airkem Sales and Service v. Department of Mental Health,* 8 W.Va. Ct. Cl. 180 (1971). Accordingly, an award in the sum of $5,585.34 should be, and is hereby, made.

Award of $5,585.34.

Opinion issued November 1, 1977

CHARLES W. GROSE

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-75)

Charles W. Grose, the claimant, in person.

Gregory W. Evers, Attorney at Law, for the respondent.

RULEY, JUDGE:

On April 6, 1977, the claimant's automobile was damaged when it struck a loose piece of blacktop on New Hope Road near Elkview, West Virginia. The claimant alleges that the respondent was negligent and asks for damages in the sum of $358.04.

The State is neither an insurer nor a guarantor of its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). The initial requirement to establish negligence in this case would be proof that the respondent either knew or, in the exercise of ordinary care, should have known about the defect in the road. See *Frazier v. Department of Highways,* 9 Ct. Cl. 171 (1972) and *Jones v. Department of Highways,* 9 Ct. Cl. 117 (1972). The sum of the testimony in this case revealed that the respondent occasionally blacktopped the road in question and that the road, at the place where the accident occurred, was in "pretty good" condition. This Court cannot conclude from that evidence that even the initial requirement of proof was met. Accordingly, the claim must be denied.

Claim disallowed.

Opinion issued November 1, 1977

McHENRY HUDNALL, JR.

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-52)

McHenry Hudnall, Jr., the claimant, in person.

James W. Withrow, Attorney at Law, for the respondent.

RULEY, JUDGE:

Upon stipulation of the parties to the effect that respondent negligently failed to secure a steel plate covering a large hole in Route 60 in South Charleston, West Virginia; that claimant, on February 26, 1977, was driving his vehicle in a lawful manner when it went into the hole; and that, as a result of respondent's negligence, claimant's car was damaged in the amount of $147.73, an award in that amount should be, and is hereby, made.

Award of $147.73.

Opinion issued November 1, 1977

RALEIGH MOTOR SALES, INC.

vs.

DEPARTMENT OF NATURAL RESOURCES

(No. CC-76-123)

Raleigh Motor Sales, Inc., the claimant, by Roger Andrew Sharp, its President.

Henry C. Bias, Jr., Deputy Attorney General, for the respondent.

RULEY, JUDGE:

In February, 1976, the claimant, Raleigh Motor Sales, Inc., repaired a four-wheel drive vehicle belonging to the respondent, Department of Natural Resources. Unable to get bids on the job because of the nature of the repair work, employees

of the Department of Natural Resources had taken the vehicle to the claimant and asked the claimant to repair the four-wheel drive, overhaul the engine, and fix the starter and clutch. The respondent's employees informed the claimant that they could authorize repairs only up to $500.00; the claimant's employees informed them that the job certainly would cost more than $500.00. The respondent's employees left the vehicle, assuming that they would be notified when the cost of repair exceeded $500.00. The claimant's employees assumed that they were to repair the vehicle and that any excess would be easily requisitioned. Total cost of the repairs came to $1,952.36. The Department of Natural Resources paid only the $500.00. The claimant seeks recovery of the remaining $1,452.36.

It appears from the evidence that the parties agreed to have the vehicle repaired, but achieved only a misunderstanding regarding the $500.00 limitation or the total cost of repairs. The repairs took about a month to perform and the respondent does not contend that the total cost was excessive. As a result of the misunderstanding, the claimant performed over $1,900.00 of services and received only $500.00 in payment.

In cases where the State has been unjustly enriched because of a misunderstanding, this Court has not hesitated to make an award in claims which "in equity and good conscience" the State should pay. *Brunetti Hardware and Painting vs. Department of Mental Health*, 10 Ct. Cl. 96 (1974). See also *Smith v. Alcohol Beverage Control Commission*, 8 Ct. Cl. 127 (1970). The West Virginia Supreme Court of Appeals held, in *In re Estate of Paul S. Thacker*, 152 W.Va. 455, 164 S.E.2d 301 (1968), Syllabus pt. 3:

> "When personal services are performed by one person at the instance and request of another person who is benefited by such services and there is no blood or family relationship between them and no legal or moral obligation that such services should be performed, the law implies a contract that the person who performs such services shall be paid reasonable compensation for such services unless it is shown that the persons intended that such compensation should not be paid."

In view of the facts of this case and the law applicable to them, it appears that an award in the sum of $1,452.36 should be, and is hereby, made.

Award of $1,452.36.

Opinion issued November 1, 1977

CHARLES E. SCHOOLEY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-131)

Robert B. Black, Attorney at Law, for the claimant.

Gregory W. Evers, Attorney at Law, for the respondent.

RULEY, JUDGE:

Upon stipulation of the parties to the effect that, on October 11, 1976, the claimant lawfully drove his 1973 dump truck across a bridge which collapsed on Local Service Route 5/5 in Taylor County, West Virginia, thereby damaging the truck in the amount of $7,000.00; that the respondent, upon an inspection in 1974, had found the bridge to have a load limit of zero tons; that the respondent had made no effort to repair the bridge or post a weight limit upon it since 1974; and that no warning signs were in place upon or near the bridge on the day the accident happened, an award in the sum of $7,000.00 should be, and is hereby, made.

Award of $7,000.00.

Opinion issued November 1, 1977

ROY D. SMITH

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-129)

James W. St. Clair, Attorney at Law, for the claimant.

Gregory W. Evers, Attorney at Law, for the respondent.

RULEY, JUDGE:

This claim in the sum of $422.50 grows out of damage to the claimant's 1965 model Chevrolet automobile which allegedly was sustained as the result of an accident which happened between 9:30 and 10:00 p.m. on September 10, 1976, when the front end of the claimant's car fell through a hole in the wooden floor of an old, narrow bridge on Rock Camp Road near Milton, West Virginia. The evidence indicates that the bridge had been closed in June, 1976; that the respondent then had erected barricades at each end of the bridge composed of striped 55-gallon drums with 3 x 10 or 3 x 12 timbers placed across their tops; that the respondent had placed a sign 32 inches high and somewhat wider reading "Bridge Closed" in a position where it faced traffic approaching the bridge, as the claimant had approached it, from W.Va.-U.S. Route 60; that the respondent periodically inspected the barricades and sign, and both were present on September 5, 1976, the date of the last inspection before the accident; that the timbers on the barricades occasionally were moved or removed by unknown third persons; and that the claimant did not see the sign or any part of the barricades as he approached the place where the accident happened that night. These facts fail to establish negligence on the part of the respondent and do establish negligence on the part of the claimant which at least contributed to cause the accident and resulting damage. Accordingly, this claim must be denied.

Claim disallowed.

Opinion issued November 14, 1977

C. H. JAMES & CO., DIVISION
OF JAMES PRODUCE CO., INC.

vs.

DEPARTMENT OF CORRECTIONS

(No. CC-77-148)

Claimant appeared by *Charles H. James, II,* its president.

Frank M. Ellison, Deputy Attorney General, for the respondent.

GARDEN, JUDGE:

On May 18, 1976, and on May 19, 1976, the claimant delivered certain merchandise to respondent's Work/Study Centers located at Charleston and Beckley, respectively. The total cost of this merchandise for which claimant invoiced respondent was $39.91. For some reason, these invoices were not paid prior to the close of fiscal year 1975-76. Respondent, by its Answer, admits the validity of these invoices and this claim, but alleges that there were not sufficient funds remaining at the close of the fiscal year from which these invoices could have been paid. Under these circumstances and in accordance with the reasoning of this Court as expressed in *Airkem Sales and Service v. Department of Mental Health,* 8 Ct. Cl. 180 (1971), we must refuse to make an award.

Claim disallowed.

Opinion issued November 14, 1977

COURT OF CLAIMS
STATE OF WEST VIRGINIA

FRANK DAVIS and BILLY JOE DAVIS, d/b/a DAVIS AUTO PARTS

(Claim No. D-996a)

and

BILLY JOE DAVIS

(Claim No. D-996b)

and

HARTFORD ACCIDENT & INDEMNITY COMPANY and ISHMAEL COLLINS,

(Claim No. CC-76-125)

Claimants,

vs.

DEPARTMENT OF HIGHWAYS,

Respondent.

John Troelstrup, Attorney at Law, for the claimants.

Gregory W. Evers, Attorney at Law, for the respondent.

RULEY, JUDGE:

These three claims all grow out of the same accident and, accordingly, were consolidated. The physical facts in this case are clear. Claimants, Billy Joe Davis and Frank Davis, doing business as Davis Auto Parts in Paintsville, Kentucky, operate a wrecker service. On Friday, June 13, 1975, Bill Joe Davis undertook to tow a large coal truck belonging to Ishmael Collins from Paintsville to Hurricane, West Virginia. At about 2:00 p.m., while travelling toward Charleston on Route I-64 in the outside eastbound traffic lane, Davis' tow truck struck a hole in the surface of a bridge located approximately .8 mile east of milepost 19 on I-64, near the town of Ona. The irregularly shaped hole measured approximately 44 by 48 inches, and, at its location, all of the pavement had dropped out of

the bridge, leaving only the steel reinforcing rods in place. When the right wheels of the vehicle hit the hole, in what must have been a spectacular accident, the tow truck went out of control and dragged the coal truck across the inside eastbound lane, past the bridge, across the median strip, and into the westbound traffic lanes. There the vehicles flipped and separated. The coal truck came to rest on its side in the westbound lanes, and the tow truck flipped over, landing back on its wheels in the median strip. Both trucks were damaged, and Billy Joe Davis sustained personal injuries.

Davis' testimony and pictures taken after the accident establish that Friday the 13th was a clear, dry, sunny day. Davis' testimony and that of John Mullins, driver of the car immediately behind Davis' truck, also establish that Davis was driving carefully and within the speed limit. There were no signs warning approaching motorists about the hole in the pavement. Davis could not have stayed in the outside eastbound lane and avoided the hole, but neither could he have swerved into the inside eastbound lane to avoid it, because Mullins was in the inside lane, beginning to pass Davis.

The claimants allege that the respondent negligently failed to maintain the bridge and negligently allowed the hole to exist in the bridge without repairs or warning to motorists.

Since the landmark case of *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947), it has been established in West Virginia that the State is neither an insurer nor a guarantor of the safety of persons travelling on its roads. See also *Lowe v. Dept. of Highways,* 8 Ct. Cl. 210 (1971). The duty imposed on the Department of Highways is that of "reasonable care and diligence * * * under all circumstances". *Parsons v. State Road Commission,* 8 Ct. Cl. 35 (1969). This Court has more recently stated that the State's duty has been fulfilled "if streets and sidewalks are in a reasonably safe condition for travel in the ordinary modes, by day and night". *Shaffer v. Board of Regents,* 9 Ct. Cl. 213 (1973).

Turning to the case at hand, respondent, in its brief, citing four Opinions of this Court, contends that the State properly performed its duties regarding the bridge on Route I-64, and

was not negligent. This case differs significantly from the cases cited [*Janus v. S.R.C.*, 1 Ct. Cl. 343 (1942); *Harris v. S.R.C.*, 7 Ct. Cl. 189 (1968); *Varner v. Department of Highways*, 8 Ct. Cl. 119 (1970); *Lowe v. Department of Highways*, 8 Ct. Cl. 210 (1971)]. All of those cases involve either falling rocks or placement of guardrails; none involve defects in the road's surface, as does the instant case. All of those cases concern the two-lane, winding sort of highway for which West Virginia is known (described in *Adkins, supra,* as "narrow, with steep grades and sharp curves"); none of them concerns a modern, four-lane, interstate highway such as Route I-64 (unheard-of at the time of the *Adkins* decision). The Department of Highways has a duty to keep such interstate highways reasonably safe for traffic travelling at authorized speeds, and a concomitant duty to make a reasonable and diligent effort to discover and warn motorists of hazards which foreseeably would make such travel dangerous. On a road where the facts, circumstances, or speed limit would dictate a low speed, a hole such as the one in question might not pose a threat to motorists. But such a hole in a bridge on an interstate highway is an extreme hazard for ordinary traffic. In *County Commissioners of Carroll County v. Staubitz,* 231 Md. 209, 190 A.2d 79 (1963), it was stated:

> "Although the standard of reasonable care remains constant, what is reasonable care in a given situation varies with the conditions present on such road or highway. Reasonable care on a busy, often travelled highway requires greater diligence on the part of the county commissioners than that required on a relatively little-travelled road." (citations omitted)

See also *Jenkins v. Maryland,* 25 Md. App. 558, 334 A.2d 549 (1975), *Braswell Motor Freight Lines, Inc. v. Toups,* La. App., 255 So. 2d 155 (1971), and 4 Blashfield Automobile Law and Practice, 3rd edition, §161.9 *"Extent of Liability".*

Does the respondent's failure to repair the hole or warn approaching motorists constitute negligence? This Court stated in *Frazier v. Dept. of Highways,* 9 Ct. Cl. 171 (1972), "It also seems fundamental that an important cross-country highway

such as U.S. Route 60 * * * would be expected to afford safe passage at or near a posted speed limit of 45 miles per hour." And in *Varner, supra,* this Court held that "when the State Road Commission knows or should know that an unusually dangerous condition exists, there is a duty to inspect and correct the condition within the limits of funds appropriated by the Legislature for maintenance purposes". The State was found negligent in *Varner* for failing to correct a known, dangerous condition which caused the rockslide which killed Mrs. Varner. The State has been found negligent for failing to discover and correct a hazard on a bridge which a "casual inspection" would have revealed. *Randall v. Dept. of Highways,* 8 Ct. Cl. 147 (1970). The State also has been found responsible for property damage caused by a landslide attributable to water backed-up behind a plugged drain along a highway, when the evidence revealed that employees of the Department of Highways had patched cracks in the road caused by the same backwater and should, therefore, have done something to correct the condition of the drain. *Olive v. Department of Highways,* 8 Ct. Cl. 148 (1970).

The evidence in this case impels the conclusion that the Department of Highways, in the exercise of ordinary care, should have known of the existence of the hole in the bridge before the accident happened. Mullins attested to its existence as early as 9:30 p.m. the day before the accident happened. In view of the evidence that the interstate highway bridges in the area apparently had required surface repairs several times before the accident, the Department of Highways had an obligation to inspect them with reasonable frequency and care. Four employees of the Department of Highways testified that they drove across the bridge in question between the hours of 9:00 a.m. and 12:30 p.m. the day of the accident. None of them saw the hole in question. The respondent suggests that it should be inferred from the testimony of its employees that the hole came into existence only momentarily before the accident happened, but that seems improbable and would require the Court to disregard the Mullins testimony.

The respondent contends that, even if it were negligent, awards should be precluded by the contributory negligence of

Billy Joe Davis. Davis had not driven over the bridge in three months. Although he knew that other bridges on the interestate were rough and patched, he had negotiated them safely, and certainly had no reason to expect to encounter the large hole in the bridge. He was travelling at 45 mph (his testimony) or 50 mph (Mullins), below the speed limit. He saw the hole 30 or 40 feet before he hit it, couldn't swerve to the left to avoid it because Mullins was about to pass him, and had no choice but to drive over the hole. After giving the issue due consideration, this Court cannot conclude that Davis was guilty of contributory negligence. To the contrary, it appears that the respondent's negligence was the sole cause of the accident, and, accordingly, the issue of liability must be resolved in favor of the claimants.

Turning to the issue of damages, the claimants, Frank Davis and Billy Joe Davis, doing business as Davis Auto Parts, have asserted a claim in the sum of $66,000.00 attributable to damage to the 1969 Ford model 950 wrecker truck which was owned by them. Although both claimants testified that the wrecker truck was a total loss (and there was no evidence to the contrary), it was rebuilt by Frank Davis, who worked on it part-time for approximately one year. Frank Davis testified that it could have been rebuilt in three months if he had worked on it 40 hours per week. Included in this claim are items for the cost of repair of the truck, loss of use of the truck, loss of a large quantity of tools which it was claimed were in the truck at the time of the accident and apparently were carried away by unknown third persons, and a towing charge in the sum of $325.00 for moving the wrecker truck from Hurricane back to Paintsville. The undisputed evidence is that the fair market value of the wrecker truck was $35,000.00 immediately before the accident and $10,000.00 immediately after the accident, the difference being the sum of $25,000.00, but that the cost of repair was $18,800.00, viz., $14,000.00 for parts and materials and $4,800.00 for labor. In *Cato v. Silling,* 137 W.Va. 694, 73 S.E.2d 731 (1952), Syl. 7, the general rule is stated as follows:

> "[T]he proper measure of damages for injury to personal property is the difference between the fair market value

of the property immediately before the injury and the fair market value immediately after the injury, plus necessary reasonable expenses incurred by the owner in connection with the injury. When, however, injured personal property can be restored by repairs to the condition which existed before the injury and the cost of such repairs is less than the diminution of the market value due to the injury, the measure of damages may be the amount required to restore such property to its previous condition."

Accordingly, the award to these claimants should include the cost of repair in the sum of $18,800.00 plus the towing charge of $325.00. It appears from the evidence and under applicable law that the award should also include some reasonable sum for loss of use of the wrecker truck. See *Jarrett v. E. L. Harper & Son, Inc.*, ____ W.Va. ____, 235 S.E.2d 362 (1977). A tortfeasor "is held responsible for all the consequences of his negligent act which are natural and probable". *Ohio-West Virginia Co. v. Chesapeake and Ohio Railway Co.*, 97 W.Va. 61, 124 S.E. 587 (1924). See also *Stewart v. Pollack-Forsch Co.*, 105 W.Va. 453, 143 S.E. 98 (1928). The respondent's negligence certainly caused these claimants to lose the use of the wrecking truck, and the claimants deserve an award for loss of use for a period of time reasonably required to effect repairs on the truck. The proof offered for determining damages due to loss of use consisted of Davis Auto Parts' records for receipts from their wrecker operations covering the period from 18 months before the accident to a date two years after the accident. Those records showed that, before the accident, Davis Auto Parts' three wreckers (the large one damaged in this accident and two smaller ones) produced an average gross income of $1,786.00 per month; during the time the truck was under repair, wrecker income averaged only $445.00, a difference of $1,341.00 per month. Testimony regarding the expenses of operating the large wrecker included a definite figure of $60.00 per month for gasoline, with no definite proof of the cost of oil, tries, or any maintenance, which the Davis brothers did themselves. A loss of profit, when not awarded, is generally excluded because "there are no criteria by which

their amount can be ascertained with reasonable certainty or definiteness." *Stewart v. Pollack-Forsch Co., supra.* Thus, prospective profits of a new business (*Ohio-W.Va. Coal Co. v. Chesapeake and Ohio Railway Co., supra; Shatzer v. Freeport Coal,* 144 W.Va. 178, 107 S.E.2d 503 [1959]; *Whitehead v. Cape Henry Syndicate,* 69 S.E. 263 [Va., 1910]) or losses due to a reduction of public confidence (*Ohio-W.Va. Coal Co., supra*) are generally denied as too speculative or conjectural. But if a business is well established, as Davis Auto Parts was, damages may be awarded for loss of profits. *Whitehead, supra.* In addition, "Uncertainty as to amount of the damages does not prevent a recovery, if the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty [citations omitted]." *Haddad v. Western Contracting,* 76 F. Supp. 987 (N.D.W.Va., 1948). While the evidence in this case as to loss of use is not as definite as might be desired, we do not believe that it is so uncertain that recovery should be denied. It is our opinion, based upon the evidence, that damages for loss of use for a period of three months is reasonable and that the sum of $2,000.00 would be a fair and just compensation for that loss of use. Inasmuch as the larceny of the tools could not have been a foreseeable consequence of the respondent's negligence, no recovery for that item can be allowed. From the foregoing, it is apparent that the total award to the claimants, Frank Davis and Billy Joe Davis, doing business as Davis Auto Parts, should be the sum of $21,125.00.

Billy Joe Davis, who was 27 years of age when these claims were heard on December 7, 1976, has asserted an individual claim in the sum of $10,500.00 for personal injuries which he sustained in the accident and for loss of a wrist watch. The only evidence respecting the value of the wirst watch, which was damaged beyond repair, was that its cost on December 18, 1974, was $131.25. Respecting his personal injuries, there was evidence that he sustained cuts and bruises, a fracture of his skull, and a fracture of his twelfth thoracic vertebra. There was no evidence whatsoever concerning the extent or severity of either of the fractures, but there was evidence that, for some time after the accident, Billy Joe suffered from headaches

and vertigo. Although he testified that he saw a doctor two or three times after the accident for treatment of injuries related to it, the only evidence of medical expense incurred is an item of $50.00 for an x-ray on June 14, 1975, an item of $35.00 for an x-ray on June 16, 1975, and a charge in the sum of $25.00 by E. E. Musgrave, M.D., for an office visit. The evidence of Joseph P. Seltzer, M.D., who performed a complete orthopaedic and neurological examination upon the claimant on behalf of the respondent on November 29, 1976, was that, as of that date, he had made a complete recovery without any permanent residuals. In view of these circumstances, it appears that an award in the sum of $750.00 will compensate the claimant, Billy Joe Davis, for the personal injuries and damages which he sustained.

The claimants, Hartford Accident & Indemnity Company and Ishmael Collins, the collision insurer and owner, respectively, of the 1974 model Brockway coal truck, have asserted a claim in the sum of $26,667.95 for damage to it. The undisputed evidence is that the damage to the coal truck rendered it a total loss. It appears that the claim which is asserted is made up of the sum of $26,167.95 paid by Hartford to Collins (and to which Hartford thereupon became subrogated) and the sum of $500.00 representing Collins' deductible portion of his collision insurance. Although there was some confusion about the matter in the evidence, it appears from the evidence that the fair market value of the coal truck immediately before the accident was $24,550.00 and that it was sold for salvage subsequent to the accident for the sum of $2,723.50. Accordingly, an award in the sum of $21,826.50 should be made to these claimants.

Award of $21,125.00 to claimants, Frank Davis and Billy Joe Davis, doing business as Davis Auto Parts.

Award of $750.00 to claimant, Billy Joe Davis.

Award of $21,826.50 to claimants, Hartford Accident & Indemnity Company and Ishmael Collins.

Opinion issued December 6, 1977

KERMIT REED HUBBS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-83)

Claimant appeared in person.

Richard Carlton, Attorney at Law, for respondent.

GARDEN, JUDGE:

The claimant is the owner of a farm located on Shepherd's Ridge, a rural area in Marshall County, eight miles from the City of Moundsville, West Virginia. This farm is bisected by a secondary road which is maintained by respondent. The farm fronts on both sides of this secondary road for a distance of about one-half mile. The claimant kept cattle on the farm; consequently, his property on both sides of the road was fenced. The claimant did not live on the farm but did visit it daily for the purpose of feeding his cattle.

During the month of January, 1977, this area of Marshall County, as was true in other areas in West Virginia, received a very large accumulation of snow as the result of three or four severe snowstorms. As a matter of fact, the snow on the road and property of the claimant in some areas was as deep as 12 feet. As a result, the respondent's regular road crews did not have the necessary manpower to clear the roads in Marshall County, and thus the Office of Emergency Services directed the National Guard to assist the respondent in clearing the roads of snow.

The claimant testified that employees of respondent had removed snow from the road on three or four occasions prior to the day in January when members of the National Guard started their removal operations. Claimant was present at the farm when the National Guard was attempting to remove the snow, and he requested that they not push the snow from the road directly into his fence line, but rather, that they push the snow up and down the road and through a small break in the fence line that had been made previously by employees

of respondent. The members of the National Guard refused to comply with claimant's request, and as a result, a large length of the fence line was destroyed, including some 65 fence posts and a 14-foot wooden gate. The claimant repaired this damage, and the cost of the necessary material and labor amountd to $435.90.

One of the basic statutory responsibilities imposed on the West Virginia Commissioner of Highways is the maintenance of the roads and highways of this State. (See Code 17-2A-8.) Certainly included within the term "maintenance" would be the responsibility for snow removal to make the highways safe and passable for motorists, and we are of the opinion that this duty is nondelegable and nonassignable.

The respondent was not directing or supervising the activities of the National Guard. This is the basis for respondent's contention that the National Guard was an independent contractor and that respondent is therefore not responsible for the negligence of the members of the National Guard. We agree that the National Guard occupied the position of an independent contractor, but the general rule of nonliability is subject to certain well-defined exceptions, such as where the undertaking is particularly hazardous, where the employer interferes with the conduct of the work, where the injury is the direct or natural result of the work, or *where the law imposes a special duty.* (Emphasis supplied) See *Chenoweth v. Settle Engineers, Inc.,* 151 W.Va. 830, 156 S.E. 2d, 297 (1967). While the ends attained as the result of snow removal are most salutary, we are of the opinion that the respondent cannot escape liability by attempting to delegate the performance of this special duty to third parties.

Being of the opinion that the members of the National Guard performed their work in a negligent manner, and that, as a proximate result of such negligence, the claimant sustained damages, we hereby make an award in favor of the claimant in the amount of $435.90.

Award of $435.90.

Opinion issued December 8, 1977

DARRELL E. BUCKNER & BETTY S. BUCKNER

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-129)

Claimants appeared in person.

Richard Carlton, Attorney at Law, for respondent.

PER CURIAM:

The parties in this claim filed a written stipulation which revealed that, on March 24, 1977, the claimant, Betty S. Buckner, was driving their vehicle on Secondary Route 60/12 in the vicinity of Belle in Kanawha County; that respondent had negligently allowed a hole to remain in the road which was covered with water on the date of the accident; and that claimant, Betty S. Buckner, without fault on her part, struck the hole and damaged their vehicle in the amount of $63.46, which sum is a fair and equitable estimate of the damage sustained. Based on the foregoing, an award in the above amount is hereby made to the claimants.

Award of $63.46.

Opinion issued December 8, 1977

CLYDE W. CUMMINGS & BETTY L. CUMMINGS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-102)

Clyde W. Cummings appeared in person.

Richard Carlton, Attorney at Law, for respondent.

GARDEN, JUDGE:

As a result of heavy snows during the months of January and February, 1977, and because respondent's snow removal equip-

ment was insufficient, the respondent, through special purchase orders, which were introduced into evidence, rented from L. C. Coal Company of Kingwood, two endloaders, two 4-wheel drive pickups, one mechanic's truck (all with operators), and one base control system. During the evening of February 4, 1977, while engaged in snow removal on Secondary Route 112 in Preston County, one of the above-mentioned endloaders, for reasons not clearly explained, left the right-of-way of the road, broke through claimants' fence, and went over the hill some 200-250 feet into the claimants' farm. At the time of the incident, the endloader was being operated by an employee of L. C. Coal Company, and apparently, no representatives of respondent were in the area.

The operator of the endloader was unable to extricate the endloader from claimants' property, and, as a result, L. C. Coal Company hired an independent bulldozer operator who bulldozed a road through claimants' property which was then used as a means of egress by the bulldozer and the endloader. In the process of bulldozing the road, a considerable number of valuable trees of the claimants were destroyed. Three competitive estimates, for repairing the fence, restoring the claimants' property to its former condition, and including the value of the trees, were introduced into evidence, the lowest being in the amount of $1,030.00.

Certainly the failure of the endloader operator to confine his activities within the right-of-way of the road constituted negligence, and for the reasons expressed by the Court in the recently decided claim of *Hubbs v. Department of Highways,* Claim No. CC-77-83, we hereby make an award in favor of the claimants in the amount of $1,030.00.

Award of $1,030.00.

Opinion issued December 8, 1977

DEPARTMENT OF HIGHWAYS

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. CC-77-65)

Hershel R. Hark, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

GARDEN, JUDGE:

This claim was submitted for decision on the pleadings which consisted of claimant's Notice of Claim and respondent's Amended Answer. From these pleadings it would appear that in June of 1976, the claimants sold and delivered a quantity of heating oil to respondent's Huttonsville Correctional Center, and on June 30, 1976, claimant invoiced respondent for the cost thereof in the amount of $3,040.00. Claimant seeks an award for the amount of the invoice and, in addition, interest thereon from June 14, 1976, the date of delivery of the last shipment of oil to respondent.

In respect to the interest claimed, the record fails to disclose the existence of any contract between the parties specifically providing for the payment of interest; thus, pursuant to Code 14-2-12, we are precluded from giving consideration thereto. Further, the respondent's Amended Answer alleged that no funds were remaining in its appropriation at the close of fiscal year 1975-76 from which this claim could have been paid, and we must therefore refuse to make an award on the basis of our decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct. Cl. 180 (1971).

Claim disallowed.

Opinion issued December 8, 1977

ROBERT M. HASTINGS & LINDA HASTINGS,
d/b/a HASTINGS STABLES

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-94)

Claimants appeared in person.

Richard Carlton, Attorney at Law, for respondent.

GARDEN, JUDGE:

The claimants are the owners of property which fronts on the Old Kingwood Pike in Monongalia County. On this property they maintain a small stable where they board horses. They also use part of the property as a pasture field which was fenced prior to the severe winter of 1976-77. Claimants testifield that, during the winter, employees of respondent, in conducting snow plowing operations, damaged a .2 mile-long section of the pasture field fence fronting on the Old Kingwood Pike. Claimants contend that as a result of this damage, they have been unable to turn horses out in this pasture, and their business has suffered, although no evidence of the amount of such loss was introduced into evidence.

Robert M. Hastings testified that on one occasion during the winter, he observed respondent's equipment being used to clear snow from Old Kingwood Pike at its intersection with Greenbag Road. On that occasion, the respondent's employees were pushing all of the snow over and against the subject fence line, and the claimant observed a grader on top of the drifting snow actually breaking the top off of the fence posts. Mr. Hastings was of the opinion that the weight of the snow being pushed into and on top of the fence was the reason for the fence line's being damaged.

Linda Hastings testified that she observed respondent's equipment during the winter working in the fence line area of the road clearing snow, and that she never observed anyone else such as the National Guard or other independent parties

engaged in snow removal. She testified further that, in order to repair the fence, she and her husband would have to purchase 110 locust posts at $1.50 each and 8 rolls of 12½ gauge barbed wire at $25.00 per roll, for a total expense of $365.00.

Fred Siegworth, a general foreman of respondent, testified that he was familiar with the road situation in the subject area during the winter of 1976-77, and that the respondent had contracted with one Raymond Dalton to plow Old Kingwood Pike, and that Dalton furnished his own equipment and men. However, he did not testify that employees of respondent were never engaged in plowing operations during the winter on Old Kingwood Pike.

Whether the damage to the claimants' fence was caused by employees of the respondent or by employees of Raymond Dalton, in our opinion, is not material; the damage resulted from negligent conduct, and in accordance with our reasoning set forth in the recently decided claim of *Hubbs v. Department of Highways,* Claim No. CC-77-83, we hereby make an award in favor of the claimants in the amount of $365.00.

Award of $365.00.

Opinion issued December 8, 1977

PFIZER CORPORATION,
ROERIG DIVISION

vs.

DEPARTMENT OF HEALTH,
DIVISION OF MENTAL HEALTH

(No. CC-77-104)

Daniel L. Lynch appeared on behalf of claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

GARDEN, JUDGE:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer. In April of 1976, the respondent's Spencer State Hospital placed

an order with claimant for 160 bottles of Navane Oral Concentrate at a cost of $638.40, as reflected in the 1976-77 West Virginia Drug Contract Book. The order was delivered to the Spencer State Hospital, and claimant invoiced respondent for $1,246.40. Respondent paid claimant only $638.40 in accordance with the price as listed in the Drug Contract Book, and in this claim, the claimant now seeks an award of $608.00, the difference between the invoice price and the amount paid.

It developed that a mistake had been made in the Drug Contract Book in respect to a 160-bottle order. The Drug Contract Book also listed the cost of one bottle of Navane as $14.51, and the cost of a 32-bottle order as $348.16. The mistake becomes apparent when one realizes that the cost per bottle in a 160-bottle order is only $3.99, compared to a $10.88 cost per bottle in a 32-bottle order and a single-bottle order cost of $14.51.

In its Answer, the respondent admits that it ordered, received, and used the 160 bottles of Navane, and that a pricing mistake had been made in the Drug Contract Book. The pricing mistake was not discovered until after the close of fiscal year 1976-77, and the respondent alleges that there were not sufficient funds remaining in respondent's appropriation at the close of the fiscal year from which the claim could have been paid.

While we feel that this is a claim which in equity and good conscience should be paid, we are of further opinion that an award cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct. Cl. 180 (1971).

Claim disallowed.

Opinion issued December 12, 1977

DAVID E. ALVIS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-62)

No appearance by claimant.

Gregory W. Evers, Attorney at Law, for respondent.

PER CURIAM:

The claimant and the respondent have stipulated that on or about February 12, 1977, at approximately 7:45 p.m., the claimant was operating his automobile in the westbound lane of W.Va. Route 33 two miles west of Spencer, West Virginia. It was dark and a light rain was falling. The claimant's automobile struck a hole in the westbound lane which was full of water and obscured from view. It was further stipulated that the respondent had patched the hole three times within one week of claimant's accident, but the patch continued to "boil" out. There were no warning signs or barricades. As a result of the accident, the right rear wheel and radial tire of claimant's vehicle were damaged, and $99.85 is a fair and equitable estimate of the damages sustained by the claimant. Believing that liability exists on the part of the respondent and that the damages are reasonable, the Court hereby makes an award of $99.85 to the claimant.

Award of $99.85.

Opinion issued December 12, 1977

SANDRA S. CLEMENTE

VS.

DEPARTMENT OF MOTOR VEHICLES

(No. CC-77-167)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

The claimant, Sandra S. Clemente, filed this claim requesting a refund of the 5% tax paid to the respondent as a result of the purchase of a secondhand car from Rogers Motor Sales in Parkersburg, West Virginia. The claimant was not satisfied with the automobile, and the dealer refunded her money.

It is the opinion of this Court that, since by mutual agreement between the parties the sale was nullified and the claimant's money refunded, the tax paid in the amount of $73.75 should be refunded to the claimant. Accordingly, an award in the sum of $73.75 should be, and is hereby, made.

Award of $73.75.

Opinion issued December 12, 1977

GEORGE M. CUSTER

VS.

DEPARTMENT OF MOTOR VEHICLES

(No. CC-77-86)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

This claim is for a refund of the 5% tax paid to the respondent as a result of the claimant's purchase of an automobile. The claimant, George M. Custer, of Wheeling, West Virginia, purchased a 1977 Oldsmobile Delta 88 automobile from Bob's Chevrolet, Inc. in Barnesville, Ohio. He paid the West Virginia

Department of Motor Vehicles, through the Wheeling Automobile Club, the sum of $302.00, representing the 5% tax on the automobile purchased and a $2.00 title fee. It was later determined that the automobile was equipped with a Chevrolet engine. The dealer was unable to replace the engine or the automobile. The claimant's money was refunded and the automobile transferred to the dealer.

It is the opinion of the Court that in equity and good conscience, since the parties nullified the transaction, the tax paid should be refunded. The title to the automobile was assigned to the dealer. The title fee should not be returned. Accordingly, an award in the sum of $300.00 should be, and is hereby, made.

Award of $300.00.

Opinion issued December 12, 1977

DIRECT MAIL SERVICE COMPANY

vs.

BOARD OF REGENTS

(No. CC-77-151)

No appearance by claimant.

Frank M. Ellison, Deputy Attorney General, for respondent.

PER CURIAM:

The claimant, Direct Mail Service Company, filed its claim in the amount of $750.00 against the respondent for design and art work for brochures furnished Southern West Virginia Community College at Logan, West Virginia. The respondent filed its Answer admitting liability and recommending payment of the claim. The Answer admitted that the services were ordered and received by the respondent, that the funds were available, and that the claimant was not paid due to the fault of the respondent in not timely processing the claimant's invoice. Therefore, it is the opinion of the Court on the basis of the pleadings that the claim in the amount of $750.00 should be allowed.

Award of $750.00.

Opinion issued December 12, 1977

PAULINE E. FLAHERTY

vs.

DEPARTMENT OF FINANCE & ADMINISTRATION

(No. CC-77-89)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

GARDEN, JUDGE:

The claimant, a self-employed practical nurse from Wheeling, had traveled to Charleston to attend Governor Rockefeller's Inauguration on January 17, 1977. As any who were in attendance can attest, the weather was extremely cold, and most of the grounds outside the Capitol complex were covered with a sheet of ice. The claimant was apparently working her way up to the speaker's stand and was on a sidewalk which she described as being a glare of ice with people sliding everywhere. She was wearing leather, ribbed-soled boots without heels. She testified that she was not pushed or jostled but simply slipped on the ice which she recognized as being slippery and dangerous. In any event, this slippery condition caused her to fall, and, as a result, she suffered a fracture near the head of the humerus of her right arm.

She received emergency treatment at the Capitol Dispensary and was thereafter taken to Thomas Memorial Hospital where the fracture was diagnosed and where her arm was immobilized. Despite her injury, the claimant was of sufficient fortitude to return to the Capitol that evening, and she did attend the reception and dance in honor of Governor Rockefeller. She returned to Wheeling where she continued to receive medical treatment. At the time of the hearing in October, 1977, she testified that she had made a good recovery, but still was periodically required to obtain a cortisone injection in her right shoulder. Mrs. Flaherty testified that her out-of-pocket expenses resulting from her fall were in the amount of $646.00. Included in that amount was a $260.00 wage loss and an expense of $100.00 for hiring a third party to drive her invalid

husband to the hospital and doctor's office. The balance represented her actual medical expenses.

Falling and sustaining a personal injury is always a most traumatic and painful experience, particularly when a person is many miles from home, and we have the greatest sympathy for the claimant, but, even assuming that the respondent was guilty of negligence in failing to exercise ordinary care to keep the Capitol grounds in a reasonably safe condition, we must conclude that the claimant is barred from recovering by virtue of the doctrine of assumption of risk. The law is clear that where a dangerous condition is created by one party and such dangerous condition is recognized as such by another party who nevertheless exposes himself to such condition and is injured as a result, the injured party is barred from recovery from the party who created such dangerous condition. We must, therefore, reluctantly refuse to make an award to claimant.

Claim disallowed.

Opinion issued December 12, 1977

TIMOTHY J. GRIMMETT

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-147)

No appearance by claimant.

Richard Carlton, Attorney at Law, for respondent.

PER CURIAM:

By written stipulation filed with the Court, the claimant and the respondent stipulated that on or about August 3, 1977, the respondent was repairing holes in the floor of the Montgomery Bridge, Bridge No. 10-6-0.12, located at Montgomery, West Virginia, in Kanawha County. It was further stipulated that the claimant was driving his truck across the bridge and struck a hole over which sheet metal had been inadequately placed. The claimant's vehicle sustained damage in the amount of $271.44.

The Court, being of the opinion that liability exists on the part of the respondent and that the damages are reasonable, hereby makes an award of $271.44 to the claimant.

Award of $271.44.

Opinion issued December 12, 1977

MICHAEL J. HART

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-124)

No appearance by claimant.

Richard Carlton, Attorney at Law, for respondent.

PER CURIAM:

The claimant and the respondent filed a written stipulation with the Court in which the parties stipulated that the respondent, on June 28, 1977, was making certain maintenance repairs utilizing welding rods on the Williamstown Bridge on W.Va. Route 14 at Williamstown, Wood County, West Virginia. It was further stipulated that the respondent's employees left pieces of welding rod material on the bridge after completing the day's work. At or about 6:00 p.m. the same day, the claimant's motorcycle tire and tube were punctured by a piece of welding rod material as he was proceeding across the bridge, sustaining damage in the amount of $46.49.

The Court, believing that liability exists on the part of the respondent and that the damages are reasonable, hereby makes an award of $46.49 to the claimant.

Award of $46.49.

Opinion issued December 12, 1977

THEODORE KORTHALS
& EMILE KORTHALS

vs.

DEPARTMENT OF HIGHWAYS

(No. D-1041)

No appearance by claimants.

Richard Carlton, Attorney at Law, for respondent.

PER CURIAM:

By written stipulation entered into by the claimants and the respondent and filed with the Court, it was stipulated that the claimants own property at #2 Cecil Place, in Wheeling, Ohio County, West Virginia. The right-of-way fence of Interstate 70 is located along the rear boundary line of claimants' property. It was further stipulated that in the summer of 1975, the respondent sprayed a weed killer known as Hyvar X-L along its right-of-way fence adjacent to claimants' property, knowing that Hyvar X-L killed weeds and plants by being absorbed into the soil and the roots of weeds and plants. As a result, at least 19 trees and 3 shrubs at the rear of claimants' property died or were damaged in the amount of $3,500.00. On the basis of the above, and from the exhibits filed with the stipulation that the damages are reasonable, the Court believes that liability exists, and hereby directs an award to the claimants in the amount of $3,500.00.

Award of $3,500.00.

Opinion issued December 12, 1977

JOHN LAVENDER, JR.

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-85)

Claimant appeared in person.

James W. Withrow, Attorney at Law, for respondent.

WALLACE, JUDGE:

This claim in the amount of $186.44 was filed by John Lavender, Jr. and his daughter, Tammy Sue Lavender, for damages to a 1976 MG Midget automobile owned by the claimant, John Lavender, Jr. Since the damaged automobile was owned by the claimant, John Lavender, Jr., respondent's motion to designate him the sole claimant was sustained.

The evidence revealed that in the early part of April, 1977, Tammy Sue Lavender was driving the claimant's automobile on W.Va. Route 61 in East Bank, West Virginia. It was dark, and the weather was clear. The road was blacktopped. Tammy Sue Lavender testified that she was driving approximately 30-35 miles per hour. She stated that she had driven the road previously going to and from school, but had turned off the road before reaching the point of the accident. She further stated that she proceeded over a hill, and as she entered into a curve, the automobile struck "chug holes" in the pavement. Due to the approach of an oncoming automobile, she was unable to miss them. The claimant, who later went to the scene of the accident to assist his daughter, had no trouble because he was familiar with the highway and was driving a bigger automobile.

To establish negligence on the part of the respondent, there must be proof that the respondent either knew, or, in the exercise of ordinary care, should have known about the defects in the highway. Although apparent defects existed, there is no showing that the respondent had knowledge of the holes, or, if it did, that the holes were of such magnitude as to put respondent on notice of the possibility of an accident.

The law of West Virginia is well established that the State is not a guarantor of the safety of travelers on its roads. *Parsons v. State Road Comm'n.*, 8 Ct. Cl. 35. The case of *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 held:

> ". . . the user of the highways travels at his own risk and that the State does not and cannot assure him a safe journey. . ."

From the record in this case, the Court is of the opinion that the claimant has not proved such negligence on the part of the respondent as to establish liability. Accordingly, the Court is of the opinion to, and does, disallow the claim.

Claim disallowed.

Opinion issued December 12, 1977

HUGH C. MAYFIELD

VS.

DEPARTMENT OF HIGHWAYS

(No. CC-77-118)

Claimant appeared in person.

Richard Carlton, Attorney at Law, for respondent.

GARDEN, JUDGE:

On a weekend in February, 1977, during the height of a series of critical snowstorms in Preston County, members of the National Guard were attempting to plow Secondary Route 7/13 in the area of the claimant's 400-acre farm. In the course of this plowing operation, done with a bulldozer, the boom on the claimant's 33-A power loader was struck by the bulldozer and was damaged to the extent that it was rendered irreparable. The evidence disclosed that the width of the right-of-way of Secondary Route 7/13 at and near claimant's farm was 30 feet and that the power loader was located some 22 feet from the center of the road, or at least 7 feet from the right-of-way, clearly located on claimant's property.

The claimant testified that, during a weekend morning in February, 1977, a bulldozer operator had pushed snow from the road onto his property, and as a result, had covered the power loader with snow. Operators on the bulldozer were then switched, and the new operator, being unaware of the presence of the power loader, struck the boom while continuing the snow removal operation. Obviously, when this occurred, the operator was at least 7 feet from the edge of respondent's right-of-way. While there was a conflict in the evidence as to whether agents of respondent were supervising the operation of the bulldozer, it was agreed that agents of respondent were generally instructing the National Guard as to which roads in Preston County the latter should devote their snow removal operations.

In line with our reasoning in the recently decided claim of *Hubbs v. Department of Highways,* Claim No. CC-77-83, we believe that liability for this damage must rest with the responent. Claimant testified that when the damage occurred, the cost of a new boom for the power loader was $400.00, and we therefore make an award to claimant in that amount.

Award of $400.00.

Opinion issued December 12, 1977

PHYLLIS J. RUTLEDGE, CIRCUIT CLERK
OF KANAWHA COUNTY, W.VA.

vs.

OFFICE OF THE STATE AUDITOR

(No. CC-77-77)

No appearance by claimant.

Gregory W. Bailey, Assistant Attorney General, for respondent.

PER CURIAM:

The claimant, Phyllis J. Rutledge, Circuit Clerk of Kanawha County, West Virginia, filed a claim in the amount of $314.00,

representing the fees incident to instituting the suit of State of W.Va. vs. AAA Building, Inc., et al. The Answer filed by the respondent admits the validity of the claim and that there were sufficient funds for the fiscal year in question from which the claim could have been paid, but it was not paid due to an oversight. Therefore, it is the opinion of the Court, on the basis of the pleadings, that this claim in the amount of $314.00 should be allowed.

Award of $314.00.

Opinion issued December 22, 1977

RAYMOND N. BELMONT

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-84)

Raymond N. Belmont, the claimant, in person.

James W. Withrow, Attorney at Law, for the respondent.

PER CURIAM:

Upon stipulation of the parties to the effect that employees of the respondent, while directing traffic, negligently instructed the claimant to proceed across a road onto which respondent's employees had just dumped a substance known as "reddog"; that those instructions, when followed by the claimant, caused the claimant to receive two flat tires on his vehicle; and that $80.00 is a fair and equitable estimate of the value of those damages, an award in that amount should be, and is hereby, made.

Award of $80.00.

Opinion issued December 22, 1977

CECIL E. JACKSON EQUIPMENT, INC.

vs.

DEPARTMENT OF CORRECTIONS

(No. CC-77-97)

Jack Turney, Attorney at Law, for the claimant.

Henry C. Bias, Jr., Deputy Attorney General, for the respondent.

RULEY, JUDGE:

This claim was submitted upon the pleadings by agreement of the parties. In its Amended Answer, the respondent admits the validity of the claim and represents to the Court that sufficient funds remained in the respondent's budget from which the claim could have been paid. Accordingly, the claimant's request for $415.24 in payment for goods sold and delivered is granted.

Award of $415.24.

Opinion issued December 22, 1977

VIRGINIA SUE COOK

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-144)

Virginia Sue Cook, the claimant, in person.

Gregory W. Evers, Attorney at Law, for the respondent.

RULEY, JUDGE:

Upon stipulation of the parties to the effect that, on the 13th of July, 1977, an employee of the respondent, while removing debris from a right of way, negligently threw a rock against the claimant's vehicle, breaking the windshield, and that the claimant's vehicle thereby was damaged in the amount of $112.27, an award in that amount should be, and is hereby, made.

Award of $112.27.

Opinion issued December 22, 1977

JOHN F. CUMMINGS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-77)

John F. Cummings, the claimant, in person.

Richard Carlton, Attorney at Law, for the respondent.

RULEY, JUDGE:

On Thursday evening, June 17, 1976, an automobile owned by the claimant and operated by the claimant's wife struck a hole in the inside, eastbound lane of Route I-70 between the Wheeling Tunnel and the Elby off-ramp, sustaining damage for which the claimant seeks $120.90.

This accident involves the same pothole which was involved in the case of *Hoskins v. Department of Highways,* 12 Ct. Cl 60 (1977). That case is controlling. The evidence clearly indicates that the hole appeared suddenly and without warning. Proof of actual or constructive notice is a prerequisite to establishing negligence on the part of the respondent. *Davis v. Department of Highways,* 12 Ct. Cl. 31 (1977); *Hoskins, supra.* Respondent did not have notice of this particular hole in the road in time to take action to prevent this accident. Since negligence is, therefore, not shown, and since the State is neither an insurer nor a guarantor of the safety of motorists on its highways (*Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 [1947]), this claim must be denied.

Claim disallowed.

Opinion issued December 22, 1977

PATRICIA S. HOSKINS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-79)

Patricia S. Hoskins, the claimant, in person.

Nancy J. Norman, Attorney at Law, for the respondent.

RULEY, JUDGE:

On Thursday evening, June 17, 1976, an automobile driven by the claimant struck a large hole in the inside, eastbound lane of Route I-70, just beyond the Wheeling Tunnel. The claimant alleges that respondent's negligence caused the resulting damage to her vehicle, and seeks an award in the amount of $181.75.

Although this case closely resembles *Davis Auto Parts v. Department of Highways,* 12 Ct. Cl. 31 (1977), one essential element of proof in *Davis* is not present in this case. In *Davis,* the evidence indicated that the defect in Route I-64 had been present for at least 15 hours prior to that accident; in this case, the hole apparently came into existence within an hour of the accident. Although the respondent's duty of "reasonable care and diligence in the maintenance of a highway under all the circumstances" (*Parsons v. State Road Commission,* 8 Ct. Cl. 37 [1969]) may require respondent to put greater effort into the maintenance of superhighways than in the maintenance of lesser-travelled country roads (*Davis, supra,* and *Bartz v. Department of Highways,* 10 Ct. Cl. 170 [1975]), proof of actual or constructive notice is required in all cases. *Davis, supra, Lowe v. Department of Highways,* 8 Ct.Cl. 210 (1971), *Varner v. Department of Highways,* 8 Ct. Cl. 119 (1970). Such proof, found in *Davis,* cannot be found in the record in this case. To the contrary, the evidence indicates that the dangerous condition appeared suddenly, and that the respondent promptly moved to take safety precautions as soon as it became aware of the problem. Since negligence is not proved, and since *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947), holds

that the State is neither an insurer nor a guarantor of the safety of motorists on its highways, this claim must be denied.

Claim disallowed.

Opinion issued December 22, 1977

DANIEL LEWIS LIGHT

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-53)

Daniel Lewis Light, the claimant, in person.

Richard Carlton, Attorney at Law, for the respondent.

RULEY, JUDGE:

In late March, 1977, an automobile owned and operated by the claimant struck a pothole on Route 19 between Morgantown and Westover, bending the rim of the right front wheel, causing a flat tire, breaking a shock absorber, and knocking the front end out of alignment, for which the claimant seeks $131.00 in damages.

The State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For negligence of the Department of Highways to be shown, proof that the respondent had actual or constructive notice of the defect in the road is required. *Davis Auto Parts v. Department of Highways,* 12 Ct. Cl. 31 (1977); *Lowe v. Department of Highways,* 8 Ct. Cl. 210 (1971); *Varner v. Department of Highways,* 8 Ct. Cl. 119 (1970). There is no evidence in the record of any notice to the respondent, and the simple existence of a defect in the road does not establish negligence per se. See *Bodo v. Department of Highways,* 11 Ct. Cl. 179 (1977), and *Rice v. Department of Highways,* 12 Ct. Cl. 12 (1977). This claim must be denied.

Claim disallowed.

Opinion issued December 22, 1977

ANNA JANE PHILLIPS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-131)

Anna Jane Phillips, the claimant, in person.

Richard Carlton, Attorney at Law, for the respondent.

PER CURIAM:

Upon stipulation of the parties to the effect that a flagman, employee of the respondent, directed the claimant to drive her automobile around a repair site and between an asphalt truck and a barricade; that claimant objected, contending that the gap was too small to accommodate her vehicle; that the flagman, over her objections, negligently caused her to proceed; that the claimant's car then came into contact with the barricade, damaging the vehicle; and that the amount of $82.40 represents full and fair compensation to the claimant for the damages, an award in that amount should be, and is hereby, made.

Award of $82.40.

Opinion issued December 22, 1977

S. B. WALLACE & COMPANY

vs.

DEPARTMENT OF CORRECTIONS

(No. CC-77-119)

S. B. Wallace & Company, a corporation, the claimant, by *Lee A. Smith,* President.

Frank M. Ellison, Deputy Attorney General, for the respondent.

RULEY, JUDGE:

This claim was submitted upon the pleadings by agreement of the parties. The respondent admits in its Answer that four

invoices or bills for goods sent by claimant to the respondent represent valid claims in the total amount of $157.49, and that funds were available in respondent's budget to pay for those goods. The claim for the fifth invoice, in the amount of $8.24, is barred by the five-year statute of limitations set forth in West Virginia Code §55-2-1. Accordingly, an award in the amount of $157.49 should be, and is hereby, made.

Award of $157.49.

Opinion issued December 22, 1977

MARIE T. SADD

vs.

DEPARTMENT OF HIGHWAYS

No. CC-77-36)

Marie T. Sadd, the claimant, in person.

James W. Withrow, Attorney at Law, for the respondent.

RULEY, JUDGE:

On Monday, February 28, 1977, while travelling north on Route 62 past the Route 34 intersection, the claimant drove her automobile off her right-hand side of the pavement of the highway into a ditch, damaging the vehicle. The claimant alleges that the accident was caused by the allegedly negligent design of the highway, which narrows to the left at the place where the accident occurred.

Narrow, winding roads are a fact of life in the State of West Virginia. See *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). Recognizing the nature of the State's terrain and the constraints inherent in a limited budget, our Courts have long held that the State is neither an insurer nor a guarantor of the safety of persons travelling on its roads. *Adkins, supra,* and *Lowe v. Department of Highways,* 8 Ct.Cl. 210 (1971). Establishing liability on the part of the Department of Highways requires proof of a violation of the respondent's duty of "reasonable care and diligence in the maintenance of a high-

way under all the circumstances." *Parsons v. State Road Commission,* 8 Ct. Cl. 35, 37 (1969). No proof of negligence exists in the case at hand. Although the road did narrow at the point of the accident, the respondent had 15 miles-per-hour speed limit signs posted, and another sign warning motorists of a bump in the road near the accident site. There were no defects in the pavement. A motorist travelling at the posted speed limit, exercising any moderate degree of care, should have encountered no difficulties while travelling along Route 62. The respondent met its required standard of care, and was not negligent. Accordingly, this claim must be denied.

Claim disallowed.

Opinion issued December 22, 1977

TRAVENOL LABORATORIES, INC.

vs.

DEPARTMENT OF HEALTH,
DIVISION OF MENTAL HEALTH

(No. CC-77-91)

Travenol Laboratories, Inc., the claimant, by *Charles Bordo,* its agent.

Henry C. Bias, Jr., Deputy Attorney General, for the respondent.

RULEY, JUDGE:

This claim was submitted upon the pleadings by agreement of the parties. The parties agree that the respondent paid the claimant for pharmaceutical products at old prices instead of new ones, when the price agreement between the parties provides that prices are subject to change. The respondent's Amended Answer also admits that there were sufficient funds remaining in the respondent's budget from which this claim could have been paid. Accordingly, claimant is entitled to an award in the amount of $53.52, representing the amount of the price increase.

Award of $53.52.

Opinion issued January 6, 1978

FRANK G. BARR

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-141)

Claimant appeared in person.

Richard Carlton, Attorney at Law, for respondent.

GARDEN, JUDGE:

The claimant is the owner of an 8-acre tract of land which abuts on the Cool Spring-Mount View Road, a road which is maintained by respondent. The property is located about 8 miles south of Morgantown and is used by the claimant for gardening and pasture land. During January and February, 1977, approximately 1200 feet of claimant's fence were damaged as the result of snow plowing to remove the heavy accumulation of snow on Cool Spring-Mount View Road along which the 1200 feet of fence ran. The fence was of woven wire with a single strand of barbed wire on the top, and the fence posts were spaced about 10 feet apart. The claimant did not indicate that the fence had been struck by any snow plowing equipment, but he was of the opinion that the tremendous volume of snow, with its attendant weight, was pushed into and against the fence and caused the damage. The claimant testified that he had obtained an estimate in the amount of $595.68 for the repair of his fence.

Claimant testified that the snow removal was conducted by employees of respondent and its authorized personnel. Upon being asked what he meant by authorized personnel, the claimant testified that he was referring to one Raymond Dalton, who was a neighbor of his, engaged in the timber business but employed by respondent to assist in the snow removal. The claimant was unable to state that any of respondent's employees were directing Dalton's activities. Fred Siegwarth, a general foreman for respondent, testified that Dalton had been hired by respondent to assist in the heavy snow removal because he had the necessary equipment, unavailable to respon-

dent. He further testified that no personnel of respondent worked with Dalton, nor was he supervised by personnel of respondent.

Whether the damage to claimant's fence was caused by respondent's employees or by respondent's independent contractor, Raymond Dalton, we are of the opinion, based on this Court's reasoning in the claim of *Hubbs vs. Dept. of Highways*, Claim No. CC-77-83, that the liability for the damage rests upon respondent. We therefore make an award in favor of claimant in the amount of $595.68.

Award of $595.68.

Opinion issued January 6, 1978

CHARLES A. BOWMAN

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-137)

Claimant appeared in person.

Gregory W. Evers, Attorney at Law, for respondent.

GARDEN, JUDGE:

On June 29, 1977, around 1:00 p.m., the claimant was proceeding from his home in Alum Creek to the Big Bend Golf Course and was travelling on the Coal River Road near the Tornado Bridge. He was operating his 1975 Dodge van. Before reaching the Tornado Bridge, he was stopped in a line of traffic by one of respondent's flagmen. The road at this point was a narrow, two-lane road of asphalt construction. After being motioned to proceed and after he had passed the flagman, the claimant discovered for the first time that respondent had placed tar on both lanes of the road, and for a distance of about 100 yards, he was forced to drive his van through this tarred area. Prior to getting into this tarred area, he had not been warned of the condition of the road by warning signs or other means.

As a result of the foregoing, the claimant's van was heavily splashed with tar. He proceeded to Big Bend and played golf, but, upon his return home some 5 or 6 hours later, he attempted to remove the tar with the use of gasoline and kerosene, but to no avail. Subsequently, the tar was removed by the Royal Oldsmobile Company of Charleston at a cost of $154.50.

The respondent called Lewis Caruthers, Jr., the respondent's foreman on this particular project, who admitted that respondent had done the tarring on the road on or about the date in question. He further testified that he had successfully removed similar tar from vehicles with the use of diesel fuel, if the same was used shortly after the tar had become applied. We, of course, agree that the claimant is under a legal duty to minimize his damage, but we do not feel that the claimant's efforts to remove the tar were unreasonable. We are of the further opinion that respondent's failure to warn the claimant of the presence of this tar or its failure to tar only one lane of traffic at a time constituted negligence. We therefore make an award in favor of the claimant in the amount of $154.50.

Award of $154.50.

Opinion issued January 6, 1978

ELEANOR F. CHARBENEAU
& ELEANOR B. CHARBENEAU

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-73)

The claimants appeared in person.

Richard Carlton, Attorney at Law, for respondent.

GARDEN, JUDGE:

The claimants, Eleanor F. Charbeneau & Eleanor B. Charbeneau, mother and daughter, are the joint owners of a farm located in the rural area of Marshall County. The property

was subjected to heavy snowfalls during January and February of 1977, to the extent that the State-maintained road which bisected their farm became unpassable. One day early in February, the claimants observed a bulldozer attempting to plow the road, and the man who was operating the bulldozer came to their home to inquire about the condition of other roads in the area. During the conversation that ensued, the claimants received the definite impression that he was employed by respondent.

Later the same day while walking out to the road to pick up their mail, the claimants observed that the bulldozer had driven off the right-of-way and onto their property, and, in so doing, had destroyed 227 feet of fencing, a 16-foot gate, and 30 fence posts. They presented an estimate in the amount of $253.45 for the repair of the damage. They also testified that as a result of the damage, they were unable to rent a portion of the farm to third parties for pasturing purposes, and thus lost income. They testified that they were not seeking recovery of this loss, but were seeking only sufficient funds to enable them to restore the fence line. Moreover, their testimony relating to the loss of income was too speculative to support an award for this item of damage.

Arnold Rush, a foreman of respondent in the Marshall County area, testified that respondent had hired Mountaineer Excavation of Moundsville to assist respondent in bulldozing roads, and that, while he couldn't be sure, he was of the opinion that Mountaineer Excavation equipment did work in the area of the claimants' property.

Under these facts, we are of the opinion that the claimants are entitled to an award in accordance with the Court's opinion in the recently decided claim of *Hubbs v. Dept. of Highways,* Claim No. CC-77-83, and an award is thus made to claimants in the amount of $253.45.

Award of $253.45.

Opinion issued January 6, 1978

BRADFORD G. FRAZIER

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-201)

No appearance on behalf of claimant.

Richard Carlton, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision on the agreed facts set forth in a written stipulation, which revealed the following: that on September 19, 1977, respondent was engaged in the repair of a portion of I-64 near the Ona Exchange and had routed traffic on I-64 onto the exit ramp at the exchange; that respondent had knowledge of a large hole on the paved portion of the ramp but had made no repairs and had failed to erect any warning signs; that on September 19, 1977, at about 6:30 a.m., the claimant was directed onto the ramp by respondent; that the claimant was exercising due care but did not observe the hole until it was impossible to stop and avoid striking the same; and that as a proximate result of respondent's negligence, the claimant's vehicle struck the hole and was damaged to the extent of $160.48. By reason of the foregoing, and believing that the amount of damages is fair and reasonable, we hereby make an award in favor of the claimant in the amount of $160.48.

Award of $160.48.

Opinion issued January 6, 1978

H. M. HILLS, JR.
& LUIS A. LOIMIL

vs.

DEPARTMENT OF PUBLIC SAFETY

(No. CC-77-200)

No appearance on behalf of claimants.

Frank M. Ellison, Deputy Attorney General, for respondent.

PER CURIAM:

The claimants are medical doctors practicing their profession in Charleston, West Virginia. From March 25, 1976, through June 14, 1976, they rendered professional services to Trooper Lloyd Aker, who had been injured in the line of duty. They submitted their statement to the Workmen's Compensation Fund but were later advised that the statement should be submitted to respondent, who is liable for medical bills of members of the Department injured in the line of duty. Respondent refused to pay the statement because it was submitted well after the close of the fiscal year during which the services were rendered. The Answer filed by respondent admits the validity of the claim and that the claimants are entitled to payment; we accordingly make an award in favor of the claimants in the amount of $105.00.

Award of $105.00.

Opinion issued January 6, 1978

SANDERS FLOOR COVERING, INC.

vs.

BOARD OF REGENTS

(No. CC-77-74)

Elbert E. Sanders, President, Sanders Floor Covering, Inc., appeared for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

The claimant, Sanders Floor Covering, Inc., filed its claim in the amount of $1,819.00 for the installation of Bigelow carpet in the office and conference room of the School of Pharmacy at West Virginia University. The claimant installed the carpet on June 23 and 24, 1976, pursuant to a purchase order issued to it dated June 8, 1976. On June 26, 1976, the claimant received a cancellation of the purchase order from West Virginia University, which cancellation was dated June 16, 1976.

The respondent acknowledged receipt of the carpeting as installed and in its Answer admits that there were sufficient funds to pay the purchase order.

The Court is of the opinion that the claimant is entitled to payment; accordingly, an award of $1,819.00 is made in favor of the claimant.

Award of $1,819.00.

Opinion issued January 6, 1978

THOMPSON'S OF MORGANTOWN, INC.

vs.

BOARD OF REGENTS

(No. CC-77-177)

No appearance on behalf of claimant.

Frank M. Ellison, Deputy Attorney General, for respondent.

PER CURIAM:

The claimant, on June 26, 1976, being the low bidder, was awarded a contract for the installation of a quantity of furniture at the West Virginia University Medical Center. Claimant thereafter delivered and installed the furniture and invoiced respondent in August, 1976, in the amount of $901.77. Payment was not received, and upon inquiry, claimant was advised that the order had been cancelled. Claimant denies having received any cancellation order and has filed this claim seeking payment of $901.77 and 1% per month service charge. We, of course, cannot consider the service charge claim, being prohibited by statute from awarding interest on claims, but the Answer filed by respondent having admitted the validity of the claim and that claimant is entitled to payment, we hereby make an award in favor of the claimant in the amount of $901.77.

Award of $901.77.

Opinion issued January 6, 1978

MARVIN ROY WELCH

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-184)

Robert G. Wolpert, Attorney at Law, for claimant.

Richard Carlton, Attorney at Law, for respondent.

PER CURIAM:

The claimant and respondent, by counsel, have filed a written stipulation in this claim which reveals the following: that the respondent, on August 30, 1977, owned and maintained a one-lane bridge, No. 20-45-5.20, over Little Sandy Creek on State Route 45 near Elkview in Kanawha County; that on the above-mentioned date the claimant, while exercising due care, drove his vehicle upon the bridge, and the vehicle ran over a loose piece of sheet metal which had been negligently installed by respondent's employees; that as a result, the claimant's vehicle sustained damage to the extent of $99.98; that $49.98 was paid to claimant by his collision carrier, and the remaining $50.00 of the damage was paid by the claimant.

Believing that liability exists and that the damages are reasonable, an award is hereby made to claimant in the amount of $50.00.

Award of $50.00.

Advisory Opinion issued January 17, 1978

EDWARD L. NEZELEK, INC.

vs.

DEPARTMENT OF FINANCE & ADMINISTRATION AND DEPARTMENT OF HEALTH

(No. CC-78-2)

James K. Brown, Attorney at Law, for Edward N. Nezelek, Inc.

Henry C. Bias, Jr., Deputy Attorney General, for petitioner.

RULEY, JUDGE:

Pursuant to the provisions of West Virginia Code, Chapter 14, Article 2, Sections 13 (3) and 18, Miles E. Dean, Commissioner of the Department of Finance and Administration, has filed a petition seeking an advisory determination respecting the claim of Edward L. Nezelek, Inc., a corporation, based upon the following facts.

By a duly executed purchase order dated August 20, 1976, the Department of Mental Health (now the Department of Health) entered into a contract with Nezelek by which Nezelek became obligated to complete the first phase of construction of a Central Mental Health Complex near Pocatalico in Kanawha County for the sum of $5,851,000.00. The total cost of the project was estimated to be $25,000,000 to $30,000,000 excluding the cost of necessary roads and bridges. It is undisputed that the parties entered into the contract in good faith. The contract provided that it was to be performed within 470 working days after August 20, 1976. Several months later, an administrative determination to the effect that the contract should be cancelled was made, and that determination was communicated to Nezelek by letter dated March 4, 1977, from Mr. Dean. The reasons assigned for such determination were: that the isolated location of the complex was not suitable for its intended purpose and was in conflict with the concept of community health centers that were being constructed in other parts of the state; that the location was not served by water, sewer, or other utilities; that the location was not served by a public means of transporta-

tion; that the location would have required road construction involving two river crossings estimated to cost $5,300,000; and that the nature of the commitment, once the project was under way, was substantially greater than that which had been either contemplated or funded. Notwithstanding those reasons, it is the opinion of this Court, and it is conceded by the petitioner and the Agencies involved, that the cancellation constituted a breach of contract entitling Nezelek to recover its resulting damages. By the time the contract was cancelled, Nezelek had entered subcontracts for various parts of the work and materials which have resulted in obligations from it to thirty-four different subcontractors. Litigation in prosecution of some of those subcontract claims presently is pending against Nezelek. Nezelek had been paid the sum of $164,589.00 for part of its work done before the contract was cancelled. Specifically, the petitioner now seeks an advisory determination approving payment of a settlement or compromise in the sum of $439,004.92, which has been negotiated with Nezelek subject to such approval. It appears that such sum is substantially less than Nezelek would seek to recover if it were prosecuting its claim in this Court. It has been estimated reliably that Nezelek will expend $355,604.92 in settling the claims of its subcontractors, and, if that is correct, it will leave $83,400.00 to Nezelek for its own costs and expenses. In any event, it has been acknowledged that Nezelek will have the sole responsibility for settling subcontractors' claims. The applicable measure of damages is set forth in 3A Michie's Jurisprudence, "Building Contracts", §30, pages 494-5, as follows:

> "A contractor under a building contract who, after having performed a portion of the contemplated work, is prevented from completing the same by the owner, or is justified in his abandonment thereof by the owner, may recover not only the value of the labor and materials bestowed upon the property and expenses necessarily incident to the work done and provided for in the contract, but also such profits as he could have made if he had been permitted to complete the work."

The Court does not have before it all of the facts necessary to apply that measure to this case, but it certainly appears prob-

able and it is the plain representation of the petitioner that the sum thus computed would exceed the proposed settlement. Accordingly, it is the determination of this Court that the approval sought by the petitioner should be, and it is hereby, granted, and the petitioner is advised that the sum of $439,004.92 should be paid to Nezelek in full discharge of all obligations under the contract. The Clerk is directed to file this advisory opinion and to transmit a copy thereof to petitioner.

Advisory Opinion issued February 9, 1978

ALERT SANITATION

vs.

OFFICE OF THE GOVERNOR—
EMERGENCY FLOOD DISASTER RELIEF

(No. CC-77-156)

No appearance on behalf of claimant.

Frank M. Ellison, Deputy Attorney General, for respondent.

GARDEN, JUDGE:

As an aftermath of the tragic flood in Williamson, West Virginia, in April of 1977, the respondent rented one small and seven large portable toilets from claimant. After the emergency, the claimant proceeded to Williamson to recover the toilets, but was unable to locate them. Subsequently, one of the large toilets was located and returned to claimant. The six missing large toilets had a fair market value of $350.00 each, and the small toilet had a fair market value of $250.00. Respondent has filed an Answer admitting the validity of the claim, and has requested an advisory opinion of this Court pursuant to Code 14-2-13(3).

We are of the opinion that as a result of the unlawful conversion of these toilets by the respondent, the claimant is legally entitled to be reimbursed for their fair market value of $2,350.00, which amount we believe should be paid by respondent to claimant. The Clerk is directed to file this advisory opinion and to transmit a copy thereof to respondent.

Opinion issued February 9, 1978

ELWOOD CLARK, ADMIN. OF THE ESTATE
OF SHARON MARIE CLARK, DEC.

vs.

STATE FIRE MARSHAL

(No. CC-76-102)

William B. Carey, Attorney at Law, for the claimant.

Henry C. Bias, Jr., Deputy Attorney General, for the respondent.

RULEY, JUDGE:

Claimant's decedent was killed in a fire which destroyed the Washington House Hotel at Berkeley Springs, West Virginia, on the night of August 24-25, 1974. Claimant alleges that respondent's failure to inspect the hotel and cause it to cease operations constituted negligence and was the proximate cause of the fire and death. Claimant seeks damages for the alleged wrongful death under the provisions of West Virginia Code §55-7-5 and 6. Respondent has moved to dismiss, contending that the claim is barred by the two-year period of limitation set forth in West Virginia Code §55-7-6.

Claimant's decedent died on August 25, 1974. Thus, under Code §55-7-6, the claim had to be filed on or before August 25, 1976. Claimant's attorney commenced this proceeding by mailing the Notice of Claim to the Clerk of this Court by special delivery on August 23, 1976. However, the Clerk did not receive the Notice of Claim until September 2, 1976, eight days after the expiration of the statutory period. Although the postal service may have caused the claim to be filed after August 25, this Court cannot ignore the statutory requirement that the Notice of Claim "be filed with the clerk" within the appropriate period. Code, §14-2-21. See also *Huntington Steel & Supply Company v. West Virginia State Tax Commissioner*, 8 Ct. Cl. 123. Timely filing of a claim with the Clerk is clearly the responsibility of claimant or claimant's attorney, who may choose any method of delivery he considers expeditious. In this case, the failure of the postal service to deliver the Notice

of Claim within three days, although regrettable, does not provide any legal ground for this Court to deny respondent's motion to dismiss.

Claimant also contends that the period of limitation was tolled by at least one of two extraordinary circumstances in this case. The first involves the incapacity of decedent's mother. West Virginia Code §55-7-6 provides that only the personal representative of the deceased may bring an action for wrongful death. See *Silvious v. Helmick*, 291 F. Supp. 716 (N.D.W.Va., 1968). Only a distributee can be appointed administrator within the first thirty days after the death of a person dying intestate. West Virginia Code §44-1-4. Under the wrongful death statute in effect at the time of the fire, distributees were to be determined by the statute of descent, Code, §42-1-1. At the time of her death, the decedent's sole distributee was her mother. But her mother was mentally incapacitated. Thus, claimant contends that the mother's disability tolled the statute at least for the thirty days immediately following the death, under the provisions of West Virginia Code §55-2-15, entitled "General savings as to persons under disability".

The second extraordinary circumstance is the delay in appointing an administrator for decedent's estate. The administrator, decedent's brother, was not appointed until April 8, 1976, less than four months before the period of limitation expired. Citing the general proposition from 28 A.L.R.3d 1144 that "an action cannot be maintained until there is a person in being capable of suing", claimant argues that the period was tolled until the administrator was appointed.

Claimant's arguments treat the limitation period in West Virginia Code §55-7-6 like a statute of limitation. Since *Lambert v. Ensign*, 42 W.Va. 813 (1896), West Virginia courts have refused to apply any of the Code provisions which would toll a statute of limitation to the two-year period of limitation in the wrongful death statute.

> "* * * the cause of action (wrongful death) did not exist at common law but is created by statute. The bringing of the suit within two years * * * is made an essential element of the right to sue, and it must be accepted in all

> respects as the statute gives it. And it is made absolute, without saving or qualification of any kind whatever. There is no opening for explanation or excuse. Therefore, strictly speaking, it is not a statute of limitations." *Lambert, supra.*

Since the period of limitation is viewed, not as a limit on the remedy, but as a condition on a statutory right to sue, there are no exceptions to its application. "The two year limitation on commencing an action for wrongful death is an integral part of the cause of action, and statutes in derogation of common law will be strictly construed" (citations omitted). *Rosier v. Garson,* 156 W.Va. 861, 199 S.E.2d 50 (1973). Thus, in *Rosier* and in *Smith v. Eureka Pipe,* 122 W.Va. 277, 8 S.E.2d 890 (1942), the provisions of Code, §55-2-18, (granting the right to institute a new action within one year after an order, not on the merits, disposing of a pending action) were held not to apply to wrongful death actions. By analogy, Code, §55-2-15, does not apply to wrongful death actions, and the incapacity of the decedent's mother does not extend the period of limitation. Similarly, following the logic of *Smith, Rosier,* and *Lambert,* this Court cannot change the law and toll the period of limitation until an administrator is appointed. Most jurisdictions reach a similar conclusion regarding administrators. See 70 A.L.R. 472. For additional discussions relating to conditions and limitations on wrongful death actions, see 132 A.L.R. 292 and 67 A.L.R. 1070.

The motion to dismiss is granted.

Claim dismissed.

Opinion issued February 9, 1978

ECONO-CAR INTERNATIONAL, INC.

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-32)

Robert J. Louderback, Attorney at Law, for claimant.

Gregory W. Evers, Attorney at Law, for respondent.

GARDEN, JUDGE:

On April 26, 1974, one Ronald Keller was operating claimant's 1973 International tractor-trailer at and near the junction of Route 460 and Interstate 77 near Princeton, West Virginia. At this point, Keller, who had been driving for about 3½ hours, decided to rest and make some entries in his driver's log. He proceeded onto the one-lane entrance ramp to Interstate 77, and, observing a wide berm of crushed stone to his right, he drove his unit onto the berm. In so doing, five of the tires on the right side of his tractor-trailer were damaged when they passed over a stub of a metallic post which extended out of the crushed stone berm some two or three inches. No evidence was introduced to indicate who was responsible for placing this metallic object in the berm, but the implication was clear that Vecellio & Grogan, a Beckley highway contractor who had constructed the subject interchange, was responsible. Damage to the tires in a total amount of $669.75 was stipulated by claimant and respondent.

The evidence revealed that the contract for this project, which bore Project Name "I-77 & U.S. 460 Interchange", was awarded by respondent to Vecellio & Grogan on April 4, 1972, and work on the same commenced on May 22, 1972. Through Ralph Beckett, an engineer employed by Vecellio & Grogan, the claimant introduced into evidence respondent's Form HL-416 entitled "Contract Completion Report". This form, which was dated April 16, 1974, clearly reflects that the contract was completed on December 7, 1973, and this date of completion was further confirmed by the testimony of Mr. Beckett. This witness further established that as of December 7, 1973, Vecellio

& Grogan had removed all of its equipment from the project site, and that the interchange had been opened to public travel. The claimant thus contends that since the subject incident occurred five months after Vecellio & Grogan had completed the project and five months after the interchange had been opened to the public, the respondent is liable for the damage to its equipment.

On the other side of the coin, the respondent vigorously contends that while the contractor, Vecellio & Grogan, may have completed the construction on December 7, 1973, the contract or project was not finally accepted by the respondent until May 2, 1974, a date subsequent to the subject incident; thus, any liability must rest upon Vecellio & Grogan. David Murphy, the Finals Engineer for the Construction Division of respondent, testified that it was his responsibility to determine the amount of final payment to contractors and whether the project had been completed in accordance with the plans and specifications. Mr. Murphy testified that the Contract Completion Form was prepared by personnel in respondent's District 10 office on April 16, 1974, who then forwarded it to the respondent's Charleston office, where it was approved and signed by the Director of the Construction Division and then finally approved by the State Highway Engineer on May 2, 1974. Although the exact date in May does not clearly appear on the form introduced into evidence, Mr. Murphy, testifying from other official records from his office, clearly established that the form was approved and signed by the State Highway Engineer on May 2, 1974. Immediately above the State Highway Engineer's signature, the following language appears:

> "The contractor having completed the contract on the above project, the Commissioner, upon the recommendation and approval as shown hereon, hereby accepts said contract and releases said contractor from any further responsibility in connection therewith."

We believe that the above-quoted language is clear and unambiguous, and that while a delay of almost five months between the completion date and the date of final acceptance by respondent casts a burden on the contractor, we do not feel

that the respondent can be held liable for the negligent maintenance of this particular section of highway until May 2, 1974. For this reason, we refuse to make an award in favor of the claimant.

Claim disallowed.

Advisory Opinion issued February 9, 1978

ROBERT L. MASSIE
and MAE MASSIE

vs.

OFFICE OF THE GOVERNOR—
EMERGENCY FLOOD DISASTER RELIEF

(No. CC-77-199)

No appearance on behalf of claimants.

Frank M. Ellison, Deputy Attorney General, for respondent.

GARDEN, JUDGE:

Pursuant to Code §14-2-13(3), the respondent has requested this Court to render an advisory opinion in respect to the following factual situation: In April of 1977, during the cleanup following the devastating flood in Williamson, West Virginia, a contractor employed by respondent damaged the residence of the claimants when a piece of the contractor's Hi Lift equipment struck the rear of the residence. The claimants incurred a bill in the amount of $465.00 to have the damage repaired. The respondent has filed an Answer which, in effect, admits the existence of liability and that the amount of damage is reasonable.

We agree that liability exists, and we are of the opinion that respondent should pay damages to the claimants in the amount of $465.00. The Clerk is directed to file this advisory opinion and to transmit a copy thereof to respondent.

Advisory Opinion issued February 9, 1978

ALEX RAY

vs.

OFFICE OF THE GOVERNOR—
EMERGENCY FLOOD DISASTER RELIEF

(No. CC-77-192)

No appearance on behalf of claimant.

Frank M. Ellison, Deputy Attorney General, for respondent.

GARDEN, JUDGE:

The respondent, pursuant to Code §14-2-13(3), has requested the Court to render an advisory opinion as to the legal status of this claim which arises from the following factual situation.

Following the devastating flood in Williamson, West Virginia, on April 4, 1977, the respondent engaged the services of Burgett Construction Company to assist in cleaning up the resultant debris. During this operation, an employee of Burgett, while operating an endloader, destroyed a wall and gate at the rear of the claimant's property. The wall was constructed of concrete block and was 30 feet long and 4 feet tall. An estimate in the amount of $1,175.00 for the replacement of the wall and gate was presented. The respondent has filed an Answer admitting liability for the damage and asserting that the claim should be paid.

We agree that under the factual situation set forth above, liability rests with respondent, and it should respond in damages to claimant in the amount of $1,175.00. The Clerk is directed to file this advisory opinion and to transmit a copy thereof to respondent.

Advisory Opinion issued February 9, 1978

WEST VIRGINIA
PUBLIC EMPLOYEES INSURANCE BOARD

vs.

DEPARTMENT OF MOTOR VEHICLES

(No. CC-77-172)

Cletus B. Hanley, Attorney at Law, for the claimant.

Frank M. Ellison, Deputy Attorney General, for the respondent.

PER CURIAM:

The claimant seeks to recover the sum of $5,563.68, representing the premium due from the Department of Motor Vehicles to the West Virginia Public Employees Insurance Board for the month of June, 1977. The Answer admits the validity of the claim, and the case was submitted upon the pleadings. However, in the Notice of Claim filed on September 15, 1977, it is stated that "there were insufficient moneys in the proper account to pay this sum for the last fiscal year". Following the precedent of *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 W.Va. Ct. Cl. 180 (1971), the Court must deny the claim.

Claim disallowed.

Opinion issued February 10, 1978

CURTIS ALLISON

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-110)

No appearance by claimant.

Richard Carlton, Attorney at Law, for respondent.

PER CURIAM:

The parties have filed a written stipulation with the Court in which they have stipulated that the respondent maintained

State Route 3 near Gap Mills, West Virginia, in Monroe County, and that the claimant owns and operates a service station, restaurant, and grocery store at the foot of an upgrade on State Route 3. The respondent constructed and maintains two culverts under the road, the first of which was inadequate to carry off the overflow from heavy storms. It was further stipulated that the berm of the road was negligently constructed so that it was elevated above the blacktopped portion of the highway. Water from the first culvert eroded a ditch in the berm, causing the surface water to bypass the second culvert. Although the respondent had knowledge of the condition, it failed to take corrective measures. On two occasions, July 31, 1976, and October 9, 1976, as a result of respondent's negligence, water entered claimant's business damaging the claimant's sewer system and various retail items in the amount of $244.85 as listed on the estimate of damages filed with the stipulation. Believing that liability exists on the part of the respondent and that the damages are reasonable, the Court is of the opinion to, and does, make an award to the claimant in the amount of $244.85.

Award of $244.85.

Opinion issued February 10, 1978

ARTHRITIS CARE ASSOCIATES

vs.

DIVISION OF VOCATIONAL REHABILITATION

(No. CC-77-220)

Arthritis Care Associates, the claimant, by *Paul D. Saville,* M.D.

Henry C. Bias, Jr., Deputy Attorney General, for the respondent.

PER CURIAM:

This case was submitted upon the pleadings, in which respondent admits liability for services rendered by claimant in the amount of $25.40. An award in that amount is hereby made.

Award of $25.40.

Opinion issued February 10, 1978

OLIE G. BASTIN AND PRISCILLA BASTIN

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-24)

Charles G. Johnson, Attorney at Law, for the claimants.

Gregory W. Evers, Attorney at Law, for the respondent.

RULEY, JUDGE:

This claim was before the Court a second time upon a motion for rehearing, which more accurately would be designated as a motion for reconsideration, since no additional evidence was taken. The claimants, whose property in Elk District, Harrison County, was the subject of an eminent domain proceeding incident to the construction of Interstate Route 79, seek an award of $4,500.00 in "relocation assistance funds". The claim was submitted upon a stipulation which included the following matters:

"* * *

The claimants contend and *the Department of Highways admits that the Department had actual knowledge of the claim and its amount within the eighteen* (18) *month period.* * * * The Department of Highways admits that the claimants would be entitled to recover the sum of Four Thousand Five Hundred Dollars ($4,500.00) except for the failure of the claimants to file a formal claim. (Emphasis supplied.)

* * *"

The sole defense asserted by the respondent was that the claimants failed to file a formal written claim for the relocation assistance funds as required by a typewritten 18-page document entitled "Brochure Relocation Advisory Assistance" published by the respondent. On page 4 of that document, it is stated:

"* * *

(c) Claim must be filed within eighteen months of date you were required to relocate.

* * *"

Other provisions imply that a written form must be filed. When the claim was argued upon its reconsideration, the Court pointed out to counsel that the decision might turn on whether the brochure did or did not constitute rules or regulations duly promulgated by the respondent and thus have the force and effect of law. The authority to make rules and regulations pertaining to relocation expense is contained in Code §17-2A-20, which provides, in part:

"* * *

> Payments under this section are subject to the following limitations and to any rules and regulations made by the commissioner as herein authorized:
>
> * * *
>
> The commission shall establish by rules and regulations a procedure for the payment of relocation costs within the limits of and consistent with the policies of this section.
>
> * * *"

Nothing whatever in the "brochure" indicates that it is to be regarded as rules and regulations or that it was made or promulgated by the commissioner. In its first paragraph on page 1, it is stated:

"* * *

> Your State Road Commission wishes to aid and assist in relocating and re-establishing you, your family, your business, your farm, the nonprofit organization, and the owner of other personal property who will be displaced because of the construction of Federal-aid highways. It is our desire to accomplish this in an orderly, timely, equitable, and efficient manner so as to assure that those individuals dislocated do not suffer disproportionate injuries because of the highway program designed for the benefit of the public as a whole.
>
> * * *"

and, on page 17, it is stated in capital letters:

"* * *

THIS IS AN INFORMAL SUMMARY OF BENEFITS AVAILABLE TO PERSONS WHO ARE FORCED TO RELOCATE THEIR FAMILY, FARM, BUSINESS OR NONPROFIT ORGANIZATION FROM A HIGHWAY PROJECT IN WEST VIRGINIA. (Emphasis supplied.)

* * *"

It thus appears that the "brochure" did not constitute rules and regulations and did not have the force and effect of law. Granted on page 18 of the brochure, it also is stated in capital letters:

"* * *

A COPY OF THE BASIC FEDERAL REQUIREMENTS OF THE BUREAU OF PUBLIC ROADS GOVERNING PAYMENTS IS CONTAINED IN IM 80-1-68, AS REVISED.

* * *"

and Instructional Memorandum 80-1-71 [a 65 page document relating to "Relocation Assistance and Payments — Interim Operating Procedures (RCS 34-01-03) (OMB 04-R-2211)]" published by the Federal Highway Administration, at page 31, provides:

"* * *

o. CLAIMS

In order to obtain a moving expense payment, a relocated person must file a written claim with the State agency on a form provided by the agency for that purpose within a reasonable time limit determined by the State.

* * *"

but it does not appear from any evidence before the Court that IM 80-1-71 is anything more than what it proclaims itself to be, viz., an instructional memorandum.

In view of the circumstances that the respondent did have actual knowledge of the Bastin claim for relocation expense (including knowledge of the amount of the claim) within eighteen months, and that there is no dispute as to the amount which they should receive, viz., $4,500.00, the Court is of opin-

ion to, and does hereby, reverse its earlier decision and make an award to the claimants in that sum.

Award of $4,500.00.

Opinion issued February 10, 1978

BOONE REMODELING COMPANY

vs.

DEPARTMENT OF CORRECTIONS

(No. CC-77-130a-e)

J. R. Rogers, Attorney at Law, for claimant.

Frank M. Ellison, Deputy Attorney General, for respondent.

GARDEN, JUDGE:

These five claims were consolidated for hearing purposes, and this Opinion will address itself to each claim in alphabetical order.

(No. CC-77-130a)

The claimant had been requested by respondent to deliver and install carpeting in an office of respondent in property located on Washington Street which was being rented by respondent from a private owner. In September of 1976, the respondent rescinded the order, but not before the claimant had purchased material and expended labor in a total amount of $1,580.00.

At the hearing it was agreed that the respondent was prohibited by Regulation 3.01 from entering into such a contract by reason of the fact that the offices where the improvements were to be installed were leased premises, and the claimant, by counsel, thereupon advised the Court that it desired to withdraw its claim, and the claim was thereupon dismissed.

(No. CC-77-103b)

While claimant was performing a contract for respondent at the Industrial School for Boys at Neola, West Virginia, the respondent's O. V. Wright, Supervisor of Maintenance, requested

claimant to change some electrical wiring in a newly constructed building. This additional work was to be done for $4,300.00, and it was represented to claimant that a change order would be issued covering this additional item of cost. The necessary material and labor were furnished by claimant and the work was completed. Thereafter, the change order was requested, but the same was not approved.

Respondent, in its Answer, admits that it ordered and received the work described in the requested change order, and that the amount of $4,300.00 is due and owing to the claimant. Accordingly, we hereby make an award in favor of the claimant in the amount of $4,300.00.

(No. CC-77-130c)

While claimant was engaged in the performance of a contract at respondent's Industrial Home for Girls at Salem, West Virginia, the respondent's O. V. Wright, Supervisor of Maintenance, requested claimant to install some 526 yards of fire-rated carpeting and padding at a cost of $2,630.00, and it was represented that this expense would be handled by the issuance of a change order. After the carpeting was installed, a change order was submitted but was refused.

Respondent, in its Answer, admits that it ordered and received the carpeting, and that the amount of $2,630.00 is due and owing the claimant. We therefore make an award in favor of the claimant in the amount of $2,630.00.

(No. CC-77-103d)

In 1976, the Legislature had appropriated $88,000.00 to cover the cost of conducting extensive renovations at Sutton Hall Cottage, which is one of the buildings at respondent's Industrial School for Girls at Salem, West Virginia. O. V. Wright, who at the time was respondent's Supervisor of Maintenance, requested estimates for this work from several contractors, and the estimates so received well exceeded the appropriate $88,000.00. O. V. Wright testified that it therefore became necessary for him to delete some of the work originally included in the Request for Quotations, and that he therefore deleted the originally included fluorescent lights and bedroom lights. Request for bids was then advertised. Claimant was low bidder at $85,-

000.00, and, as O. V. Wright testified, "Well, of course, I had $3,000.00 to play with."

Claimant was required to perform certain electrical work under the original contract, and during the progress of this work, Wright conferred with claimant's president, Eugene Ferrell, concerning the furnishing and installation of the fluorescent and bedroom lights which had earlier been deleted from the Request for Quotations. Mr. Ferrell agreed to furnish and install 58 fluorescent and 28 bedroom lights for the sum of $3,000.00. At that time, both gentlemen were aware that the wiring to the hall lights and bedroom lights would not pass inspection by the State Fire Marshal and that it would have to be removed and replaced by a better grade of wiring. At this point, we believe that a preponderance of the evidence clearly demonstrates that claimant agreed to perform this wiring in return for respondent's deleting several items of work required under the terms of the original contract, namely, the requirement on the part of claimant to clean the copper pipe on the exterior of the building and the furnishing and installation of a new 100-ampere panel on the first floor with all necessary breakers to handle the load.

While there was testimony to the effect that the claimant attempted to clean the exterior copper on three occasions, it was generally conceded that this work was not, in fact, performed. Two witnesses, including a witness for claimant, testified that they would not undertake the work of cleaning the exterior copper for any figure less than $5,000.00, and implied that claimant had received a credit in that amount by being excused from the performance of this part of the original contract.

Instead of invoicing respondent for the agreed-upon amount of $3,000.00, the claimant is requesting an award of $6,367.00, which claimant contends covers the cost of furnishing and installing the fluorescent and bedroom lights, the cost of the wire, and the labor for the installation of the same. Since claimant has, so to speak, received a $5,000.00 credit against the original contract, we believe that an award of the full amount requested would constitute unjust enrichment to claimant. We therefore limit the claimant's award to $3,000.00.

(No. CC-77-130e)

Claimant was contacted by O. V. Wright, Supervisor of Maintenance of respondent's Anthony Center at Neola, West Virginia, and was requested to construct a roof on a dormitory at the Center. Wright assured the claimant that a purchase order for this work would be secured. The work was completed by claimant, and on March 23, 1977, respondent invoiced claimant for $11,475.00. The invoice has not been paid, primarily because the necessary purchase order was never authorized and issued. The respondent, in its Answer, admits that it ordered and received the work, but denies that the proper charge for such service is $11,475.00. Respondent alleges that the correct amount of the charge should be $7,000.00, which sum, it admits, is due and owing the claimant.

At the hearing, counsel for the parties advised the Court that claimant was willing to accept the sum of $7,000.00 in discharge and full satisfaction of its claim, and the Court therefore makes an award in favor of the claimant in the amount of $7,000.00.

To recapitulate, these claims are disposed of in the following manner:

CC-77-130a—Claim disallowed.
CC-77-130b—Award of $4,300.00.
CC-77-130c—Award of $2,630.00.
CC-77-130d—Award of $3,000.00.
CC-77-130e—Award of $7,000.00.

Opinion issued February 10, 1978

BOONE SALES, INC.

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-119)

No appearance in behalf of claimant.

Richard Carlton, Attorney at Law, for respondent.

PER CURIAM:

By written stipulation entered into by the parties and filed with the Court, it was agreed that the claimant entered into a

contract to purchase certain real estate on U. S. Route 119 near the top of Lens Creek Mountain in Boone County, West Virginia, and that a building located on the property had previously been damaged by fire and not repaired. On October 14, 1975, respondent's employees, through the Rehabilitation Environmental Action Program, tore down the damaged building. A deed for the property was executed and delivered three days later, transferring legal title and this cause of action to the claimant. It was further stipulated that the claimant sustained $1,100.00 in damages to the building. Believing that liability exists on the part of the respondent and that the damages are reasonable as shown by the estimates filed with the stipulation, the Court hereby makes an award to the claimant in the amount of $1,100.00.

Award of $1,100.00.

Opinion issued February 10, 1978

MRS. RICHARD L. COOPER

vs.

DEPARTMENT OF NATURAL RESOURCES

(No. CC-77-60)

Claimant appeared in person.

Gregory Bailey, Assistant Attorney General, for respondent.

WALLACE, JUDGE:

The claimant is the owner of a seven or eight-acre parcel of real estate upon which her residence is erected in Winifrede, Kanawha County, West Virginia. On March 17, 1977, a rather severe forest fire was burning on top of a mountain about 1½ miles from the claimant's property. The fire ultimately burned an area of over 100 acres. During the morning of the fire, and while the claimant was away from her home, two or three young men who had been recruited by respondent to fight the fire entered upon claimant's property and started either a backfire or a line fire for the purpose of resisting the larger fire.

As a result of the backfire or line fire, certain property of the claimant was destroyed. The claimant testified that 500 feet of 1½-inch plastic water pipe was destroyed and that the cost of new plastic pipe and the labor for installing the same totaled $175.00; that a wooden boat having a value of $50.00 was destroyed; and that a cinder block pump house and a pump located therein having a total value of $550.00 were also destroyed.

Code §20-3-4 authorizes the respondent and its duly authorized agents to enter upon private property and to start backfires and take such other countermeasure for the purpose of fighting forest fires. While this statute exonerates fire fighters from criminal responsibility, it does not mean that property owners' property can be destroyed without compensation being made. We therefore are of the opinion that the claimant is entitled to an award.

The claimant was not represented by counsel at the hearing, and as a result, her testimony relating to damages did not meet the usual requirements relating to measure of damages. Nevertheless, we believe that an award of $475.00 would constitute equitable compensation for the claimant's loss.

Award of $475.00.

Opinion issued February 10, 1978

ALBERT D. FENTRESS
and HAZEL S. FENTRESS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-162)

Albert D. Fentress and *Hazel S. Fentress,* the claimants, in person.

Gregory W. Evers, Attorney at Law, for the respondent.

PER CURIAM:

Upon stipulation of the parties to the effect that the respondent, during road grading operations, damaged claimants' fence

in the amount of $122.68, an award in that amount should be, and is hereby, made.

Award of $122.68.

Opinion issued February 10, 1978

FRIDEN MAILING EQUIPMENT CORPORATION

vs.

DEPARTMENT OF CORRECTIONS

(No. CC-77-125)

Friden Mailing Equipment Corporation, a corporation, the claimant, by *Betsy Curry,* its Credit Manager.

Frank M. Ellison, Deputy Attorney General, for the respondent.

PER CURIAM:

This case was submitted upon the pleadings, in which the respondent admitted liability for an unpaid balance in the sum of $147.00 due the claimant for lease of a postage meter. An award in that amount is hereby made.

Award of $147.00.

Opinion issued February 10, 1978

PEGGY S. GOTT

vs.

DEPARTMENT OF HEALTH,
DIVISION OF MENTAL HEALTH

(No. CC-77-153)

No appearance by the claimant.
Frank M. Ellison, Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision upon the pleadings by agreement of the parties. The claimant was employed by the respondent from August 1, 1974, until August 31, 1975, at an

agreed salary of $20,000 per year, but she was paid on the basis of an annual salary of $16,000. This claim, in the amount of $4,332.00, is for the difference between the agreed salary and the salary actually paid. The respondent's Answer admits the validity of the claim and the amount due. Accordingly, the Court makes and award to the claimant in the amount of $4,332.00.

Award of $4,332.00.

Opinion issued February 10, 1978

HOGAN STORAGE & TRANSFER COMPANY

vs.

DEPARTMENT OF AGRICULTURE
and DEPARTMENT OF HEALTH

(No. CC-77-134)

Lafe P. Ward, Attorney at Law, for claimant.

Frank M. Ellison, Deputy Attorney General, for respondents.

GARDEN, JUDGE:

The facts giving rise to this claim are tragic, but bizarre. The claimant is a licensed motor carrier of general commodities with its principal place of business in Williamson, West Virginia. At the close of business on April 4, 1977, the claimant had about 18 trailers, 13 tractors, and six straight trucks located in its terminal. The trailers and trucks were in various stages of being loaded with commodities for later delivery. One of the trailers, a 1964 Strick semitrailer tandem, was loaded for departure the next morning with about 40,000 pounds of Banner Sausage and Armour Products. That night the Tug River overflowed its banks, causing complete devastation in Williamson, including the inundation of the trailer mentioned above.

Charles Dawson, president and general manager of claimant, testified that after the flood waters had subsided and he had an opportunity to inspect his terminal, and in particular the subject trailer, he became concerned as to whether the cargo had

become contaminated as a result of the flood waters. As soon as the telephones in Williamson became operational, about three days after the flood, Mr. Dawson contacted the Interstate Commerce Commission Office in Charleston, which in turn referred him to the United States Department of Agriculture Office in Charleston. He was finally referred to the West Virginia Department of Agriculture, and that agency sent two of its representatives, Swansey L. Evans and Herma G. Hanshew, to Williamson in order to determine if the subject cargo had in fact been contaminated.

Mr. Evans and Mrs. Hanshew inspected the subject trailer's cargo at claimant's terminal early on the 12th of April and advised Mr. Dawson that the cargo was in fact contaminated and would have to be destroyed. At that point, a Lt. Williams of the National Guard was contacted, and it was agreed that the trailer would be taken to the city dump where its cargo would be disposed of, the city dump being located about four miles from the claimant's terminal. The National Guard assisted the claimant and pulled the flood-disabled tractor, which had previously been hooked to the subject trailer, from the trailer. Claimant thereafter used one of its functioning tractors to move the trailer to the city dump. At the city dump, the trailer was positioned in accordance with the instructions of one Francis H. Leary, an employee of the West Virginia Department of Health with expertise in the field of solid waste collection facilities.

Mr. Leary testified that he had been sent to Williamson by his superiors on April 7 and had been placed in charge of the operations at the city dump. He recalled the trailer's being brought to the dump and that the driver of the rig had positioned the same in the dump in accordance with his instructions. He testified that he had been contacted earlier by Mr. Evans, a lady coworker, and a Lt. Williams as to whether the load of contaminated meat could be disposed of at the city dump. He advised them that it could, but that they would have to bring sufficient personnel with them to unload the trailer and remove it from the site. Mr. Leary testified that, after the trailer had been spotted as instructed by him, he and Mr. Evans went to the rear of the trailer and looked in the door and

then went to the front of the trailer and discovered that the tractor was gone. He then, quite significantly in our opinion, testified "and my blood pressure went up several degrees because it showed me that there was a foul-up somewhere, the trailer was not being removed immediately."

On April 14, the cargo of the trailer not having been removed, and, in what we detect, a bit of anger, Mr. Leary ordered the destruction of the trailer, which was thereupon bisected by a bulldozer and thereafter buried with cargo in the city dump. Mr. Evans testified that on the morning of April 14, he orally advised Mr. Dawson on the downtown streets of Williamson that his trailer was to be destroyed that day. Mr. Dawson, in rebuttal testimony, denied that Mr. Evans imparted this information to him. Thus, the curtain fell on an episode, very reminiscent of a "Keystone Cop" comedy of the past.

Whether the destruction of the trailer resulted from a misunderstanding or failure of communication between Mr. Evans and Mr. Leary, we firmly believe that the respondents are liable for the unlawful conversion of claimant's trailer. Testimony was presented at the hearing which leads us to the conclusion that on April the 14th, the claimant's trailer had a fair market value of $6,000.00, and we thus make an award in favor of the claimant in that amount.

Award of $6,000.00.

Opinion issued February 10, 1978

ROBERT H. JOHNSON

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-146)

Claimant appeared in his own behalf.

Richard Carlton, Attorney at Law, for the respondent.

RULEY, JUDGE:

Claimant's 1956 Volkswagen bus was taken from his property and crushed by respondent under the auspices of the REAP

program. Respondent admits that it failed to follow proper statutory procedures which would have allowed claimant to reclaim his vehicle. Thus, respondent admits liability. This hearing was held solely on the issue of damages.

The standard measure of damages for injury to personal property is the loss of fair market value, plus reasonable and necessary expenses incurred by the owner in connection with the injury. *Cato v. Silling,* 137 W. Va. 694, 73 S.E.2d 731 (1952). The bus was a total loss. Claimant testified that the bus was operable when taken, and worth $900.00, based on his experience with similar vehicles. Respondent offered no evidence to the contrary. Accordingly, an award of $900.00 should be, and is hereby, made.

Award of $900.00 to claimant.

Opinion issued February 10, 1978

JONES PRINTING COMPANY, INC.

vs.

GOVERNOR'S OFFICE OF ECONOMIC AND COMMUNITY DEVELOPMENT

(No. CC-77-207)

No appearance by the claimant.

Frank M. Ellison, Deputy Attorney General, for the respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon the pleadings. The claimant filed its claim in the amount of $235.00 for printing five hundred copies of the newspaper, *Intouch,* ordered by the respondent. The respondent's Answer admits the validity of the claim and the amount due.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $235.00.

Award of $235.00.

Opinion issued February 10, 1978

KANAWHA VALLEY RADIOLOGISTS, INC.

vs.

BOARD OF VOCATIONAL EDUCATION,
DIVISION OF VOCATIONAL REHABILITATION

(No. CC-77-212a-k)

Kanawha Valley Radiologists, Inc., a corporation, the claimant.

Frank M. Ellison, Deputy Attorney General, for the respondent.

PER CURIAM:

This case was submitted upon the pleadings, in which the respondent admitted the validity of the claim for $109.00 for services rendered. Accordingly, an award in that amount should be, and is hereby, made.

Award of $109.00.

Opinion issued February 10, 1978

EUGENE LAFFERTY and WANDA LAFFERTY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-44)

Fred A. Jesser, III, Attorney at Law, for the claimants.

Gregory W. Evers, Attorney at Law, for the respondent.

RULEY, JUDGE:

An Opinion of this Court, dated March 22, 1977*, held the respondent negligent in this case, but disallowed the claim due to inadequate proof of damages. Pursuant to Rule 15 of the Rules of Practice and Procedure, a rehearing was held on August 9, 1977, on the issue of damages.

Expert testimony on the claimant's behalf placed the reduction in market value of the claimants' land at $10,500.00, caus-

*See *Lafferty v. Department of Highways,* 11 Ct.Cl. 239 (1977).

ed by respondent's construction of a highwall for Route 19 and the resulting increase in water draining across claimants' land. The expert witness for the claimants was a real estate appraiser with considerable experience in real estate transactions in Fayette County, where the claimants' property is located.

His estimates of value before and after the damage were based in part upon a comparison of recent transactions involving similar real property in Fayette County. The respondent's expert witness placed the diminution of value at $4,000.00, but his estimate was based solely on a description of the property without seeing or inspecting it and was based on only minimal experience with real property in Fayette County.

This Court finds that claimants have incurred damages of $10,500.00, that amount representing the diminution in value caused by respondent's negligence. Diminution in market value being the proper measure of damage to property in cases like this, (*Jarrett v. E. L. Harper and Son, Inc.*, ... W.Va. ....., 235 S.E.2d 362 [1977]), an award in the sum of $10,500.00 should be, and is hereby, made.

Award of $10,500.00.

Opinion issued February 10, 1978

THOMAS F. LAMBERT

vs.

DEPARTMENT OF WELFARE

(No. CC-77-193)

Thomas F. Lambert, the claimant, in person.

Frank M. Ellison, Deputy Attorney General, for the respondent.

PER CURIAM:

The claimant was dismissed from the employ of the respondent on August 6, 1976, but was reinstated. The respondent has

not paid the claimant the $457.60 it owes him for the period of his suspension, and admits the validity of the claim in its Answer. Thus, an award in the amount of $457.60 is hereby made.

Award of $457.60.

Opinion issued February 10, 1978

LINDA LESTER and LEON LESTER

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-210)

Linda Lester and *Leon Lester,* the claimants.

Richard Carlton, Attorney at Law, for the respondent.

PER CURIAM:

Claimants seek recovery of property damage in the sum of $199.63 sustained by their 1975 model Ford automobile on June 5, 1977, when a loose plank in a wooden bridge runner in the Mohawk Bridge on West Virginia Route 1/2, in McDowell County struck the underside of the automobile. The claim was submitted upon a stipulation which revealed that the respondent had constructive knowledge, viz., that it should have known of the need for repairs to the bridge before the accident happened. It also was stipulated that the claimants had exercised reasonable care for their own safety. It thus appears that the respondent was guilty of negligence which caused the accident and resulting damage, and that the claimants themselves were not guilty of contributory negligence. Accordingly, an award is hereby made in the sum of $187.63 (the stipulated amount of damage).

Award of $187.63.

Opinion issued February 10, 1978

GERALD J. LYNCH

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-175)

Claimant appeared in person.

Gregory W. Evers, Attorney at Law, for respondent.

PER CURIAM:

When this claim was heard, the parties dictated a stipulation into the record which revealed the following facts:

On August 4, 1977, the claimant was driving his 1974 Cadillac across a bridge connecting Woodward Drive and Route 21 in Kanawha County, which bridge was owned and maintained by respondent. While claimant was crossing the bridge, a wooden plank unexpectedly came loose and damaged the exhaust system of claimant's vehicle. The respondent had notice of the disrepair of the bridge, but failed to warn claimant of the defective condition of the bridge. The parties agreed that the claimant's cost of repairs in the amount of $206.76 was fair and accurate.

Believing that liability exists on the basis of the stipulation as recited above, and that the damages are fair and accurate, we hereby make an award in favor of the claimant in the amount of $206.76.

Award of $206.76.

Opinion issued February 10, 1978

MOORE BUSINESS FORMS, INC.

vs.

DEPARTMENT OF MOTOR VEHICLES

(No. CC-78-23)

No appearance on behalf of claimant.

Frank M. Ellison, Deputy Attorney General, for respondent.

PER CURIAM:

In the spring of 1976, the respondent issued a purchase order for 1978 license plate decals at an agreed price of $87.95 per thousand. Claimant made an error in billing and invoiced respondent at the rate of $87.59 per thousand. Claimant also failed to bill respondent for the freight charges, even though the purchase order reflected that the sale was F.O.B. claimant's factory. The respondent has filed an Answer admitting that it owes claimant the sum of $195.97, and we therefore make an award to claimant in the amount of $195.97.

Award of $195.97.

Opinion issued February 10, 1978

CAROLYN CRISP SHERWOOD

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-214)

No appearance by claimant.

Gregory W. Evers, Attorney at Law, for respondent.

PER CURIAM:

By written stipulation submitted to the Court by the parties herein, it was stipulated that on or about April 5, 1976, the respondent's employees were engaged in welding operations on the Willow Wood Bridge on Local Service Route 3 in Summers County, West Virginia, and that the claimant was properly

driving her 1975 Oldsmobile across the bridge when one of respondent's employees negligently dropped hot welding slag on the windshield of claimant's automobile causing damage in the amount of $237.00. Believing that liability exists on the part of the respondent, and that the damages are reasonable, the Court is of the opinion to and does make an award of $237.00 to the claimant.

Award of $237.00.

Opinion issued February 10, 1978

NEW MARTINSVILLE/WETZEL COUNTY EMERGENCY SQUAD, INC.

vs.

DIVISION OF VOCATIONAL REHABILITATION

(No. CC-77-211)

No appearance by claimant.

Frank M. Ellison, Deputy Attorney General, for respondent.

PER CURIAM:

The claimant, at the request of a representative of respondent's Clarksburg, West Virginia office, did on November 25, 1975, and again on December 1, 1975, make round trips between New Martinsville and Charleston for the purpose of transporting by ambulance a Donald H. Lancaster from Institute to New Martinsville and back again six days later. For this service, the claimant billed respondent $162.00, but claimant's bill was never paid. The respondent has filed an Answer admitting the validity of the claim, and that claimant is entitled to receive the amount of its claim. Therefore, an award is hereby made in favor of claimant in the amount of $162.00.

Award of $162.00.

Opinion issued February 10, 1978

HELEN L. NORVELL, EXECUTRIX OF THE ESTATE OF GLENN HARTSEL NORVELL, DECEASED

VS.

DEPARTMENT OF HIGHWAYS

(No. D-936)

W. Dale Greene, Attorney at Law, for the claimant.

Gregory W. Evers, Attorney at Law, for the respondent.

PER CURIAM:

This wrongful death claim was submitted upon stipulation of the parties to the effect that the respondent knew of dangerous, slippery road conditions caused by a tar spill on State Route 4 in Clay County, and negligently failed to correct those conditions; that the respondent knew of several vehicle accidents at the point of the spill, near Ivydale, one of which had torn out guardrails; that the respondent negligently failed to take any action to replace those rails or warn motorists of the dangerous conditions; that such negligence by the respondent caused the accident on April 25, 1973, as a result of which claimant's decedent died; and that the sum of $15,000.00 represents a fair and reasonable award in settlement of this claim. Therefore, an award in that amount should be, and is hereby, made.

Award of $15,000.00.

Opinion issued February 10, 1978

ARIZONA M. OFFUTT

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-109)

David A. Glance, Attorney at Law, for the claimant.

Nancy J. Norman, Attorney at Law, and *James W. Withrow,* Attorney at Law, for the respondent.

RULEY, JUDGE:

On December 23, 1975, a 1970 Ford Torino, owned by claimant and driven by claimant's son, slid on a patch of ice on Boulevard Avenue, near Fairmont, skidded off the road, and fell about twenty feet down a hillside. In the place where the accident happened, part of Boulevard Road had collapsed, reducing it from a two-lane to a one-lane road. Claimant, seeking recovery for damage to the automobile in the sum of $2,000.00, alleges that respondent negligently failed to repair Boulevard Avenue and failed to keep the road clear of ice, thus causing the accident.

The evidence in this case reveals that Boulevard Avenue had collapsed in the spring of 1975, a full eight months before this accident occurred. Respondent made no effort to repair the road, and at the time of the accident, had only two "One Lane" signs and reflectors in place to warn motorists of the hazard. The signs and reflectors were within 20 feet of the collapsed portion of the road. The evidence also leads to the conclusion that, although the respondent knew that the road was icy on the day before the wreck, no cinders or salt were put on the road until after the accident. When the Department of Highways knows that a road is too narrow for two-lane traffic, and knowingly allows a dangerous condition to exist on such a road, it is negligent and liable for damages caused by such negligence. *Jones v. Department of Highways,* 9 Ct.Cl. 117 (1972). The Court finds the respondent negligent.

The evidence also impels the conclusion that claimant's son was familiar with the road and was driving slowly (approximately 10 mph) and carefully as he approached the collapsed portion of the road. The Court finds no evidence of contributory negligence. Therefore, respondent is found liable.

On the issue of damages, the only evidence offered consisted of claimant's testimony that the car had a book value of $1,700.00 at the time of the accident, and a salvage value of $75.00. Accordingly, claimant should be awarded the sum of $1,625.00 in damages.

Award of $1,625.00.

Opinion issued February 10, 1978

OTIS ELEVATOR COMPANY

vs.

DEPARTMENT OF HEALTH, DIVISION OF MENTAL HEALTH

(No. CC-77-204)

Otis Elevator Company, the claimant, by *John C. Regnier,* its Manager.

Frank M. Ellison, Deputy Attorney General, for the respondent.

PER CURIAM:

The respondent owes the claimant $95.00 for routine maintenance services. The respondent, in its Answer, admits the validity of the claim. Accordingly, an award in the amount of $95.00 should be, and is hereby, made.

Award of $95.00.

Opinion issued February 10, 1978

POLIS BROTHERS

vs.

DEPARTMENT OF HEALTH,
DIVISION OF MENTAL HEALTH

(No. CC-77-107)

Polis Brothers, the claimant, by *Joseph L. Polis.*

Henry C. Bias, Jr., Deputy Attorney General, for the respondent.

RULEY, JUDGE:

By agreement of the parties, this claim was submitted upon the pleadings and an affidavit by Joseph L. Polis, who, with his brother, Anthony, does business as Polis Brothers, claimant in this action.

The claim and affidavit assert that Polis Brothers sold and delivered eggs and quartered fryers worth $239.90 to a place called Roney's Point Center in Triadelphia, for the use and benefit of the respondent. Attached to the affidavit were copies of the two invoices for that merchandise, addressed to Roney's Point. The respondent's Answer denies the allegations and asserts that the claimant has failed to state a claim for which relief may be granted.

The pleadings do not explain what, if any, relationship exists between Roney's Point and the respondent. Indeed, it is unclear whether Roney's Point is an institution, a place on the map, or whatever. If the Court had only the pleadings before it, the claim would have to be denied. But Mr. Polis' affidavit clearly implies that respondent is liable for bills sent to Roney's Point. Going beyond the evidence, the Court notes that the 1976 edition of the West Virginia Blue Book, Volume 60, at page 410, lists Roney's Point as a state institution under the control of the Mental Health Department. Accordingly, we hold the respondent liable in the amount of $239.90. An award in that amount should be, and is hereby, made.

Award of $239.90.

Opinion issued February 10, 1978

JERRY AUSTIN REXRODE

vs.

DEPARTMENT OF NATURAL RESOURCES

(No. CC-77-202)

Jerry Austin Rexrode, the claimant, in person.

Frank M. Ellison, Deputy Attorney General, for the respondent.

PER CURIAM:

This case was submitted upon the pleadings, in which respondent admits liability for a balance of $2,943.72 owed the claimant for construction of a fireplace in a picnic shelter at the Cass Scenic Railroad. An award in that amount is hereby made.

Award of $2,943.72.

Opinion issued February 10, 1978

ANTHONY R. ROSI

vs.

DEPARTMENT OF MOTOR VEHICLES

(No. CC-77-138)

No appearance by the claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision upon the pleadings by agreement of the parties. The claimant purchased a 1977 Plymouth Volare automobile from Country Club Chrysler-Plymouth in Clarksburg, West Virginia. Because of numerous problems with the automobile, the claimant returned it and received a refund of the purchase price. The dealer was unable to refund the 5% tax paid to the respondent in the sale. This

claim is for a refund of the $271.60 tax paid. It is the opinion of this Court that since the sale was nullified between the parties and the sales price refunded, the tax paid in the amount of $271.60 should be refunded to the claimant. (*George M. Custer vs. Department of Motor Vehicles,* CC-77-86, 12 Ct. Cl. 48; *Sandra S. Clemente vs. Department of Motor Vehicles,* CC-77-169, 12 Ct. Cl. 48). Accordingly, an award in the sum of $271.60 should be, and is hereby, made.

Award of $271.60.

Opinion issued February 10, 1978

FRANKLIN ROSS and ELSIE M. ROSS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-132)

No appearance by claimants.

Richard Carlton, Attorney at Law, for respondent.

PER CURIAM:

The parties have filed a written stipulation with the Court in which they have stipulated that the respondent is responsible for the maintenance and control of the I-64 bridge at the point the bridge passes over the 1600 block of Madison Avenue in Huntington, West Virginia. On July 6, 1977, the claimant, Elsie M. Ross, drove a 1973 Ford automobile owned by the claimant, Franklin Ross, westerly on Madison Avenue under the bridge. A light from a sign on the bridge fell on the automobile causing damage to the automobile in the amount of $347.80. Believing that liability exists on the part of the respondent and that the damages are reasonable, the Court is of the opinion to and does make an award to the claimant in the amount of $347.80.

Award of $347.80.

Opinion issued February 10, 1978

MARY JO SHARP

vs.

DEPARTMENT OF HEALTH,
DIVISION OF MENTAL HEALTH

(No. CC-77-66)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

GARDEN, JUDGE:

The claimant, who previously had been employed at the Guthrie Center in Kanawha County as an executive housekeeper, was transferred to Barboursville State Hospital on July 1, 1976, as a Teacher I, a part-time position. It was further established, by exhibit, that the employment was of a temporary nature, for a period of four months, and that the claimant was to work 28.8 hours per week. In addition, the claimant's employment was extended an additional five months, expiring March 31, 1977, at a monthly salary of $586.00 (representing 71.9% of the full-time salary of $815.00 for the position which she held on a part-time basis).

On November 17, 1976, the claimant, feeling that her duties at Barboursville were becoming fewer, conferred with James Clowser, who at that time was the Deputy Director of Mental Health, about becoming employed at Barboursville on a full-time basis. Mr. Clowser was agreeable, and in the claimant's presence he telephoned Dr. Glen T. Roberts, the Chief Personnel Officer for the Department of Health, and told him that it was his desire that the claimant be placed on full-time status as of December 1, 1976. Dr. Roberts, who testified at the hearing, confirmed this conversation and testified that he had told Mr. Clowser that there would be no problem if the claimant could be reached on the appropriate Civil Service register. Dr. Roberts testified that he then contacted George Pozego, Superintendent at Barboursville, and told him of Mr. Clowser's request and that Mr. Pozego then initiated the necessary paperwork to bring about the full-time appointment of claimant from the Civil Service register.

On December 1, 1976, the claimant, believing that she had attained full-time status, worked an eight-hour day, but on the following day during which she worked another eight hours, her supervisor, Violet Waggoner, questioned her about the number of hours she was working. Mrs. Waggoner advised the claimant that she had not been advised officially as to claimant's full-time status, and the claimant suggested that Mrs. Waggoner check with Central Office for verification of claimant's full-time status. The claimant continued to work on a full-time basis through December of 1976, but when she submitted her time sheet for that month, her supervisor, Mrs. Waggoner, refused to approve it and wrote the following notation on the sheet. "I refuse to sign this Time Sheet, as this employee is scheduled only to work 28.8 hours per week. She is working additional time on her own." When this occurred, the claimant testified that she called Mr. Clowser's office and was advised that notice as to her full-time status had been forwarded to Barboursville. Claimant continued to work on a full-time basis until January 27, 1977, when she received a letter from Superintendent Pozego that her employment would be terminated on March 31, 1977, and that until that time she would continue to work 28.8 hours per week as originally planned when her appointment was made. Claimant thereafter confined her working hours to 28.8 hours per week, and she admits that during her employment at Barboursville, she never received anything in writing officially stating that she was a full-time employee. Claimant is seeking an award of $458.00, which represents the difference in her total pay as a full-time employee during the months of December and January and what she did receive during that period as a part-time employee.

In explanation of this matter, Dr. Roberts testified that in December of 1976, all superintendents in the Department of Mental Health were requested to review their budgets relating to personal services to determine if it would be necessary to request a deficiency appropriation from the Legislature. Mr. Pozego's projection developed that there would be insufficient monies to pay claimant past the month of March, 1977. Dr. Roberts also testified that as a result of Mr. Pozego's original paperwork, approvals had been received from Civil Service

and from the Department of Finance and Administration in respect to claimant's full-time status, but by this time the insufficiency of funds for personal services had become apparent, and Mr. Pozego therefore prepared the necessary papers to cancel claimant's status as a full-time provisional employee. Dr. Roberts further testified that, although it was the intention of respondent to elevate claimant to that of a full-time employee, such elevation was in fact never carried out.

While we are critical of claimant's voluntarily working on a full-time basis in December and January, when she had to be aware of some problem in obtaining official approval of her full-time status, she did devote a substantial amount of her time for which she has not been compensated. We believe that equity and good conscience require us to make an award covering these uncompensated working hours, and we therefore make an award in favor of claimant in the amount of $458.00.

Award of $458.00.

Opinion issued February 10, 1978

COURT OF CLAIMS
STATE OF WEST VIRGINIA

FRED K. TESTA and
CLAUDIA I. TESTA,

Claimants,

vs.

DEPARTMENT OF HIGHWAYS

Respondent,

CLAIM NO. D-669a

and

SALEEM A. SHAH and
THERESA A. SHAH,

Claimants,

vs.

DEPARTMENT OF HIGHWAYS

Respondent.

CLAIM NO. D-669b

Peter L. Chakmakian, Attorney at Law, for the claimants.

Gregory W. Evers, Attorney at Law, for the respondent.

RULEY, JUDGE:

The claimants in these consolidated cases allege that the respondent unlawfully cut down a total of fifty-seven trees belonging to them and ask for treble damages as provided in Code §61-3-48a, "Cutting, damaging or carrying away without permission, timber, trees, growing plants or the products thereof; treble damages provided." The respondent does not deny that the trees in question were beyond the thirty-foot right of way (15 feet from center) on Secondary Route 9/3 in Jefferson County, but contends that the trees were within a prescriptive easement enjoyed by the State along the road.

There is no question that the trees were beyond the thirty-foot right of way the Department of Highways enjoys. *Hark*

v. Mountain Fork Lumber Co., 127 W.Va. 586, 34 S.E.2d 348 (1945). The right of way may also include, however, embankments, slopes, ditches, and other areas necessary for the maintenance of travel. W.Va. Code §17-1-3, *Hark, supra.* If the land on which the trees stood had been maintained by the State as part of the road for at least ten years, the respondent would not be liable. *Riddle v. Department of Highways,* 154 W.Va. 722, 179 S.E.2d 10 (1971). But the evidence indicates that the area in question had not been a part of the roadway, had not been in "continued and uninterrupted use or enjoyment for at least ten years" (*Riddle, supra*) by the State. In fact, the cutting of the trees was the first step in the respondent's plan to widen the road in 1971. The respondent's agents wrongfully cut the trees, and, even though they believed they had a right to do so, the respondent is liable to the claimants for damages.

The claimants seek recovery of treble damages under the provisions of Code §61-3-48a, which read:

> "Every person, firm, association, partnership or corporation, who shall cut, damage, or carry away without permission from the rightful owner thereof, any timber, trees, logs, posts, fruit, nuts, growing plant or product of any growing plant, shall be liable to the rightful owner to the amount of three times the value of such as damages, which shall be in addition to and notwithstanding any other penalties by law provided."

Although the same subject, viz., unlawful cutting of trees, was involved in *Blair v. Department of Natural Resources,* 9 W.Va. Ct. Cl. 69 (1972), the issue of treble damages was not addressed expressly by the Court and it awarded only compensatory damages. In 52 Am. Jur. 2d *"Logs and Timber"*, §135, p. 101, under a subheading relating to punitive and multiple damages, it is stated:

> "§135. Generally.
>
> In many states, statutes have been enacted providing for double or treble damages and penalties in certain circumstances. Many of these statutes expressly pertain to trespass on timberlands and provide for double or treble damages for the cutting or removal of timber. In some

> states, the statute is regarded as remedial and not penal, notwithstanding a provision therein for treble damages. *But it has been held that equity will not decree multiple damages under such enactments, because such damages are in the nature of penalties which are not enforceable in courts of equity.*" (Emphasis supplied)

Code §14-2-13 confers upon this Court jurisdiction of "Claims and demands * * * which the State as a sovereign commonwealth should in equity and good conscience discharge and pay. * * *" While that statute does not make this Court a court of equity, it is our opinion that, when it and other related statutes are considered together, it appears implicit that equitable principles should govern the amount of awards which this Court makes. In addition, in 52 Am. Jur. 2d *"Logs and Timber"*, §137, p. 103, it is stated:

> "It is generally held that where timber is cut or carried away under a bona fide mistake of fact, as, for example, where the trespasser believes that he is on his own land or the lands of another upon which he is authorized to go, the penalty statutes do not apply, even though they contain no exculpatory provisions. * * *"

and there is no evidence in this case that the respondent cut the claimants' trees under anything other than a bona fide mistake of fact. For these reasons, we believe that compensatory rather than treble damages should be awarded.

The evidence shows that the respondent cut 30 trees on the Testa property. They were of mixed variety, many of them hackberry, but others were walnut, elm, ash, hickory, cherry, and locust, ranging in size from 0.4 feet to 2.0 feet in diameter. The evidence shows that the respondent cut 27 trees of similar mixed variety and size on the Shah property. There was an uncommon divergence of expert opinion evidence as to the value of the trees, ranging from $332.24 to $11,602.50 for the Testa trees, and from $107.75 to $9,601.10 for the Shah trees. The opinions as to the lower sums were "forest tree" value and were based on the premise that only value for timber should be considered. However, the undisputed evidence is that the trees were in proximity to Secondary Route 9/3 along the back side

of the Testa and Shah properties, and that, although they were located a substantial distance from dwelling houses, they did have functional use in screening for privacy, abatement of highway noise, and as a windbreak. The opinions as to the higher sums were expressed by Donald S. Frady, a nationally respected arborist of Falls Church, Virginia, but it appears that they were based, at least in part, upon "shade tree" value and utilized the "shade tree formula". It appears that neither the "forest tree" nor the "shade tree" label or classification fits the facts of this case very well. In view of all of the evidence, it is the opinion of the Court that $4,500.00 would be a fair compensation for the damage sustained by the claimants Testa, and $3,500.00 would be a fair compensation for the damage sustained by the claimants Shah.

Judge Wallace disqualified himself and did not participate in the consideration of these claims.

Award of $4,500.00 to Fred K. Testa and Claudia I. Testa.

Award of $3,500.00 to Saleem A. Shah and Theresa A. Shah.

Opinion issued February 10, 1978

3M BUSINESS PRODUCTS SALES, INC.

vs.

DEPARTMENT OF MOTOR VEHICLES

(No. CC-77-194)

No appearance by claimant.

Frank M. Ellison, Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted to the Court upon the pleadings, which consist of claimant's Notice of Claim for unpaid invoices in the amount of $957.50 and respondent's Answer admitting the validity of the claim and the amount due. Accordingly, the Court makes an award to the claimant in the amount of $957.50.

Award of $957.50.

Opinion issued March 8, 1978

CLENDENIN LUMBER & SUPPLY COMPANY

vs.

DEPARTMENT OF HEALTH,
DIVISION OF MENTAL HEALTH
(No. CC-78-14)

No appearance on behalf of claimant.

Frank M. Ellison, Deputy Attorney General, for respondent.

PER CURIAM:

Claimant furnished Armstrong Excelon floor tile and brush-on adhesive for use at Guthrie Center. Purchase Order Number 109 in the amount of $458.85 was not paid because it was submitted after the close of the fiscal year during which the supplies were furnished. The respondent admits the validity of the claim, that there were sufficient funds with which to pay the claim, and that the claimant is entitled to payment.

Accordingly, the Court makes an award in favor of the claimant in the amount of $458.85.

Award of $458.85.

Opinion issued March 8, 1978

MICHAEL H. COEN
and RUTH COEN

vs.

DEPARTMENT OF HIGHWAYS

(No. D-1008)

Martin S. Bogarad & William R. Kiefer, Attorneys at Law, for claimants.

Gregory W. Evers, Attorney at Law, for respondent.

WALLACE, JUDGE:

This claim, filed by Michael H. Coen and Ruth Coen, his wife, was the result of an automobile accident which occurred at approximately 11:20 a.m. on October 17, 1973, on West Vir-

ginia Route 2 in Wellsburg, West Virginia. The weather was clear and the temperature ranged between 45 and 55 degrees.

Route 2, from a point on the north side of Wellsburg at 27th Street southerly to 12th Street, is a dual four-lane highway consisting of a concrete medial strip between two southbound lanes and two northbound lanes.

On the day of the accident, employees of the respondent had sprayed portions of the area of Route 2 with a combination of linseed oil and mineral spirits as an anti-spalling compound for the preservation of the concrete to prevent spalling caused by salt on the highway.

The claimant, Michael H. Coen, was driving his 1970 Chevrolet Impala automobile in a southerly direction in the right or outside lane of West Virginia Route 2. At the intersection of Route 2 and 16th Street, his automobile collided with an automobile driven by Raymond A. Lengyel. Lengyel testified that he was driving his 1968 Pontiac Catalina automobile 35 to 40 miles per hour northerly on Route 2, and that, as he started to pass a tractor trailer, his automobile started to slide. He lost control, slid across the medial strip into the southbound lane of the highway, and was struck by the southbound Coen automobile. He further testified that he noticed a discoloration of the surface of the highway from the point where it changed from a two-lane to a four-lane highway, and that there were no barricades or warning signs. Lengyel, who received only minor injuries, was taken to the hospital in an ambulance with Michael H. Coen. He stated that he returned to the accident scene later and that the intersection and all lanes of the highway were slippery and discolored.

Employees of the respondent testified that on the morning of the accident, they started spraying the highway at approximately 8:00 a.m., spraying the outside or right-hand lane of the four-lane section of Route 2 south from 27th Street to 12th Street in Wellsburg and the outside or right-hand lane north to Cross Creek. The spraying was done by a Ford tractor equipped with a 200-gallon tank and a spray bar which was set six inches above the surface of the road. An automobile preceded the tractor which was followed by a pickup truck. There were no

flagmen, barricades, or warning signs used. The equipment had flashing lights. The tractor traveled at approximately six miles per hour. It did not stop during the spraying process but continued until the job was completed. The men applying the material had never done this type of work before except on two bridges in Brooke and Hancock Counties the day before the accident.

Certain of the claimants' witnesses testified to the effect that all four lanes of the highway were sprayed. The respondent's witnesses testified that only the outside lanes were treated. Various witnesses for the claimant and the respondent stated that the material applied to the highway was tracked from one lane to the other by traffic using the road. Some described the road surface as tacky, others for the claimants described it as slippery.

The testimony of expert witnesses for the claimants and the respondent pertained to the variables that affect the drying time of the anti-spalling compound. Weather, temperature, age of the road surface, speed of the spraying vehicle, quantity, and rate of application are necessary factors to be considered. Various factors affect the application of the mixture. The expert for the respondent testified that the compound should be dry in 2½ hours. However, the testimony of certain witnesses for the claimants and the respondent indicated that the mixture was not dry at the time of the accident.

The claimant, Michael H. Coen, was seriously injured. He suffered severe contusions of his lung and shoulder and various injuries to his ribs, head, neck, and back. He lost 50% use of the right shoulder. The record reveals that prior to the accident he had emphysema and his breathing capacity was reduced to 44% but he was not incapacitated; he worked full time as a locomotive engineer for the Wheeling-Pittsburgh Steel Company and was able to bowl, play golf, and lead a normal life. The lung injury aggravated the emphysema, and he has been unable to work since the accident. Michael Coen is required to use oxygen continually for all but a few moments on his better days. He is in continuous pain. His inability to breathe has necessitated frequent hospitalization. According to the medical

testimony, the claimant, Michael H. Coen, is totally and permanently disabled, and his disabled lung, disabled shoulder, facial scarring, and continuous pain are a proximate result of the accident. His wife, the claimant, Ruth Coen, and other members of his family care for him constantly. It has been necessary to expend large sums of money for physicians, hospital, pharmacies, oxygen supplies, and other incidentals. The admitted costs incurred by reason of the injuries were: $2,922.-00 for doctors, $22,940.00 for hospital costs, $2,825.68 for pharmacy expense, $776.20 for oxygen supplies and equipment, and $143.70 for ambulance service. At the time of the accident Michael Coen was earning approximately $12,000.00 per year. Since the accident he has been unable to work.

From the evidence, it is the opinion of the Court that the negligence of the respondent was the proximate cause of the accident. Respondent failed to provide for the safety of the traveling public during and after the application of the anti-spalling compound to the highway. The surface of the highway was treated by inexperienced personnel of the respondent. There were no warning signs nor flagmen before, during, or after the job was completed. Accordingly, the Court, after considering the medical expenses and loss of wages both present and future, finds from the record that the claimants are entitled to recover, and makes an award to the claimants in the amount of $65,000.00.

Award of $65,000.00.

Opinion issued March 8, 1978

RICHARD L. WEEKLY

vs.

OFFICE OF EMERGENCY SERVICES

(No. CC-77-219a&b)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

Claims CC-77-219a and CC-77-219b filed by the claimant, Richard L. Weekly, against the respondent were consolidated for hearing.

CC-77-219a is a claim for $1,025.85 for 26 3/4 days leave which accrued to the claimant as Administrative Officer for the respondent prior to his appointment as Acting Director. Upon the hearing of the claim, the respondent, by counsel, admitted the validity of the claim and that it should be paid.

CC-77-219b represents a claim for $1,144.98 filed by the claimant for the difference between his salary as Acting Director of the respondent agency and that of Administrative Officer for the months of July, August, and September, 1973. West Virginia Civil Service System Form CS-4 was introduced as Claimant's Exhibit No. 1. The Form, properly executed and approved, appointed the claimant as respondent's Acting Director effective July 2, 1973, at a salary of $1,166.66 per month. The claimant was paid $785.00 per month for the months of July, August, and September.

In view of the admissions made by the respondent in Claim CC-77-219a and the evidence presented in Claim CC-77-219b, the Court is of the opinion to and does make awards to the claimant as follows:

Claim No. CC-77-219a—$1,025.35

Claim No. CC-77-219b—$1,144.98.

Opinion issued April 3, 1978

ERVIN ARTHUR, ADMINISTRATOR OF THE ESTATE OF CECIL C. BRUMFIELD, DECEASED

vs.

DEPARTMENT OF HEALTH, DIVISION OF MENTAL HEALTH

(No. CC-76-56)

E. G. Marshall, Attorney at Law, for the claimant.

Henry C. Bias, Jr., Deputy Attorney General, and *Gerald Lacy,* Assistant Attorney General, for the respondent.

RULEY, JUDGE:

The claimant seeks damages in the sum of $115,000.00 for the alleged wrongful death of Cecil C. Brumfield which occurred on August 6, 1975. On June 16, 1975, Mr. Brumfield, then aged 77 years, was admitted as a patient to Huntington State Hospital. He had been a patient there on one previous occasion, in 1967. Without going into needlessly embarrassing detail, the evidence demonstrated clearly that his condition both mental and physical, from the time of his admission until his demise, was poor. At about 1:30 a.m. on June 22, 1975, he provoked an altercation with another patient but apparently sustained no noticeable injury. On July 30, 1975, he fell while walking in a hallway. He was examined promptly after that fall by Vermald N. Constantino, M.D., a staff physician who, incident to physical examination, ordered x-rays of the hips which were interpreted as negative by both Dr. Constantino and G. M. Tolley, M.D., a radiologist on the staff of Cabell Huntington Hospital.

On August 3, 1975, the claimant and his wife, who are the daughter and son-in-law of the decedent, visited him at Huntington State Hospital and were understandably upset and distressed by the radical change in his physical appearance and condition. Following their visit, additional x-rays were taken which were interpreted as showing a "slightly displaced fracture involving the neck of the right femur". Mr. Brumfield was transferred to Cabell Huntington Hospital on August 4, 1975, and expired there two days later.

Numerous allegations of misconduct on the part of the respondent are made, but, in sum, they assert that Mr. Brumfield's death was caused by negligence of the respondent in failing to provide proper care for him and, in particular, in failing to transfer him to Cabell Huntington Hospital on July 30, 1975. In fact, the decedent's daughter testified that if he had been "put in the hospital the night he fell, July 30th" there would have been no claim.

To make an award in this case, the Court would be obliged to conclude that it has been shown by a preponderance of the evidence that the respondent was guilty of negligence which proximately caused the death of Mr. Brumfield. It is urged that the Court should reach that conclusion solely upon the evidence of the decedent's physical condition on and after August 3, 1975. We cannot agree. To do so would require speculation (in the absence of any direct evidence whatever, it might be added) and, of course, this Court should not and cannot base decisions on speculation. In that connection, Irvin M. Sopher, M.D., Chief Medical Examiner of the State of West Virginia, who performed an autopsy upon the decedent's body, expressed the opinion that the decedent "died as a result of pneumonia and apparent cardiac failure complicating a fracture of the right hip" and added that the pattern of bodily injuries which he had noted in his report was not sufficiently specific to allow conclusions to be drawn regarding their etiology or cause.

Claim disallowed.

Opinion issued April 3, 1978

MINNIE LEE BROWN

vs.

DEPARTMENT OF HIGHWAYS

(No. D-999)

Michael R. Crane, Attorney at Law, for claimant.

Nancy Norman, Attorney at Law, for respondent.

WALLACE, JUDGE:

This claim was filed as the result of surface water damage to claimant's property. The claimant lives at 822 Avesta Drive

in St. Albans, West Virginia. Avesta Drive is also Route 12/9 and has been maintained by the respondent since 1950. Route 12/9 or Avesta Drive serves the claimant and her neighbors and terminates 500 to 600 yards beyond the claimant's house. Avesta Drive was an unimproved dirt and gravel road 16 to 20 feet wide previous to the summer of 1976, at which time the respondent graded the existing material and applied a 60-pound surface treatment of bituminous material and aggregate to the road. Claimant's property, which fronts 206 feet on the road, is approximately 17½ feet from the center of the road. The road runs generally in an east-west direction and slopes downhill past the claimant's house. Originally, claimant's house was below the level of the road. In 1970 she had her house raised 5 to 6 courses of cinder blocks to make it level with the road. The area between the front of the house and the road was filled with fill dirt. Across the road from the claimant's home is a hill section. The natural drainage of this area flows into a drain at the edge of the road emptying into a culvert and pipe which carries the water under the road and into a natural ravine on claimant's property 20 to 25 feet from her house.

The claimant testified that, over the years, the respondent's road maintenance consisted of grading and filling holes with additional dirt and rock. The continual filling of holes and grading of the road raised the elevation of the road and caused surface water to flow down the road and off in front of her house. The water washed out the fill in front of the house, damaged the porch and downspout, and created some dampness in the basement. She further testified that the pipe under the road had not been maintained properly, causing the water to flow under rather than through it, the resulting soil erosion causing damage to her property. She complained to the respondent on many occasions, but little was done to correct the damage problems. In an effort to improve the flow of water under the road she put an extension an the existing pipe.

Joseph T. Deneault, respondent's maintenance engineer for Kanawha County, testified that the road was not a high speed, highly constructed road. The road is crowned and the surface water flows to both sides. He stated that a section of the road approximately 5 feet wide and extending approximately 30

feet in front of claimant's house slopes towards the house, and that surface water flows onto claimant's property at this point. He further testified that the re-surfacing of the road in 1976 probably raised the elevation of the road one inch. He was unable to testify as to the maintenance in previous years because he had been in his present position for only approximately 1½ years. He stated that the pipe under the road had settled away from the existing culvert, causing water to flow underneath the pipe, except in heavy concentrations of water when it flows under and through the pipe. The water under the pipe causes the soil to erode. From the evidence, it is the opinion of the Court that the respondent was negligent in its failure to provide proper maintenance to the road and the drainpipe under it. The lack of proper maintenance was the proximate cause of the damage to claimant's property, and she is entitled to recover. The Court, having considered the record and the values established in the appraisals offered into evidence, makes an award of $4,500.00 to the claimant.

Award of $4,500.00.

Opinion issued April 3, 1978

WILLIAM C. GRIFFING

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-50)

The claimant appeared in person.

Gregory W. Evers, Attorney at Law, for the respondent.

WALLACE, JUDGE:

On March 3, 1977, the claimant was driving his 1970 Toyota automobile on the main road through Cabin Creek, Kanawha County, West Virginia. Although the record does not disclose the road designation, the respondent admitted that it was maintained by the Department of Highways. The road is a two-lane highway. The weather was clear, the road dry. Although it was not yet dark, the claimant's automobile lights were on.

The claimant testified that the road was in bad shape and that he was driving at approximately 10 to 15 miles per hour. As he rounded a curve or bend in the highway, his automobile struck a hole in the pavement. His right front wheel rim and tire were damaged.

The law of West Virginia is well established that the State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947), *Parsons v. State Road Commission,* 8 Ct. Cl. 35. There is no evidence in the record of any prior notice to the respondent. The existence of road defects without notice to the respondent is not sufficient to establish negligence. Proof that respondent had notice of the defect in the road is necessary. *Lowe v. Department of Highways,* 8 Ct. Cl. 210 (1971).

Accordingly, the Court is of the opinion to and does hereby disallow the claim.

Claim disallowed.

Opinion issued April 3, 1978

LLOYD HARDING GWINN

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-191)

Claimant appeared in person.

Richard Carlton, Attorney at Law, for respondent.

WALLACE, JUDGE:

On August 24, 1977, at about 10:30 a.m., the claimant was driving his 1976 Ford Bronco in a northerly direction on West Virginia Route 20. He was proceeding from his home in Leivasy to keep an appointment with a doctor in Richwood. At the time it was raining very hard, and, according to the claimant, it had rained throughout the entire night. As the claimant came out of a turn near the Nettie Grade School, he observed a large accumulation of water on the road about eighty to ninety feet

ahead of him. Route 20 at this point is a two-lane asphalt road, one lane for northbound traffic and one lane for southbound traffic, and the lanes are separated by double yellow lines. The road is crowned in the middle to facilitate drainage, and, as was established by the evidence, is seven inches higher in the center of the road than at the edges of the roadway.

The claimant testified that he was traveling between 30 and 35 miles per hour when he first observed the water which was entirely covering his northbound lane of travel, and that while he slowed his vehicle, he lost control of it when it entered the water. As a result, the vehicle struck the embankment on the right-hand side of the road and was damaged to the extent of $517. Claimant also testified that he had unobstructed vision 150 to 175 feet north of the accident scene and that no traffic was approaching from the opposite direction, but that he did not avoid the water by proceeding left of center for fear that he would be violating the law in crossing a double line.

The testimony further revealed that the water had accumulated on the road as the result of a clogged culvert on the east side of the road. The claimant was of the opinion that the water was from 12 to 18 inches deep on the right-hand or east edge of the road, and Hubert H. Greathouse, who resided near the accident scene and who testified on behalf of claimant, was of the opinion that the water was 18 inches deep at the edge of the road. On the other hand, H. B. Dodrill, a maintenance foreman of respondent, testified that when he arrived at the accident scene shortly after claimant's vehicle had been removed, the water at the right-hand side of the road was only 4 inches deep.

The witness Greathouse clearly established that respondent had prior knowledge of the clogged culvert. Two weeks prior to the accident he had visited respondent's headquarters and complained about stagnant water standing in the culvert, and a week later, respondent's employees had inspected the culvert but made no repairs. Greathouse further testified that at approximately 9:00 a.m. on the morning of the accident, his wife, at his request, phoned respondent's headquarters and reported the water accumulation, but nothing was done until after claimant's accident. While this Court is of the opinion

that the negligence of the respondent in failing to maintain the subject culvert has been established, we are equally convinced that the claimant's own testimony demonstrates that he was guilty of contributory negligence which proximately contributed to claimant's accident. While it is most laudable for claimant to have refused to cross the double line for fear of violating the law, his falure to do so when there was no approaching traffic for a distance of some 150 to 175 feet constituted negligence, and, for that reason, we make no award.

Claim disallowed.

Opinion issued April 3, 1978

NATHAN HADDAD, JR.

vs.

DEPARTMENT OF MOTOR VEHICLES
& DEPARTMENT OF FINANCE & ADMINISTRATION

(No. CC-77-2)

Stephen A. Mallory, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

This claim was filed by Nathan Haddad, Jr. against the respondents for pay allegedly due for unpaid accumulated compensatory time while an employee of the respondents. The claimant started work with the Department of Motor Vehicles in 1963. He was transferred to Information Systems Services Division (ISSD) of the Department of Finance and Administration in 1971. During most of his employment, his immediate supervisor was Fred Michael, Jr. Rachael Pendleberry, the secretary for Michael, gave the claimant a slip of paper with her typed signature on it which stated that as of August 31, 1973, the claimant had accumulated 517¼ hours of compensatory time. She testified that she kept her own records which were not official.

Employees of the respondent were called as witnesses by the claimant. The testimony of these witnesses established that

there was no record made of compensatory time. Fred Michael testified that during the time the claimant worked for the Department of Motor Vehicles, employees were allowed time off during slack periods to compensate for periods when they were required to work overtime. The claimant had the same right as other employees, and Michael testified that the claimant had taken time off under this program.

Civil Service was started in the fall of 1968, at which time compensatory time could not be accumulated in excess of 40 hours without written permission of the appointing authority. There was no evidence that written authority was given to accumulate compensatory time for the claimant.

Harold Casali, Director of ISSD, testified that he had no knowledge of claimant's claim until 1976, just prior to his resignation to take other employment. He stated that for the past five years, the West Virginia Wage and Hour Law requirements had been met. Compensatory time was either taken within two weeks or the employee was paid overtime.

The claimant testified that 75 to 80 percent of the time claimed was accrued while he was employed by the Department of Motor Vehicles. The witness Michael testified that if there was accumulated compensatory time, 90 percent accrued prior to claimant's transfer from the Department of Motor Vehicles in 1971. The evidence does not disclose the existence of any record which would justify an award by this Court. The only evidence of compensatory time is the slip of paper introduced as Claimant's Exhibit No. 1 showing 572¼ hours accrued time as of August 31, 1973. The secretary who prepared the slip stated that the information was not taken from any official records but was a continuation of work of prior secretaries. The claimant's superiors testified that there were no records kept; that compensatory time was not transferable; and that time could not accumulate in excess of 40 hours without written permission.

The respondents, in addition to denying the claim, alleged that the claim was barred by the Statute of Limitations under the provisions of West Virginia Code Chapter 21, Article 5C, Section 8, which provides:

"(a) Any employer who pays an employee less than the applicable wage rate to which such employee is entitled . . . by virtue of this article shall be liable to such employee for the unpaid wages; . . .

(d) In any such action the amount recoverable shall be limited to such unpaid wages as shall have been paid by the employer within two years next preceding the commencement of such action . . . ."

This claim was filed on January 5, 1977. Claimant's Exhibit No. 1 purports to show 517¼ hours accrued compensatory time as of August 31, 1973. There is no evidence of time claimed subsequent to this date. Therefore, the provisions of the statute are applicable to this claim.

For reasons herein set out, the Court disallows the claim of the claimant.

Claim disallowed.

Opinion issued April 3, 1978

EDITH ANN THOMPSON
& ROGER DALE THOMPSON

vs.

DEPARTMENT OF NATURAL RESOURCES

(No. CC-77-7)

Thomas M. Hayes and *Charles Moredock*, Attorneys at Law, for claimants.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

This claim arose as the result of an accident in the Kanawha State Forest in a picnic area known as Rattle Snake Run maintained by the respondent. On July 17, 1976, the claimants and their children arrived at the Rattle Snake Run picnic area at approximately 2:30 p.m. for a family picnic. They selected a spot where two picnic tables had been placed together. The

tables were eight to ten feet from a fireplace. The claimant, Roger Dale Thompson, was building a fire in the fireplace. His wife, Edith Ann Thompson, was nursing her nine-week-old baby at the picnic table. Without warning, a large limb from a dead tree near the table fell on Mrs. Thompson. She was injured and the table was damaged. The baby was unhurt. Mrs. Thompson received a fracture of the right arm, a macerated abrasion over her right ankle, a bump on the forehead, and an abrasion on her right hip.

The Forest Superintendent, Osbra Eye, testified that he had knowledge of the tree and that it had died the previous summer. It had not been removed because he did not think it was a hazard. He stated that maintenance crews were frequently in the area and did not report to him any apparent danger from the tree. However, he further testified that decayed limbs from dead trees often fall without warning, and after viewing photographs taken of the tree the day after the accident, he stated that the tree appeared to be dangerous. The photographs indicated that the top of the tree was in a state of advanced decay and that many limbs had apparently fallen prior to the accident. The testimony revealed that users of the picnic area often moved tables from one place to another and that it was not the custom for maintenance crews to change their location. In the instant case, no effort had been made by the respondent to remove the tree or relocate the tables, although it was known the tree was dead and in a decaying condition.

From the evidence, it is the opinion of the Court that the respondent was negligent in failing to remove the dead tree, and its negligence was the proximate cause of the injuries to the claimant, Edith Ann Thompson. Although there were no permanent injuries, she required hospitalization and treatment. The admitted costs incurred as a result of the accident were $1,230.50 for doctors, $2,214.70 for hospital costs, $34.06 for medication, $112.00 for radiology fees, and $36.05 for ambulance service. The Court finds that the claimants are entitled to recover, and hereby makes an award in the amount of $9,627.36.

Award of $9,627.36.

Opinion issued April 3, 1978

GERALD E. TINSLEY and
LOIS C. TINSLEY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-165)

Claimants appeared in person.

Richard Carlton, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant, Gerald E. Tinsley, a paramedic employed by the Charleston Emergency Ambulance Service, and his wife, Lois Tinsley, also a claimant, were riding his Suzuki motorcycle on the afternoon of July 13, 1977, in an easterly direction on Coopers Creek Drive (W.Va. Route 41) in Kanawha County, and were approaching its intersection with Ada Mae Drive. The claimant, Gerald E. Tinsley, was operating the motorcycle. As they approached the above-mentioned intersection, they entered a rather sharp turn to their right. As they rounded the curve, they found that their lane of travel was almost completely covered with an accumulation of water and mud resulting from a clogged drainage ditch located on the south side of Coopers Creek Drive.

Gerald E. Tinsley testified that when the motorcycle entered the water and mud area, it started to fishtail and proceeded into the opposite lane of traffic which was dry. At this point, Mr. Tinsley attempted to turn the motorcycle to the right to avoid certain mailboxes located on the north berm of the road, but by reason of the presence of gravel on that side of the road, the motorcycle slid out from under them. As a result, Mr. Tinsley suffered a fracture of his right clavicle or collar bone, and abrasions and cuts of his right shoulder and knee. He was taken by ambulance to the Charleston Area Medical Center where he received treatment in the emergency room and was discharged. No testimony was introduced in respect to the injuries, if any, sustained by the claimant, Lois Tinsley.

In addition to suffering intense pain for a period of three days, the claimant was unable to return to his employment for a period of ten weeks. At the time of the accident, he was earning approximately $200.00 per week; he thus suffered a loss of income of about $2,000.00. He incurred an ambulance bill of $30.00 and total medical expenses of $172.75. Also, his motorcycle was damaged to the extent of $300.97.

In respect to the issue of liability, we have consistently held that the respondent is not an insurer of the safety of the users of the highways of this State. Respondent's duty in claims such as this one is to use ordinary care to maintain Coopers Creek Drive in a reasonably safe condition, and the lack of or failure to exercise ordinary care must be established by a preponderance of the evidence. While the claimant testified that the mud and water on the road resulted from a clogged drainage ditch on the south side of the road, no evidence was introduced establishing how long this condition had existed prior to the afternoon of the accident. Mr. Tinsley testified that he returned to the accident scene the following day for the purpose of taking photographs of the accident scene and that the road was clear of any mud and water. Furthermore, there was a complete failure to establish that the respondent had notice, either actual or constructive, of the condition of this portion of Coopers Creek Drive. Such notice is an essential ingredient for establishing liability. See *Davis Auto Parts v. Dept. of Highways,* 12 Ct. Cl. 31 (1977), *Lowe v. Dept. of Highways,* 8 Ct. Cl. (1971), and *Varner v. Dept. of Highways,* 8 Ct. Cl. 119 (1970). Being of the opinion that negligence on the part of respondent has not been proved, this Court hereby denies the claim.

Claim disallowed.

Opinion issued April 3, 1978

DEMA MARIE WELCH

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-17)

Edward C. Goldberg, Attorney at Law, for the claimant.

Gregory W. Evers, Attorney at Law, for the respondent.

WALLACE, JUDGE:

This claim arose as the result of a fall by the claimant in a hole on the bridge across Elk River at Clendenin, West Virginia. The claimant had lived in the vicinity for approximately 40 years, and in Clendenin for six years prior to her accident.

On the morning of August 16, 1976, the claimant and her daughter, granddaughter, and daughter-in-law were going by bus to Charleston. With other passengers, they walked westerly across the Clendenin Bridge to the bus stop on West Virginia Route 119. They used the pedestrian walkway on the right-hand or upper side of the bridge. The claimant testified that the walkway was of wood construction and was in bad condition. She further testified that a board was missing in the walkway when she crossed over it on the morning of the day of the accident. The party returned by bus that day. It was still daylight. The claimant, carrying her purse and glasses in her hand and several packages in her arms, proceeded with other bus passengers easterly across the bridge on the same walkway she had used in the morning. There were people in front and in back of her. As she was proceeding across the bridge, her daughter-in-law warned her of the hole in the walkway. She fell into the hole about the same time the warning was given. A policeman and others assisted her in getting out of the hole. Her daughter-in-law drove her to a Charleston hospital where she was a patient for almost two weeks. She suffered from bruises, abrasions, and shock.

The claimant, according to the evidence presented in the record of this case, was guilty of contributory negligence as a matter of law. Had she exercised the reasonable care required

of her under the circumstances and maintained a proper and effective lookout for the hole which she knew to be there, she would have seen it in time to avoid injury. To be actionable, the negligence of the respondent must be the proximate cause of the injury. The Court is of the opinion and finds that under the circumstances of this case, the condition of the bridge was not the proximate cause of the accident. The claimant's failure to take the necessary precautions for her own safety was the proximate cause of her injury.

Accordingly, the claim is disallowed.

Claim disallowed.

Opinion issued May 1, 1978

ROBERT A. HEATER

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-179)

No appearance by the claimant.

Gregory W. Evers, Attorney at Law, for the respondent.

WALLACE, JUDGE:

This claim in the amount of $2,038.00 was submitted to the Court upon the pleadings. The claimant was Chief Inspector for the respondent on Project APD-484 (11)C-2. On June 4, 1975, he became involved in an argument with Dewey Moore, an employee of the J. F. Allen Company, contractor for the project. The argument apparently resulted in a fight between the claimant and Moore. As a result of the altercation, the claimant entered a plea of nolo contendere to a charge of assault and battery and was fined $38.00. He settled for $1,500.00 in a civil action filed against him by Moore, and incurred attorney fees in the amount of $500.00. This claim was filed to recover these amounts from the respondent.

The respondent filed its Answer admitting that the claimant was an employee working within the scope of his employment

and further admitting the allegations of the claim and exhibits and that the respondent is obligated in the amount of the claim. The Court disagrees.

The test of liability of the principal for the tortious act of his agent is whether the agent at the time of the commission of the act was acting within the scope of his authority in the employment of the principal, and not whether the act was in accordance with his instructions. If such act is done within the scope of authority and in furtherance of the principal's business, the principal is responsible. But if the agent steps outside the boundaries of the principal's business, for however short a time, the agency relation is for that time suspended, and the agent is not acting within the scope of his employment. *Tri-State Coach Corporation v. Walsh,* 188 Va. 299, 49 S.E.2d 363 (1948). In the case of *Porter v. South Penn Oil Company,* 125 W.Va. 361, 24 S.E. 2d 330 (1943), the Supreme Court of Appeals of West Virginia held:

> "Before a master can be held liable for an assault upon a third person, committed by his servant, it must be shown that such assault was committed, either by the direction of the master, or in the performance by the servant of duties within the scope of his employment, or in the course of and connected with such employment."

The action of the claimant as an employee of the respondent was not within the scope of his employment and was not such action that could reasonably be expected of an employee in the type of work he was performing. Therefore, there could be no liability on the part of the respondent. The pleadings and exhibits submitted to the Court for decision revealed that the claimant entered a plea of nolo contendere to a charge of assault and battery and settled a civil action resulting from the criminal charge, neither of which is anticipated as being within the scope of his employment. For the reasons herein stated, the Court disallows the claim.

Claim disallowed.

Opinion issued May 1, 1978

GERALDINE MAY McCARTHY, ADMINISTRATRIX OF THE ESTATE OF ROBERT EUGENE McCARTHY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-33)

David Robertson and *Martin Gaughan,* Attorneys at Law, for the claimant.

Henry C. Bias, Jr., Deputy Attorney General, and *Gregory W. Evers,* Attorney at Law, for the respondent.

RULEY, JUDGE:

On June 5, 1975, claimant's decedent was driving north on West Virginia Route 2 near Follansbee when his car slid to the left, crossed three lanes of traffic, and collided with a telephone pole, killing him. Claimant, seeking damages for the alleged wrongful death, alleges that the respondent negligently caused gravel and slate to be on the road which, moistened by rain, caused the road to be slippery and thereby caused the accident.

The State is neither an insurer nor a guarantor of the safety of motorists travelling on its highways. *Adkins v. Sims,* 130 W.Va. 645 (1947); *Lowe v. Department of Highways,* 8 Ct. Cl. 210 (1971). Thus, establishing negligence on the part of the respondent requires proof that respondent failed to conform to a standard of "reasonable care and diligence * * * under all circumstances." *Parsons v. State Road Commission,* 8 Ct. Cl. 35 (1969). The evidence in this case fails to meet that burden of proof. In fact, the evidence is conflicting regarding the very existence of the alleged dangerous condition. Several witnesses testified that road repair crews, working on the berm near the accident site on the day of the accident, did not leave any dirt or slag on the highway. The police officer who arrived on the scene immediately after the accident testified that the road was wet, but that there was no debris on the highway. Others reported "dirt and mud laying on Route 2", and one witness said, "The road was covered with slag and cinders." Even if the Court concludes that there was debris on the road, it could not

conclude that its presence there was caused by negligence on the part of the respondent.

The evidence also is conflicting as to whether the road was wet or dry. Wet roads, like roads with a splattering of dirt or gravel, are obvious dangers for which drivers should take reasonable precautions. "Ordinary prudence requires a driver to take greater care in keeping control of his vehicle under such adverse (wet) conditions." *Frazier v. Department of Highways,* 9 Ct. Cl. 171 (1972). Certainly, the respondent cannot be held responsible for whatever moisture, if any, fell on the roadway. If the respondent knew or in the exercise of ordinary care should have known that rain would create an especially dangerous condition at the place where the accident happened, and failed to take reasonable precautions to protect motorists, then perhaps the respondent would have been guilty of negligence. (See *Frazier, supra.*) But there was no evidence to that effect. For the foregoing reasons, the claim must be denied.

Claim disallowed.

Opinion issued May 1, 1978

CONNIE LYNN MILLER

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-124)

Larry Skeen, Attorney at Law, for claimant.

James W. Withrow, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant seeks damages in the amount of $6,300.35 from the respondent occasioned by an automobile accident on June 17, 1976. The accident occurred at approximately 5:30 a.m. The claimant lived about three miles north of Spencer, West Virginia, at Tariff, West Virginia. She was employed by Norris Industries in Spencer. On the morning of the accident, the claimant was driving alone to work on West Virginia Route 14 in her 1974 Ford Pinto. There had been unusually heavy rain-

fall during the night. At a point approximately ½ mile from Spencer, she entered a curve in the highway where she encountered gravel across the highway washed there by the night rain. She testified that the speed limit was 25 miles per hour and that she was travelling at 20 to 25 miles per hour. She stated that she attempted to slow down but the automobile started to slide. The vehicle slid into an embankment on the left side of the highway, proceeded back across the road, over a guardrail, and down into a ravine. The automobile was destroyed. The claimant received injuries requiring hospitalization for five days. She was unable to return to work until July 12, 1976.

Corporal Stanley B. Rexrode of the West Virginia State Police testified that after being notified of the accident he arrived at the scene at approximately 6:10 a.m. He assisted in the removal of the claimant from her automobile. His investigation revealed that the claimant's automobile had skidded 75 feet before hitting the embankment, then proceeded across the highway, over the top of the guardrail, and into a ravine, a total distance of 151 feet. He stated that there was a heavy concentration of gravel in the curve of the roadway from the washout due to summer thunderstorms the night before. The road had recently been blacktopped, and the berm had been raised to correspond with the blacktop. Gravel had been placed on the berm the entire contract length. He stated that during the construction there had been gravel on the road on one other occasion. This was reported, and the gravel was removed by the respondent.

In line with decisions of the Supreme Court of Appeals of West Virginia, this Court has consistently held that the State is not a guarantor of the safety of travelers on its roads. The user of the highways travels at his own risk. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947); *Parsons v. State Road Comm'n.,* 8 Ct. Cl. 35 (1969). For negligence of the respondent to be shown, proof that the respondent had actual or constructive notice of the defect in the road is required. *Davis Auto Parts v. Department of Highways,* 12 Ct. Cl. 31 (1977); *Lowe v. Department of Highways,* 8 Ct. Cl. 210 (1971); *Varner v. Department of Highways,* 8 Ct. Cl. 119 (1970). There is no evi-

dence in the record of any notice to the respondent that the gravel had washed on the highway during the night; the existence of the gravel in the road does not in itself establish negligence per se. *Light v. Department of Highways,* 12 Ct. Cl. 61 (1978).

From the record, the Court does not believe there is a clear showing that the respondent knew or should have known a condition existed which would be expected to cause injury or damage to the claimant.

Accordingly, this Court finds that the claimant is not entitled to recover the damages sustained by her, and hereby disallows the claim.

Claim disallowed.

Opinion issued May 1, 1978

MORRISON PRINTING CO., INC.

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-36)

Claimant appeared through its president, *J. C. Morrison.*

Anthony G. Halkias, Attorney at Law, for respondent.

PER CURIAM:

According to a written stipulation filed by the parties, the respondent contracted with the claimant whereby the latter was to print the West Virginia State Map. The stipulation further provides that employees of respondent wrongfully delayed claimant from performing the contract within the contract time schedule, and as a result, claimant suffered financial losses and damages; that the losses and damages sustained by claimant include, but are not limited to, loss of 140 hours of press time, the purchase of press time from another printer, loss of time by claimant's employees in re-scheduling of printing, and an expense for insuring and warehousing additional paper in inven-

tory at the close of claimant's fiscal year; and that claimant sustained losses and damages in the amount of $3,000.00.

Pursuant to the stipulation as outlined above, an award in favor of claimant in the amount of $3,000.00 is hereby made.

Award of $3,000.00.

Opinion issued May 1, 1978

MAXINE V. PAULEY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-208)

Claimant appeared in person.

Richard Carlton, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant, Maxine V. Pauley, seeks damages in the amount of $206.05 incurred when she drove her 1973 Mercury Montego automobile over a manhole in Nitro, West Virginia, on October 4, 1977. The claimant had parked her automobile on an unpaved portion of land on the west side of West Virginia Route 25 across the highway from the Rite-Aid Pharmacy at 23rd Street in Nitro. When she returned to her automobile she started forward and the left front wheel of her automobile dropped into a manhole. The left front fender was damaged and the chrome strip was torn from the door.

George P. Sovick, Chief Engineer of respondent's Right of Way Division, testified that the manhole in question was located on a twelve-foot strip of land twelve feet from the right of way of West Virginia Route 25 on the line between property belonging to the City of Nitro and the New York Central Railroad. He further stated that the manhole was not maintained by the respondent, and this testimony was not rebutted. The respondent introduced as its Exhibit No. 2 a certified copy of a deed by which the City of Nitro acquired in 1959 the twelve-foot strip of land adjacent to West Virginia Route 25 on which the claimant had parked her automobile.

It is apparent from the record that the accident did not occur on State-owned property and the manhole in question was not maintained by the respondent. Accordingly, the claimant's claim is disallowed.

Claim disallowed.

Opinion issued May 1, 1978

PRIVATE DIAGNOSTIC CLINIC,
SURGICAL PROFESSIONAL PROGRAMS OFFICE

vs.

DIVISION OF VOCATIONAL REHABILITATION

(No. CC-77-224)

No appearance by the claimant.

Frank M. Ellison, Deputy Attorney General, for the respondent.

PER CURIAM:

This claim was submitted upon the pleadings by agreement of the parties. The claimant filed its claim in the amount of $399.18 alleging it had not received payment on an authorization for medical expenses incurred by a patient at the Duke University Medical Center in 1975. The respondent's Answer admits the validity of the claim and states that there were sufficient funds with which to pay the claim but that the invoice had not been timely submitted.

Accordingly, the Court makes an award in favor of the claimant in the amount of $399.18.

Award of $399.18.

Opinion issued May 1, 1978

JEANNE ROBINSON

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-33)

Lawrence L. Manypenny, Attorney at Law, for claimant.

Richard Carlton, Attorney at Law, for respondent.

WALLACE, JUDGE:

Claimant filed a claim in the amount of $15,500.00 against the respondent for injuries received as the result of a fall. Claimant was an employee of the Department of Welfare. On April 17, 1975, at approximately 3:00 p.m., the claimant, with a friend, was returning to her automobile across the street from the Welfare Office in the 400 block of Main Street in Wheeling, West Virginia. Main Street is also West Virginia Route 2. The weather was clear, the sun shining. As the claimant approached the other side of the street from the Welfare Office, and before her companion could warn her, she stepped into a hole in the surface of the pavement and fell. She received a sprained fracture of her left ankle and was hospitalized until April 21, 1975.

It is well established that the State is neither an insurer nor guarantor of the safety of persons travelling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E. 2d 81 (1947). The same is applicable to pedestrians crossing the highway. To establish negligence, there must be proof that the respondent had actual or constructive notice of the defect in the road. *Light v. Department of Highways,* 12 Ct. Cl. 61 (1978); *Lowe v. Department of Highways,* 8 Ct. Cl. 210 (1971); *Varner v. Department of Highways,* 8 Ct. Cl. 119 (1970). Without notice to the respondent, the mere existence of a defect in the road surface is not negligence per se. *Light v. Department of Highways,* 12 Ct. Cl. 61 (1978).

Accordingly, the Court is of the opinion to and does disallow the claim.

Claim disallowed.

Advisory Opinion issued May 25, 1978

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

DEPARTMENT OF HEALTH

(No. CC-78-43)

Herman E. Rubin, Special Counsel, for claimant.

Frank M. Ellison, Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for an advisory opinion pursuant to Code 14-2-18. From the Notice of Claim and the respondent's Answer, it appears that Barboursville State Hospital, as a result of a miscalculation, underpaid its statutory contribution to claimant in the last two quarters of fiscal 1975-76. This underpayment amounted to $1,917.17. Claimant is also seeking interest on this underpayment at the rate of one percent per month pursuant to Code 21A-5-17. The accrued interest on the underpayment, as of the date of the submission of the claim to this Court, amounted to $509.40, resulting in a total claim of $2,426.57.

The respondent, in its Answer, admits that there were sufficient funds available at the close of the pertinent fiscal year from which this claim could have been paid. It is therefore clear that the respondent is legally liable to claimant in the amount of $1,917.17, the amount of the underpayment. With respect to the claim for accrued interest, being restricted by Code 14-2-12 from awarding interest unless the claim arises on a contract specifically providing for the payment of interest, we conclude that respondent is not legally liable for the payment of the accrued interest. Since this is an advisory opinion, no award will be made, but the Clerk of this Court is directed to file this opinion and to forward copies thereof to the respective department heads of claimant and respondent.

Opinion issued May 25, 1978

TIMOTHY RAKES, by his father
and next friend, ANDREW RAKES,
and ANDREW RAKES

vs.

BOARD OF EDUCATION OF THE
COUNTY OF LINCOLN,
and BENJAMIN HATTEN

(No. CC-77-55)

Robert W. Lawson, III, Attorney at Law, for claimants.

Henry C. Bias, Jr., Deputy Attorney General, for respondents.

PER CURIAM:

In this claim, claimant Andrew Rakes, as next friend of his son, Timothy Rakes, seeks recovery for injuries received by his son in a physical education class conducted at the Harts High School in Harts, Lincoln County, West Virginia; in addition, he seeks recovery in his individual capacity for medical expenses incurred by him in effecting a cure of his son's injuries. The high school was controlled and maintained by respondent Board of Education of Lincoln County, and the physical education class was under the supervision of the respondent, Benjamin Hatten, an agent and employee of the Board of Education of Lincoln County.

The respondents have filed a Motion to Dismiss, and a more detailed discussion of the facts is not needed in order to rule on this motion. In the motion, the respondents contend that this Court has no jurisdiction to hear a claim against an individual employee of the State, and with this contention we agree. The respondents further contend that this Court has no jurisdiction to hear a claim against a board of education, and with this contention we also agree. The jurisdiction of this Court is clearly set forth and limited by Code 14-2-13, which reads in part as follows:

> "The jurisdiction of the court, except for the claims excluded by section fourteen (§14-2-14), shall extend to the following matters:

1. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the State *or any of its agencies,* . . . ." (Emphasis supplied.)

Code 14-2-3 defines the term "state agency" as follows:

" 'State agency' means a state department, board, commission, institution, or other administrative agency of state government: Provided, that a *'state agency' shall not be considered to include* county courts, *county boards of education,* municipalities, or any other political or local subdivision of the State regardless of any state aid that might be provided." (Emphasis supplied.)

It is apparent from the foregoing that the respondents' Motion to Dismiss must be granted.

Opinion issued June 15, 1978

ODLUND HANEY SPANGLER, JR.

vs.

DEPARTMENT OF EMPLOYMENT SECURITY

(No. CC-78-86)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

The pleadings establish that the claimant was hired by respondent on a 30-day emergency appointment from January 16, 1978 through February 15, 1978, as an Employment Interviewer I at a monthly salary of $608.00. Due to a clerical error, the official records reflect that the claimant was hired as a Clerk I (a lower salaried classification), all of which resulted in a gross pay for the month in question of $88.50 less than the amount to which he was entitled. The Answer of respondent admits these facts, and states that respondent attempted to rectify the error but that the State Auditor has refused to make payment to the claimant on the basis that such a payment would constitute a retroactive salary increase contrary to State

law. As this situation arose due to an error, the payment does not constitute a retroactive increase. The Court hereby makes an award to the claimant in accordance with the provisions in W. Va. Code, Chapter 14, Article 2, Section 19.

Award of $88.50.

Opinion issued June 22, 1978

RUSH FIELDS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-77)

John F. Bronson, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On February 13, 1978, the claimant's wife was operating his 1974 Chevrolet Caprice on Route 52 in Gilbert, West Virginia, and was crossing the Gilbert Bridge when it struck a ¾" metal plate which had become loose and was in an upright position. The parties have stipulated that the bridge was owned and maintained by the respondent, and that the claimant's vehicle sustained damages amounting to $1,142.18. Being of the opinion that liability exists and that the claimed damages are reasonable, the Court hereby makes an award in favor of the claimant in the amount of $1,142.18.

Award of $1,142.18.

Opinion issued June 22, 1978

UARCO, INCORPORATED

vs.

BOARD OF REGENTS

(No. CC-78-53)

Milton S. Koslow, Attorney at Law, for claimant.

Frank M. Ellison, Deputy Attorney General, for respondent.

PER CURIAM:

The Notice of Claim reflects that in March of 1976, the respondent's West Virginia Institute of Technology forwarded a purchase order to claimant for 10,000 printed forms. These forms were shipped by claimant to respondent on May 14, 1976, and claimant thereafter invoiced respondent on July 13, 1976, for $713.18. Respondent has filed an Answer admitting ordering and receiving the subject forms, but assigning as a reason for the non-payment of the invoice that it was not received prior to the close of fiscal year 1975-76. The Answer further admits that the sum of $713.18 is due and owing the claimant, and that sufficient funds were available to pay the invoice had the same been submitted prior to the close of fiscal year 1975-76.

On the basis of the foregoing, an award in favor of claimant in the amount of $713.18 is hereby made.

Award of $713.18.

Opinion issued July 12, 1978

LILLIAN M. HOLSTEIN

vs.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

(No. CC-78-78)

Claimant appeared in person.

Edward Gardner and *Gregory Elliott*, Assistant Attorneys General, for respondent.

GARDEN, JUDGE:

The claimant, a former employee of the Department of Welfare, is requesting this Court to direct the respondent to pay her retirement benefits which she claims she is legally entitled to receive. Counsel for the respondent filed a Motion to Dismiss asserting, inter alia, that this Court does not have jurisdiction to grant the requested relief. At the hearing, a ruling on the Motion to Dismiss was taken under advisement, and evidence was presented on the merits of the claim.

The evidence disclosed that the claimant was first employed by the Department of Welfare on August 23, 1965, where she remained in varying capacities until May 11, 1974, a service credit period of some 104 months. Prior to her employment by the Department of Welfare, the evidence further disclosed that claimant had been employed as a substitute teacher by the Raleigh County Board of Education during fiscal year 1963-64, and also that she had been employed by the same agency on a full-time basis during fiscal year 1964-65. Apparently during the early part of 1974, the claimant was offered a more attractive position with the federal Social Security Administration, but before resigning from her position with the Department of Welfare, she made inquiry of employees of respondent who assured her that if she had attained two years of service credit as a result of her service with the Raleigh County Board of Education, that she would be eligible for retirement benefits under the West Virginia Public Employees Retirement System. With this information the claimant resigned and accepted employment with the federal government, but most re-

grettably, within six weeks she was forced to resign from her position due to a serious illness, and as a result, has been unable to resume her working activities.

Jewell Dye, chief retirement consultant for respondent, testified that she indeed recalled talking by phone with the claimant on several occasions in the early months of 1974, and that she did advise the claimant that if she had paid into the retirement fund for a period of two years with the Teachers Retirement Fund, that with the excess of eight years of service with the Department of Welfare she would have attained the necessary service credit of ten years which would entitle her to retirement benefits. Ms. Dye testified that she advised claimant that before a final determination as to eligibility could be determined, it would be necessary to obtain confirmation of the prior service from the Teachers Retirement Fund. After requesting such confirmation, it was determined that claimant, during fiscal year 1963-64, had been employed only on a substitute teacher basis, and that during that year had only worked for a one-month period in excess of 10 days, and that as a result was only entitled to one month's service credit for fiscal year 1963-64, which coupled with the 12 months credit for fiscal year 1964-65, meant claimant had only 13 months available for transfer from the Teachers Retirement System to the West Virginia Public Employees Retirement System. All of this was regrettably determined after the claimant terminated her employment with the Welfare Department, and thus after 9 years and 9 months of satisfactory service, the claimant was 3 months shy of attaining the necessary 10 years of service credit.

While it is most lamentable that these situations occur, we are of the opinion that we do not possess the statutory jurisdiction to direct the respondent to award retirement benefits to claimant, and for that reason, the Motion to Dismiss should be sustained, but beyond that, because on the merits of the case we do not feel that the claimant has established that she is entitled to the claimed retirement benefits, we must and do hereby refuse to make an award to the claimant.

Claim disallowed.

Opinion issued July 12, 1978

HERMAN F. LILLY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-133)

Walton S. Shepherd, III, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision on the agreed facts set forth in a written stipulation which revealed that during the year 1971, respondent performed work on Project 6811 on Kanawha County Route 1/4 known as Angel Fork Road in Jefferson District; that respondent's work blocked a stream on the property of the claimant causing periodic flooding; that claimant's property was also damaged by a slip caused by work on the project; that respondent had knowledge of the conditions caused by its work but failed to take corrective measures; that claimant employed Lovell Johnson to perform corrective work at a cost of $1,200.00. By reason of the foregoing and believing that liability exists on the part of the respondent, the Court makes an award in favor of the claimant in the amount of $1,200.00.

Award of $1,200.00.

Opinion issued July 12, 1978

DELORIS J. LIVELY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-228)

Deloris J. Lively, the claimant, appeared in person.

Richard Carlton, Attorney at Law, for respondent.

GARDEN, JUDGE:

Claimant testified that she was operating her 1971 Chevrolet automobile in a northerly direction on Greenbrier Street in

Charleston on the morning of July 7, 1977, and was making a left turn from that street in order to proceed in a westerly direction on Interstate 64. She was ascending a hill on Greenbrier Street as she approached its intersection with Interstate 64 when she suddenly came upon a large "blotch" of yellow paint which apparently had been spilled on the street. She further testified that yellow center lines in the immediate area appeared to be freshly painted and that she also observed a truck in the area with a center line painting attachment on its rear, but that she could not identify it as being one of respondent's pieces of equipment.

Claimant, after arriving at her place of employment, phoned respondent's office and reported the incident, and she was advised that they (the respondent) were aware of the spilled paint and that she should obtain an estimate of the cost to remove the paint from her car and take photographs of her car depicting the areas damaged by the paint. The claimant thus obtained an estimate for the paint removal from Tag Galyean Chevrolet, Inc. in the amount of $98.88, and photographs of her car were introduced into evidence which clearly reflected the existence of yellow paint on the right wheels and lower portion of the right-hand side of the body of her car.

E. E. Goodwin, chief claims investigator of respondent, testified that respondent maintained records reflecting the activities of its center line painting crews and that he had carefully examined the pertinent records during the early part of July 1977, and that they failed to disclose that respondent had performed any center line painting at the subject intersection or had transported any paint through the area.

The hearing in this claim was held on March 29, 1978, and the facts as set out above were established. The Court was of the opinion that the claim should be disallowed because the claimant had failed to establish by a preponderance of the evidence that the respondent had in fact spilled the paint. However, prior to the issuance of an opinion, it was brought to the attention of the Court that employees of respondent did indeed spill the paint. As a result, the Court, on its own motion, reopened the claim on July 5, 1978, to permit the introduction of

this after-discovered evidence in the form of the testimony of Bill G. Shuler.

Mr. Shuler testified that he is employed by respondent as a chemist with the Materials Control Soil and Testing and that among his duties was the testing of road paint for durability. He further indicated that on July 7, 1977, he and other employees of respondent were transporting paint for testing purposes from their office on Michigan Avenue in Charleston to Nitro; that they were using a stake body truck with a section of the tailgate missing, and to keep the paint cans from falling from the truck, they had placed garbage cans on the truck to more or less block the missing tailgate section.

Mr. Shuler further testified that, as the truck neared the intersection of Greenbrier Street and I-64, two one-gallon cans of yellow paint fell from the truck and ruptured when they struck the street. Before respondent's employees could get back to the area to warn motorists of the paint spill, Mr. Shuler testified that cars were proceeding through the wet paint. He further indicated that he called his office from Nitro and reported the incident but that he never filed a report in writing, which accounts for E. E. Goodwin's testimony; that he (Goodwin) could find no record of painting or of paint being transported at this intersection.

Being of the opinion that the respondent's employees were negligent in attempting to transport this paint in a truck with a missing tailgate section, and being of the further opinion that the claimant was not guilty of contributory negligence, we hereby make an award in favor of the claimant in the amount of $98.88.

Award of $98.88.

Opinion issued July 12, 1978

R. H. BOWMAN DISTRIBUTING CO., INC.

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-99)

W. H. Johnson, Business Manager of R. H. Bowman Distributing Co., Inc., appeared on behalf of claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

GARDEN, JUDGE:

On April 15, 1976, Robert F. Hewitt, an employee of claimant, was operating claimant's tractor-trailer rig in a southerly direction on Secondary Route 79. He was proceeding from Rainelle to the Pure Oil Refinery near Cabin Creek. Secondary Route 79 at the time of the accident was a two-lane blacktop road. It was daylight and the weather was clear and the roadway dry. Hewitt had just driven onto Secondary Route 79 from Route 61 and was some 600 feet south of the intersection of these two routes when he saw a flagman and a crew working on Secondary Route 79. The flagman motioned for Hewitt to proceed, and as he proceeded through the work area he encountered mud on the road. Hewitt testified that as he proceeded through the mud something jerked his rig to the right and into the ditch along the west side of the road. He was not sure whether it was a pothole or something else that caused his rig to be jerked to the right. The rig, principally the trailer whose frame had been bent, was damaged, and the repair bill, including labor and material, amounted to $1,410.77.

The Notice of Claim alleges that the accident was due to "inadequate flagging on a mud-slick section of the road." The respondent denies that it was negligent in any manner and further denies that the flagman who motioned Hewitt through the work area was its employee. In support of this contention the respondent called as a witness one of its foremen, Jerry Easter, who testified that on the day of the accident the firm of Orders & Haynes was widening Secondary Route 79 a distance of two feet and that it was necessary for the contractor "to cut the road out and then put it back in with blacktop."

Easter further testified that the respondent had no supervisory personnel on the job, but that they did have one employee, Miguel Rodriguez, on the job simply for the purpose of taking tickets from Orders & Haynes' truck drivers so that respondent would have a record of loads and tonnage of dirt and other material that the contractor had moved during the construction.

Driver Hewitt in his testimony indicated that he recognized vehicles belonging to respondent at the job site from the emblems on the doors, but he admitted that he could not identify the flagman as an employee of respondent. Deputy Sheriff J. T. Meadows, who investigated the accident, testified that he did not observe any vehicles of the respondent at the job site during the course of his investigation.

The Court believes that the record fails to demonstrate that the subject flagman was an employee of respondent but most probably was an employee of the independent contractor, Orders & Haynes, and as such, the respondent cannot be held liable for the negligence, if any, of such flagman. For this reason the claim is disallowed.

Claim disallowed.

Opinion issued July 12, 1978

FOSTER STARCHER

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-120)

Claimant appeared in person.

Richard Carlton, Attorney at Law, for respondent.

GARDEN, JUDGE:

The claimant filed this claim against the Department of Highways for damages to his motor vehicle. On September 22, 1976, the claimant was driving his 1974 Suburban Cheyenne 20 pulling a 25-foot Terry Trailer northerly on W.Va. Route 26 near Tunnelton, West Virginia, in Preston County. It was approximately 10:15 a.m. It was raining. He was alone. A tractor and trailer proceeding southerly on Route 26 was passing the claimant on his left side. He was travelling at about 20-30 mph.

The claimant's vehicle struck a channel iron-type signpost lying in the road. When the front wheel of the vehicle struck the post, it curved up and wedged itself in the right front door causing damage in the amount of $293.91. The claimant testified that he did not see the signpost because he was watching the tractor and trailer on his left. Claimant further testified that he had no way of knowing the post was one used by the respondent except that he was familiar with the type used by it. He did not know whether the respondent had had a sign erected at the place of the accident and that it was possible it could have been dumped with other trash and debris in a roadside dump in the area of the accident.

Norman Blake Ridenour, a foreman for the respondent, testified that he works the area where the accident occurred, and that he travels the road at least twice a day going to and from respondent's headquarters. He stated that there was a roadside dump at the place of the accident; that it was not maintained by the respondent, and, to the best of his knowledge, there had never been a sign in the area maintained by the respondent.

For the Court to make an award, the claimant must prove by a preponderance of the evidence that the negligence of the respondent was the cause of his damage. In this case the claimant's vehicle struck a signpost in the road. There is no evidence that the post belonged to the respondent, nor is there evidence that it was knocked from the side of the road onto the highway. The claimant testified that the post was the type used by the respondent. Respondent's witness testified that the respondent had no signposts in the area of the accident. Without more evidence, the Court cannot make an award. The law is well established in West Virginia that the State is not an insurer of the user of the highways but that he travels at his own risk. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E. 2d 81 (1947).

From the record, the Court is of the opinion that the claimant has not established by a preponderance of the evidence that the damage to his vehicle was the result of actionable negligence on the part of the respondent.

Accordingly, the claim of the claimant is disallowed.

Claim disallowed.

Opinion issued July 12, 1978

JOHN TILLINGHAST
& JANET TILLINGHAST

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-80)

Gordon T. Ikner, Jr., Attorney at Law, for claimants.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court upon written stipulation of the parties. It was stipulated that in February, 1976, the respondent was constructing a road near Danville in Boone County, West Virginia, and that blasting activities of the respondent damaged the claimants' property. It was further stipulated that the claimants sustained damage to their property in the amount of $4,000.00. Believing that liability exists on the part of the respondent and that the damages are reasonable, the Court makes an award to the claimants in the amount of $4,000.00.

Award of $4,000.00.

Opinion issued July 12, 1978

U.S.A.A. INSURANCE CO.
& HAROLD F. MAY

vs.

DEPARTMENT OF HIGHWAYS

(No. 77-215 a&b)

Claimant appeared in person.

Richard Carlton, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant, Harold F. May, filed this claim in the amount of $184.89 against the respondent for damages to his 1977 Monte

Carlo automobile. On or about August 25, 1977, he was driving his automobile on W.Va. Route 6/6 near St. Albans, West Virginia. It was late afternoon. It was raining heavily. The claimant testified that there was a work crew spreading material on the surface of the highway. He stated that he did not know if the personnel and equipment were those of the respondent or a private contractor. The traffic was not stopped. He did not see a flagman. Several days later he had his automobile washed, and discovered foreign material on the rocker panel moulding and on the undersides of the bumpers. Various efforts to remove the substance failed. He was advised that the damaged areas would have to be refinished.

Doyle Thomas, the respondent's foreman for the area in question, testified that surface material could not be applied to a highway during a rain or when the road was wet. He identified his daily time sheets for August 22, 23, 24, 25, and 26, 1977. These sheets, which were introduced as Respondent's Exhibit No. 1, reflect the type of work performed, equipment used, and the location of the work for each day. The sheets revealed that no work was performed by the respondent on W.Va. Route 6/6 on any of the days covered by the sheets introduced.

From the record, the Court is of the opinion that the claimant has not shown by a preponderance of the evidence that the damages sustained were the result of actionable negligence on the part of the respondent. Accordingly, the claim is disallowed.

Claim disallowed.

Opinion issued July 12, 1978

JOHN THOMAS WEDDINGTON

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-161)

Claimant appeared in person.

Richard Carlton, Attorney at Law, for respondent.

GARDEN, JUDGE:

This claim in the amount of $109.55 was filed by the claimant against the respondent for damages to his 1970 Montego automobile. The home of the claimant is located at 157 First Avenue in Nitro, West Virginia. First Avenue is also W.Va. Route 25. To reach First Avenue or the highway by automobile from the claimant's house, the claimant backs down a steep driveway. Before entering the highway, it is necessary to watch for traffic. On August 25, 1977, at approximately 7:40 a.m., the claimant backed down his driveway to the highway. The weather was clear. An ambulance was proceeding along the highway. To permit the ambulance to pass, the claimant drove his automobile along the berm of the highway. As he was driving along the berm of the highway, the left front wheel of his automobile struck a rock. The claimant stated he was driving less than 10 mph and that the rock was about six feet from the paved portion of the highway. The rock struck under the automobile damaging the muffler, tail pipe, and exhaust pipe. The claimant testified that he knew there were rocks on the berm; that he drove in and out of his driveway at least twice a day going to and from work, and that he saw rocks on the berm the day before the accident. He also testified that the respondent had spread rocks on the berm to build it up. The claimant's wife testified that the rocks were scraped up shortly after the accident. She did not know who did the work but the equipment was painted yellow. The claimant stated that he did not complain to the respondent about the rocks on the berm.

Claude Bartley, area supervisor for the respondent, testified that the area where the accident occurred was in the area of

his responsibility. He further testified he investigated time records of work performed in the area and that no work had been done on the berm in front of claimant's house from July 1, 1977, to the date of the hearing of this claim.

The record in this case does not justify that an award be made by the Court. The claimant was driving on the berm of the highway over rocks which he knew were there. He could have waited for the ambulance to pass his driveway and then entered the paved portion of the highway as he was accustomed. Aside from the conduct of the claimant, the Court does not believe that the claimant has established by a preponderance of the evidence any actionable negligence on the part of the respondent. Accordingly, the claim is disallowed.

Claim disallowed.

Opinion issued July 12, 1978

BLISS R. WOTRING

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-140)

Claimant appeared in person.

Richard Carlton, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant, Bliss Wotring, filed this claim in the amount of $2,500.00 against the respondent for water damage to his property located on the south side of W.Va. Route 7 five miles west of Kingwood, West Virginia, in Preston County, The natural terrain slopes downhill from Route 7 to the claimant's house. The road down the hill from Route 7 to the claimant's home was formerly part of old Route 7 which was abandoned after the present highway was constructed and is now claimant's private road. It is not a part of the highway system and is not maintained by the respondent.

On July 25, 1977, there was a heavy rain causing water to flow down the road and into claimant's field. The claimant testified approximately 1½" of rain fell. The respondent's witness testified that the records maintained by the respondent in Kingwood indicated there were 2.49 inches of rainfall.

The claimant testified that the culverts on Route 7 and one under his private road were stopped up due to the respondent's failure to keep them open. He stated this caused the water from the heavy rain to flow down his road and into his field causing considerable damage. He also stated that dirt from the construction of a private road on the north side of Route 7 filled the drainage ditches causing the water to flow down his road. The claimant did not complain to the respondent of the condition until the day after the heavy rain.

This Court made an award to the claimant herein in 1972 under similar circumstances as in the instant case. See *Wotring v. Dept. of Highways,* 9 Ct. Cl. (1972). In the 1972 case, no evidence was introduced by the respondent to refute the claimant's claim. The uncontradicted evidence indicated a drainage problem existed and that the State had been notified months before the damage and failed to correct the problem. In the instant case, the claimant testified that a culvert on Route 7 was stopped up as well as the culvert under his private road. The respondent had no notice of an existing problem. To the contrary, Gerald M. Lowe, an inspector for the respondent, testified the ditches along W.Va. Route 7 in the vicinity of claimant's property were pulled with a grader on July 17, 18, and 19, 1977, to remove debris, and that the inlets and outlets of drains were cleaned in preparation for paving the road.

Ernest W. Shaffer, respondent's Preston County road superintendent, testified that he went to the claimant's property with another employee on July 27, 1977, in response to the complaint of the claimant the previous day. He stated the claimant's road was in "pretty good shape" and that he saw no debris in the ditches along W.Va. Route 7.

From the record in this case it is most difficult for the Court to believe that the diversion of surface water caused by a stopped culvert, if actually stopped up, was the sole cause of

the damages claimed. The water from the heavy rain followed its natural course down the slope of the hill and claimant's road. To hold that a diversion of water from a stopped culvert was the sole, direct, and proximate cause of the damage, is unwarranted from the evidence.

Accordingly, the Court is of the opinion that the claimant has not shown by a preponderance of the evidence that the damages claimed were the result of actionable negligence on the part of the respondent, and hereby disallows the claim.

Claim disallowed.

Opinion issued August 10, 1978

THE C & P TELEPHONE CO. OF W. VA.

vs.

DEPARTMENT OF NATURAL RESOURCES

(No. CC-78-105)

David K. Hall, Attorney at Law, for claimant.

Gregory Elliott and *Ed Gardner,* Assistant Attorneys General, for respondent.

PER CURIAM:

On or about April 29, 1976, employees of respondent, acting within the scope of their employment, were training students from Sherman High School in Seth, West Virginia, to shoot firearms. The employees had negligently selected the site for such activities and negligently supervised the students. As a result, bullets from the firearms struck claimant's telephone cables, causing damage in the amount of $884.71. Claimant has received the sum of $442.35 from the Boone County Board of Education in partial payment of the damages, and now claimant seeks the sum of $442.36 from respondent. Believing that liability exists on the part of the respondent and that the damages are reasonable, the Court makes an award to the claimant in the amount of $442.36.

Award of $442.36.

Opinion issued August 10, 1978

ARNELL CHURCH

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-79)

Claimant appeared in person.

Henry Haslebacher, Attorney at Law, for respondent.

RULEY, JUDGE:

On March 9, 1978, at about 12:30 a.m., the claimant, while proceeding from Oak Hill to Pineville in his 1977 Grand Prix automobile, drove over and along what is commonly referred to as the Old Rhododendron Trail. The claimant described the road, other than the area where the pothole was located, as a great piece of highway, and he explained that he struck the pothole because it was filled with water and thus could not be observed. No evidence was introduced to establish that respondent knew or should have known of the existence of this pothole. Damages were in the total amount of $198.00.

The State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. *Adkins v. Sims,* 130 W. Va. 645, 46 S.E. 2d 81 (1947). For negligence of the Department of Highways to be shown, proof that the respondent had actual or constructive notice of the defect in the road is required. *Davis Auto Parts v. Department of Highways,* 12 Ct. Cl. 31 (1977); *Lowe v. Department of Highways,* 8 Ct. Cl. 210 (1971); *Varner v. Department of Highways,* 8 Ct. Cl. 119 (1970). There is no evidence in the record of any notice to the respondent; and the simple existence of a defect in the road does not establish negligence per se. See *Light v. Department of Highways,* 12 Ct. Cl. 61 (1978); *Bodo v. Department of Highways,* 11 Ct. Cl. 179 (1977); and *Rice v. Department of Highways,* 12 Ct. Cl. 12 (1977). This claim must be denied.

Claim disallowed.

Opinion issued August 10, 1978

CLIMATE MAKERS OF CHARLESTON, INC.

vs.

BOARD OF REGENTS

(No. CC-78-90)

J. B. Fisher, Attorney at Law, for claimant.

Gregory Elliott and *Ed Gardner,* Assistant Attorneys General, for respondent.

PER CURIAM:

Claimant seeks payment of the sum of $903.00 for three room air-conditioning units purchased by respondent on April 26, 1977. Respondent, in its Answer, admits the validity of the claim and declares that there were sufficient funds remaining in its appropriation for the fiscal year in question from which the claim could have been paid. Respondent denies, however, that part of the claim attributable to the interest on the $903.00.

Pursuant to Chapter 14, Article 2, Section 12 of the West Virginia Code of 1931, as amended, this Court cannot allow any claim for interest unless the claim is based upon a contract which specifically provides for the payment of interest. Since there was no proof of such a contract in this case, we are of the opinion to and do hereby make an award to the claimant in the amount of $903.00.

Award of $903.00.

Opinion issued August 10, 1978

B. H. COTTLE AND B. H. COTTLE, EXECUTOR OF THE ESTATE OF LUCY M. COTTLE, DECEASED

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-49)

No appearance by claimant.

Henry Haslebacher, Attorney at Law, for respondent.

PER CURIAM:

The parties in this claim filed a written stipulation which revealed the following: that, on July 20, 1972, a "stone quarry agreement" was made between the claimant and respondent, under which the Department of Highways performed stone quarrying operations while constructing a highway near Scott Depot, West Virginia; that while engaged in the quarrying activities, the Department of Highways caused some degree of damage to claimant's land; and that respondent is thereby liable to claimant for the sum of $1,200.00, which amount is a fair estimate of the damage sustained by the claimant.

Based on the foregoing, an award in the above amount is hereby made.

Award of $1,200.00.

Opinion issued August 10, 1978

EASTMAN KODAK CO.

vs.

OFFICE OF THE SECRETARY OF STATE

(No. CC-78-112)

No appearance by claimant.

Gregory Elliott and *Ed Gardner,* Assistant Attorneys General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant Eastman Kodak Company seeks payment of a bill for renewal equipment performance program for a Miracode Microfilmer in the amount of $275.00.

The respondent admits the validity of the claim, but states also that it lacked the requisite funds in its appropriation for the fiscal year in question from which the claim could have been paid.

While we feel that this is a claim which is equity and good conscience should be paid, we are of further opinion that an award cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct. Cl. 180 (1971).

Claim disallowed.

Opinion issued August 10, 1978

CHARLES R. EVANS
& ERNESTINE EVANS

vs.

DEPARTMENT OF BANKING

(No. CC-77-127)

Claimants appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

The claimant, Charles R. Evans, filed this claim in the amount of $3,658.49, later amended to $7,712.95, against the Commissioner of Banking (1968), Department of Banking, Receiver of Parkersburg Savings & Loan Company, Commissioner of Banking (1976), the Governor (1967), and the Legislature (1967), State of West Virginia. None of the individuals occupying the above-named positions was specifically named.

Ernestine Evans was joined by the Court as a claimant.

During the hearing, the claimants filed a motion requesting the Court to convert the claim into a class action, and the

amount of damages was increased to $2,608,473.70. The persons constituting the class in this instance are not so numerous as to make it impracticable to bring them all before the Court as required by Rule 23(a) of the Rules of Civil Procedure. Therefore, the motion is overruled.

The claim as filed alleged:

(1) that there was an unlawful scheme of reorganization of the Parkersburg Savings & Loan Company of Parkersburg, West Virginia;

(2) that the governor and legislature were negligent in failing, prior to October 1967, to provide statutes sufficient to protect the people in their dealings with industrial loan companies;

(3) that respondents unlawfully permitted the scheme of reorganization to be accomplished;

(4) that satisfaction of certain accounts constituted fraud by W. Bruce Hoff, the Receiver of the Parkersburg Savings & Loan Company, and Commissioner of Banking;

(5) that the Department of Banking was negligent in its failure to prevent criminal fraud;

(6) that the distribution of assets by the Receiver of the Parkersburg Savings & Loan Company was inequitable; and

(7) that the Commissioner of Banking and Department of Banking in 1976 unlawfully permitted the Parkersburg Savings & Loan Company to become the Parkersburg Industrial Financing Corporation.

The hearing commenced February 3, 1978, and, after being continued, was completed on May 24, 1978. The Court considered all the evidence presented by the parties including certain exhibits subject to respondent's objections.

This Court was created under the provisions of Chapter 14 of the Code of West Virginia. The jurisdiction of the Court extends to claims and demands against the State or any of its

agencies with certain exclusions. The statute provides that the Court shall consider claims which, but for the constitutional immunity of the State from suit, or for some statutory restrictions, inhibitions, or limitations, could be maintained in the regular courts of the State. The Court has no jurisdiction to make an award against an individual. Accordingly, the Court dismisses the claim against the Commissioner of Banking (1968), the Receiver of Parkersburg Savings & Loan Company, the Commissioner of Banking (1976), the Governor (1967), and the Legislature (1967), leaving the Department of Banking as the sole remaining respondent.

The record discloses that the Parkersburg Savings & Loan Company was in financial difficulty in 1967. The Commissioner of Banking placed the business in receivership and appointed a receiver. A plan of reorganization was submitted to the Department of Banking to reopen the business. The plan provided that the depositors would be paid 50% of their deposits over a five-year period and receive stock in the company for the remaining balance of their accounts. After certain changes required by the Commissioner of Banking were made, the reorganization plan was submitted to the depositors for approval or disapproval.

W. Bruce Hoff, the attorney for Parkersburg Savings & Loan Company, who was instrumental in drafting the reorganization plan, sent letters to the depositors advising that the plan would fail without 100% participation of the depositors. Ninety-five per cent of the depositors, including the claimant, Charles R. Evans, approved the reorganization of the company. Chapter 31 of the Code of West Virginia, now Chapter 31a, requires 75% approval before a reorganization can be approved by the Department of Banking. The commissioner of banking, in accordance with the law, approved the reopening of the business and directed the receiver to deliver the assets in his hands to the reorganized company.

The claimants contend that 100% approval was necessary to reorganize the company as represented by the attorney for the company. They also stated that certain of the depositors who did not approve the reorganization plan were allowed by the company to withdraw their deposits in full.

W. Lovell Higgins, Deputy Commissioner of Banking, after the commencement of the hearing and at the request of the claimants, investigated claimants' charges. Mr. Higgins testified that the business reopened on September 13, 1968; that he examined the records of the company, and 95% of the total deposits were converted under the reorganization plan; that certain of the unconverted accounts were paid in full after April 1, 1969, which was subsequent to the reopening of the business; that W. Bruce Hoff indicated that some accounts of non-approving depositors had been purchased by persons outside of the company; and that Mr. Hoff had, in fact, indicated by letter to the depositors that 100% participation was necessary to accomplish the reorganization of the company. Mr. Higgins further testified that there was no statutory requirement for 100% participation, and that 75% was required by Chapter 31, now Chapter 31a, of the Code of West Virginia. Mr. Higgins stated he found nothing illegal in his investigation of the reorganization and the reopening of the business.

Claimants based the amount of their claim on the dollar value of the stock issued in the reorganization multiplied by an inflation adjustment factor obtained from a publication by the United States Bureau of the Census entitled *Statistical Abstract of the United States* (97th ed. 1976). This Court, by statute, cannot award interest unless the claim is based on a contract which specifically provides for the payment of interest. The claimant, Charles R. Evans, recognized this statutory prohibition in his testimony at the time he introduced the inflation factor. The claimants, by claiming an inflation adjustment, are in effect requesting the Court to do indirectly that which it cannot do directly.

The claimants were not represented by counsel, and the Court, in an attempt to determine the validity of the claim, received in evidence subject to respondent's objections testimony and exhibits which, in a court of law, would be inadmissible. The Court, in arriving at its decision, has assessed the materiality of and the weight to be afforded the evidence presented.

There is no evidence in the record that the reorganization of the Parkersburg Savings & Loan Company was unlawful as al-

leged, nor is there evidence that the respondent, Department of Banking, unlawfully permitted the reorganization. It was alleged that the Department of Banking was negligent in its failure to prevent criminal fraud. The record does not sustain this allegation. There was no evidence that the Department of Banking unlawfully permitted the Parkersburg Savings & Loan Company to become the Parkersburg Industrial Financing Corporation.

Accordingly, the Court finds that the claimants have failed to prove the allegations of their complaints and have not established a claim against the Department of Banking. The record established that the Department of Banking permitted the reorganization of the Parkersburg Savings & Loan in compliance with the law after it was approved by 95% of the depositors. There is no evidence that non-approving depositors were allowed to withdraw their accounts prior to the reorganization.

Actions by the Parkersburg Savings & Loan Company, its officers, and employees are not within the jurisdiction of this Court.

For the reasons herein, the Court disallows the claim of the claimants.

Claim disallowed.

Judge Ruley disqualified himself and did not participate in the consideration of this claim.

Opinion issued August 10, 1978

CHARLES R. GORE

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-197)

No appearance by claimant.

Henry Haslebacher, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damage

in the sum of $332.49 sustained by the claimant's vehicle when, on September 20, 1977, it collided with a limb which had fallen upon West Virginia Route 3, near Lowell, in Summers County, from a dead tree located near that highway. Accordingly, an award in that sum should be, and is, hereby made.

Award of $332.49.

Opinion issued August 10, 1978

CHARLES P. LONG

vs.

DEPARTMENT OF HIGHWAYS
(No. CC-78-115)

No appearance by claimant.

Henry Haslebacher, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $43.76, based upon the following facts: In April, 1978, claimant was driving across the Shadle Bridge in Mason County, West Virginia. While claimant was crossing the bridge, which is owned and maintained by respondent, a piece of steel flooring punctured one of the tires on claimant's car. The tire was damaged beyond repair. Respondent is therefore liable to claimant for the sum of $43.76, which is a fair and equitable estimate of the damages sustained by claimant.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $43.76.

Opinion issued August 10, 1978

RODGER C. MELLING

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-33)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

RULEY, JUDGE:

The claimant, a project engineer for the respondent, has filed a claim in the amount of $99.73, representing the cost of repairing the damage to his automobile as a result of striking a pothole on U. S. 119 near Elkview on January 25, 1978. The claimant was on his way home at approximately 5 o'clock in the evening, driving north. The claimant testified that respondent had widened this road about two years prior to the accident by constructing a section 30 inches wide on the east side of this two-lane asphalt road. The pothole, which the claimant described as being 12 feet long, 12 to 18 inches wide, and 8 inches deep, was located in and near the seam that was created between the old road and the widened section. Claimant admitted that he had previously observed potholes in the general area, but not the one which he struck. He testified that the hole was completely filled with water, which accounted for his failure to observe the same prior to the accident. Apparently in an effort to establish notice of this pothole to respondent, claimant testified that one of respondent's maintenance garages was located within a quarter of a mile of the accident scene and that it was in an area frequently used by respondent's employees as a lunch stop.

Gary Huffman, a foreman of respondent, testified that one of his duties was the repairing of potholes, and that during winter months, the only material available for filling potholes was "cold mix". He described this "cold mix" as a very poor substitute for "hot mix", which was not available until the spring of each year. Huffman testified that the subject pothole had been filled three or four times during the winter, but he

could not state whether any of these fills had been prior to January 25, 1978. Testifying from his official records, he also established that his work crew was kept almost continually busy during the month of January, 1978, in the removal of ice and snow.

The evidence fails to establish that respondent breached any legal duty owed to claimant. The respondent's duty was that of ordinary care to keep this road in a reasonably safe condition. The respondent being neither an insurer nor a guarantor of the safety of persons travelling on the highways of this State, *Adkins v. Sims,* 130 W.Va. 645, 46 S.E. 2d 81 (1947), we must disallow this claim.

Claim disallowed.

Opinion issued August 10, 1978

PHYSICIANS FEE OFFICE

vs.

DEPARTMENT OF CORRECTIONS

(No. CC-78-74)

No appearance by claimant.

Gregory Elliott and *Ed Gardner,* Assistant Attorneys General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer. Claimant seeks payment of the sum of $2,956.50 for services rendered to an inmate of the respondent Department of Corrections.

The respondent admits the validity of the claim, but states also that it lacked the requisite funds in its appropriation for the fiscal year in question from which the claim could have been paid.

While we feel that this is a claim which in equity and good conscience should be paid, we are of further opinion that an award cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct. Cl. 180 (1971).

Claim disallowed.

Opinion issued August 10, 1978

ROBERT M. PRATT

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-122)

Claimant appeared in person.

Henry Haslebacher, Attorney at Law, for respondent.

GARDEN, JUDGE:

Claimant's son, John M. Pratt, was operating his father's 1973 Oldsmobile in a southerly direction on Route 214 in Kanawha County on the evening of March 3, 1978, when the right wheels of the car struck a pothole which was filled with water and as such, unobservable. Claimant seeks an award of $377.36 which was the cost of repairing the damage to the car.

John M. Pratt and two companions testified that they had no knowledge of the existence of the pothole; that the speed of the car was between 30 and 40 miles per hour; and that none of them saw the hole prior to impact because the pothole was filled with water. The claimant testified that he had observed the subject pothole some two weeks before the accident. He further testified that after the accident he measured the hole, which was elliptical in shape, and found it to be 15 to 20 inches on the short axis and 20 to 25 inches on the long axis. No testimony was presented which would establish that respondent knew or should have known of the existence of this pothole.

It is axiomatic that the State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E. 2d 81 (1947). In order to establish negligence on the part of the respondent, it is necessary to establish that it had notice, either actual or constructive, of the defect in the road. *Davis Auto Parts v. Department of Highways,* 12 Ct. Cl. 31 (1977); *Lowe v. Department of Highways,* 8 Ct. Cl. 210 (1971); *Varner v. Department of Highways,* 8 Ct. Cl. 119 (1970). Mr. Pratt testified that he had observed the pothole two weeks before the accident. We do not feel that this is sufficient to establish constructive notice to respondent of the pothole's existence. The simple existence of this pothole does not establish negligence per se. *See Light v. Department of Highways,* 12 Ct. Cl. 61 (1978); *Bodo v. Department of Highways,* 11 Ct. Cl. 179 (1977); and *Rice v. Department of Highways,* 12 Ct. Cl. 12 (1977). By reason of the above, this claim is disallowed.

Claim disallowed.

Opinion issued August 10, 1978

MAE RUSSELL

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-81)

No appearance by claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $700.00, based upon the following facts:

On or about August 24, 1977, the Department of Highways was engaged in construction activities across U. S. 119 near claimant's house. As a result of this construction, water was blocked in the storm sewer lines, causing the same to back up

through the basement floor drains and flood claimant's basement. As a result, claimant's two washing machines, dryer, tools, and furnace were damaged. In addition, claimant incurred expenses for the removal of water, mud, sludge, and other debris. The parties agree that the sum of $700.00 is a fair and equitable estimate of the damages sustained by the claimant.

The Court finds that the respondent was negligent in its construction activities, proximately causing injury to the claimant's property, and that the respondent is liable to the claimant for damages in the amount stipulated.

Award of $700.00.

Opinion issued August 10, 1978

ROMIE C. SAYRE

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-64)

Wayne King, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

RULEY, JUDGE:

In March of 1978, the claimant and his wife were proceeding in his 1977 Chevrolet Caprice automobile to their home near Peach Fork, which is located between Porter's Creek and Clendenin in Kanawha County. The road over which they were travelling was apparently in a poor state of repair due mainly to the severity of the winter weather. It was dusk and it had been raining most of the day. At some point the car became stuck in a rut in the road, and the claimant, with the aid of a bumper jack, was able to extricate the car from the rut. From this point the claimant, with his wife driving, pushed the car for a distance of 100 feet, where it slipped into a ditch and was damaged to the extent of $533.48. The claimant testified that previous to the accident he and his neighbors had made numerous complaints to respondent, and this testimony was uncontradicted by respondent.

James Huffman, a foreman of respondent, testified that he was familiar with the road where the accident occurred and that it was among the roads that he and his crew maintained. According to Huffman, the road was assigned a low priority, and usually it was graded twice a year and the ditch line was dragged. He testified that the road was a rock base road, and the drainage ditch along the side of the road was probably a foot to a foot and a half in depth. According to Huffman, he put some 144 tons of stone on the road on the 3rd and 4th days of January, 1978. He further indicated that the road was difficult to maintain due to its inaccessibility. In order for heavy equipment to reach this area, it is necessary for them to proceed through Clay County because of the existence of a low weight limit bridge on the most direct route in Kanawha County.

We have held many times that the respondent is neither an insurer nor a guarantor of the safety of persons travelling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E. 2d 81 (1947). Judge Jones in *Cassel v. Department of Highways,* 8 Ct. Cl. 259 (1971), stated the duty as follows:

> "Following decisions of the Supreme Court of Appeals of West Virginia, this Court has consistently held that the State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of its highways under all the circumstances. The maintenance of highways is a governmental function and funds available for road repairs are necessarily limited."

We do not believe as a matter of law that the record in this case establishes by a preponderance of the evidence that the respondent failed to exercise reasonable care and diligence in the maintenance of this road. This conclusion thus eliminates the necessity of exploring possible contributory negligence or assumption of risk on the part of the claimant. Accordingly, we disallow the claim.

Claim disallowed.

Opinion issued August 10, 1978

A. A. SPAGNUOLO

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-134)

No appearance by claimant.

Henry Haslebacher, Attorney at Law, for respondent.

PER CURIAM:

The parties in this claim filed a written stipulation which revealed the following: that, on or about February 2, 1978, the claimant entered into an agreement to sell certain wheels and axles to the respondent; that the respondent is presently in possession of the wheels and axles but has not paid for them; and that respondent is liable to claimant for the sum of $480.00, which amount is a fair and equitable estimate of the value of the said wheels and axles.

Based on the foregoing, an award in the above amount is hereby made.

Award of $480.00.

Opinion issued August 10, 1978

POLLY STEVENS, GUARDIAN OF THE PERSON AND ESTATE OF JAMES WALTER STEVENS AND TIMOTHY STEVENS

vs.

DEPARTMENT OF HIGHWAYS

(No. D-688)

William S. Steele and *Wade H. Bronson, Jr.,* Attorneys at Law, for claimant.

Nancy Norman, Attorney at Law, for respondent.

GARDEN, JUDGE:

James Walter Stevens and Timothy Stevens were the owners of certain real estate situate on Jenny's Creek in Mingo

County, West Virginia. When the claim was filed, they were under the age of eighteen years, and consequently the claim was filed in their mother's name as guardian. Their property was located on a hillside above Jenny's Creek. On the property was a frame house consisting of five rooms and a bath. Farther up the hill and behind the house was an unimproved, narrow, two-lane road which was owned and maintained by the respondent. On the uphill side of this road was a ditch line designed for the purpose of diverting the surface water coming from the hillside above and thus preventing the same from washing away the road.

Mrs. Stevens testified that through the years the respondent had failed to devote any maintenance to this ditch line; that as a result, the same had become clogged with debris; and that surface water, instead of being carried off, would wash down the road and onto her wards' property. Mrs. Stevens further indicated that as early as 1969 she noticed that the surface water was also carrying away portions of the road and depositing the same on the property behind the residence where she and her two sons lived. The condition of the hillside continued to worsen, and in 1971, Mrs. Stevens went to respondent's local maintenance garage and requested assistance. On one visit she conferred with one Lester Messer and on another visit with Tom Marcum, the county maintenance supervisor. Mrs. Stevens also testified that she registered complaints with the Governor's Office by phone on at least fourteen or fifteen occasions.

As a result of these complaints, Mrs. Stevens testified that respondent would dump large quantities of sand, gravel, and rubbish in the washed-out areas of the road, but that this newly deposited material would only be washed down on her wards' property during the next rainfall and increase the amount of unstable earth above the residence. Mrs. Stevens testified that never during these filling operations by respondents was any attempt made to drag the ditch line in order to eliminate its clogged condition. Finally, during the early morning hours of February 18, 1972, a landslide occurred which, with the exception of one room which was damaged, completely destroyed the residence as well as seven apple trees located

on the property. After this occurred, Mrs. Stevens stated that with the aid of a bulldozer, the partially damaged one room was moved to an adjoining piece of property where it was attached to an existing one-room structure where she and her two children resided until February, 1973, when another slide occurred destroying this structure. This claim, however, is limited to the damages resulting from the 1972 slide.

Tom Marcum, who was at that time the respondent's county maintenance supervisor, testified on behalf of the claimant and confirmed that he received a visit from Mrs. Stevens who was seeking assistance and relief from the condition on the hillside. He testified that for at least a year prior to the destruction of the residence, after each rain he would place at least fifteen truckloads of creek gravel, crushed stone, "and about anything that they could get hold of" on the road in order to bring the road up to grade so that school buses could get through. He also testified that this was the only maintenance performed, confirming, at least by implication, Mrs. Stevens' testimony that no attempt was ever made to clean out the ditch line.

The respondent called as an expert witness William E. Bennett, a geologist with nineteen years' experience. Mr. Bennett testified that he had inspected the property on July 8, 1976, four days prior to the date of the hearing held in this claim and well over four years after the landslide occurred. Based on his inspection of the property, his experience, and his knowledge of geological conditions in West Virginia, Mr. Bennett was of the opinion that the landslide was caused by an unstable condition created by subsurface water percolating or running beneath the slide area, but that the slide was triggered as a result of the removal of the toe of the slope from the slide area. Mr. Bennett testified that he observed the ditch line along the road, and that, in his opinion, it was sufficient to handle the surface water runoff. While his testimony was most persuasive, we cannot ignore the direct testimony of Mrs. Stevens, who testified that on many occasions she saw the water being cast onto the property because of the improperly maintained ditch. While Mr. Bennett was of the opinion that the slide was triggered by the removal of the toe of the slope, no testimony was introduced as to when this removal occurred, and, if so,

by whom. The only testimony relating to bulldozing activities was that of Mrs. Stevens, who indicated that a bulldozer was on her property after the slide and helped move the one remaining room of the house to adjoining property.

We believe that the respondent was under a legal duty to use reasonable care to maintain the subject ditch line in such condition that it would carry off the surface water and prevent it from being cast upon the Stevens property. See *Wotring v. Department of Highways,* 9 Ct. Cl. 138 (1972); *Olive v. Department of Highways,* 8 Ct. Cl. 148 (1970). We believe that the claimant has proved by a preponderance of the evidence that the respondent failed to maintain the ditch line properly and that such failure proximately caused the landslide and the damage to the Stevens property.

In support of her claim for damages, the claimant, without objection, introduced into evidence a written report from S. P. Goodman, a real estate appraiser from Williamson, W.Va. Mr. Goodman, whose report indicated that he had been appraising property for half a century, was of the opinion that the fair market value of the property was $14,285.00. The respondent called as its expert Gary S. Tokarcik, who personally testified to the method he followed in reaching his opinion regarding the fair market value of the property before the landslide and the fair market value of the property after the landslide, which is, of course, the proper method of establishing damage to real estate. His opinion was that the difference in these two values was $8,450.00. We believe that the testimony of Mr. Tokarcik is entitled to much more weight than the written report of Mr. Goodman, and we therefore make an award in favor of the claimant in the amount of $8,450.00.

Award of $8,450.00.

Opinion issued August 10, 1978

TEXACO, INC.

vs.

OFFICE OF THE SECRETARY OF STATE

(No. CC-78-127)

No appearance by claimant.

Gregory Elliott and *Ed Gardner,* Assistant Attorneys General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant Texaco seeks payment of the sum of $33.09 for petroleum purchases made by respondent. In its Answer, respondent admits that the claim is valid and that the claimant is entitled to receive payment, but further alleges that there were not sufficient funds remaining in respondent's appropriation at the close of that fiscal year from which the claim could have been paid.

While we feel that this is a claim which in equity and good conscience should be paid, we are of further opinion that an award cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct. Cl. 180 (1971).

Claim disallowed.

Opinion issued October 11, 1978

WILLIAM J. ADKINS, DOROTHY MARIE ADKINS, ARMILDA WILEY AND DOROTHY MARIE ADKINS, AS NEXT FRIEND OF MARY JANE ADKINS AND PEGGY JOYCE ADKINS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-78)

Houston A. Smith, Attorney at Law, for claimants.

James W. Withrow, Attorney at Law, for respondent.

WALLACE, JUDGE:

William J. Adkins and Dorothy Marie Adkins filed their claim against the Department of Highways in the amount of $5,200.00 for damages to their home caused by flood water.

In the course of the hearing, it developed not only that title to the real estate involved in the claim was vested in William J. Adkins and Dorothy Marie Adkins, but that the deed to the property, introduced as Respondent's Exhibit No. 2, granted their children an interest subject to the life estate of Armilda Wiley. Accordingly, Armilda Wiley and Dorothy Marie Adkins, as next friend of Mary Jane Adkins and Peggy Joyce Adkins, the Adkins' daughters, were added by the Court as additional claimants.

The subject property consists of approximately 10 acres of land fronting about 2500 feet on W.Va. Route 37/2 in Lincoln County, West Virginia. The home of the claimants is a one-story, four-room frame house with a front porch and a closed-in back porch. The house rests on piers of concrete blocks about two feet above the ground.

Leander Wiley, the father of the claimant, Dorothy Marie Adkins, built the house 25 to 30 years ago and lived in it for approximately 10 years. He conveyed the property to the claimants, who have lived there since.

The claimant, Dorothy Marie Adkins, testified that approximately four years ago the respondent constructed a fill and

installed a three-foot culvert in Bruner Creek, which runs within 25 feet of their house. She stated that after the culvert was installed, the creek overflowed during heavy rains, and the excessive water washed under the house. She complained to the respondent's superintendent at West Hamlin, West Virginia, and to Commissioner Ritchie, and wrote to the Governor. The respondent replaced the culvert with a four-foot culvert approximately one and a half years ago, which has not corrected the problem. She further testified that the creek has overflowed four times since the culverts were installed, the last time being April 4, 1977. She stated that the respondent had been notified each time the water overflowed the creek banks.

The claimants maintained that the culverts were improperly installed by the respondent, causing the flooding to occur. No evidence was introduced by the respondent to refute the claimants' allegation. The record establishes that flooding did not occur prior to the installation of the culverts by the respondent, and that the claimants notified the respondent, but no action has been taken to remedy the problem.

The claimants introduced as their Exhibit No. 2 an estimate of the cost to repair the entire house. The repairs listed on the estimate in the amount of $13,820.00 were in excess of damages actually caused by the water. The estimate included replacing the closed-in back porch and the front porch, paneling of three interior rooms, and replacing the roof shingles.

The parties admitted by agreement Respondent's Exhibit No. 4, which was an appraisal of the damaged property.

The appraiser determined that there was physical damage to the house caused by the flooding of the creek, but that there was no damage to the land from erosion or soil movement. Primary damage to the property consisted of the weakening of the pier foundation through erosion around the pillars. The appraiser considered the damages claimed to the house roof, but since the roof was over 25 years old and the covering had an actual age of 22 years, it was at the end of its economic life. Other areas of the house claimed to be damaged were the result of physical deterioration, not the flooding. The only before and after value of the property introduced in the record

was established by the respondent. The appraiser established the market value to be $8,500.00 prior to the damage, and $6,500.00 after the damage.

Therefore, from the evidence and exhibits, the Court finds that the claimants suffered water damage to their property as a result of the negligence of respondent, and makes an award of $2,000.00 to claimants William J. Adkins, Dorothy Marie Adkins, Armilda Wiley, and Dorothy Marie Adkins, as next friend of Mary Jane Adkins and Peggy Joyce Adkins.

Award of $2,000.00.

Opinion issued October 11, 1978

CYNTHIA LOU BRADSHAW

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-30)

Gregory W. Evers and *John P. Carter,* Attorneys at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

Claimant filed this claim in the amount of $140.76 against the respondent for damages sustained to a tire and rim on her 1975 Chevrolet Camaro automobile as a result of striking a pothole. The accident occurred on January 31, 1978, at approximately 8:15 p.m. on W.Va. Route 25 in Nitro, West Virginia. It was dark and it was raining. The claimant was traveling at approximately 25 mph intending to make a right-hand turn from Route 25 into a bowling alley in Nitro. There was a vehicle about 25 feet in front of her and another behind. She testified that she saw the lead vehicle hit something in the road which was later determined to be a pothole in the surface of the highway. She stated that she was unable to slow down or stop because of the traffic. Her automobile struck the hole, damaging the right rear tire and rim.

The consistent position of the Court with respect to cases involving alleged highway defects is set out in the case of *Parsons v. State Road Commission,* 8 Ct. Cl. 35 (1969), wherein the Court stated in part as follows:

> "This Court has many times held that the State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. The case of *Adkins v. Sims,* 130 W.Va. 645, 46 S.E. (2d) 81, decided in 1947, holds that the user of the highway travels at his own risk, and that the State does not and cannot assure him a safe journey. The maintenance of highways is a governmental function and funds available for road improvements are necessarily limited."

It was not established by the record that the respondent had notice of a dangerous condition in the highway, nor was such a neglect of duty proved that would create liability on the part of the respondent. Accordingly, the Court is of the opinion to and does disallow this claim.

Claim disallowed.

Opinion issued October 11, 1978

THE COUNTY COMMISSION
OF MASON COUNTY

vs.

DEPARTMENT OF PUBLIC SAFETY

(No. CC-77-109)

W. Dan Roll, Mason County Prosecuting Attorney, for claimant.

Gregory Elliott and *Edward Gardner,* Assistant Attorneys General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the claimant's Notice of Claim and the respondent's Amended Answer.

Claimant originally sought payment of the sum of $5,200 for back rent due under a lease agreement with respondent. Claimant later reduced this amount to $3,600 in a letter of settlement to respondent.

In its Amended Answer, the respondent admits that it is indebted to the claimant for back rent in the sum of $3,600, but also alleges that there were not sufficient funds in its appropriation for the fiscal year in question from which the claim could have been satisfied.

While we feel that this is a claim which in equity and good conscience should be paid, we are of further opinion that an award cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Dept. of Mental Health,* 8 Ct. Cl. 180 (1971).

Claim disallowed.

Opinion issued October 11, 1978

HENRY ELDEN & ASSOCIATES

vs.

DEPARTMENT OF NATURAL RESOURCES

(No. CC-77-190)

Michael T. Chaney, Attorney at Law, for claimant.

Frank M. Ellison, Deputy Attorney General, for respondent.

WALLACE, JUDGE:

The claimant filed its claim in the amount of $4,000.00 for services rendered the respondent. The claimant entered into a contract with the respondent to make a feasibility study for an activity center at Twin Falls State Park, maintained and operated by the respondent. The study was to be divided into four phases, the claimant to be paid $5,000.00 upon the completion of each phase. Although the contract provided for a completion date of June 30, 1977, claimant was directed to finish by the end of February, 1977, so that appropriate legislation could be presented to the legislature for approval and funding

of the project. In an effort to meet the deadline imposed by the respondent, the claimant worked on all phases of the contract.

By letter dated February 10, 1977, David C. Callaghan, respondent's director, advised the claimant that the respondent did not desire to complete the study and cancelled the contract. No reasons were given for the cancellation of the contract.

After the contract was cancelled, the respondent had no further contact with the claimant, and the claimant filed this claim for services rendered.

Respondent contends that no single phase of the contract was completed, and there was insufficient work performed to justify the compensation claimed by the claimant.

To support the amount of the claim, the claimant introduced, as its Exhibits Nos. 3 and 4, sheets showing the percentage of work performed on each phase of the contract and the compensation claimed.

The record establishes that the claimant attempted to complete the contract with the respondent only to have it cancelled. It does not disclose the specific reasons for the termination. The Court finds that the respondent breached the contract and that the claimant is entitled to be compensated for the services rendered the respondent. Accordingly, the Court makes an award of $4,000.00 to the claimant.

Award of $4,000.00.

Opinion issued October 11, 1978

DAVID L. MAYSE

vs.

BOARD OF REGENTS

(No. CC-77-173)

Claimant appeared in person.

Frank M. Ellison, Deputy Attorney General, for respondent.

WALLACE, JUDGE:

The claimant instructed an automobile technology program at Parkersburg Community College, Parkersburg, West Virginia. During the spring semester of 1976, he agreed to repair an unlicensed, 1967 Ford Mustang belonging to William Satoris as a part of his class instruction. Mr. Satoris was to pay for the parts. After class periods, the automobile was parked in the area reserved for teacher parking. Following the spring semester and a six-week summer course, the claimant left the school for a month on a school-sponsored trip. The vehicle was left on the teachers' parking lot. In the trunk were a transmission and alternator, belonging to the claimant.

The claimant testified he had parked old automobiles on the parking lot previously, but for not more than two hours at a time.

A security employee of the respondent observed that the Mustang and two other automobiles had been on the parking lot for some time and reported the fact to his superior. He was instructed to tag them with a notice requesting their removal within seven days. Such notices were placed on the vehicles. The automobiles were not removed by the owners, and after seven days they were towed away.

The claimant, upon his return to the school, discovered the Satoris automobile missing. His investigation revealed that it had been towed away and he found it on the premises of H & M Wrecking, the firm that towed the vehicles. The engine had been removed. He did not inspect the truck to ascertain whether his transmission and alternator were still there. He

made no effort to pay the towing and storage charges to repossess the vehicle, nor did he notify Mr. Satoris of the loss of his automobile and its subsequent location at H & M Wrecking.

The claimant filed this claim for the loss of the automobile belonging to Mr. Satoris and for the loss of his transmission and alternator.

From the record, there is no basis for the respondent to be held liable to the claimant for the loss of an automobile belonging to Mr. Satoris, nor is there any liability upon the respondent for the loss of the transmission and alternator belonging to the claimant.

The claimant left the Mustang with its contents on the parking lot knowing that he would be absent from the school for some time. Personnel at the school were not advised as to the ownership of the automobile nor were any arrangements made to leave it parked on the parking lot. The action taken by the respondent was readily foreseeable under the circumstances. There was no negligence or wrongdoing proved on the part of the respondent which would justify recovery. The claim of the claimant is disallowed.

Claim disallowed.

Opinion issued October 11, 1978

TRANSPORT MOTOR EXPRESS, INC.

vs.

PUBLIC SERVICE COMMISSION

(No. CC-78-4)

Transport Motor Express, Inc., the claimant, by *Darrell L. Bauer*, its agent.

Frank M. Ellison, Deputy Attorney General, for the respondent.

PER CURIAM:

This claim was submitted upon the pleadings. It is admitted by the respondent that the claimant inadvertently duplicated

and twice paid the sum of $837.00 for an order of 279 Uniform Vehicle Identification Stamps at the rate of $3.00 per vehicle. It is the position of the respondent that West Virginia Code §11-1-2a, providing for refund of taxes erroneously collected, is limited to taxes and cannot be extended by interpretation to fees such as this; hence, the claimant can recover its inadvertent second payment only through an award in this Court. See 46 Op. Att'y. Gen. 253 (1955). It is readily apparent that an award in the sum of $837.00 should be, and it is hereby, made.

Award of $837.00.

Opinion issued October 11, 1978

PATRICK WEST

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-205)

No appearance by claimant.

Henry Haslebacher, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a duly executed written stipulation which revealed the following: During a road construction project of respondent, which called for the construction of a fill on land adjacent to claimant's property, respondent was negligent in failing to provide a drain for the fill. Twice during heavy rains, mud and water washed into an apartment on claimant's land, causing damage in the sum of $950.00.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $950.00.

Opinion issued October 23, 1978

THE C&P TELEPHONE COMPANY OF W.VA.

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-132)

No appearance by claimant.

Henry Haslebacher, Attorney at Law, for respondent.

PER CURIAM:

Upon written stipulation to the effect that on or about November 19, 1974, employees of the respondent were digging on the land of Durstine Perrine, located near State Route 5/6 in Braxton County, West Virginia; and to the effect that, while engaged in said digging, the respondent negligently damaged telephone cables belonging to the claimant in the amount of $239.68; the Court finds the respondent liable, and an award in the above-stated amount is hereby made.

Award of $239.68.

Opinion issued October 23, 1978

CLAYWOOD PARK PUBLIC SERVICE DISTRICT

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-87)

William R. Pfalzgraf, Attorney at Law, for the claimant.

Nancy J. Aliff, Attorney at Law, for the respondent.

PER CURIAM:

Upon stipulation to the effect that respondent's sign crew damaged claimant's water main in the amount of $162.50 while installing a STOP sign, an award in that amount is hereby made.

Award of $162.50.

Opinion issued October 23, 1978

ILENE CLARK COOKSEY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-114)

Ilene Clark Cooksey, the claimant, in person.

Gregory W. Evers, Attorney at Law, for the respondent.

RULEY, JUDGE:

On March 23, 1977, an automobile owned and driven by the claimant struck a pothole in Route 60, near Belle, damaging the right front tire and wheel. The claimant asserts that the accident was caused by the respondent's negligence and seeks damages in the sum of $162.63.

The State is neither an insurer nor a guarantor of the safety of motorists travelling on its highways. *Adkins v. Sims,* 130 W.Va. 645 (1947); *Lowe v. Department of Highways,* 8 Ct. Cl. 210 (1971). Therefore, claimant must prove that respondent failed to conform to a standard of "reasonable care and diligence * * * under all the circumstances." *Parsons v. State Road Commission,* 8 Ct. Cl. 35 (1969). In the instant case, the pothole was located near the claimant's right-hand edge of the pavement. It also was filled with water, from a rain earlier in the day. There is no evidence that respondent had either actual or constructive notice of the pothole. See *Davis v. Department of Highways,* 12 Ct. Cl. 31 (1977); *Swift v. Department of Highways,* 10 Ct. Cl. 56 (1974). Accordingly, the evidence is not sufficient to establish negligence on the part of the respondent, and this claim must be denied.

Claim disallowed.

Opinion issued October 23, 1978

AILEEN W. DODRILL

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-67)

Aileen W. Dodrill, the claimant, in person.

Nancy J. Aliff, Attorney at Law, for the respondent.

RULEY, JUDGE:

On February 13, 1978, claimant's automobile struck a water-covered pothole on Route 60 between South Charleston and St. Albans, damaging the car in the amount of $227.46. The claimant alleges that respondent was negligent and is liable for those damages.

West Virginia neither insures nor guarantees the safety of motorists on its highways. *Adkins v. Sims,* 130 W.Va. 645 (1947). Potholes are a persistent and unavoidable problem, one of which all motorists should be aware. For the State to be found liable for pothole-caused damages, claimants must first establish that the State had actual or constructive notice of the particular hazard in the roadway which caused the accident. *Davis v. Department of Highways,* 12 Ct. Cl. 31 (1977). Claimant brought forth no evidence that the State had either actual or constructive notice, and, accordingly, the claim must be denied.

Claim disallowed.

Opinion issued October 23, 1978

A. M. FREDLOCK, II

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-3)

No appearance by claimant.

Henry Haslebacher, Attorney at Law, for respondent.

PER CURIAM:

Upon written stipulation to the effect that the claimant, A.M. Fredlock II, was an employee of the respondent during the time of December 6, 1977 through December 10, 1977; that the claimant was sick during such period and had accumulated enough sick leave to cover that period; and that the respondent improperly deducted said period of absence from claimant's pay; the Court finds the respondent liable, and an award of $235.20 is hereby made to the claimant.

Award of $235.20.

Opinion issued October 23, 1978

WILLIAM L. HANSON, SR. AND
WILLIAM L. HANSON, JR.

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-82)

William L. Hanson, Sr., and *William L. Hanson, Jr.*, the claimants, in person.

Nancy J. Aliff, Attorney at Law, for the respondent.

RULEY, JUDGE:

On March 16, 1978, the claimant, William L. Hanson, Jr., was driving south on Route 119 at Elkview when an accident occurred which damaged the automobile owned by the claim-

ant, William L. Hanson, Sr., in the amount of $1,000.00. The claimants allege that the accident was caused by potholes in the road and seek damages from the respondent.

The simple existence of a pothole in the road does not make the State negligent per se. For the State to be found negligent, it must have had actual or constructive notice of the particular road defect which allegedly caused the accident and must have unreasonably allowed that defect to continue to exist. *Davis v. Department of Highways,* 12 Ct. Cl. 31 (1977). The record in this case contains no evidence of any notice to respondent or failure to act on respondent's part. Thus, respondent cannot be found negligent. Recognizing that the State is neither an insurer nor guarantor of the safety of persons travelling on its highways (*Adkins v. Sims*, 130 W.Va. 645 [1947]), and that, therefore, no award can be made without proof of negligence, the Court must deny this claim.

Claim disallowed.

Opinion issued October 23, 1978

ALVIN O. HUNTER

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-68)

J. D. Miller, Attorney at Law, for the claimant.

Richard Carlton, Attorney at Law, for the respondent.

PER CURIAM:

Upon stipulation to the effect that, on February 10, 1977, the claimant's automobile was damaged in the amount of $223.00 when a portion of ceiling tile fell from the Wheeling Tunnel ceiling onto the car; and to the effect that respondent is responsible for the maintenance of the Wheeling Tunnel; the Court finds the respondent liable, and an award of $223.00 is hereby made to the claimant.

Award of $223.00.

Opinion issued October 23, 1978

JAMES G. KEITH

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-188)

James G. Keith, the claimant, in person.

Richard Carlton, Attorney at Law, for the respondent.

RULEY, JUDGE:

The claimant's automobile struck a pothole located two feet to the right of the eastbound lane of the ramp from Route 61 to the Montgomery bridge. The claimant seeks damages in the amount of $95.62 from the respondent.

The State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. *Adkins v. Sims,* 130 W.Va. 645 (1947). For the State to be found liable, it must first have had either actual or constructive notice of the defect in the roadway. It appears in this case that the State had no notice at all, and, accordingly, cannot be found liable.

Claim disallowed.

Opinion issued October 23, 1978

PEGGY KEYSER

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-38)

Peggy Keyser, the claimant, in person.

Nancy J. Aliff, Attorney at Law, for the respondent.

RULEY, JUDGE:

On October 27, 1977, the claimant was lawfully driving east on I-64 towards Huntington when her car ran over a sign lying flat on the roadway, which sign flipped up and damaged her automobile's exhaust system in the sum of $113.56.

The Court finds that the sign (a long, narrow sign with yellow and black diagonal stripes, like those used by respondent) was respondent's property; that leaving it upon the travelled portion of the highway constituted negligence on respondent's part; and that an award therefore should be made to the claimant in the amount of $113.56.

Award of $113.56.

Opinion issued October 23, 1978

JAMES T. KRATOVIL

vs.

DEPARTMENT OF HEALTH,
DIVISION OF MENTAL HEALTH

(No. CC-78-54)

James T. Kratovil, the claimant, in person.

Gregory E. Elliott, Attorney at Law, for the respondent.

RULEY, JUDGE:

The claimant alleges that the respondent was negligent in issuing a pass to an involuntarily committed patient, permitting the patient to leave Weston Hospital to seek legal assistance from the claimant, a lawyer in Weston. While in the claimant's office, the patient became excited, asked claimant for money and, when he refused, smashed his typewriter against the wall. The claimant seeks damages in the amount of $140.00, the price of the ruined typewriter.

The fact that a mental patient, while temporarily released from a hospital, causes damage to someone's property does not make the institution granting the release negligent per se. Such releases may be an integral part of the patient's therapy. The claimant must establish that the hospital and its staff did not "exercise that degree of care, in diagnosing the illness of a patient and in calculating the possibilities that his assaultive tendencies may assert themselves, which is commensurate with the risks involved in opening the doors of the hospital to him

for leaves of absence during which he will be free of professional care, supervision or restraint." *Eanes v. U.S.*, 407 F.2d 823, 38 A.L.R.3d 696, at 698 (4th Cir., 1969). See also annotation at 38 A.L.R.3d 699. In this case, there is no evidence whatever before the Court regarding the patient's background, the hospital's reasons for granting the pass, the degree of care exercised by the hospital staff, or anything else which would convince this Court that the respondent was negligent in calculating the risks to the public and granting the pass to the patient. Without such evidence, the claim must be disallowed.

Claim disallowed.

Opinion issued October 23, 1978

DALLAS POE

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-97)

Dallas Poe, the claimant, appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

GARDEN, JUDGE:

At about 7:00 p.m. on April 9, 1978, the claimant was operating his 1969 Chevrolet automobile in an easterly direction on Route 60 near Hurricane in Putnam County, when he struck a pothole which he estimated to be about 15 to 20 inches wide and 9 inches deep. As a result, his automobile sustained damages in the amount of $101.46. Mr. Poe testified that he was travelling at about 45 miles per hour in a 55-mile-per-hour area; that the highway was fairly straight; that it was still daylight and the weather was clear and the highway was dry; and that there were no vehicles in front of him which would have obstructed his vision or ability to see the pothole which he struck.

Mr. Poe further testified that the following morning he telephoned respondent's headquarters in Winfield and reported

the incident. The lady with whom he spoke did not identify herself but did advise Mr. Poe that they knew about the pothole and that they had received other complaints. The lady apparently did not advise Mr. Poe as to the length of time that they had knowledge of the existence of this pothole.

Proof of actual or constructive notice of the existence of a pothole is a necessary ingredient to the establishment of negligence on the part of respondent. *Cummings v. Department of Highways,* 12 Ct. Cl. 59 (1977); *Hoskins v. Department of Highways,* 12 Ct. Cl. 60 (1977). Additionally, it must be established that after receiving notice, the respondent had sufficient time within which to take remedial action. This element was not established in this claim. Further, this Court feels that the failure of the claimant to observe the pothole and avoid striking it, certainly, at least, contributed to the accident.

For the foregoing reasons, this claim is denied.

Claim disallowed.

Opinion issued October 23, 1978

THELMA J. STONE

vs.

OFFICE OF THE GOVERNOR—
EMERGENCY FLOOD DISASTER RELIEF

(No. CC-78-11)

Thelma J. Stone, the claimant, in person.

Frank M. Ellison, Attorney at Law, for the respondent.

PER CURIAM:

The respondent admits liability for damages in the amount of $2,500.00 to a rock wall owned by the claimant, caused by the State's workers during the clean-up of flood debris in Williamson on or about April 19, 1977. Accordingly, an award of $2,500.00 is hereby made.

Award of $2,500.00.

Opinion issued October 23, 1978

WILLARD P. TEETS, ATTORNEY IN FACT FOR PERCY E. TEETS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-158)

No appearance by claimant.

Henry Haslebacher, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $3,000.00, based upon the following facts: During the month of January, 1977, the respondent was engaged in snow removal operations on State Route 47 in Preston County, West Virginia, in the vicinity of property belonging to Percy E. Teets, represented herein by his Attorney in Fact, William P. Teets. In the course of these operations, the respondent negligently caused snow to be piled on the property of Percy E. Teets, killing certain trees. Respondent is therefore liable to claimant for the sum of $3,000.00, which is a fair and equitable estimate of the damage sustained by the aforementioned Percy E. Teets.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $3,000.00.

Opinion issued October 23, 1978

W. F. WEBB

vs.

DEPARTMENT OF HIGHWAYS
(No. CC-78-191)

No appearance by claimant.

Henry Haslebacher, Attorney at Law, for respondent.

PER CURIAM:

Upon written stipulation to the effect that claimant resides at 115 Brown Street in Clarksburg, West Virginia; that damages to the foundation of claimant's dwelling in the amount of $1,100.00 were caused by water run-off from a nearby road right-of-way owned by the respondent; and to the effect that negligence on the part of the respondent was the proximate cause of said damage, the Court finds the respondent liable, and hereby makes an award in the above-stated amount.

Award of $1,100.00.

Opinion issued October 24, 1978

JEFFREY D. BUBAR

vs.

DEPARTMENT OF HIGHWAYS
(No. CC-78-27)

Jeffrey D. Bubar, the claimant, in person.

Richard Carlton, Attorney at Law, for the respondent.

RULEY, JUDGE:

A contractor employed by the respondent as its agent was removing snow from I-64 on January 22, 1978, when its end-loader caught the end of an expansion joint in the roadway, bending it upward four inches. The contractor did not report the incident. A courtesy patrol driver reported it sometime before 11:00 A.M., and the respondent's witness testified that the damage was repaired by 11:30.

Sometime shortly before the damage was repaired, the claimant's car struck the bent expansion joint, damaging his automobile's exhaust system in the amount of $92.24. There is no evidence of any contributory negligence of the claimant.

General principles of tort and agency law require that the Court find the respondent liable. The contractor damaged the expansion joint, and negligently failed to make any effort to notify the respondent or warn motorists. Any such effort could have prevented the damage to the claimant's car. "Where an agent acts negligently in the regular course of his employment, the law is well settled that the prnicipal must bear the consequences of his agent's negligence * * *". 1A M.J., *"Agency"*, §86. The contractor negligently performed his appointed task; the respondent is therefore liable to the claimant. Accordingly, an award is hereby made in the amount of $92.24.

Award of $92.24.

Opinion issued October 24, 1978

CAPITOL BUSINESS EQUIPMENT, INC.

vs.

BOARD OF REGENTS

(No. CC-77-108)

Fred F. Holyroyd, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted upon the pleadings by agreement of the parties. The respondent admits that on June 7, 1976, West Virginia University received 262 Model No. 3015 Heavy Duty Kirsch traverse rods, with attachments, pursuant to its Order No. 812405, for the sum of $951.06, but avers that there were not sufficient funds appropriated by the Legislature for the fiscal year in question from which payment could be made. Following the precedent of *Airkem Sales and Service, et al. v. Dept. of Mental Health,* 8 Ct. Cl. 180 (1971), the claim must be denied.

Claim disallowed.

Opinion issued October 24, 1978

CAVALIER CRUSHING COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-26)

Donald A. Lambert, Attorney at Law, for the claimant.

Gregory Evers, Attorney at Law, for the respondent.

RULEY, JUDGE:

In early July, 1976, the claimant crushing company received a letter from the respondent announcing an auction sale of "approximately 1350 junk cars", to be held at the site where the cars were located near Belington, in Barbour County, on July 23, 1976. In response to the letter, Mr. Mason Herring, owner of the crushing company, visited the site on the day before the auction and attempted, without success, to count the number of vehicles located there. On the day of the auction and prior to the sale, employees of respondent announced that an additional 158 units had been added to the lot, making a total of 1508. The auctioneer, an employee of the respondent, informed the prospective bidders that they were to bid on what they could see, and the bidders were given ample time to inspect the site and attempt to evaluate the junk. The claimant was the high bidder and proceeded to crush the junk and sell the scrap to a metal recycling company. The claimant contends that it found only 756 junk cars, instead of the 1350 advertised by the respondent, that it incurred a monetary loss of $32,177.50 as a result of the respondent's alleged misrepresentation, and asks for an award in that amount.

The respondent contends that the auction was a sale in gross (that is, a sale of whatever junk was on the site, *not* a sale of any specific number of junk cars) and that the respondent performed its part of the sale and, therefore, is not liable.

Several persons who attended the auction testified that, although the auctioneer mentioned the number 1508, he also pointed to the lot and told the bidders, "You're buying what

you see." The auctioneer testified that he told the bidders that the lot contained 1508 "units", and that he proceeded to explain that "unit" was a term used by respondent in record-keeping. He also testified that, in his explanation to the bidders, he defined a "unit" as one load of junk dumped by respondent's employees at the site, said loads often consisting of *less* than one junk car.

"A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner." W. Va. Code §46-2-328. Thus, although this sale was later reduced to a written contract (which, incidentally, made no reference to any specific number of cars or units), this Court must analyze the terms of the sale as understood by the parties at the time the hammer fell. "Where the terms and conditions of the sale are plain and unambiguous and are plainly announced at the time and place of sale, they are binding upon a purchaser at the sale, whether he heard them or not and though he may not have understood them." 2A M.J. *"Auctions and Auctioneers"*, §9. The evidence in this case clearly reveals that the bidders understood that they were bidding for the right to clear the site of the junk located there, not for any particular number of vehicles. Mr. Herring and his son, apparently not intending to rely on the advertised estimate, visited the site on the day before the auction to count the cars and estimate the value of the junk, and saw the site and the junk again on the day of the sale. Others engaged in the crushing business testified that their concern is with the weight of the junk, since they sell it by the ton. The number of cars may be a useful tool for estimating the weight and, hence, the value of the junk, but it is understood to be an imprecise measure. From the evidence, the Court is constrained to conclude that the number of cars at the site was not a material element of the sale. Both claimant and respondent understood the terms of the sale to include all the vehicles, parts of vehicles, or other junk at the site, irrespective of the number of cars there. Mr. Herring's failure to hear the auctioneer's explanation of "unit" does not make the respondent responsible for Mr. Herring's failure to estimate accurately the amount of junk at the site.

In a similar Virginia case, an auctioneer stated that a tract of land for sale consisted of two acres, but pointed to the enclosure of the tract at the same time. The successful bidder, upon finding that the tract contained only "one acre and twelve poles", refused to pay. The seller was granted a bill for specific execution against the buyer, the Court holding that "it was a purchase of the lot of ground, such as it was, whether it was more or less than two acres", and denied the buyer's request for abatement of the price. *Foley v. McKeown*, 4 Leigh 627, 31 Va. 1059 (1833). See also *Grantland v. Wight*, 2 Munford 179, 16 Va. 357 (1811). The same principles apply to this case inasmuch as this was a sale of the lot of vehicles, cars, or junk. Thus, under the facts of this case and the applicable law, the Court must find the claimant's contention to be without merit and deny this claim.

Claim disallowed.

Opinion issued October 24, 1978

FOREST JOE KING, ET AL.,

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-37)

James H. Coleman, Attorney at Law, for the claimant.

Nancy J. Aliff, Attorney at Law, for the respondent.

RULEY, JUDGE:

The claimants in this case are Forest Joe King and Patricia Ann King, husband and wife, and their two infant children, Denny Joe King and Beverly King, all of whom seek damages for personal injuries which they sustained in a single-vehicle accident which happened at approximately 2:20 P.M., on Saturday, March 13, 1976, at a point on West Virginia Route 54 in the village of Hotchkiss, in Raleigh County. At the time and place of the accident, Forest Joe King was driving his 1971 model Ford F-100 truck in a general southerly direction upon the highway and the other claimants were passengers in

it. His claim includes the following special damages: $5,134.00, representing the total medical expense incurred by all four occupants of the truck for the treatment of their injuries; $1,300.00 for damage to his vehicle; $1,267.00 for lost wages; and $1,000.00 for services of a housekeeper, prescriptions, and transportation. All of those sums and items were received in evidence by agreement and stipulation of the parties.

The evidence shows that, as a southbound vehicle approached the place where the accident happened, it travelled around a curve to the right and then entered a straight stretch of highway at least 300 feet long at the end of which there was a curve to the left. The highway was paved with a blacktop surface which was dry at the time of the accident. At about 100 feet from the south end of the straight stretch, there were three large potholes in proximity to each other in the southbound traffic lane. The evidence shows that they had been in existence for a substantial length of time before March 13, 1976. In fact, Trooper Bradford Vaughan of the Department of Public Safety, who investigated the accident, testified that he himself had hit the holes while operating his cruiser in either February or March before the accident happened. The evidence shows that the holes were of sufficient size to present a considerable danger or hazard to vehicular traffic but that the respondent had not taken any action to warn vehicle operators of that danger. Mr. King travelled over the straight stretch at about 30 to 40 miles per hour. He saw the first of the three potholes at a distance of about 100 to 200 feet and then slowed to about 20 to 25 miles per hour. Due to oncoming traffic, he was unable to miss the hole nearest the south end of the straight stretch which was struck by the right wheels of the truck. That hole was about 3 feet wide, 3 feet long, and 6 to 8 inches deep. The impact of that collision broke the steering mechanism of the truck, causing it to leave the pavement and travel 96 feet over the west berm of the highway and down an imbankment into a ditch. This evidence impels the Court to resolve the issue of liability in favor of the claimants. While it is true that the respondent's county maintenance supervisor testified in effect that the respondent was doing all that it could do to maintain the highways of Raleigh County

before the accident happened, no explanation was offered for its failure to warn motorists of the danger created by the potholes which precipitated this accident. And the evidence plainly shows that such dangerous condition had existed for a sufficient length of time that the respondent either knew, or, in the exercise of ordinary care, should have known of its existence.

Turning to the matter of damages, the evidence shows that, in addition to the special damage aggregating $8,701.00 previously delineated, Forest Joe King sustained undisplaced complete vertical fractures of the anterior aspects of the left third and fourth ribs and a sprain of his cervical spine. Patricia Ann King sustained a compound comminuted fracture of the mid-shaft of her left femur and a compound fracture of her nose. Denny Joe King sustained a fracture of the right frontal portion of his skull. Beverly King sustained a cerebral contusion. All of the occupants of the truck sustained abrasions and contusions and all of them were admitted as patients to Raleigh General Hospital following the accident. Beverly King was discharged from the hospital on March 16, 1976, Denny Joe King was discharged on March 18, 1976, and Patricia Ann King was discharged on April 3, 1976. There is no evidence of the date on which Forest Joe King was discharged. Apparently, no member of the family sustained a permanent injury other than Mrs. King. In the report of an orthopedic evaluation performed March 20, 1978, it is stated that she has a one-half inch shortening of the left lower extremity with generalized muscular atrophy and limitation of flexion of the knee by 30%. The orthopedist estimated her disability at 15%. At the time of the examination, she was 22 years of age. In view of the evidence, the Court is disposed to make awards as follows: to Forest Joe King, the sum of $11,000.00; to Patricia Ann King, the sum of $20,000.00; to Denny Joe King, the sum of $2,500.00; and to Beverly King, the sum of $2,500.00.

Award of $11,000.00, to Forest Joe King;
award of $20,000.00, to Patricia Ann King;
award of $2,500.00, to Denny Joe King; and
award of $2,500.00, to Beverly King.

Opinion issued October 24, 1978

HAROLD MAHAFFEE

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-136)

No appearance by claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $94.24, based upon the following facts: On or about July 1, 1977, claimant was lawfully operating his 1973 Ford Torino on and over the Market Street Bridge, also known as U.S. Route 250, in Wheeling, West Virginia. Due to the negligence of the respondent, the claimant's automobile was damaged by a MEN WORKING sign, which blew over and struck said automobile. Respondent is therefore liable to claimant for the sum of $94.24, which is a fair and equitable estimate of the damage sustained by the claimant.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $94.24.

Opinion issued October 24, 1978

ALICE MARCUM

vs.

DEPARTMENT OF NATURAL RESOURCES

(No. CC-76-65)

Raymond F. Crooks, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

The claimant, Alice Marcum, age 60, filed her claim against the respondent for injuries received from a fall in an outhouse

in Laurel Run State Park which is maintained by respondent. The claimant was attending a church school picnic in the park on June 22, 1975. It was a hot, clear day. The church group, consisting of 30 to 40 persons, arrived at the park at approximately 9:30 a.m. on the morning of the day of the accident. The picnic area was near the swimming pool area. After church services, the group had their picnic lunch. The claimant testified that after eating she went to an outhouse, but because of the dirty conditions, she did not enter, but proceeded to another. As she attempted to enter the outhouse, where she had never been before, she opened the door, stepped up from the ground level onto the outhouse floor, slipped on the floor, and fell. She stated that the interior was dark, and that the floor had paper and water on it. The claimant fractured her left elbow in the fall, and, as a result of her injury, will always have a limitation of motion.

Brenda Droughts, a witness for the claimant, testified that she attended the picnic the day the claimant was injured and had been in the park each of the three previous days; that she took her children to the park several times a week to picnic and was familiar with the outhouse in question as well as the others in the area. She further testified that they were always a mess. The floors were covered with paper plates, paper, and water. Rather than use the outhouses, she took her children to the restrooms at the swimming pool because they were much cleaner.

The record establishes that the respondent knew or with reasonable effort should have known of the condition of the outhouses and taken such action as was necessary to correct the situation. The failure of the respondent to properly maintain the facilities placed in the park for public use constitutes negligence on the part of the respondent.

The claimant incurred doctor bills in the amount of $149.00 and a hospital bill of $22.00, and sustained limited permanent injury to her elbow. The Court finds that the negligence of the respondent caused the injury to the claimant, and makes an award of $2,171.00.

Award of $2,171.00.

Opinion issued October 24, 1978

RHODA RAYNETT McINTYRE

vs.

DEPARTMENT OF HIGHWAYS

(No. D-737)

Frank T. Litton and *James M. Sturgeon, Jr.*, Attorneys at Law, for the claimant.

James W. Withrow, Attorney at Law, for the respondent.

RULEY, JUDGE:

On the night of Wednesday, May 17, 1972, the claimant, in company with her mother, went into the Cohen Drugstore on Washington Street in Pocatalico to do some shopping. They left the drugstore at about 10:00 P.M., intending to cross Washington Street at a point directly in front of it. While her mother was crossing the street uneventfully, the claimant stepped off the sidewalk into a pothole in the blacktop surface of the pavement adjacent to the curb, which caused her to fall. On cross-examination, she testified that the "oblong" hole was about a foot and a half long, four or five inches deep, and about thirty feet from the intersection of Rebecca Street. She also testified that, while it was not raining at the time of the accident, it had rained earlier in the evening and there was water in the hole. When she fell, the claimant was carrying packages containing various items including a hamster cage. The claimant was unaware of the hole until she stepped down into it. There was no claim that the respondent had actual knowledge of the pothole, but constructive knowledge was established, albeit without great weight, by the undisputed testimony of an expert witness who testified that, in his opinion, it would have taken more than two months for the hole to develop to its size at the time of the accident. Such constructive knowledge, without any remedial measures or warning action, establishes negligence on the part of the respondent. The Court could not conclude that the claimant was guilty of contributory negligence without resorting to speculation, and, accordingly, the issue of liability must be resolved in her favor.

Turning to the matter of damages, it appears that the claimant sustained abrasions of her right knee and a bruise of her right ankle. She has sought medical attention for those injuries on only two occasions, viz., May 22, 1972, and January 6, 1977, when she went to the office of Jean P. Cavender, M.D., incurring expense in the sum of $22.00. On the latter occasion, it was reported that

> "She states that the right ankle and right knee ache and sometimes swell after being on them too much. She tried to work in a drug store last year and found that the joints were painful after being on them for 7-8 hours."

but no objective symptoms were noted, and there was full range of motion in both joints. In view of the evidence, the Court is disposed to make an award in the sum of $500.00.

Award of $500.00.

Opinion issued October 24, 1978

MOORE BUSINESS FORMS, INC.

vs.

DEPARTMENT OF HEALTH,
DIVISION OF MENTAL HEALTH

(No. CC-78-46)

Moore Business Forms, Inc., the claimant, by *James Ruziska,* its agent.

Edward W. Gardner, Assistant Attorney General, for the respondent.

PER CURIAM:

This claim was submitted upon the pleadings. Upon the admission of the respondent that it received and accepted an excess of 770 business forms (10,770 on an order for 10,000), having a value of $51.42, an award in that sum is hereby made.

Award of $51.42.

Opinion issued October 24, 1978

ORKIN EXTERMINATING, INC.

vs.

DEPARTMENT OF HEALTH,
DIVISION OF MENTAL HEALTH

(No. CC-78-96a-c)

Ray Summerfield, Branch Manager, Orkin Exterminating, Inc., appeared for the claimant.

Gregory E. Elliott and *Edward W. Gardner,* Assistant Attorneys General, for the respondent.

RULEY, JUDGE:

At the hearing upon this claim, the respondent admitted liability for failure to pay for services rendered to Roney's Point Center, and admitted that funds remained in the budgets for the years in question from which the bills could have been paid. However, neither the claimant nor the respondent accurately added the amounts due. Performing its own addition, the Court finds respondent liable to claimant in the amount of $110.00 for claim 96a, $68.00 for claim 96b, and $34.00 for claim 96c, for a total award of $212.00.

Award of $212.00.

Opinion issued October 24, 1978

CHARLES EDWARD PAULEY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-136)

Charles Edward Pauley, the claimant, in person.

Nancy J. Aliff, Attorney at Law, for the respondent.

WALLACE, JUDGE:

This claim is for property damage in the sum of $203.39 sustained by the claimant's Dodge automobile in a single-

vehicle accident which occurred at about 11:45 P.M., on Wednesday, April 26, 1978, when the claimant drove that automobile into a depression about 10.5 feet wide and 3 feet deep in Secondary Route 3/3, commonly called High Street, near St. Albans. The claimant testified that there had been a chronic and recurring problem, of which he was aware, caused by slipping of the road base at the place where the depression was located. He also testified that, at the time of the accident, it was raining. He testified further that he had observed the depression when he drove over the road on the morning of April 26, 1978, but that its depth had increased between then and the time of the accident. Under the law of West Virginia, it is well settled that contributory negligence on the part of a claimant, however slight, which contributes to proximately cause an accident and resulting injuries, will preclude the recovery of damages. 13B Michie's Jurisprudence, "Negligence", §26, p. 280. Under the facts of this claim, it is apparent that, irrespective of whether the respondent was or was not negligent in the performance of its duties relating to Secondary Route 3/3, the claimant was himself guilty of negligence which at least contributed to cause the accident and his resulting damage. Being aware of the depression, its propensity to become worse, and the fact that it was raining, he failed to take sufficient precautions to protect his own safety and property. Accordingly, this claim must be denied.

Claim disallowed.

Opinion issued October 24, 1978

RANDALL I. SAMPLES

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-82)

Charles M. Kincaid, Attorney at Law, for the claimant.

Gregory W. Evers, Attorney at Law, for the respondent.

RULEY, JUDGE:

This claim grows out of a single-vehicle accident which occurred at about 10:00 P.M., on Sunday, May 22, 1975, at a point of West Virginia Route 4 near Corton in Kanawha County. The claimant was driving his van in a general easterly direction around a curve, following a vehicle being driven by an unidentified woman, when a large oak tree fell across the highway between the two eastbound vehicles. The claimant's van then collided with the tree, with resultant damages and injuries being sustained by the van and the claimant, respectively. Upon agreement of counsel, only the issue of liability was tried.

The claimant testified that when he first saw the oak tree on the night of the accident, it had just fallen onto the pavement about 30 feet in front of his van, which he was operating at about 40 miles per hour. The trunk of the oak tree was about three feet in diameter and it was about 50 to 60 feet tall. Before it fell, it was located above the highway and near the top of an embankment on its north side. The terrain at and near the place where the accident happened was densely wooded on both sides of the highway. The tree was alive. Although the evidence respecting the location of the tree may have been somewhat equivocal, the only evidence before the Court, offered by two witnesses on behalf of the respondent, was that the tree was not on the public right-of-way. It was uncontroverted, however, that at least some portion of it extended over the highway. It also was uncontroverted that, shortly before the accident occurred, a severe thunderstorm accompanied by gusting winds had passed through the area.

The claimant testified that he was familiar with the oak tree and its location, having noticed it frequently before the accident happened. There was no evidence that the respondent, or anyone else, had been working in the area from which the tree fell.

The Court is constrained to conclude that it is not established by a preponderance of the evidence that the respondent knew or, in the exercise of ordinary care, should have known that the oak tree posed a hazard to traffic on the highway. See *Widlan v. Department of Highways,* 11 Ct. Cl. 149 (1976) and *Criss v. Department of Highways,* 8 Ct. Cl. 175 (1970). Accordingly, the claim must be denied.

Claim disallowed.

Opinion issued October 24, 1978

R. L. SMITH, D/B/A
ARCHITECTURAL ASSOCIATES

vs.

DEPARTMENT OF PUBLIC SAFETY

(No. CC-78-174)

No appearance by claimant.

Ellen F. Warder, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer. Claimant seeks payment of the sum of $879.91 for architectural services performed on a project involving the State Police Academy Dormitory at Institute, West Virginia.

The respondent admits the validity of the claim, but states also that there were not sufficient funds remaining in Special Revenue Account 8352-36 from which the claim could have been paid.

While we feel that this is a claim which in equity and good conscience should be paid, we are of further opinion that an

award cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct. Cl. 180 (1971).

Claim disallowed.

Opinion issued October 24, 1978

BILLY JOE VINSON
AND PAUL F. VINSON

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-157)

James M. Cagle, Attorney at Law, for the claimants.

Nancy J. Aliff, Attorney at Law, for the respondent.

RULEY, JUDGE:

These claims for damages for personal injuries sustained by each claimant respectively, and for property damage to the 1966 model Cadillac automobile owned by the claimant, Paul F. Vinson, arise out of a single-vehicle accident which happened at approximately 10:00 P.M. on August 27, 1975, when that automobile collided with a concrete pier or abutment separating the two traffic lanes of W.Va.-U.S. Route 119 at a railroad underpass in Marmet, Kanawha County. At the time and place of the accident, Paul F. Vinson was driving his automobile with its headlights on, and his brother, Billie Joe Vinson, was riding in the right front seat. They were traveling in a general northerly direction from their former home in Logan to Cleveland where they then resided. Paul F. Vinson had driven through the underpass before and was familiar with it.

The claimants contend that the accident was caused by negligence on the part of the respondent in failing to repair several holes in the northbound lane of the highway south of the underpass, and in failing to warn motorists of their existence. Paul F. Vinson testified that those holes were two to three inches deep and about ten to fifteen inches "around". Billie Joe Vinson described the highway at that place as a

"rough road". Neither claimant saw the holes before the automobile struck the first one. Both claimants and other witnesses called in their behalf testified to the effect that at the time of the accident, there were no signs warning northbound drivers of any danger or hazard. Billie Joe Vinson testified that Paul said, "Brace yourself" when the car encountered the rough road and that the car hit the pier about three or four seconds later. Paul F. Vinson testified that, prior to striking the holes, he had been driving at a speed of 35 or 40 miles per hour. He also testified that, when he hit the holes, he hit the brakes, but they didn't stop the car, adding that, "They didn't hold the car back. The car kept going." It is a rule of thumb that miles per hour may be converted to feet per second by multiplying the miles per hour by one and one-half. Thus, a vehicle traveling 35 miles per hour travels 52.5 feet in one second, 157.5 feet in three seconds, and 210 feet in four seconds.

On August 2, 1975, a train had derailed and had fallen on Route 119 on the south side of the underpass causing extensive damage to the paved surface of the highway. The undisputed evidence is that from that date until a new surface was applied (sometime after August 27, 1975) the respondent made repairs, including patches, in that area several times each week. In addition, several employees of the respondent, the investigating police officer of the City of Marmet, J. W. Armentrout, and Dan Toney, an emergency medical technician employed by the Marmet Fire Department and Ambulance Service, testified to the effect that a warning sign or signs were erected (although there was divergence in their testimony as to the type of sign) and in place at the time of the accident warning northbound motorists of the rough or hazardous road. Jerry Easter, a foreman employed by the respondent, testified that a "Rough Road" sign had been erected facing northbound traffic at a point about one hundred yards south of the underpass. Messrs. Toney and Armentrout confirmed that testimony.

Significantly, Officer Armentrout testified that, incident to his investigation of the Vinson accident, he took a statement from Paul F. Vinson which read:

" 'Going north on U.S. 119, *I saw a sign,* I hit my brakes, the car lights blinded me, and the car slid onto the dirt and rocks.' " (Emphasis supplied.)

Officer Armentrout also made the following answers to the following questions regarding a conversation with Paul F. Vinson at the Charleston Area Medical Center:

"Q Were the people, then, sitting right outside of the emergency room at Charleston Area Medical Center?

A Right, the driver was, right.

Q Okay. Do you specifically recall these words being said to you about signs, or do you recall them after reading your report that you submitted?

A I remember him saying something about he saw the signs.

Q Do you remember what signs he was talking about?

A They — *he said he saw the sign just before he entered the construction site,* and as well as I remember, the only signs that was there was the hazard signs." (Emphasis supplied.)

The duty owed by the respondent to motorists traveling upon state highways is a qualified one, namely, reasonable care and diligence in the maintenance of its highways under all the circumstances. *Cassel v. Department of Highways,* 8 Ct. Cl. 254, at 259 (1971). The undisputed evidence respecting frequent repairs to the surface of the highway between the train derailment on August 2 and the claimants' accident on August 27, 1975, precludes a finding that the respondent was negligent in failing to repair the highway. Although there is a substantial conflict in the evidence as to the existance of a warning sign at the time of the accident, the Court feels obliged (particularly in view of the statement made by Paul F. Vinson to Officer Armentrout, shortly after the accident happened, to the effect that he saw such sign) to resolve that conflict in favor of the respondent. It necessarily follows that the Court must conclude that the respondent was not guilty of negligence

which proximately caused the accident and, hence, deny these claims.

Claims disallowed.

Opinion issued November 16, 1978

ELVA B. PETTS

vs.

DIVISION OF VOCATIONAL REHABILITATION

(No. D-927d)

AND

JAMES M. PRESTON

vs.

DIVISION OF VOCATIONAL REHABILITATION

(No. D-927i)

Michael J. Farrell, Attorney at Law, for claimants.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

GARDEN, JUDGE:

These claimants are seeking awards for overtime compensation during a period of time that they were employed as houseparents at the respondent's facility at Institute, West Virginia. Actually, a total of eleven claims were filed, but counsel agreed to present testimony in only two, believing that the testimony of these two claimants would be representative of all pending claims. Ten of the claims, including these two, were filed on February 21, 1975, and the eleventh, the claim of Paul Leach, was filed on April 23, 1975.

Initially, what must be determined is the applicable period of time during which the claimants allegedly failed to receive the overtime wages to which they were entitled under the West Virginia Minimum Wage and Maximum Hours Standards For Employees. Code 21-5C-8 provides as follows:

"Any employer who pays an employee less than the applicable wage rate to which such employee is entitled under or by virtue of this article shall be liable to such employee for the unpaid wages; an agreement by an employee to work for less than the applicable wage rate is hereby declared by the legislature of West Virginia to be against public policy and unenforceable.

In any such action the amount recoverable shall be limited to such unpaid wages as should have been paid by the employer *within two years next preceding the commencement of such action.* Nothing in this article shall be construed to limit the right of an employee to recover upon a contract of employment." (Emphasis supplied.)

Claimants contend that, although the actions (with the exception of one) were commenced on February 21, 1975, through their attorney they presented their claims to the Wage and Hour Director of the West Virginia Department of Labor on or about November 15, 1974, and after conducting an investigation, the Director suggested that the claimants file their claims in this Court. Thus, the claimants contend that the two-year period should run from November 15, 1972 to November 15, 1974. With this contention we cannot agree. The wording of the statute quoted above is clear and unambiguous, and we thus hold that the statute mandates the two-year period to be between February 21, 1973 and February 21, 1975. During the early part of this period, the claimants were required to work nine straight days, and then they would be entitled to five straight off days, after which they would again work nine straight days. Under this schedule the claimants were paid a monthly salary in addition to receiving free meals and lodging. On May 1, 1974, as a result of an amendment, the Federal Wage and Hour law became applicable to State employees. Thereafter, on June 7, 1974, the respondent's housemothers began working a daily eight-hour shift, and the housefathers, on June 30, 1974, went to the eight-hour shift. The evidence in respect to the date of the implementation of the shift work was conflicting, and for the sake of consistency, we here hold that the period of time in question for both housemothers and housefathers is from February 21, 1973

through June 30, 1974. The claim of Paul Leach having been instituted on April 23, 1975, the period in question for him is April 23, 1973 through June 30, 1974.

Counsel for the respondent vigorously contends that at the close of fiscal year 1972-73 and fiscal year 1973-74, insufficient funds were expired in the personal service accounts from which these claims for overtime compensation could have been paid, and that the ability of this Court to make awards has been foreclosed by the decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct. Cl. 180 (1971). Pay stubs were introduced into evidence by the claimants reflecting that their salaries were paid interchangeably from account numbers 4400-06 and 8044-04. There were insufficient funds in the former account at the close of fiscal 1972-73 and fiscal 1973-74 to pay these claims, but there were sufficient funds in the latter account from which these claims could have been paid each year. Respondent contends that account number 8044-04 is funded by federal monies and that at the close of the fiscal years in question, these funds are not expired and returned to the general revenue account, but are simply transferred to the same account for use during the following fiscal year.

Since these claims were submitted for decision, the Supreme Court of Appeals of West Virginia has decided the case of *State ex rel. Crosier v. Callaghan,* ..... W.Va. ....., 236 S.E. 2d 321 (1977), and we believe that case to be dispositive of this particular issue. *Crosier,* a mandamus action, involved a successful attempt on the part of conservation officers of the Department of Natural Resources to recover overtime wages. Among other defenses, the respondent contended that Code 12-3-17 precluded him from complying with a writ of mandamus, because there were insufficient funds in the current fiscal appropriation to pay for overtime worked by conservation officers. Suffice it to say that Code 12-3-17 was the basis for reaching this Court's result in *Airkem,* supra. Justice Harshbarger, speaking for the Court in *Crosier,* used the following language in disposing of the *Airkem* defense:

> "In this case, Code 12-3-17 and 21-5C-8 must be construed in pari materia. Code 12-3-17, subject to specified excep-

tions, prohibits any state officer from authorizing or paying any account incurred during any fiscal year out of the appropriation for the following year. Code 21-5C-8, however, expressly authorizes payment of back overtime wages for two consecutive years immediately preceding an employee's action for unpaid wages. To the extent that retroactive liability for unpaid wages is incurred against an employer, it is incurred at the time liability is determined. Theoretically, an employer could fail to pay correct overtime wages for many years; his liability for two years back payment, however, is not legally incurred under Code 21-5C-8 until the employee prevails in an action to recover the money due. Thus, while work may be performed by government employees in the course of prior fiscal years, the government's liability for payment of back wages arises at the time they are found to be due."

Thus, it seems clear that the balance in accounts 4400-06 and 8044-04 at the close of fiscal years 1972-73 and 1973-74 is immaterial. If liability for unpaid wages is determined in this proceeding at this time, it will be paid out of the current personal services appropriation or from a special appropriation. This was made clear by Justice Harshbarger in *Crosier,* supra, when he used the following language:

"We also find unpersuasive respondent's argument that mandamus does not lie because there are insufficient funds in this year's Department of Natural Resources' personal services appropriation from which to pay petitioner's overtime compensation. Nor do we believe that it is petitioner's responsibility to demonstrate factually that there will be an adequate surplus in this year's fiscal appropriation to cover the payment.

Inherent in respondent's argument is the premise that petitioner's right to back wages is contingent upon his finding a fund from which he can be paid and then submitting a blueprint for payment to the Court that does not infringe upon designated fiscal appropriations. This is not correct when, as here, an employee is lawfully entitled to remuneration for services rendered. Where there are un-

expended funds in any account which may be lawfully charged with payment of this debt, whether it be from the personal services appropriation or from the general fund in the state treasury, then petitioner is entitled to mandamus directing payment of the amount due."

During the periods from February 21, 1973, and April 23, 1973 (Leach claim), through June 30, 1974, which we will hereafter refer to as the "critical period", the minimum wage from February 21, 1973 to June 30, 1973 was $1.40 per hour, and from July 1, 1973 to June 30, 1974, the minimum wage was $1.60 per hour. See Code 21-5C-2. In respect to overtime, Code 21-5C-3 provides in part as follows:

"(a) On and after January one, one thousand nine hundred sixty-seven, no employer shall employ any of his employees for a workweek longer than forty-eight hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

As indicated earier, the claimants during the critical periods were being paid a monthly salary, and during the hearing it appeared that there was a dispute as to the proper method of converting a monthly salary to an hourly rate. We believe that the proper method of conversion should follow the following principles. The evidence established that claimant Preston, during fiscal 1973-74, was being paid a monthly salary of $410.00. We are of the opinion that this figure should be multiplied by 12 to establish an annual salary, or in this case, $4,920.00. Dividing this figure by the 52 weeks in any given year reflects a weekly salary of $94.62. Again dividing this figure by the 48-hour work week, an hourly wage of $1.97 per hour is determined.

In addition to the above, Code 21-5C-4 provides as follows:

"In determining whether an employer is paying an employee wages and overtime compensation as provided in sections two and three (21-5C-2 and 21-5C-3) of this article, there shall be provided in accordance with the regulations which shall be promulgated by the commission-

er a credit of twenty-five cents an hour for an employee customarily receiving gratuities, and a reasonable credit for board and lodging furnished to an employee. The commissioner shall promulgate regulations relating to maximum allowances to employers for room and board furnished to employees."

Some discussion between counsel took place at the hearing concerning credits that respondent should be allowed for meals and lodging furnished to houseparents, and it was suggested that a credit of $1.00 per day for meals and a credit of $26.00 per month for lodging should be allowed. By the same token, if these credits are allowed for respondent, the claimants should be permitted to add these items to their monthly salaries in order to determine their true hourly rate of compensation. Claimant Preston's salary thus would become $466.00 per month, or an hourly rate of $2.24 per hour. The unfairness of allowing the respondent a monthly credit for meals and lodging, and the corresponding increase in hourly rate to the claimants, is due to the fact that we believe each of the claimants handled his five-day-off periods differently. Claimant Preston permanently remained in his dormitory room at Institute, while claimant Petts, whose home was located in nearby Dunbar, obviously left Institute and spent her five-day-off period at her own residence. For the most part, we believe that increasing claimants' hourly rate and allowing the respondent a credit for meals and lodging would amount to little more than a washout, and if allowed on an equitable basis, would certainly create a bookkeeping nightmare. We thus conclude and so hold that any allowances for meals and lodging shall not be considered a credit to respondent or by the claimants in arriving at their respective hourly rates.

The pivotal question for decision in these claims is what constitutes "hours worked" and what constitutes "off duty" time as those terms are defined in the statute and in the rules and regulations as promulgated by the Commissioner of Labor. Workweek and hours worked are defined in Code 21-5C-1 as follows:

"(g) 'Workweek' means a regularly recurring period of one hundred sixty-eight hours in the form of seven

consecutive twenty-four-hour periods, need not coincide with the calendar week, and may begin any day of the calendar week and any hour of the day.

(h) 'Hours worked,' in determining for the purposes of sections two and three (21-5C-2 and 21-5C-3) of this article, the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday, time spent in walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform and activities which are preliminary to or postliminary to said principal activity or activities, subject to such exceptions as the commissioner may by rules and regulations define."

What is a houseparent and what are his or her duties? The job description of a houseparent as defined by the Division of Vocational Rehabilitation states that a houseparent is a person responsible for supervising students in a dormitory or other living facility. Specific job duties are delineated, such as keeping order in the meal lines during meals, supervising students in the dormitory for cleanliness and care of their rooms, making bed check at night for absenteeism, driving cars to transport students, driving an ambulance in an emergency, reporting abnormal behavior to counselors, supervising grounds during late evening hours, trying to create a home-like atmosphere in the dormitory, and accompanying students on shopping trips. Claimants would expand this list with such activities as providing students with fresh linens, seeing that students are provided with cleaning supplies, meeting weekly with counselors, and driving students to various hospitals, bus depots, and railroad stations; but, by and large, these activities described by the claimants fall within the specific job duties outlined by respondent.

As earlier indicated, during the critical period, houseparents would work for nine straight days and then be off for a period of five days. Thus, it is necessary for us to determine the number of "hours worked" during the first seven days of the nine straight working day periods. A typical houseparent's

day would commence at approximately 6:00 a.m., and after washing and dressing, they would report to the dining room at 7:00 a.m. to monitor the breakfast line until 8:30 a.m., an undisputed hour and one-half of work. At 11:45 a.m. until 12:45 p.m., they would again report to the dining facility for an additional admitted one hour of work. From 4:45 p.m. to 5:45 p.m., they again would monitor in the dining area, again admitted as an hour worked. From 6:00 p.m. until 10:00 p.m., the houseparents were required to patrol the grounds or be in attendance with the students in the recreation hall, an admitted four hours of work. Between 10:00 p.m. and 11:00 p.m., the houseparents conducted bed checks and supervised lights out.

Basically, the hours in dispute are the hours between breakfast (3 hours and 15 minutes), the hours between lunch and supper (4 hours) and the sleeping hours, roughly between 11:00 p.m. and 6:00 a.m. Much testimony was introduced on behalf of the claimants establishing that quite frequently the sleeping hours of the houseparent would be interrupted by students returning to the center in an intoxicated condition, students locking themselves out of their rooms when going to the toilet, students becoming ill during the night, and a myriad of other nocturnal disturbances. We believe that the issue of the compensability of sleeping hours is answered by the regulations promulgated by the West Virginia Department of Labor, specifically, Section 3.11 of Regulation III, which reads as follows:

> "(a) Where an employee is required to be on duty twenty-four hours or more, the employer and employee may agree on bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than eight hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. *Where no expressed or implied agreement to the contrary is present, the eight hours of sleeping time and lunch periods constitute hours worked.*" (Emphasis supplied.)

The record is entirely silent of either an expressed or an implied agreement that sleeping hours and lunch periods are

not to be considered hours worked, and we are thus constrained to hold that the same are to be considered hours worked.

An abundance of testimony, undisputed by claimants, was introduced by respondent establishing that it was the custom of respondent to excuse claimants from duty upon their request so that they might attend to personal matters. These requests, depending on the individual claimants, varied as to frequency but would take place during the morning and afternoon hours. In an attempt to be fair and equitable, in view of what may be considered an artificial and unjustified posture in respect to sleeping time, we are of the opinion that a one-half hour period in the morning and a like period in the evening should not be considered hours worked in accordance with Code 21-5C-1 (h). We also believe that, of the total time (7 hours and 15 minutes) between breakfast and lunch and lunch and dinner, at least five hours should not be considered hours worked. Consequently, in each of the first seven days of the nine straight days worked by claimants, we hold that they should be credited with 18 hours worked. This results in a work week of 126 hours, 48 of which are at the regular hourly rate and the remaining 78 hours at the rate of one and one-half times the regular rate.

It probably should have been noted at the outset of this opinion that this Court was not requested to arrive at monetary awards, but rather was requested only to establish guidelines from which counsel for the parties could compute any awards that might be due the various claimants. We have indicated our opinion in respect to the initial seven straight days worked by the respective claimants. The remaining two days of the nine-day schedule would, so to speak, be worked at the regular rate of 18 hours per day and as a consequence, claimants would not be entitled to overtime compensation.

Both claimant and respondent have access to records establishing during the "critical period" the days worked and the days taken by the claimants as either annual leave time or sick time, during which the claimants should be paid on a 48-hour-per-week basis computed on the hourly rate as set forth earlier

in this opinion. Also to be included under the same reasoning is the two-week leave period granted to claimant Preston, and denominated "professional leave" following his attack by a student during which claimant suffered personal injuries in February of 1974.

The Court trusts that within the parameters laid down in this opinion, counsel for the parties can agree in respect to additional compensation that may be due and owing, if any, to each of the claimants. If that can be done and an appropriate Stipulation be thereafter tendered, appropriate awards could then be made by this Court.

IN THE COURT OF CLAIMS OF THE
STATE OF WEST VIRGINIA

ELVA B. PETTS,

Claimant,

(No. D-927d)

vs.

DIVISION OF VOCATIONAL REHABILITATION,

Respondent.

and

JAMES M. PRESTON,

Claimant,

(No. D-927i)

vs.

DIVISION OF VOCATIONAL REHABILITATION,

Respondent.

O R D E R

Pursuant to an opinion of this Court issued on November 16, 1978, counsel for the parties in the above-styled matters and other related claims have conferred and computed the monetary amounts of additional compensation due and owing each

of the claimants and have filed a written Stipulation reflecting the amounts of additional compensation due and owing each of said claimants, which Stipulation is hereby ORDERED filed. Pursuant to this Court's opinion herein referred to and said Stipulation, awards are hereby made in favor of the following named claimants in the following stated amounts.

James Preston	$ 5,888.75	D-927i
Ralph Keeling	4,593.88	D-927b
Paul Leach	2,394.65	D-927k
Elva Petts	3,985.42	D-927d
Rondal Fury	4,296.92	D-927f
Arthur White	5,217.75	D-927h
Gertrude Preston	5,771.49	D-927j
Harry Wells	3,423.80	D-927c
Ralph Parker	2,070.77	D-927a
Icy Mae DeWeese	202.50	D-927g
Ethel Engegno	4,989.22	D-927e

Dated this 5th day of January, 1979.

JOHN B. GARDEN
Presiding Judge

Opinion issued December 8, 1978

MARY JO HALL

vs.

BOARD OF REGENTS

(No. D-1025)

Ross Maruka, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

The claimant, Mary Jo Hall, filed this claim against the respondent for injuries received as a result of a fall when leaving a ladies' rest room at Fairmont State College. The claimant had enrolled in the school in late August or early

September of 1973. On November 12, 1973, she went to a ladies' rest room on the second floor of the Administration Building near her classroom. She had never used this rest room previously. The elevation of the rest room floor was seven inches higher than the level of the hallway floor. To enter the rest room, it was necessary to step up into the room; when leaving, it was necessary to step down. There were no obstructions on the floor of the rest room nor in the hall. Before entering the room, it was necessary for the claimant to allow two girls to leave. She then proceeded to enter, stepping up into the room. She stayed for a very short time and as she was leaving, she opened the door, missed the step, and fell into the hall. The claimant testified, "I didn't see the step when I opened the door and stepped out; I didn't see it." The claimant received a severe fracture of the left arm which required extensive medical treatment, surgery to the elbow, and hospitalization. At the time of the accident, the claimant was carrying two books in her left arm and a strap purse over her right shoulder. There were no signs inside or outside the rest room warning of the step. The evidence indicated that there had been a sign inside the rest room, but someone had removed it.

The claimant was a student at Fairmont State College and ". . . students in a building are generally held to have the status of invitees to whom the school owes a duty to make the premises reasonably safe," 34 A.L.R.3d 1179. The claimant, as a student, was an invitee upon the premises of the school, and the duty of the school is limited to that owed to an invitee.

Although we are most sympathetic toward the claimant for the injuries she sustained, the absence of a sign in the rest room is not sufficient to establish liability on the part of the respondent. Having stepped up when she entered the rest room, she must, had she been exercising ordinary care, have known that she would have to step down when she departed. The claimant testified that she was carrying two books in her left arm, had a strap purse over her shoulder, and did not see the step when she opened the door.

Considering the record in this case, the only conclusion is that the accident was one which would not have occurred if

the claimant had been exercising ordinary care when leaving the rest room. The claimant's lack of such care was contributory negligence on her part, if not the sole proximate cause of the fall. Accordingly, this claim is disallowed.

Claim disallowed.

Opinion issued December 8, 1978

SILAS C. WIERSMA, M.D.

vs.

DEPARTMENT OF HEALTH,
DIVISION OF MENTAL HEALTH

(No. CC-78-158)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the claimant's Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of $1,120.00 for salary due him for medical coverage at Barboursville State Hospital from June 13, 1977 through June 16, 1977 for 70 hours of work performed at $16.00 per hour.

In their Answer, respondents admit the validity of the claim and join in the claimant's request that it be honored. Respondents further allege that there were sufficient monies remaining in the funds appropriated for that purpose at the close of the fiscal year in question.

Based on the foregoing, an award in the above amount is hereby made.

Award of $1,120.00.

Opinion issued January 9, 1979

ALLING & CORY

vs.

DEPARTMENT OF CORRECTIONS

(No. CC-78-232)

No appearance by claimant.

Joseph C. Cometti, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of $4,401.40 for merchandise which was ordered, shipped, and received, but for which no payment was made by respondent.

In its Answer, the respondent admits the allegations of fact set forth in the Notice of Claim, but further alleges that there were no funds remaining in the respondent's appropriation for fiscal year 1977-1978 from which the obligation could have been paid.

While we feel that this is a claim which in equity and good conscience should be paid, we are of further opinion that an award cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct. Cl. 180 (1971).

Claim disallowed.

Opinion issued January 9, 1979

JAMES R. BANHART

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-119)

Claimant appeared in person.

Henry Haslebacher, Attorney at Law, for respondent.

WALLACE, JUDGE:

On May 9, 1978, at approximately 7:30 a.m., the claimant was operating his 1978 Chevrolet half-ton truck at a speed of about 25 miles per hour in an easterly direction on State Route 61 in Handley, West Virginia. The weather conditions were clear, but it had been raining during the night. The road at the point of the accident is a two-laned highway of blacktop construction. The claimant testified that he was aware of potholes in the eastbound lane and had consequently pulled left of center or into the westbound traffic, but an approaching motorist caused him to return to the eastbound lane. There, he struck a water-filled pothole, which, in his opinion, was about nine inches deep. As a result, the claimant sustained damages to his truck amounting to $190.76.

The respondent called as a witness on its behalf Jerry Easter, who testified that he was employed by the respondent as a maintenance foreman working out of Marmet, and that he was very familiar with the existence of the potholes to which the claimant had referred. While Mr. Easter could not be specific as to dates, he did indicate that employees of respondent had attempted, on several occassions, to repair these holes through the use of both hot mix and cold mix. He explained that the City of Handley was having a drainage problem, and that as a result, water would accumulate and stand on Route 61. Easter explained that this would cause both hot or cold mix to wash out and thus re-create the former pothole.

The Court is of the opinion that the claimant has failed to establish negligence on the part of the respondent. Respondent

is not an insurer of those using the highways of this State, but is under a duty only to use reasonable care to keep the highways in a reasonably safe condition. The Court is of the opinion that the respondent has discharged this duty in this particular case. For the reasons assigned, this claim is disallowed.

Claim disallowed.

Opinion issued January 9, 1979

GLADYS BARFIELD

vs.

GOVERNOR'S OFFICE—
EMERGENCY FLOOD DISASTER RELIEF

(No. CC-78-173)

Claimant appeared in person.

Gregory Bailey, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant, Gladys Barfield, filed this claim in the amount of $505.84 against the respondent for damage to a small stone and brick house located on her land behind her residence at 305 East 3rd Avenue, Williamson, West Virginia. At the hearing the claim was amended and the amount increased to $700.16.

The first floor of the small house was used by the claimant for storage purposes. On the second floor was an apartment which the claimant rented. During the cleanup operation following the April 1977 flood in Williamson, certain of the damaged houses and buildings were marked for demolition. The claimant's small house was not one designated to be removed.

The claimant testified that respondent's employees started to demolish the small house on her property, and before she succeeded in stopping the demolition, the house was damaged. She was instructed to contact Paul Hicks, who she was told

was in charge of house removal. When she contacted Mr. Hicks in regard to the damage to her house, Hicks told her "it would be no problem". No action was taken by the respondent, and the claimant attempted to have the damage to the house repaired.

Cancelled checks totalling $700.16 introduced by the claimant indicated that she paid the following sums: $285.00 to Pete Hoyer for labor; $407.25 to J. D. West & Son, Inc., for materials; and $7.91 to Maynard Paint and Hardware for materials.

From the record, the Court is of the opinion that the claimant's damage was caused by the negligence of the respondent, and that the claimant is entitled to recover the sums expended to repair her house in the amount of $700.16.

Award of $700.16.

Opinion issued January 9, 1979

BERNHARDT'S CLOTHING, INC.

vs.

DEPARTMENT OF CORRECTIONS

(No. CC-78-203)

No appearance by claimant.

Joseph C. Cometti, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of $1,986.80 for goods and services rendered to respondent. Invoices were sent by the claimant to the West Virginia State Penitentiary, but no payment was received.

In its Answer, respondent admits the allegations of fact set forth in the Notice of Claim and states that there were sufficient funds on hand at the close of the fiscal year from which the claim could have been paid.

In view of the foregoing, this Court hereby makes an award to the claimant in the amount of $1,986.80.

Award of $1,986.80.

Opinion issued January 9, 1979

THE C&P TELEPHONE COMPANY OF WEST VIRGINIA

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-71)

David K. Hall, Attorney at Law, for claimant.

Henry Haslebacher, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $1,160.29, based upon the following facts: On or about March 15, 1975, a landslide occurred in Wetzel County, West Virginia, blocking off State Route 2 and damaging claimant's telephone cables. Claimant repaired the damage by the placement of temporary cables.

On or about April 25, 1975, respondent negligently cut two of the temporary cables during cleanup operations. Respondent is therefore liable to claimant for the sum of $1,160.29, which is a fair and equitable estimate of the damage sustained by the claimant.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $1,160.29.

Opinion issued January 9, 1979

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA

vs.

BOARD OF REGENTS

(No. CC-78-152)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

On or about June 16, 1976, respondent's employees negligently failed to ascertain the location of claimant's underground cables while digging a trench for the purpose of placing electric wires. As a result, claimant's cables were damaged in the amount of $144.34.

In its Answer, the respondent acknowledges the validity of the claim and joins the claimant in its request for judgment in favor of the claimant.

Accordingly, this Court hereby makes award to the claimant in the above amount.

Award of $144.34.

Opinion issued January 9, 1979

STANLEY N. COSNER

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-182)

No appearance by claimant.

Henry Haslebacher, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for

damages in the sum of $246.00, based upon the following facts: During the months of January, February, and March of 1978, heavy snow caused the respondent to perform snow removal operations on County Route 15/1, also known as Broad Hollow Road, in Mineral County. Route 15/1 is owned and maintained by the respondent.

In the course of these snow removal operations, respondent was negligent, and damaged claimant's fencing on that part of his land adjacent to the road. Since the respondent's negligence was the proximate cause of the claimant's damage, the respondent is liable to the claimant for the sum of $246.00, which is a fair and equitable estimate of the damage.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $246.00.

Opinion issued January 9, 1979

RICHARD L. CUNNINGHAM

vs.

DEPARTMENT OF PUBLIC SAFETY

(No. CC-78-258)

No appearance by claimant.

Ellen F. Warder, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of $290.00 for overtime worked during the month of June, 1978.

In its Answer, the respondent admits the validity of the claim, and further states that there were sufficient funds remaining in the appropriation for the Department of Public Safety for the fiscal year in question from which the overtime could have been paid; however, said overtime request was not

honored because it was not presented for payment within the fiscal year in which the services were rendered and the liability incurred.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $290.00.

Opinion issued January 9, 1979

LILLIAN DALESSIO

vs.

BOARD OF REGENTS

(No. CC-78-88)

Claimant appeared in person.

Frank M. Ellison, Deputy Attorney General, for respondent.

GARDEN, JUDGE:

During the academic year 1977-78, the claimant was a student at West Virginia University and occupied a room in the Towers Dormitory. At the suggestion of those in charge of the dormitory, the students locked their personal possessions in the closets located in the dormitory rooms for security reasons during the Christmas recess, which, during that academic year, was between December 18, 1977 and January 4, 1978.

Upon claimant's return to school at the conclusion of the Christmas recess, she was advised that a pipe had burst and that water had quite possibly gotten into the closet containing her personal possessions. An examination of the closet revealed that water had in fact entered the closet and had ruined many of claimant's personal possessions, including a tennis racket and cover, a pair of boots, a pair of shoes, a sleeping bag, stereo headphones, two stereo speakers, and eight record albums. Claimant testified that these items were ruined, but that prior to the water damage they had a combined fair market value of $300.00.

Franklin Glasscock, respondent's maintenance supervisor, testified that he had investigated the cause of the water damage and found that a hose running from a faucet to an automatic washer had ruptured in the utility room located on the floor above the claimant's room. Mr. Glasscock testified that while his crew periodically checked these hoses, it was his opinion that the hose had ruptured as a result of ordinary wear.

The law on this subject is well stated in 49 Am. Jur. 2d §881 Landlord and Tenant (1970) as follows:

> "While a landlord's liability for water overflow damage from appliances in his control may be based on his failure to keep an agreement or covenant to repair or breach of a statutory duty to repair, the prevailing view is that he may be found liable where negligence is shown in the construction, maintenance, or repair of the appliances even though he is not under a contractual or statutory duty to repair, although there is contrary authority."

This Court is of the opinion that the legal relationship existing between the respondent and the claimant is that of landlord and tenant. As early as the decision of the Supreme Court of Appeals in *Marsh v. Riley,* 118 W.Va. 52, 188 S.E. 748 (1936), it was held that a landlord is under a duty to maintain premises used in common by his tenants in a reasonably safe condition. The utility room located above claimant's room was certainly an area used in common by many students, and this Court is of the opinion that respondent's failure to properly maintain the hose on this washer constituted negligence, and that such negligence was the proximate cause of the damage to the claimant's personal property.

Award of $300.00.

Opinion issued January 9, 1979

DAVIS MEMORIAL HOSPITAL

vs.

DEPARTMENT OF CORRECTIONS

(No. CC-78-230a-c)

No appearance by claimants.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

In October of 1977, hospital services were rendered by claimant to three inmates of respondent's Huttonsville Correctional Center in the following amounts: Charles Michael Adkins, $433.75; David Selby, $2,418.21; and Harry E. Willis, $381.23, for a total of $3,233.19. Billing for these services was submitted to Huttonsville Correctional Center, but no payment was received by the claimant.

Respondent, in its Answer, admits the allegations in the Notice of Claim, and states further that there were sufficient funds in the appropriation for the Department of Corrections for the fiscal year in question from which the claim could have been paid.

Based on the foregoing facts, an award in the above amount is hereby made to the claimant.

Award of $3,233.19.

Opinion issued January 9, 1979

MERTON M. DELANCEY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-91)

Claimant appeared in person.

Henry Haslebacher, Attorney at Law, for respondent.

WALLACE, JUDGE:

On the morning of March 14, 1978, at approximately 7:30, the claimant was operating his automobile in a westerly direction on U.S. 60 in the City of Belle, West Virginia. The weather was clear but cloudy, and the road at the point of the accident was a two-lane blacktop road. The pavement was wet and covered with slush. The claimant testified that, as a car was approaching him from the opposite direction, he veered slightly to the right to avoid hitting the approaching motorist and hit a pothole which was obscured by water and slush on the right-hand side of the road.

Claimant testified that the pothole was in the extreme north side of the road, was at least 20 feet in length, and extended into the road anywhere from a foot to a foot and one-half. Claimant was travelling at about 25 miles per hour, and as a result of striking the hole, the two tires on the right-hand side of his car were ruined. Claimant testified that he incurred a charge of $147.09 to repair the damages to his car. Claimant admitted that he saw the pothole before striking it, but he did not realize the severity or size of the hole.

Consistently, this Court has followed the decision of our Supreme Court of Appeals in the case of *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947), where it was held that the State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. This Court has further held that before the respondent can be held liable in a pothole case, there must be some showing that respondent knew

or should have known of the existence of the pothole. See *Keith v. Department of Highways,* 12 Ct. Cl. 199 (1978). The record is devoid of any evidence to this effect, and, as a result, an award in favor of the claimant cannot be made.

Claim disallowed.

Opinion issued January 9, 1979

EVANS LUMBER COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-109)

L. Leslie Evans, Vice-President of Evans Lumber Company, for claimant.

Henry Haslebacher, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant, Evans Lumber Company, a corporation, filed its claim against the respondent in the amount of $892.27 for the cost of gas lost by reason of a 3/4-inch break in its private gas line. The gas line was a 2-inch steel line which furnished gas to claimant's sawmill. The line was constructed by the claimant approximately twenty years ago on claimant's property along W.Va. Route 4 on Elk River in Kanawha County. The line was approximately six inches under the ground.

L. Leslie Evans, Vice-President of the Company, testified that he thought respondent's snow plow had damaged the line because local people had said that respondent's trucks turned around off the highway at the point of the break in the line. He further stated that there was salt on the ground at this point.

The break apparently occurred sometime between early February and March of 1978.

Claims agents testifying for the respondent stated that they found no evidence of scraping in the area that might have

been caused by a snow plow; that they had no knowledge of whether respondent's trucks turned around at the point of the line break; and that the bare ground indicated the area was used by vehicles for this purpose.

Mr. Evans, testifying for the claimant, stated, "as to whether the State truck did it, I can't tell you. All I'm saying is that people who lived there say all of them turn at this point."

From the evidence presented in this claim, the Court is of the opinion that it is not sufficient to find that the negligence of the respondent caused the break in claimant's gas line. Therefore, the claim is disallowed.

Claim disallowed.

Opinion issued January 9, 1979

JOSEPH LARRY GARRETT

vs.

DEPARTMENT OF PUBLIC SAFETY

(No. CC-78-237)

No appearance by claimant.

Ellen F. Warder, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of $290.56 for overtime worked during the month of June, 1978.

In its Answer, the respondent admits the validity of the claim, and further states that there were sufficient funds remaining in the appropriation for the Department of Public Safety for the fiscal year in question from which the overtime could have been paid; however, said overtime request was not honored because it was not presented for payment within the fiscal year in which the services were rendered and the liability incurred.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $290.56.

Opinion issued January 9, 1979

TERESA K. GILLISPIE and
JOHNNY WAYNE GILLISPIE

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-153)

Claimants appeared in person.

Henry Haslebacher, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimants, who reside on West Virginia Route 214 at Alum Creek, seek recovery of $99.13, such sum being the cost of repair of damage to the gas tank of their automobile. Teresa K. Gillispie testified that the respondent graded the road on June 12, 1978, and that at about 7:00 a.m. on June 13, 1978, her husband, while backing their car into their driveway at a point near the road, struck a large rock which had been knocked to that location by the grader and left there. No evidence was offered on behalf of the respondent. The evidence impels the Court to conclude that the accident was caused by negligence on the part of the respondent without contributory negligence on the part of the claimants. Accordingly, an award in the sum of $99.13 is hereby made.

Award of $99.13.

Opinion issued January 9, 1979

LARRY A. GIOLITTO

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-205)

Claimant appeared in person.

Henry Haslebacher, Attorney at Law, for respondent.

GARDEN, JUDGE:

During the late afternoon of July 10, 1978, a warm and sunny day when the roads were dry, the claimant was proceeding from Cedar Grove to Belle in his 1968 Nova automobile. Although the record is not too clear, he was proceeding up a two-lane road in order to obtain access to Route 60, a four-lane highway, where he intended to turn left and then proceed west on Route 60 to Belle. He had kept to the extreme right of the access road in order that he would not impede traffic which might be turning onto the access road from Route 60. He had come to a stop in obedience to a stop sign, and, seeing that traffic was clear, he then proceeded at a speed of three to four miles per hour when his right front wheel struck a pothole. The claimant described this hole as being round with a diameter of some 12 inches and from 8 to 11 inches in depth.

The claimant quite candidly admitted that he was aware of the existence of this hole, but insisted that he was forced to drive his car in its vicinity to avoid other motorists who might be turning onto the access road from Route 60. In addition to extensive damage to the right front tire, the front end of the car was knocked out of alignment, the coil spring was broken, and the ball joint was knocked out. Claimant suffered a fracture of his right thumb.

This particular pothole was not located in Route 60, but apparently was near the right-hand or easterly edge of the access road. No evidence was introduced to prove knowledge, either actual or constructive, that respondent was aware of the

existence of this hole. In addition, the claimant's admission of his knowledge of the existence of this hole leads this Court to the inescapable conclusion that the claimant's own negligence was the proximate cause of the accident and the ensuing damages and personal injury.

Claim disallowed.

Opinion issued January 9, 1979

DOUGLAS HANEY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-226)

No appearance by claimant.

Henry Haslebacher, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $309.50, based upon the following facts: During snow removal operations in the winter of 1977-1978, respondent's crews negligently damaged certain portions of claimant's fence on Dogtown Road in Barbour County, West Virginia. Respondent is therefore liable to claimant for the sum of $309.50, which is a fair and equitable estimate of the damage sustained by the claimant.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $309.50.

Opinion issued January 9, 1979

ROBERT V. HEVERLEY, JR.
& KATHLEEN HEVERLEY, D/B/A
FRANCES SHOPPE, INC.

vs.

DEPARTMENT OF LABOR

(No. CC-77-81)

Paul Hull, Attorney at Law, for claimants.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

This claim, in the amount of $85,000.00, was filed against the respondent by Robert V. Heverley, Jr., Kathleen Heverley, and Frances Shoppe, Inc., the Heverleys being the stockholders and, as such, the owners of the business.

It was alleged that the respondent interfered with a closing-out sale of the Frances Shoppe, Inc. by threatening prosecution for law violations and refusing to renew the sale license, which resulted in loss of sales and the illness of one of the claimants.

The Frances Shoppe, Inc. was a ladies' ready-to-wear apparel store operated by the Heverleys at 126 Adams Street in Fairmont, West Virginia. By letter dated February 23, 1976, the landlord gave written notice to vacate the premises effective April 30, 1976. Efforts to obtain a new lease were not successful. However, after the premises were sold, the claimants were able to obtain from the new owners a one-month lease of the premises at twice the previous rental.

It was then decided to close the business. Max Caplan, a professional in conducting closing-out sales, was employed to conduct such a sale. Mr. Caplan testified that he always advised his clients of the legal requirements necessary to conduct such a sale. He advised Mr. Heverley that it was necessary to obtain a license from the respondent, which necessitated the furnishing of a bond, a complete inventory of items to be sold, and a fee of $50.00.

A copy of the executed license application introduced as Claimants' Exhibit No. 3 lists the same requirements as testified to by Mr. Caplan, and further, that bond shall be furnished in accordance with Chapter 47, Article 11 B, Section 9 of the Code of West Virginia. The application form provided spaces to be checked for the type of sale to be conducted. The space provided for "fire sale" was checked on the application filed by the claimants.

In an effort to obtain a bond, Mr. Heverley testified that he made inquiry of his attorney, the bank, and insurance agent about the bond requirements. He stated that he did not show them the application form. He sent in the license application with the $50.00 fee and an inventory of the items to be sold.

A fire sale license was issued effective April 10, 1976, and terminating on May 10, 1976. Mr. Heverley testified that he changed the license from a "fire sale" by adding the word "closing-out sale". The sale commenced April 10, 1976.

Mack Combs, Assistant Director of the Consumer's Protection Division of the Department of Labor, testified that during the sale, a complaint was received from Ralph Garrison of the Fairmont Businessmen's Association about the possibility of some goods being brought into the Frances Shoppe for resale during the sale. Fred Cavallers, an inspector for the respondent, was instructed to investigate Mr. Garrison's complaint, determine what type of sale was being conducted, and why no bond had been furnished. Cavallers made his investigation and reported that some old swimsuits, found in a storage box, were added to the items being sold; that the sale was a going-out-of-business sale, and that there was no bond. He requested that a bond form be sent to the claimants.

Mr. Combs subsequently investigated the sale, and Mr. Heverley inquired about a license renewal to continue the sale beyond May 10, 1976. Mr. Combs testified that he advised Heverley that he didn't believe the department could issue a renewal of a license for a fire sale to be used for a closing-out sale, and further, no bond had been furnished. He also stated that he advised Mr. Heverley of the penalty for violating the requirements of the law for the conduct of the sale. The last

day Combs was on the premises was between the 3rd and 5th of May. He stated that his superior, Mr. Griffith, advised him to allow the sale to continue until May 10, 1976, without the bond, since the license period had practically expired.

No bond was ever furnished, and no renewal application was filed.

From the record, it is the opinion of the Court that the claimants did not comply with the legal requirements for conducting the sale, and further, that the record does not establish improper conduct toward the claimants on the part of the agents and employees of the respondent. Accordingly, the claim is disallowed.

Claim disallowed.

Opinion issued January 9, 1979

HARRY GLENN LUCAS, JR.

vs.

DEPARTMENT OF PUBLIC SAFETY

(No. CC-78-253)

No appearance by claimant.

Ellen F. Warder, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of $283.52 for overtime worked during the month of June, 1978.

In its Answer, the respondent admits the validity of the claim, and further states that there were sufficient funds remaining in the appropriation for the Department of Public Safety for the fiscal year in question from which the overtime could have been paid; however, said overtime request was not honored because it was not presented for payment within the fiscal year in which the services were rendered and the liability incurred.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $283.52.

Opinion issued January 9, 1979

LOWELL J. MAXEY

vs.

DEPARTMENT OF PUBLIC SAFETY

(No. CC-78-238)

No appearance by claimant.

Ellen F. Warder, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of $265.80 for overtime worked during the month of June, 1978.

In its Answer, the respondent admits the validity of the claim, but declares that the claimant is entitled to receive the amount of $259.20 under the laws of the State of West Virginia and not $265.80 as set forth in the Notice of Claim.

Respondent further states that there were sufficient funds remaining in the appropriation for the Department of Public Safety for the fiscal year in question from which the overtime could have been paid; however, said overtime request was not honored because it was not presented for payment within the fiscal year in which the services were rendered and the liability incurred.

Based on the foregoing facts, an award in the amount of $259.20 is hereby made to the claimant.

Award of $259.20.

Opinion issued January 9, 1979

PATRICK PLAZA DODGE, INC.

vs.

TREASURER'S OFFICE

(No. CC-78-211)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of $142.50 for repair work performed by its service shop. Respondent had refused payment because the Treasurer's Office was presented with copies of the bill instead of the original bill, as is required.

In its Answer, respondent admits that the claim is a legitimate one, and further states that there were sufficient funds remaining in the appropriation at the close of the fiscal year in question from which the claim could have been satisfied.

Based on the foregoing, an award in the above amount is hereby made.

Award of $142.50.

Opinion issued January 9, 1979

RICK'S AMBULANCE

vs.

DEPARTMENT OF WELFARE

(No. CC-77-213)

Claimant appeared in person.

Frank M. Ellison, Deputy Attorney General, for respondent.

RULEY, JUDGE:

Richard Saunders, doing business as Rick's Ambulance Service, filed this claim in the sum of $898.75 for twenty-one rural

ambulance service calls made from his place of business at Elkview in Kanawha County between February 21 and August 30, 1977, all of which allegedly were authorized by the respondent. In connection with most of the calls, the respondent had paid the claimant for the "trip in" (from the patient's home to the hospital) but had declined to pay for the "trip out" (the return trip from the hospital to the patient's home). In most, if not all, of those instances, the patient was treated at the emergency room for some ailment or infirmity and then released.

It appears that the claim is controlled by the respondent's regulations, which, among other items, provided:

> "... Ambulance service is covered when ***: 1) The patient's physical condition requires ambulance service *as certified by the attending physician;* i. e., the use of any other method of transportation is medically contraindicated and is not for the patient's convenience."

There is no evidence of any required certification, nor does it appear that any other method of transportation was medically contraindicated as to the calls to which this claim relates. Accordingly, the claim must be denied.

Claim disallowed.

Opinion issued January 9, 1979

LARRY ROTON

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-147)

Claimant, *Larry Roton,* appeared in person.

Henry Haslebacher, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant, a resident of Falling Rock, West Virginia, in order to reach his place of employment, was in the habit of

using a road known interchangeably as Reamer Road and Falling Rock Hollow (actually designated Secondary Route 63/3). The claimant testified that the road was maintained by respondent, and this testimony was not denied by the respondent.

At some point on this road, a bridge had been erected across a creek. Several weeks prior to May 10, 1978, respondent's crews were making repairs to the road and attempted to cross this bridge with a dump truck loaded with gravel. As a result, the bridge collapsed, and the dump truck was retrieved by respondent through the use of a bulldozer. No attempt was made by respondent to repair the bridge or provide any alternative means of crossing the creek. On May 10, 1978, the claimant, having no other route to follow to get to his place of employment, attempted to ford the creek in the area of the destroyed bridge. He was operating his 1974 Dodge Ram Charger, a four-wheel drive vehicle, but in fording the creek, he struck a large rock, causing considerable damage to the lower portions of his vehicle. An estimate of repairs from Patrick Plaza Dodge in the amount of $177.73 was presented.

A similar factual situation was presented to this Court in the claim of *Shafer v. Department of Highways,* issued on October 31, 1975. In that claim, the late Judge Henry Lakin Ducker made an award in favor of the claimant, basing the same on the respondent's failure to repair the bridge or to provide a reasonable alternative route. Adhering to the doctrine of stare decisis, this Court likewise makes an award in favor of the claimant in the amount of $177.73.

Award of $177.73.

Opinion issued January 9, 1979

HAYES STANLEY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-145)

Claimant appeared in person.

Henry Haslebacher, Attorney at Law, for respondent.

GARDEN, JUDGE:

During the evening of June 3, 1977, the claimant's son, Bruce Erwin Stanley, was driving his father's 1977 Chevrolet Monza through the Dingess Tunnel in Mingo County when he struck a rather large hole located approximately 45 feet from the end of the tunnel. As a result, young Stanley lost control of the vehicle, and as he emerged from the tunnel, he struck some brush that had been placed on the side of the road but close to the travelled portion of the road. According to the claimant, the brush further caused him to lose control of the automobile, and it then proceeded over an embankment, striking several trees. The car was rendered a total loss, and the claimant's insurance carrier paid him the sum of $4,750.00. Claimant seeks an award in the amount of $462.00, being the difference between the amount paid by the insurance carrier and the amount which the claimant believes to be the true value of the automobile.

Young Stanley testified that the length of the tunnel was between a half mile and three quarters of a mile, that the tunnel was narrow and would only accommodate one lane of traffic, and that no artificial lighting was provided. Young Stanley also testified that he was travelling at a speed of 35 miles per hour and that he was quite familiar with the tunnel because he passed through it on his way to and from school. He further admitted that he was well aware of the existence of the hole, but simply had forgotten about it on the evening of the accident.

The claimant and owner of the car, Hayes Stanley, testified that he was the Postmaster at Breeden, West Virginia, and

that, like his son, he was aware of the existence of the hole in Dingess Tunnel. He stated that he and other postmasters in the area had registered complaints at respondent's garage in Williamson, and that in April of 1977, several months before the subject accident, he personally conferred with respondent's assistant supervisor, Willard Sturgill, and was told by the latter that they were going to get to it. Needless to say, no repairs were made to the large hole prior to June 3, 1977.

The Court is of the opinion that the respondent was on notice of this defect in the tunnel, and that its failure to effect repairs constituted negligence. On the other hand, the Court feels that young Stanley, in driving at a speed of 35 miles per hour through a one-lane, unlighted tunnel with knowledge of this rather large hole, was likewise guilty of negligence which proximately contributed to the accident. For this reason, we must decline to make an award.

Claim disallowed.

Opinion issued January 9, 1979

CONNIE ANN STONE

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-177)

Claimant appeared in person.

Henry Haslebacher, Attorney at Law, for respondent.

GARDEN, JUDGE:

At approximately 7:30 p.m. on April 22, 1978, the claimant was operating her 1977 Mustang automobile in a southerly direction on Route 119, on a section of that road commonly referred to as the Mileground. The road at the point of the accident is two-laned, of asphalt construction, and about one and one-half miles from the northern corporate limits of the City of Moundsville. The claimant, a resident of Morgantown, West Virginia, was returning home after having attended a wedding in Latrobe, Pennsylvania. She was travelling at 35 miles per hour in a 40-mile-per-hour zone. There were no cars preceeding her nor following her, but two cars were approaching

from the opposite direction as she suddenly struck a large pothole on the right-hand side of the southbound lane, causing damage in the amount of $176.73 to her automobile.

No testimony was introduced in respect to the dimensions of the pothole, but two photographs, taken the day following the accident, were introduced into evidence from which it could easily be determined that the pothole was quite wide, extremely long, and very deep. Claimant immediately reported the incident to the Morgantown police, and their report, which was also introduced into evidence, reflected that the claimant had "hit a very deep pothole . . . . While changing tire, three other cars also lost tires in same manner within a half hour. This is an unavoidable hazard." The police reported this road hazard to an agent of respondent that night, but the pothole was not repaired until some three weeks later.

The claimant testified that she was unaware of the existence of this particular pothole, and did not see it before striking it. This Court cannot conclude that the claimant was guilty of contributory negligence in failing to observe and avoid striking the pothole. Conceivably, her lookout was impaired by the two cars that were approaching her from the opposite direction. Certainly her speed, which was well within the posted limit, was not a factor.

While respondent is not an insurer of the safety of motorists using the highways of this State, it does have the affirmative duty of using reasonable care to keep the same in a reasonably safe condition. Also, while there was no direct evidence that respondent had actual knowledge of the existence of this defect, this Court is of the opinion that it certainly should have been on notice of this defect. Route 119 is one of the main arteries for motorists travelling to Morgantown from the north. Furthermore, the size of the pothole, as reflected in the photographs, graphically demonstrates its presence for a long period of time prior to the date of the accident. Being of the opinion that the record as a whole clearly establishes negligence on the part of the respondent, this Court hereby makes an award in favor of the claimant in the amount of $176.73.

Award of $176.73.

Opinion issued January 9, 1979

CHARLES E. AND MARY P. TAYLOR

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-206)

No appearance by claimants.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Upon written stipulation to the effect that the claimants, Charles E. and Mary P. Taylor, are the owners of real property located on West Virginia Route 3, near Tornado, in Kanawha County, West Virginia; that the respondent failed to maintain a ditch adjacent to said Route 3 in front of claimants' property; that on August 30, 1978, after a rainfall, claimants' home and contents were damaged by water and mud; and that this damage was proximately caused by the rspondent's negligence; the Court finds the respondent liable, and an award of $1,566.75 is hereby made to the claimants.

Award of $1,566.75.

Opinion issued January 9, 1979

RUTH ANN TOPPINGS

vs.

DEPARTMENT OF HIGHWAYS

(No. D-1007)

Bill Wertman and *Bob Golchesky,* Attorneys at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

RULEY, JUDGE:

In 1975, Walter Toppings filed this claim in the sum of $50,000.00 for damages to land allegedly sustained as a result of diversion of a natural drain course by the respondent in

1973. At the trial, it appeared that Mr. Toppings acquired the subject property in 1971 but conveyed it to his daughter, Ruth Ann Toppings, in 1974. Accordingly, Ruth Ann Toppings should be substituted as the claimant.

The subject property, located near Chapmanville in Logan County, West Virginia, is approximately eighty-seven feet wide and one hundred thirty feet deep lying between the Guyandotte River on the west and a railroad track and W.Va. Route 10 on its east. It is adjoined on one side by a tract owned by Narlis Watts. A dwelling house occupied by Mr. Toppings is located upon the Toppings property. In the vicinity of the common line between the two properties, there is a ravine or gully estimated to be from thirty to forty-five feet deep at a point opposite the Toppings home. That gully which is of varying width provides a natural drain course and empties into the river. After Mr. Toppings acquired the property, he placed eighteen automobile bodies in the gully for the purpose of inhibiting erosion, and, in 1973, at his request and apparently as an accommodation to him, the respondent covered those vehicles with somewhere between ten and twenty truck loads of dirt and rock. In order to do that, the respondent's trucks had to travel over the Watts property inasmuch as it was impossible to reach the vehicles from the Toppings property. While the vehicles did not totally impede the flow of surface water through the area they occupied, the fill which was made upon and over them, did, and, as a result, the main channel of the gully was moved closer to the side upon which the Toppings' dwelling house was located. It appears that this could have caused acceleration of erosion on that side of the gully near the house. In fact, in April, 1977, the slide or erosion extended to a point only three feet from the house. However, some doubt was injected into the matter of causation by the following answer to the following question during the cross-examination of Patrick Luke, a district conservationist employed by the USDA Soil Conservation Service (the only witness who testified on that issue):

"Q. If this area had been left as a natural drain without any human intervention at all, would this area be eroding?

A. Yes. I can't say that it would be eroding at a lesser rate or at a greater rate. That's hard to say."

Leaving that doubt aside and assuming that the Court should conclude that the respondent caused acceleration of erosion near the claimant's home, the Court then would face the dilemma of trying to determine what part of the erosion was caused by the rsepondent without any evidence at all on the matter. That would require the Court to engage in pure speculation and, of course, it cannot do that.

The evidence, or lack of it, on the subject of damages is comparable to that respecting causation. The Court is sympathetic to the claimant's plight but it cannot substitute its imagination, individual or collective, as to matters for which the law wisely requires evidence. *Sheppard v. Department of Highways,* 9 Ct. Cl. 142 (1972). Accordingly, this claim must be denied.

Claim disallowed.

Opinion issued January 9, 1979

ALBERT K. TYRE

vs.

DEPARTMENT OF CORRECTIONS

(No. CC-78-178)

Claimant appeared in person.

Gregory Bailey, Assistant Attorney General, for respondent.

GARDEN, JUDGE:

The claimant in this claim resides in Randolph County, his home being located about one mile southwest of the Huttonsville Correctional Center. On the evening of June 22, 1978, two inmates walked away from the Correctional Center and stole the claimant's 1969 Chevrolet half-ton pickup truck. The truck had been parked in a meadow near the claimant's home, and while the keys had not been left in the truck, the inmates pulled the switch wires out and burned the switch open. The

truck was later recovered when the inmates were recaptured, but not until the truck had sustained damage in the amount of $150.00. The record disclosed that these two inmates had simply walked away from the correctional institution and thereafter commandeered the claimant's truck. Claimant testified that, while the security arrangements are now better at Huttonsville, at the time of this particular incident, the facility was not even fenced. At the hearing, the claimant made the remark that the State had never paid a claim for damage inflicted by escaped prisoners, and for that reason we deem it important to examine the prior decisions of this Court involving this issue.

In the claim of *Miller v. State Board of Control,* 1 Ct. Cl. 97 (1942), a sixteen-year-old delinquent had been sentenced to the industrial school at Pruntytown, but because it was determined that the infant was afflicted with syphilis, he was sent to a hospital in Fairmont for treatment before being turned over to the authorities at Pruntytown. While being treated at the hospital, he escaped, stole the claimant's car, and damaged it. While the Court denied a recovery, it indicated quite strongly that the reason for the denial was that the sixteen-year-old had not been fully placed in the custody of the official of Pruntytown. In *Dodrill v. State Road Commission,* 1 Ct. Cl. 251 (1942), liability was again denied, but a reading of that opinion, written by the Honorable Charles J. Schuck, clearly reflects that liability was denied principally because the claimant twice failed to appear and present testimony of his claim.

Again, in *Lambert v. Board of Control,* 2 Ct. Cl. 198 (1943), the Court declined to make an award when an inmate escaped from Pruntytown and in turn stole the claimant's car and damaged it. The Court found that the method of escape was so unique that liability could not be imposed, but did make the following comment on page 202 of the opinion:

> " . . We do not subscribe to the rule that the state department involved can at all times escape liability, but do insist that lack of reasonable care must be shown in each instance and that the negligence must be so extreme as to be directly the cause for the commission of the tort and

thus place the responsibility squarely on the shoulders of the authorities involved."

In the claim of *Johnson v. State Board of Control,* 2 Ct. Cl. 203 (1943), an award was made when six prisoners from the penitentiary, who were working on a road gang near Keyser, West Virginia, burglarized a store owned by the claimant. There were a total of 170 prisoners in the camp who were being attended by 20 guards, and the Court concluded that with such a number of guards, the escape could not have been effected, absent negligence. An award was also made in the claim of *Fletcher v. State Board of Control,* 2 Ct. Cl. 280 (1944), where an inmate who had escaped on three prior occasions escaped for the fourth time, stole the claimant's car, and subsequently damaged it. Distinguishing the claim from *Lambert,* supra, Judge Schuck held that the respondent, in failing to provide extra restraint in respect to an individual with three previous escapes, was negligent. On the other hand, an award was denied by the Court in *Worrell v. State Road Commission,* 2 Ct. Cl. 342 (1944), by reason of the failure of the claimant to prove by a preponderance of the evidence that convicts from the penitentiary had in fact stolen certain items of personal property from the claimant.

Moving on in this review of former cases involving this issue, we find that the Court in *Arrick v. State Board of Control,* 3 Ct. Cl. 141 (1945) and again in *Parsons v. State Board of Control,* 3 Ct. Cl. 147 (1946), refused to make awards by reason of the failure on the part of the respective claimants to fully establish negligence on the part of the State agency, and that such negligence contributed to and made possible the escape of the respective inmates.

An award of $3,500.00 was made in the claim of *Davis Trust Company v. State Board of Control,* 3 Ct. Cl. 188 (1946), resulting from the rape and murder of claimant's decedent. In that claim, one Lucy Ward, who resided on a farm near the medium security prison at Huttonsville, was raped and murdered on January 20, 1945, by one James Chambers, who had originally been convicted of a murder in 1935, with a recommendation of mercy, and sentenced to life imprisonment in the State penitentiary in Moundsville. The opinion is silent as

to why Chambers was later transferred to Huttonsville where, at that time, inmates were treated almost as members of a country club. Suffice it to say that on the evening of the atrocity, Chambers left the Huttonsville facility, committed his dastardly crime, and then returned to the prison without the officials even being aware of the fact that he had been absent. In our opinion, an award was never more justified. The payment of this award was later successfully contested and reference is hereby made to *State ex rel. Davis Trust Company v. Sims Auditor,* 130 W.Va. 623, 46 S.E. 2d 90 (1947).

Awards in favor of claimants were made by the Court in *Goldsboro v. West Virginia Board of Control,* 5 Ct. Cl. 187 (1950) and in *Lewis v. Department of Public Institutions,* 7 Ct. Cl. 192 (1968), and an award was denied in *State Farm Mutual Automobile Insurance Company v. Department of Public Institutions,* 7 Ct. Cl. 146 (1968), but from a reading of these last three opinions and the other opinions cited herein, it is apparent that each claim has been and should be decided on its own particular facts.

In this particular claim, no testimony was introduced by respondent in defense of the claim. The record as submitted for decision simply reveals that two unattended and unsupervised inmates walked away from the correctional institution and stole and damaged the claimant's truck. To deny recovery to this claimant would simply amount to imposing a penalty upon a citizen of this State for living near a correctional institution. Such a ruling would be illogical and without justification.

The claimant testified that he purchased the necessary parts for the repair of his truck in a total amount of $45.10. He further testified that he did the repair work in seven hours and that he was of the opinion that his time was worth $9.00 per hour. He is also requesting an allowance of $10.00 per day for the period the truck was inoperable, a period which he claims extended from June 22, 1978 to August 25, 1978. We feel that this period is unreasonably long and evidences no attempt on the part of claimant to minimize his damages. We would reduce the allowable down-time to seven days. Based on the foregoing,

an award is made in favor of claimant in the amount of $178.10.

Award of $178.10.

Opinion issued January 9, 1979

ARTHUR VANNORT

vs.

DEPARTMENT OF VETERANS' AFFAIRS AND ADJUTANT GENERAL

(No. CC-77-218)

Frank L. Abbott, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondents.

WALLACE, JUDGE:

This claim was filed by the claimant against the respondents for compensation for injuries alleged to have been received while the claimant was on riot duty with the West Virginia National Guard at Weston, West Virginia, in December of 1910. The claimant alleges in his claim that he suffered a skull fracture and subsequently lost the hearing in his right ear and became sensitive to heat and sunlight. He also alleged that he requested a disability discharge from the National Guard. Filed with his claim was a copy of his discharge which indicates that he was discharged on June 30, 1916, for failure to take the federal oath.

The respondents filed a motion to dismiss the claim on the grounds that this Court lacks jurisdiction under the provisions of West Virginia Code 14-2-14, and further, that the claim is barred by the statute of limitations.

The claimant's brief in opposition to the motion to dismiss contends that a request for a disability discharge is tantamount to a claim for a disability injury. West Virginia Code 15-1B-18 is cited and provides: "all claims arising under this section shall be inquired into by a board of three officers . . ., to be appointed upon the application of the member claiming to be

so incapacitated, . . . by the commanding officer of the organization or unit to which such member is attached or assigned."

The brief does not indicate that the claimant requested that a board be convened under this statute to determine his eligibility for disability benefits. Apparently, no action was taken by the claimant from the time of his alleged injury in 1910 until this claim was filed before this Court.

West Virginia Code 14-2-14, pertaining to the jurisdiction of this Court, provides: "The jurisdiction of the Court shall not extend to any claim:

> 1. For loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the State."

and West Virginia Code 14-2-21 further provides that this Court shall not take jurisdiction of any claim that is barred by the statute of limitations under pertinent provisions of the Code of West Virginia.

The claimant was on active duty with the West Virginia National Guard at the time of the injury in 1910, and was later discharged from the Guard for failure to take the federal oath. Since injury occurred while in the service of the State with the National Guard, this claim is specifically excluded from the jurisdiction of the Court under the provisions of West Virginia Code 14-2-14. This Court is a court of limited jurisdiction and cannot entertain claims that are specifically excluded by statutory law. *Moore v. State Road Comm'n of West Virginia*, 9 Ct. Cl. 148 (1972).

Even if this claim were not excluded from the jurisdiction of the Court by statute, the Court would be bound nontheless, by express statutory law, to apply the statute of limitations in all cases where the statute would be applicable if the claim were against a private person, firm, or corporation. West Virginia Code 14-2-21; *Shered v. Department of Highways*, 9 Ct. Cl. 137 (1972).

For the reasons herein stated, the Court is of the opinion to and does sustain the respondents' motion, and hereby dismisses the claim.

Claim dismissed.

Opinion issued January 9, 1979

TODD W. WARE and
TAYLOR PUBLISHING CO.

vs.

BOARD OF REGENTS

(No. CC-78-204)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of $3,096.51, representing the balance due on an agreement between the claimant and Potomac State College to publish the latter's yearbook. The books were delivered and accepted by the school, which made payment of $1,277.60 to the claimant, leaving a balance of $3,096.51.

In its Answer, the respondent admits the allegations of fact set forth in the Notice of Claim, and admits that there were sufficient funds on hand at the close of the fiscal year from which this claim could have been paid.

In view of the foregoing, this Court hereby makes an award to the claimant in the above-stated amount.

Award of $3,096.51.

Opinion issued January 9, 1979

JOHN M. WEBER

vs.

BOARD OF REGENTS

(No. CC-77-229)

Edgar F. Heiskell, III, Attorney at Law, for claimant.

Frank M. Ellison, Deputy Attorney General, for respondent.

PER CURIAM:

The parties in this claim have filed a duly executed written stipulation to the effect that the respondent is liable for damages in the amount of $3,400.00 resulting from the respondent's breach of an employment contract with the claimant.

Two notices of appointments (contracts) were entered into by the claimant, John M. Weber, and the respondent, West Virginia University, to employ claimant as Director of Transportation for West Virginia University; the first contract covering the period of May 15, 1977 through June 30, 1977, and the second covering a period of July 1, 1977 through June 30, 1978. Claimant's salary was $26,004.00 per year, payable in twelve monthly installments.

On May 19, 1977, claimant was informed by respondent that his position as Director of Transportation would not be continued after June 30, 1977.

In the stipulation filed with the Court, the parties agee that the amount of $3,400.00 is a just and proper sum to be paid in full settlement and compromise of this claim.

Based on the foregoing facts, an award in the above amount is hereby made to the claimant.

Award of $3,400.00.

Opinion issued January 9, 1979

LORAINE WHITE & VELMA WHITE

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-139)

No appearance by claimants.

Henry Haslebacher, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a duly executed written stipulation which revealed the following facts.

Claimants' house is located beside Cost Avenue and a bridge connecting Cost Avenue to West Virginia Route 20 in Stonewood, West Virginia. Cost Avenue and said bridge are a part of West Virginia Route 58, a highway owned and maintained by the respondent.

As a result of the respondent's negligent resurfacing activities and inadequate drain design and maintenance of Cost Avenue and the bridge, excessive water run-off occurred which damaged the claimants' home and landscape.

It is further stipulated by the parties that the sum of $1,000.00 is a fair and equitable estimate of the damage sustained by the claimants.

Based on the foregoing, an award in the above amount is hereby made.

Award of $1,000.00.

Opinion issued January 11, 1979

CHARLESTON AREA MEDICAL CENTER, INC.

vs.

DEPARTMENT OF HEALTH

(No. CC-78-283)

Cynthia L. Turco, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of $20,000.00 due under the terms of an agreement entered into by the Charleston Area Medical Center ("CAMC") and the West Virginia Department of Mental Health, whereby The CAMC Children's Diagnostic Center, also known as the Early Childhood Diagnostic Center (the "ECDC Project"), was established.

By letter from the respondent, claimant was advised that the State of West Virginia would reimburse CAMC in an amount not to exceed $20,000.00 for operating losses incurred in connection with the operation of this project. In reliance upon the assurances of the aforesaid letter, CAMC continued to operate the ECDC Project, and sustained a net operating loss in the amount of $29,043.58. CAMC submitted an Invoice for Deficit for payment to the Department of Mental Health, but received no funds from the Department.

In its Answer, the respondent admits the allegations of fact set forth by the claimant, and further states that there were not sufficient funds remaining in the appropriation at the close of the fiscal year in question from which the claim could have been paid.

While it appears that the claimant's loss, to the extent of $20,000.00, in equity and good conscience should be paid, the

Court is precluded from making an award in that sum by the doctrine of *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct. Cl. 180 (1971).

Claim disallowed.

Opinion issued January 11, 1979

JACQUELYN B. EISENBERG, PARENT AND NEXT FRIEND OF MARK HAROLD EISENBERG, AN INFANT

vs.

BOARD OF REGENTS

(No. CC-76-143)

Ward D. Stone, Jr., Attorney at Law, for claimant.
Henry C. Bias, Jr., Deputy Attorney General, for respondnt.

GARDEN, JUDGE:

During the summer of 1975, the infant claimant, Mark Harold Eisenberg, was attending the Fine Arts Camp at West Virginia University in Morgantown, and at the time he was fourteen years of age. Previously, in 1974, he had attended the three-week session of the camp, enjoyd it, and had thus returned the following year. The evidence disclosed that Mark was an above-average violinist for his age, having taken violin lessons since he was six years of age.

It was the custom to house the students attending the camp in the Towers Dormitory, but the students would attend their musical pursuits at the University's Creative Arts Center, which is located some 2000 yards or more from the Towers Dormitory. There is a road and sidewalk leading from the Towers Dormitory to the Creative Arts Center, but apparently the distance is shorter if the students, as was apparently their custom, proceeded along a dirt path in an open field that separates the Towers Dormitory and the Creative Arts Center. The infant claimant denied that he had ever been advised by anyone at the camp that this path should not be used, but Donald Portnoy, Professor of Music at the University and

the Director of the Fine Arts Camp, and whose evidentiary deposition was introduced into evidence, testified that all of the students during orientation were instructed to use the sidewalk and not the dirt path through the open field. In fact, through the deposition, a notice dated July 17, 1974, was introduced into evidence which recommended that students should use the paved route rather than the dirt path. Professor Portnoy testified that a copy of the notice or bulletin was given to each student and that copies were posted on each floor of the dormitories. While the notice introduced into evidence was dated in 1974, Professor Portnoy stated that the same procedure was followed in 1975. In any event, the record is clear that the director and counselors at the camp were fully aware that, in spite of the warning, the students were using the dirt path instead of the paved sidewalk.

On the evening of July 17, 1975, at about 8:15, Mark and several other students were returning to the dormitory from an orchestra rehearsal at the Creative Arts Center. They were using the dirt path in lieu of the paved sidewalk. In attempting to pass other students who were walking more slowly along the path, Mark walked some 5 to 10 feet off the path and suddenly fell into a hole some 48 inches wide and 42 inches deep. As a result, he fractured his right arm just above the wrist. The presence of this rather large hole was obscured by the existence of long grass around it. Mark's recovery was uneventful, and his medical expenses were less than $100.00. He remained at the camp, but because his arm was in a cast, he could not actively play his violin. The most serious consequence of the injury, however, was the fact that Mark lost interest in playing the violin, and at the time of the hearing, some two years after the accident, he had not resumed his lessons.

Cases in respect to liability of public schools and institutions of higher learning are collected in an excellent annotation appearing in 37 ALR 3d 738. Generally, the cases hold that the institution is under a duty of ordinary or reasonable care with regard to the condition of its grounds to see that they are maintained in a reasonably safe condition. We do not feel that the evidence justifies a finding of contributory negligence on the part of this 14-year-old claimant. On the other hand, we

believe that the respondent, being aware that students were using this area, was under a duty to see that the same was maintained in a reasonably safe condition. We further believe that the respondent failed in this duty and was guilty of actionable negligence. To attempt to award damages for Mark's loss of interest in the playing of the violin would involve speculation on our part, which we refuse to do. The claimant testified at the hearing that his arm had completely healed and was as good as new, but to compensate him for his pain, suffering, and nominal medical expenses, we do hereby make an award of $1,500.00.

Award of $1,500.00.

Opinion issued January 11, 1979

HENRY ELDEN & ASSOCIATES

vs.

DEPARTMENT OF FINANCE AND ADMINISTRATION and DEPARTMENT OF HEALTH

(No. CC-78-269)

Michael T. Chaney, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondents.

PER CURIAM:

By written contract dated June 28, 1976, which incorporated a Standard Form of Agreement Between Owner and Architect prepared by the American Institute of Architects, the claimant became obligated to design and prepare plans for a new hospital and boiler plant for Welch Emergency Hospital. It is alleged that the claimant performed work under the contract for which it rendered invoices of $167,000.00, of which $83,000.00 was paid, leaving a balance of $83,900.00 which was disputed. The parties joined in the submission of that dispute, pursuant to the contract, to arbitration by the American Arbitration Association. On August 18, 1978, the arbitrators, Wilson Anderson, Esquire, Harry N. Barton, Esquire, and Robert N. Bland, Esquire, made an award in the sum of $70,700.00 plus adminis-

trative fees in the sum of $1,189.00, making a total of $71,889.00, which is the amount of this claim. The claim was submitted for decision upon the pleadings. In their Answer, the respondents admit all of the foregoing facts, aver that they have no defense to the claim, and declare that the claimant is entitled to the relief sought. Accordingly, an award in the sum of $71,889.00 is hereby made.

Award of $71,889.00.

Opinion issued January 11, 1979

WOOD COUNTY BANK

vs.

DEPARTMENT OF MOTOR VEHICLES

(No. CC-78-209)

Harold W. Wilson, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision upon the pleadings. The claimant alleges that on October 7, 1974, it advanced credit in the sum of $2,565.90 to the owner of a 1972 model Volkswagen automobile, which was secured by a lien on that vehicle, but that the respondent thereafter negligently issued a new title in the name of the owner without the lien being recorded thereon. In addition, it appears from exhibits that the respondent, on April 20, 1978, obtained a judgment upon the aforesaid debt against the owner in the sum of $2,749.55, but that execution on that judgment on September 5, 1978, was returned unsatisfied with the endorsement "Nothing Found". It appears that the delay in reducing the debt to a judgment was occasioned by difficulty in locating the owner, who apparently was in Pennsylvania at one time and later was in Virginia. The Answer of the respondent admits the salient facts and joins in the claimant's prayer for an award in the sum of $2,749.55. Accordingly, it appears that an award in that sum should be made.

Award of $2,749.55.

Opinion issued January 26, 1979

JACK L. RADER

vs.

DEPARTMENT OF HEALTH

(No. CC-78-223)

CARL L. BAKER, JR.

vs.

DEPARTMENT OF HEALTH

(No. CC-78-224)

and

H. M. CURRY

vs.

DEPARTMENT OF HEALTH

(No. CC-78-251)

Claimants appeared in person without counsel.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

The above-captioned claims arise from the same factual situation. The claimants seek compensation for overtime worked as verified by the West Virginia Department of Health and certified by the West Virginia Department of Labor for fiscal years 1975-76, 1976-77, and 1977-78.

In its Answers, the respondent asserts that sufficient funds expired in fiscal year 1975-76 and fiscal year 1977-78 had payment been made to the claimants; however, in fiscal year 1976-77, there were NOT sufficient funds on hand at the close of that fiscal year from which those portions of each claim could have been paid.

Respondent cites in support of its denial of the claims for fiscal year 1976-77 the decision of this Court in *Airkem Sales and Service, et al. v. Department of Mental Health*, 8 Ct. Cl.

180 (1971). The *Airkem* decision is based upon West Virginia Code 12-3-17, which prohibits any State officer from authorizing or paying any account incurred during any fiscal year out of the appropriation for the following year.

In the decision of *Elva B. Petts and James M. Preston vs. Division of Vocational Rehabilitation,* Claim Nos. D-927d and D-927i, this Court held that personal services will not be denied, based upon the theory applied in over-expenditure claims for merchandise, as the balance in the prsonal services account is immaterial. The Court relied upon the recent Supreme Court case of *State ex rel. Crosier v. Callaghan* ..... *W.Va.* ....., 236 S.E. 2d 321 (1977), wherein that Court held that "to the extent that retroactive liability for unpaid wages is incurred against an employer, it is incurred at the time liability is determined."

The Court therefore finds the respondent, the Department of Health, liable for the overtime worked by each of the claimants, and makes awards as follows: $6,975.46 to Carl L. Baker, Jr., $6,798.78 to H. M. Curry, and $5,488.05 to Jack L. Rader.

Awards of $6,975.46 to Carl L. Baker, Jr.
$6,798.78 to H. M. Curry
$5,488.05 to Jack L. Rader

Opinion issued January 31, 1979

AMERICAN HOSPITAL SUPPLY

vs.

DEPARTMENT OF HEALTH

(No. CC-78-265)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of $424.32 for merchandise shipped to respondent on June 2, 1977 and June 30, 1977. Three invoices were sent to Welch Emergency Hospital, but no payment was received by the claimant.

In its Answer, the respondent admits the validity of the claim and states further that there were sufficient funds remaining in the appropriation for the fiscal year in question from which the claim could have been paid.

In view of the foregoing, an award in the above amount is hereby made.

Award of $424.32.

Opinion issued January 31, 1979

WAYNE BAYLISS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-276)

No appearance by claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Upon written stipulation to the effect that damages to claimant's truck in the amount of $251.83 were caused when said vehicle struck a plate and bolts protruding from the highway, which highway is Interstate-64 and Interstate-77 in Kanawha County, West Virginia; and to the effect that negligence on the part of the respondent was the proximate cause of said damage, the Court finds the respondent liable, and herby makes an award to the claimant in the above-stated amount.

Award of $251.83.

Opinion issued January 31, 1979

GUYAN TRANSFER AND SANITATION, INC.

vs.

DEPARTMENT OF FINANCE AND ADMINISTRATION

(No. CC-78-244)

Marvin W. Masters, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

GARDEN, JUDGE:

By contract dated May 25, 1972, the claimant agreed to provide pickup and disposal service of trash and garbage for occupants in mobile home sites operated jointly by the State of West Virginia and HUD in flood disaster areas in Logan County. The contract was renewed by a Renewal Agreement dated May 3, 1974, for the period from May 1, 1974 through April 30, 1975. The original contract or a copy thereof could not be located by either the claimant or the respondent, but the Renewal Agreement, which was in the form of a Purchase Order, provided as follows:

"RENEWAL AGREEMENT

This Purchase Order constitutes acceptance of Agreement made by and between the State of West Virginia, by the Commissioner of Finance and Administration, for and on behalf of the Department of Finance and Administration and Guyan Transfer and Sanitation, Inc., Amherstdale, West Virginia, for renewal to contract No. 226-L, to provide pickup and disposal service of trash and garbage for all occupants in the mobile home sites operated jointly by the State of West Virginia and HUD in flood disaster areas in Logan and environs thereof all as set forth in the contract dated May 25, 1972 now in effect and hereby renewed for a further term of one year commencing May 1, 1974 through April 30, 1975 unless cancelled prior thereto with option to renew by the State for further term of yearly periods thereafter. All in accordance with original agreement.

ESTIMATED MONTHLY COST—$4,290.00"

Pursuant to the original contract, the respondent, by letter to the claimant dated August 14, 1974, terminated the contract as of midnight on September 14, 1974. A. Douglas McKee, claimant's president, testified that from May 1, 1972 to September 15, 1974, his company performed the services as contemplated by the agreement. He stated that, even though the Renewal Contract reflected that the "Estimated Monthly Cost" of the services would be $4,290.00, that figure was the actual amount paid monthly by the respondent. Mr. McKee further testified that his company had been paid in full except for the month of July, 1974, and that as a result, the respondent was indebted to claimant in the amount of $4,290.00.

The respondent did not present any evidence to refute this claim, and, based on the record, an award in favor of the claimant in the amount of $4,290.00 is hereby made.

Award of $4,290.00.

Opinion issued January 31, 1979

HALLIBURTON SERVICES

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-264)

No appearance by claimant.

Henry Haslebacher, Attorney at Law, for respondent.

PER CURIAM:

Upon stipulation to the effect that damages to claimant's truck in the amount of $228.56 were caused when said vehicle struck a piece of metal protruding from a bridge owned and maintained by respondent, which bridge is a part of Route 16 between Ellenboro, West Virginia, and Harrisville, West Virginia; and to the effect that negligence on the part of the respondent was the proximate cause of said damage, the Court

finds the respondent liable, and hereby makes an award to the claimant in the above-stated amount.

Award of $228.56.

Opinion issued January 31, 1979

LINDA E. HAMILTON

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-260)

No appearance by claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Upon written stipulation to the effect that damages to claimant's automobile in the amount of $92.00 were caused when said vehicle struck a board protruding from the Homewood Bridge in Mannington, Marion County, West Virginia, which bridge is part of West Virginia Route 3; and to the effect that negligence on the part of the respondent was the proximate cause of said damage, the Court finds the respondent liable, and hereby makes an award to the claimant in the above-stated amount.

Award of $92.00.

Opinion issued January 31, 1979

HOWARD A. HAYNES

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-281)

No appearance by claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $300.19, based upon the following facts.

On or about October 30, 1978, claimant was operating his automobile on Interstate-64 East near Broad and Capitol Streets in Charleston, West Virginia, when he ran over some construction plates which were not securely fastened down. This resulted in damage to the undercarriage of claimant's vehicle.

Since the damage occurred because of the negligence of the respondent, and this negligence was the proximate cause of the claimant's damages, this Court hereby makes an award to the claimant in the amount of $300.19, which sum is a fair and equitable estimate of the damages sustained.

Award of $300.19.

Opinion issued January 31, 1979

ORA T. HERRON

vs.

DEPARTMENT OF PUBLIC SAFETY
and DEPARTMENT OF CORRECTIONS

(No. CC-76-108)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Amended Answer.

Claimant seeks reimbursement for paying a towing fee of $18.00 on her automobile. The fee was incurred after an inmate from the Huttonsville Correctional Center had stolen the auto, and, upon his capture, the West Virginia State Police had it towed to Green Bank, West Virginia.

In their Amended Answer, the respondents admit the claims set forth in the Notice of Claim, and further state that there were substantial funds on hand at the close of the fiscal year from which the claim could have been paid.

In view of the foregoing, an award in the amount of $18.00 is hereby made to the claimant.

Award of $18.00.

Opinion issued January 31, 1979

IBM CORPORATION

vs.

DEPARTMENT OF CORRECTIONS

(No. CC-78-277)

No appearance by claimant.

Joseph C. Cometti, Assistant Attorney General, for respondent.

PER CURIAM:

Upon written stipulation to the effect that respondent entered into Service and Lease Agreements with claimant on various copying equipment and typewriters in the amount of $3,962.30, and to the effect that respondent received invoices but made no payment to claimant, the Court finds that this is a claim which in equity and good conscience should be paid. However, we are of further opinion that, since there were no funds remaining in the respondent's appropriation for fiscal year 1977-78 from which the obligation could have been paid, an award in this claim is barred, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct. Cl. 180 (1971).

Claim disallowed.

Opinion issued January 31, 1979

POSITIVE PEER CULTURE, INC.

vs.

DEPARTMENT OF CORRECTIONS

(No. CC-77-117)

John H. Tinney, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

The respondent, Department of Corrections, entered into a contract with the claimant for certain services to be provided by the claimant at the West Virginia Industrial School for Boys at Pruntytown and the West Virginia Industrial Home for Girls at Salem, West Virginia. The claimant was to provide psychological services for the inmates of these institutions and establish a program for rehabilitation. The contract also required the claimant to provide training and consultant services to respondent's staff. The claimant was to be paid $90,000.00 for its services, which were to start on January 18, 1975, and be completed in twelve months. At the request of the respondent, performance of the contract did not commence until the third week of February, 1975.

Respondent's Exhibit No. 2 indicates that payments totalling $63,658.85 were made by the respondent under the contract. Subsequent payments were withheld pending an investigation of one of claimant's employees. Although statements were submitted, they were not paid. This claim is for the balance due under the contract.

In November of 1975, the parties negotiated and signed an agreement to extend the program for an additional nine months, which extension was never approved by the Governor's Committee on Crime and Delinquency nor by the Department of Finance and Administration.

The contract provided that if the respondent was not fully satisfied with the performance of the contract, it could terminate the contract upon thirty days' written notice to the claimant. Such a notice was not given. Just prior to the expiration of the term of the contract, Betty Light, Administrative Assistant to respondent's Commissioner, Calvin A. Calendine, notified Harry H. Vorrath, claimant's president, by telephone on January 14, 1976, that the contract would expire as of January 17, 1976, and that the claimant would receive no compensation for the last sixty-five days of the contract.

By letter dated February 6, 1976, after the contract had been terminated, Commissioner Calendine wrote Mr. Vorrath stating in part:

> "... Positive Peer Culture failed in several instances to fulfill the requirements of the original contract. I was disappointed that we could not negotiate reasonable times for the completion of this program ...
>
> However, since we have failed to reach such an agreement, we now feel that payments already made to Positive Peer Culture, Inc. are sufficient remuneration for the actual accomplishment and services rendered ..."

In his testimony, Mr. Vorrath stated that he was unaware of any dissatisfaction with the services being provided until the January telephone call from Betty Light, and that he thought the compensation was being withheld by reason of the investigation of one of claimant's employees.

The record establishes that the claimant entered into the performance of the contract and that an extension was contemplated although never consummated. The record does not establish dissatisfaction with the claimant's performance during the term of the contract, nor that any effort was made on behalf of the respondent to terminate the contract under its terms. Therefore, from the record, the Court makes an award to the claimant in the amount of $26,341.15, representing the balance due under its contract with the respondent.

Award of $26,341.15.

Opinion issued January 31, 1979

ROBERT SMITH and ELIZABETH SMITH

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-290)

No appearance by claimants.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $4,000.00, based upon the following facts.

On and prior to October 1, 1977, claimants were occupying an apartment owned by Patrick West, in Princeton, West Virginia. Also prior to that date, the respondent had been engaged in a road construction project in the immediate vicinity of the aforesaid apartment.

Respondent, during these construction activities, placed a landfill on land adjacent to claimants' apartment without making any provisions for drainage of surface water. As a result of such negligence, mud and water washed into the apartment on or about October 1, 1977, damaging personal property owned by the claimants and forcing them to find other living quarters.

Claimants' expenses included money for food, rent, and three days' lost wages.

In a cause of action styled *Patrick West v. Department of Highways,* Claim No. CC-77-205, the claimant Patrick West, owner of the apartment in the instant case, sought compensation from the respondent for damage to the building itself. A written stipulation filed therein indicated that the respondent admitted both negligence and liability for causing the mud and water to wash into the apartment building.

In view of the foregoing facts, this Court hereby makes an award to the claimants in the amount stipulated by the parties, which sum is $4,000.00.

Award of $4,000.00.

Opinion issued January 31, 1979

STATE FARM MUTUAL AUTO INSURANCE CO.,
SUBROGEE OF DANA LEE SELVIG

vs.

BOARD OF REGENTS

(No. CC-78-162)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Amended Answer.

Claimant seeks payment of the sum of $308.99 for damages to its insured's automobile which occurred when the insured's vehicle was lawfully parked on the campus of West Virginia University. Maintenance employees, while mowing the grass, scattered rocks and gravel against the finish of said vehicle.

In its Amended Answer, the respondent acknowledges the validity of the claim.

Based on the foregoing facts, an award in the amount of $308.99 is hereby made to the claimant.

Award of $308.99.

Opinion issued February 1, 1979

CENTRAL STATES RESOURCES, INC.

vs.

BOARD OF REGENTS

(No. CC-78-18)

Lewis A. George, Attorney at Law, for claimant.

Frank M. Ellison, Deputy Attorney General for respondent.

WALLACE, JUDGE:

This claim was submitted to the Court upon the pleadings.

Claimant was awarded a contract to supply Bakerstown coal at $32.00 per ton to West Virginia University beginning in October of 1976. In January, 1977, due to abnormally cold weather, the Bakerstown coal was insufficient to provide the necessary BTU's on an abnormal-need basis. It was determined that Pittsburgh coal was necessary to meet the abnormal BTU demand. Claimant was informed that the weather conditions were so severe that an emergency existed and that it should do what was necessary to obtain Pittsburgh coal. Claimant obtained Pittsburgh coal at $38.75 per ton and delivered 3,018.44 tons to West Virginia University.

The University was invoiced for the coal at the increased price, but the coal was paid for at the contract price of $32.00 per ton.

Claimant filed its claim against the respondent for $20,374.47, representing the difference between $32.00 per ton and $38.75 per ton. As a compromise, the claimant reduced its claim to $37.75 per ton, or $17,356.03.

In its Amended Answer, respondent admitted receipt of the coal, and it agreed to compensate the claimant at the rate of $37.75 per ton.

Accordingly, from the pleadings, the Court makes an award to the claimant in the amount of $17,356.03.

Award of $17,356.03.

Opinion issued February 1, 1979

JAMES H. CURNUTTE, JR.
& DEBORAH L. CURNUTTE

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-150)

Claimant, *James H. Curnutte, Jr.*, appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimants filed their claim against the respondent for loss of water service to their home due to slide conditions on Buffalo Creek Road in Wayne County, West Virginia.

The claimants purchased their home in October of 1977 for $32,900.00. The house was newly constructed. During the winter months of January, February, and March, 1978, difficulty was experienced with the water supply in the home. After the winter snow had thawed, it was discovered that a slide from Buffalo Creek Road, behind the house, had disrupted the water line. The center of the road is approximately 110 feet from the back of the house.

The road was built many years ago, and became part of the State road system by a legislative act of 1933. According to a witness for the respondent, it was constructed by the cut and cast method of building roads in hill sections. This method consists of cutting into the hillside and casting the cut material over the side opposite the hill. Respondent's witness also testified that he knew of at least four times in the seven years he was employed by the respondent that this method had been used to repair this road. He stated that cuts into the hillside were about four feet each time. The material cut from the hill

was cast over the other side onto the natural slope. The testimony indicated that the natural hill was composed of a silty, clay material subject to slides.

The record reveals that the road has been repaired and widened over the years, but now the edge of the road has broken away. Studies have been made, due to the complaint of the claimants, as to the best way to correct the situation.

The claimants filed their claim in the amount of $3,000.00, and in the course of the hearing, it developed that estimated damages would exceed that amount. The claimants asked to amend their claim to correspond with the evidence, which request was granted by the Court.

From the record, the Court is of the opinion that the negligence of the respondent in its failure to properly maintain Buffalo Creek Road was the cause of the claimants' damage. The evidence reveals that, from the estimates and costs already expended, the claimants are entitled to recover $4,604.73. Accordingly, the Court makes an award to the claimants in that amount.

Award of $4,604.73.

Opinion issued February 1, 1979

FRANCES J. LARCH
and WILLIAM E. LARCH

vs.

DEPARTMENT OF NATURAL RESOURCES

(No. CC-77-120)

Phillip D'Orazio and *Donald M. O'Rourke,* Attorneys at Law, for claimants.

Frank M. Ellison, Deputy Attorney General, for respondent.

WALLACE, JUDGE:

This claim was filed by the claimants, Frances J. Larch and her husband, William E. Larch, against the Department of

Natural Resources for injuries received by Mrs. Larch on May 30, 1976, in North Bend State Park. The park, maintained by the respondent, is located in Ritchie County, approximately two miles from Cairo, West Virginia.

On the day of the accident, the claimants had gone to the park to fish along the banks of the North Fork of the Hughes River which meanders through the park. They had driven from their home in Vienna, West Virginia, and arrived at the park at 1:30 p.m. The weather was clear and calm. They parked their automobile beside a paved road within the park, and proceeded on foot around a locked gate some 12 feet from the road. The two then continued along the bed of an abandoned railroad, left the roadbed, and went through an open area, used by deer, to the river, a distance of some 400 to 600 yards. They traveled approximately 15 feet down the bank to the river. Along both sides of the roadbed were a natural growth of brush and small and large trees.

The area was marked as a wildlife sanctuary. There were no signs indicating that it was a "no fishing" area. Mr. Larch testified that he had fished in the area many times over a period of four or five years, and that he had seen other people fishing there.

The claimants fished beside the river for about three hours. Mrs. Larch was sitting on a gravel bar in the river while fishing, and her husband was a few feet up the stream. As she was sitting on the gravel bar, Mrs. Larch was injured when a dead limb or a portion of a dead tree on top of the river bank fell without warning, striking her on her left side and knocking her down.

A small boy, in the area at the time, ran to the park lodge for help. After leaving instructions to notify the Harrisville Emergency Squad of the occurrence of an accident, the park superintendent, Robert F. Rogers, proceeded to find the area of the accident. The superintendent searched the area and located the claimants on the river bank. After advising the claimants that help was on the way, he returned to his vehicle to direct the emergency squad to the scene of the accident. When the emergency squad arrived, Mr. Rogers unlocked the

gate to permit the vehicle to proceed as close as possible to the accident scene. The claimants proceded to the Camden-Clark Hospital in Parkersburg.

Superintendent Rogers testified that the area in which the claimants were fishing was part of the area reserved as a wildlife sanctuary, and was not an area designated for fishing. He further stated that the area was not patrolled nor maintained as were other sections of the park.

From the record, the Court finds that the respondent was not negligent in the maintenance of the area where the accident occurred, and that the injuries suffered by Mrs. Larch were not foreseeable. Accordingly, the claim is disallowed.

Claim disallowed.

Opinion issued February 1, 1979

OSTRIN ELECTRIC CO.

vs.

DEPARTMENT OF NATURAL RESOURCES

(No. CC-78-169)

Milton S. Koslow, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

Purchase Order No. 8141 in the amount of $8,175.00 was issued February 9, 1978, to the claimant to do certain work for the respondent in a laboratory at 1201 Greenbrier Street in Charleston, West Virginia. The contract was accepted by the Department of Finance & Administration on March 14. Some two months after the claimant commenced preliminary work on the contract, the respondent cancelled the contract because the location of the laboratory was to be changed for fire safety reasons.

The claimant filed its claim in the amount of $1,397.50 for the cost of equipment, labor, and overhead incurred prior to

the cancellation of the contract. The claim consists of $800.00 for an electrical panel and parts; ten hours for labor at $19.75 per hour, totalling $197.50; and $400.00 for insurance, overhead, and taxes.

The respondent admitted that the purchase order was issued, but demanded proof of the value of goods and services performed.

Invoices and time records were introduced which substantiated the cost of material and labor, but the evidence was not sufficient to establish the $400.00 claimed for insurance, overhead, and taxes.

The record indicates that the panel and parts could not be returned and that there was no known market for resale.

Accordingly, the Court finds that the claimant is entitled to recover the $997.50 expended for the panel, parts, and labor.

Award of $997.50.

Opinion issued February 1, 1979

VECELLIO & GROGAN, INC.

vs.

DEPARTMENT OF HIGHWAYS

(No. D-914, D-993, D-918 Par. C)

Robert B. Sayre, Attorney at Law, for claimant.

Stuart Reed Waters, Jr., Attorney at Law, for respondent.

GARDEN, JUDGE:

These claims involve a multitude of issues arising on three separate contracts between Vecellio & Grogan, Inc. of Beckley, West Virginia, the claimant (hereinafter referred to as V & G), and the respondent. They will be discussed in the order in which they were presented at the hearing.

Issue No. 1. Federal Explosive Impost Charge (D-914)

On November 2, 1970, V & G entered into an agreement with respondent for the construction of 2.6 miles of U.S. 19 Express-

way in Nicholas County, West Virginia, being respondent's Project No. APD-482(30). By letter dated February 15, 1971, V & G's explosive supplier advised V & G that, pursuant to the provisions of the Organized Crime Control Act of 1970, Commerce in Explosives, Part 181, and Internal Revenue Regulations issued pursuant thereto, Austin Powder Company was required to place an immediate impost on explosive sales. It was stipulated between the parties that these requirements were based on regulations promulgated in the Federal Register, Volume 36, Number 10, dated January 15, 1971, a copy of which was attached to the Stipulation. It was further stipulated that, as a result of explosives purchased to perform the above-mentioned contract, V & G was required to pay its explosive supplier the sum of $1,929.10 over and above the price set forth in their contract. A careful reading of the Federal Register fails to reveal any provision which would authorize the purchaser of explosives to pass this charge on to the ultimate consumer, namely, the respondent. We are also unaware of exactly when contract prices may be altered by respondent (with the exception of increases or decreases in common carrier freight rates). This Court feels that this is simply one of the hazards, unforseen as it may be, of doing business, and for this reason, this portion of the claim is denied.

Issue No. 2. Presplitting Technique (D-914)

An additional controversy has arisen in connection with the performance of contract APD-482(30) involving the dynamiting technique known as presplitting. This is a procedure which was first developed in the early 1960's. It is a technique by which modern blasters split or crack a rock deposit along the line marking the edges of a cut prior to production blasting.

The specifications of the contract in question required that the technique of presplitting be followed. It was agreed that the performance of this contract was governed by respondent's 1968 Standard Specifications—Roads and Bridges and by respondent's Special Provisions dated January 1, 1970. Section 207.1 of the 1968 Standard Specifications reads in part as follows:

"This work shall consist of excavation for the roadway . . .in reasonably close conformity with the lines, grades, thicknesses and cross sections shown on the plans or established by the Engineer."

Section 207.3.1.1.2 of the 1968 Standard Specifications authorizes the use of the presplitting technique, but does not provide details as to how the technique is to be performed. Also, in another Section, 207.3.1.3, entitled Rock Excavation, the following appears:

"A tolerance of 18 inches, measured in a horizontal plane, for cut slopes back of the ditch line will be permitted in rock cuts . . ."

To further complicate the matter, the respondent, in its January 1, 1970 Special Provisions, deleted former Section 207.3.1.1.2 and substituted the following:

"When called for in the contract, rock excavation shall incorporate the 'presplitting' technique. This involves *a single row of holes drilled along the neat excavation line* . . . The end result is intended to yield a minimum of breakage outside the neat line of the plan cross sections." (Emphasis added.)

Claimant readily admitted that it did not drill along the neat excavation line which was simply defined as the template line shown on the cross sections. V & G's officers and employees testified that it is impossible to drill on the template line and ultimately arrive at the proper point in the ditch line as shown on the cross sections. They explained that the drilling equipment currently being used by road contractors in West Virginia simply will not physically permit them to drill on template, and that as a result, they started their drilling behind template, believing that they were entitled to a tolerance of 18 inches as set forth in 207.3.1.3. The presplitting provisions are contained in a separate section, and in that section, tolerances are not mentioned and the contractor is required to drill on the neat excavation line.

For the main part, the respondent has refused to pay V & G for the excavation of this unclassified material behind the neat

excavation line. If back breaking due to poor material fell out, the record indicates that V & G was paid. While we feel that V & G is not entitled to the 18" tolerance, we are of the opinion that equity demands an extension of some tolerance to them, and we believe that a tolerance of 12 inches is equitable. With this figure in mind, we directed the respondent's engineers and the officials of V & G to make a determination of the additional unclassified excavation performed by V & G, and to determine, at the rate of $0.99 per cubic yard, the additional compensation which should be paid to V & G.

The parties have reported to the Court that, as a result of the 12-inch tolerance outlined above, V & G is entitled to be paid for the excavation of an additional 6,264 cubic yards of unclassified material at the rate of $0.99 per cubic yard, or the sum of $6,201.36, and an award to V & G in that amount is hereby made.

Issue No. 3. Fat Fill (D-918)

On June 24, 1970, V & G entered into a contract with the respondent for the grading, draining, and paving of a portion of U.S. 460 Expressway in Mercer County, West Virginia, which was respondent's Project No. APD-200(19).

A written stipulation filed at the hearing reflects that V & G excavated 217,531 cubic yards of unclassified borrow excavation and that respondent certified and paid V & G for 203,495 cubic yards, or a difference of 14,036 cubic yards, and that the unit bid price was $0.89 per cubic yard. The parties further agreed that respondent's 1968 Standard Specifications governed all work under the contract. The pertinent provisions of these Specifications are as follows:

Article 105.3

"All work performed and all materials furnished shall be *in reasonably close conformity* with the lines, grades, cross sections, dimensions and material requirements, including tolerances shown on the Plans, or indicated in the Specifications." (Emphasis added.)

Article 105.8

"The Contractor shall be responsible for having the finished work *in reasonably close conformity* with the lines, grades,

elevations and dimensions called for in the Plans or established by the Engineer." (Emphasis added.)

Article 207.1

"(Embankment) work shall consist of . . . constructing embankments with excavated material . . . in accordance with these Specifications and *in reasonably close conformity* with the lines, grades, thicknesses and cross sections shown on the Plans or established by the Engineer." (Emphasis added.)

Article 211.3.1

"If the borrow is obtained in such quantity or in such manner that a waste of unclassified excavation, slips or excess material is caused, the amounts of such waste shall be deducted from the borrow volume."

It was remarked during the testimony in respect to this claim that all fills are fat, and this Court has concluded that such a statement is correct. Where fills are required on road construction, the contractor is furnished with cross sections showing the template lines of the slopes and, of course, a template line reflecting the location of the roadbed. The Standard Specifications require larger rocks to be placed near the outer part of the embankment and smaller rocks and spalls near the center. At the very bottom of the fill where rocks of three or four feet in diameter are used, some part of the rock by its very nature must extend beyond the template line in order to support material placed on them. Also, on the slopes where the sides of the embankment are being compacted by a bulldozer, it is necessary that extra material be used to obtain the required compaction and to make sure that the slope meets the template line.

It is to be noted that the Specifications repeatedly refer to "in reasonably close conformity". What does this term mean? A witness for V & G was of the opinion that it meant a distance of six inches to two feet, whereas a witness for respondent opined that a distance of one foot would constitute "in reasonably close conformity". It has come to the attention of the Court that on January 5, 1978, the respondent issued a Special Provision relating to Excavation and Embankment and added this language to Section 207.7.1:

"Slope lines for all embankments shall conform to the lines shown on the Plans or established by the Engineer, *except that a construction tolerance of plus or minus one foot, measured in a horizontal plane, will be permitted,* except further that the roadbed width due to the tolerance shall not be less than plan width . . ." (Emphasis added.)

Based on the testimony and all of the evidence in the record, this Court is of the opinion that one foot should be considered as being "in reasonably close conformity". We requested the engineers for the respective parties to review and determine the actual fat fill on this job with this tolerance in mind so that a proper award might be made.

The parties have now agreed that within this one-foot line beyond the template lines there are 5,689 cubic yards of unclassified borrow or fat fill. The contract entitled V & G to be paid a unit price of $0.88 per cubic yard for this material, and, consequently, an award of $5,063.21 is hereby made in favor of V & G.

Issue No. 4. Deduction for Fat Fill on Contract which was Bid Originally as a Waste Job (D-993)

This issue, and the following three issues, deal with project APD-323 (23). By agreement dated December 23, 1969, V & G contracted with the respondent to construct one segment of U. S. 119 Expressway in Mingo County, West Virginia. The testimony established that the plans indicated that the project would be a "waste job" as opposed to a "borrow job". By way of explanation, a "waste job" is a project where the unclassified excavation in the cut areas provides more than sufficient suitable material to construct the fills and embankments in the same project. On the other hand, a "borrow job" is one where the unclassified excavation obtained from the cuts produces an insufficient amount of suitable material to construct the fills and embankments. In the latter situation, it becomes necessary for the contractor to borrow additional suitable material from the project site or outside of the project site, and, of course, the contractor in such instances submits a unit price bid for this item in submitting a bid.

During the course of this construction, it became apparent to V & G that the amount of suitable material to be obtained from the cuts would be insufficient to construct the fills and embankments. By letter dated December 10, 1970, and introduced into evidence, V & G informed the respondent that a borrow in the range of 100,000 cubic yards would be necessary to complete the work and, apparently, with the approval of the respondent, V & G prepared additional plans and cross sections of various cuts on the project where V & G would excavate behind the template lines. From that source, V & G would obtain the additional needed suitable material to construct the fills and embankments.

It was stipulated by the parties that V & G, in the performance of the contract, excavated a total of 1,871,199 cubic yards of unclassified excavation and was paid for all of the excavation at a unit bid price of $1.27 per cubic yard. However, when the final cross sections were taken by the respondent, a procedure in which V & G participated, it was determined that some 45,000 cubic yards of unclassified excavation were outside of the template lines of the fills and embankments as the template lines were shown on the original plans. As a result, the respondent deducted these 45,000 cubic yards as a fat fill at the above-stated unit price of $1.27, or a total of $57,150.00, from the final payment to V & G. Respondent contends that it had the right to make this deduction in the final pay pursuant to Section 1.5.1 of the 1960 Standard Specifications—Roads and Bridges, which reads in part as follows:

> "... The Engineer shall determine the amount and quantity of the several kinds of work performed and materials furnished which are to be paid for under this Contract and his decision shall be final ..."

V & G does not dispute the fact that the disputed 45,000 cubic yards of material were beyond the template lines, but it contends that this material consisted of material within one foot of the template line ("in reasonably close conformity," as discussed earlier), unsuitable material, and material from slides (at least four in number) which occurred after the fills and embankments had been constructed. It should be noted, however, that Howard Lane, V & G's project superintendent,

admitted that at least some of the 45,000 cubic yards consisted of suitable material that had been wasted.

The respondent vigorously contends that it consistently advised V & G during the construction of the project that it would not pay for any suitable material that was wasted outside of the template lines as shown on the plans, and various entries from respondent's job diaries were introduced into evidence to substantiate the fact that these warnings were given. The job diaries further established that respondent called to V & G's attention the fact that suitable material was being wasted at certain waste pits, and that V & G advised the respondent that such suitable material would be reclaimed later if the same was needed, but that such reclamation was never performed.

While this Court is of the opinion that the respondent's action in making this deduction was proper, it also feels that the deduction was extreme. The evidence is insufficient to permit this Court to determine the exact amount of the 45,000 cubic yards which constituted fat fill, but it is convinced that certainly a portion thereof constituted fill "in reasonably close conformity" to the template, unsuitable material, and material resulting from slides. Perhaps arbitrarily, the Court is of the opinion that V & G should be paid for 30% of the 45,000 cubic yards deducted by respondent, or for 13,500 cubic yards at a unit price of $1.27 per cubic yard. Accordingly, an award in favor of the claimant in the amount of $17,145.00 is hereby made. The Court is also of the opinion that V & G is entitled to interest on this award at the rate of six per centum per annum from March 28, 1973, to February 1, 1979, the issuance date of this opinion, in accordance with Code 14-3-1, as hereinafter discussed. Calculated, this interest amounts to $6,017.70, or a total award on this issue of $23,162.70.

Issue No. 5. Interest on Public Contracts

In 1969, the Legislature, in an attempt to protect vendors and contractors dealing with State agencies, enacted Article 3 of Chapter 14 of the West Virginia Code, which requires the payment of interest on public contracts by the State of West Virginia when final payment is delayed. Code 14-3-1 provides in part as follows:

"All public construction contracts relating to roads or bridges let by the state road commissioner, entered into on and after March one, one thousand nine hundred sixty-nine, shall contain the following paragraph:

'Within one hundred fifty days after the approving authority notifies the contractor, in writing, of the final acceptance by such approving authority of the project for which this contract provides, the balance due the prime contractor shall be paid in full. Should such payment be delayed for more than one hundred fifty days beyond the date that the approving authority notifies the contractor of the final acceptance of the project in accordance with the terms of the contract and the plans and specifications thereof, said prime contractor shall be paid interest, beginning on the one hundred fifty-first day, at the rate of six per centum per annum on such unpaid balance: Provided, that if the prime contractor does not agree to the amount of money determined by the approving authority to be due and owing to the prime contractor and set forth on the final estimate document, and the approving authority makes an offer to pay the amount of the final estimate to the said prime contractor, then the prime contractor shall not be entitled to receive any interest on the amount set forth in said final estimate, but shall only be entitled to the payment of interest at the rate of six per centum per annum on the amount of money finally determined to be due and owing to the said prime contractor, less the amount of the final estimate that the approving authority had originally offered to pay to the said prime contractor.' "

The first part of the statute is clear. After a project has been completed and the approving authority notifies the contractor in writing that the same has been accepted, the balance due the prime contractor shall be paid in full, and if not paid within 150 days of the date of acceptance, interest at the rate of six per centum per annum shall be paid on the unpaid balance. It is the proviso portion of the statute which makes the application of the statute difficult.

Project APD-323(23), the U.S. 119 Expressway in Mingo County, was completed by V & G on September 18, 1972, and the project was accepted by the respondent on October 27, 1972. The evidence established that a tentative final estimate was submitted to V & G on May 1, 1973. Apparently, V & G did nothing in respect to the tentative final estimate until August 23, 1973, when V & G wrote a letter to respondent which was received by respondent on August 27, 1973, and in which V & G took exception to the quantities set out in the tentative final estimate. Thereafter, on January 10, 1974, respondent paid V & G the sum of $138,927.40, which was the amount the respondent contended was due and owing V & G under the tentative final estimate. On May 20, 1975, a voucher estimate, which was designated as "Estimate No. 58 & Final", was accepted and approved by V & G, with V & G reserving its right to file its claim in this Court. Estimate No. 58 & Final reflected that the respondent owed nothing to V & G; on the contrary, it indicated that V & G owed the respondent $6,300.00 as liquidated damages for failing to timely complete this contract. The respondent contends that this instrument is the final estimate referred to in the proviso portion of the code section set out above, and that, consequently, interest cannot be charged to the respondent because this estimate fails to reflect that any monies are due and owing V & G.

This Court does not agree with respondent's contention. Such a construction of 14-3-1 would completely destroy the obvious intent of the Legislature and would permit the respondent to avoid payment of any interest simply by failing to present a final estimate to an involved contractor.

The project was accepted by the respondent on October 27, 1972, and the 150-day period contemplated by the statute commenced to run as of that date. The respondent became liable for the payment of interest on March 28, 1973 (the 151st day subsequent to October 27, 1972). As indicated earlier, the tentative final estimate was submitted to the contractor on May 1, 1973, which estimate reflected that the contractor was entitled to $138,927.40. The Court is of the opinion that interest should be charged to the respondent from March 28, 1973 to May 1, 1973. The record indicates that, after receiving this tentative

final estimate, V & G did nothing until writing its letter of August 23, 1973, which letter was received by respondent on August 27, 1973. This Court does not feel that interest during this period, namely, May 1, 1973 to August 27, 1973, should be charged to respondent. The $138,927.40 was paid by respondent to V & G on January 10, 1974, and the Court believes that interest should be charged to respondent for this period of time, that is, from August 27, 1973 to January 10, 1974. It would thus appear that V & G is entitled to interest for a period of 171 days, which amounts to an interest charge of $3,905.64, and an award in that amount is made in favor of V & G.

Issue No. 6. Additional Construction Layout Stakes (D-993)

This issue is interrelated with Issue No. 4, again arising from the contract entered into between V & G and the respondent dated December 23, 1969, and whereby the former was to construct a segment of U.S. 119 Expressway in Mingo County, West Virginia. As indicated earlier, this project was considered by the respondent to be a waste, or at the very least, a balanced, job. In any event, the proposal submitted by V & G did not contain a line item for the excavation of unclassified borrow material.

During the course of construction, when it was determined and agreed by both parties that there was insufficient material on the job site to complete the slopes and embankments, it was decided that an additional 166,000 cubic yards of material to complete the slopes and embankments would have to be obtained (in engineering parlance, they would have to "lay back the cuts"). In road construction, the contractor does not prepare the plans and specifications but is required to stake out the project (other than the location of the center line) so that the completed highway will conform to the cross sections, etc. This involves an extensive amount of engineering and surveying work, and, as a matter of fact, in V & G's proposal there was a line item in its bid of $100,000.00 to cover the cost of this work as originally contemplated by the plans and specifications.

As the result of an apparent mistake in the plans and specifications, and for other reasons, it was agreed that V & G would

be granted a 96-day extension in order to complete the contract (actually the contract was 117 days late in being completed). During this period of time, additional engineering and surveying work was done in order to "lay back the slopes" to obtain the necessary additional material to complete the slopes and embankments. George Shimmel, Chief Engineer for V & G, testified that he was responsible for making the computations for the engineering stake-out cost overruns on the project, and that the cost to V & G for this additional engineering was $17,933.60. Respondent made no attempt to show that this expense was inflated, but seemed to be distressed by the fact that they had never been furnished an itemized breakdown of this additional expense.

We believe that the claimant has established, by a preponderance of the evidence, that this cost overrun amounted to $17,933.60, through no fault on its part. We thus make an award to the claimant on this particular issue in the amount of $17,933.60. The Court also believes that V & G is entitled to interest on this award at the rate of six per centum per annum from March 28, 1973, to February 1, 1979, the issuance date of this opinion, in accordance with Code 14-3-1, as hereinabove discussed. Calculated, this interest amounts to $6,294.60, or a total award on this issue of $24,228.20.

Issue No. 7. Liquidated Damage Claim (D-993)

This issue, too, arises from Project APD-323(23), Mingo County. The contract, which was dated December 23, 1969, provided that the work on the project was to be completed by October 31, 1971. As earlier indicated and set forth in the written stipulation filed by the parties, a time extension of 96 days was granted, which extended the completion date until July 23, 1973. Nevertheless, the project was not completed until August 17, 1972, amounting to 21 days beyond the revised completion date. As a result, the respondent assessed a liquidated damage penalty against V & G of $300.00 per day, or a total of $6,300.00, all as provided in the contract. V & G contends that the imposition of this penalty was unjustified in view of the many problems that arose during the performance of the work.

The respondent directed a letter to V & G dated January 20, 1975, which was introduced into evidence as Claimant's Exhibit

No. 9. In this letter, the respondent sets forth an analysis of the reason for respondent's proposal to extend the contract completion date 96 days. For the additional unclassified excavation, a period of 76 days was allowed; for a health hazard strike, 18 days were allowed; and for inclement weather, 2 days were allowed. V & G responded to this letter by their letter of March 11, 1975, which likewise was introduced into evidence. In that letter, V & G did, of course, accept the 96- day extension granted in respondent's letter of January 20, 1975; but V & G requested an additional extension of 209 days for reasons set forth in the letter.

Respondent contends that the CPM network submitted by V & G stated that work on the project would start on February 6, 1970, in the form of clearing and grubbing, which could be performed during inclement weather. The testimony established that the work actually commenced on March 9, 1970. Consequently, the respondent argues that if work had started in accordance with the CPM, the project would have been completed on time.

One of the requests for a time extension contained in V & G's letter of March 11, 1975, hereinabove referred to, was set forth in the letter as follows:

> "*Item* 6 — September 28, 1971 letter, we requested forty-five (45) days time extension for the truckers strike and delay in utility relocations that set back Bridges 2798 and 9796. The truckers strike caused delay in pipe delivery which caused us to change our sequence of operations. The delay in utility relocation caused our bridge subcontractor to change his schedule. When this happened, our sub-contractor started other work and when the bridge sites were ready for him, he had not completed his other work; therefore, the delay was compounded.
> We request forty-five (45) days for these delays
> (Item 6) 45 days"

No additional testimony was introduced at the hearing with respect to the truckers' strike mentioned in the above-quoted portion of the letter, and the Court is of the opinion that the facts stated in the letter are true. Section 1.8.5 of the Standard

Specifications—Roads and Bridges (Adopted 1960) and introduced into evidence as Joint Exhibit 2 provides in part as follows:

> "In computing time spent in the execution of the work, working days will not be charged for Saturdays, Sundays or Legal Holidays, unless the Contractor utilizes Saturday as a working day, or for delays due to causes beyond the reasonable control and without the fault or negligence of the Contractor, including, but not restricted to, acts of God, acts of the Commission, floods, *strikes,* state of National emergency, or freight embargoes, provided such delays prevent the Contractor from proceeding toward completion of the current controlling major operation or operations; and providing further that the Contractor has used every reasonable means to remove the cause of such delays." (Emphasis added.)

The Court is of the opinion that, if the requested 45-day extension had been partially caused by the truckers' strike, through no fault of V & G, and there was no evidence to the contrary, some additional extension of time should have been granted.

In the claim of *Whitmyer Brothers, Inc. v. The Department of Highways,* Claim No. D-571, this Court rejected the Department of Highways' claim for liquidated damages, and cited 22 Am. Jur. 2d *"Damages"*, §233, p. 319, as follows:

> "The plaintiff cannot recover liquidated damages for a breach for which he is himself responsible *or to which he has contributed,* and as a rule there can be no apportionment of liquidated damages where both parties are at fault. Hence, if the parties are mutually responsible for the delays, because of which the date fixed by the contract for completion is passed, the obligation under which another date can be substituted, cannot be revived." (Emphasis added.)

It is apparent that some of the delays resulted from the incorrect plans, which necessitated additional engineering services on the part of the claimant and additional excavation to obtain material for constructing the fills and embankments.

Furthermore, there was no evidence as to the amount of actual damage, if any, sustained by the respondent as a result of the delay in constructing this highway, which was another reason this Court in *Whitmyer, supra,* rejected the liquidated damage claim.

On May 9, 1975, in view of the fact that the final estimate reflected that the claimant owed the respondent $6,300.00 in the form of liquidated damages, the respondent wrote to V & G and requested payment of this sum. Claimant had previously deposited securities with respondent totalling $30,000.00, and, in order to recover these securities, the claimant paid the sum of $6,300.00 to respondent on May 22, 1975. This Court, being of the opinion that the imposition of the liquidated damage charge was improper, hereby awards the claimant the amount of $6,300.00. Furthermore, in accordance with Code 14-3-1, an award of interest at the rate of six per centum per annum from May 22, 1975 to February 1, 1979, which amounts to $1,-298.16, is also made. On this issue an award is thus made in favor of the claimant in the total amount of $7,598.16. As a result of the above, the following awards are hereby made.

Issue No. 1 — No award
Issue No. 2 — Award of $6,201.36
Issue No. 3 — Award of $5,063.21
Issue No. 4 — Award of $23,162.70
Issue No. 5 — Award of $3,905.64
Issue No. 6 — Award of $24,228.20
Issue No. 7 — Award of $7,598.16
Total award of $70,159.27.

Opinion issued February 1, 1979

PATRICIA WILSON, GEORGE P. WILSON
and GLADYS V. WILSON

vs.

OFFICE OF THE GOVERNOR—
EMERGENCY FLOOD DISASTER RELIEF

(No. CC-78-41)

Claimants appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

GARDEN, JUDGE:

Several weeks after the devastating flood in Williamson, West Virginia in early April of 1977, the operator of an endloader engaged in the cleanup operation damaged a wall along the front of property which, according to the Notice of Claim, was owned by the claimant, Patricia Wilson. At the hearing, it was revealed that the legal owners of the property were the father-in-law and mother-in-law of the claimant, namely, George P. Wilson and Gladys V. Wilson. Mr. and Mrs. George P. Wilson were thereupon named as additional claimants.

The claimant, Patricia Wilson, testified that the endloader in question was painted yellow and that she therefore assumed that it was owned and operated by an employee of the Department of Highways, which State agency was named the respondent in the Notice of Claim. However, Courtney Joslin testified that, in April of 1977, he was employed by the Department of Highways as a Management Analyst with the Management Services Division, and that he and about six other employees of the Department were sent to the Williamson area to supervise the cleanup effort. According to Joslin, at that time the Department of Highways had no equipment in the area, it having been inundated by the flood waters. As a result, it was necessary to hire local contractors with the equipment required to perform the actual work. Most importantly, Joslin further stated that all of the work done in the Williamson area was done under the direction of Governor Rockefeller.

As far as damages are concerned, an estimate of repairs was introduced into evidence. Prepared by one John B. Lamanca, the estimate reflected that the cost of material and labor to replace this wall would be about $1,600.00. On the other hand, claimant Patricia Wilson testified that, in her opinion and the opinion of other members of her family, the cost would not exceed the sum of $1,200.00.

This Court heard several other claims resulting from this destructive flood wherein the Office of the Governor—Emergency Flood Disaster Relief was the respondent. The Court is of the opinion that this claim was improperly filed against the Department of Highways and that no award can be made as far as that agency is concerned, but the Court on its own motion hereby substitutes the Governor's Office—Emergency Flood Disaster Relief as respondent.

The Court therefore awards the amount of $1,200.00 to claimants Patricia Wilson, George P. Wilson, and Gladys V. Wilson.

Award of $1,200.00.

Opinion issued February 20, 1979

ARNOLD G. HEATER and
GERALDINE HEATER

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-130)

Claimants appeared in person.

Henry Haslebacher, Attorney at Law, for respondent.

RULEY, JUDGE:

This claim was asserted to recover damages in the sum of $3,500.00 allegedly sustained by the claimants' dwelling house as the result of blasting done by the respondent incident to excavating a cut through a hill. The blasting began in March or April, 1977, and continued over a period of six or seven

months. The claimants' dwelling house was about 900 feet from the excavation. The blasting began at an elevation of 1026 feet but continued in depth to 987 feet, which was the elevation of the claimants' home. The same rock strata in which the blasting was done extended to the claimants' home. The respondent's superintendent, who was in charge of the blasting, testified that, to the best of his knowledge, rock strata lay on a horizontal plane. The initial blasts were in patterns of approximately 63 holes with one stick of dynamite and one and one-half pounds of ammonite in each. Toward the end of the blasting, only six to eight holes were being shot at the same time. The respondent's superintendent was careful to say that he could not deny that there had been vibrations which extended to the claimants' home. The photographic evidence in the case showed severe damage to the dwelling house consistent with the claimants' own testimony that it was caused by vibrations from the respondent's blasting. In view of that evidence, a conclusion to any other effect by the Court would be speculation. Of course, it always has been the law of West Virginia that liability for damage proximately caused by blasting is absolute. See *Konchesky v. Groves,* 148 W.Va. 411, 135 S.E. 2d 299 (1964). The claimant testified, without objection, that it would cost $2,500.00 to repair the damage sustained by his dwelling. There was no other evidence respecting the amount of damage. Accordingly, an award in that sum should be made.

Award of $2,500.00.

Opinion issued February 20, 1979

HAROLD HERSOM and
ELEANORE HERSOM

vs.

DEPARTMENT OF NATURAL RESOURCES

(No. CC-77-170)

Claimant appeared in person.

Frank M. Ellison, Deputy Attorney General, for respondent.

WALLACE, JUDGE:

This claim is in the sum of $444.29 for property damage sustained by the claimants' automobile when a limb fell onto it while it was parked in a parking lot located in Berkeley Springs State Park. The accident happened at about 2:00 p.m. on Monday, August 8, 1977. The claimant testified that it was a sunny day and that there had been no wind and no storms. According to the undisputed evidence, the limb was about fifteen to eighteen feet in length, about three inches in diameter, and was green, showing no evidence of rot or deterioration. Although there is no explanation of why the limb fell, there also is no evidence that its fall was caused by negligence on the part of the respondent. For that reason, the claim must be denied. See *Shortridge v. Dept. of Highways,* 11 Ct. Cl. 45 (1975).

Claim disallowed.

Opinion issued February 20, 1979

McCLOY CONSTRUCTION COMPANY, INC.

vs.

DEPARTMENT OF NATURAL RESOURCES

(No. CC-77-221)

Jack O. Friedman, Attorney at Law, for claimant.

Frank M. Ellison, Assistant Attorney General, for respondent.

WALLACE, JUDGE:

The claimant, McCloy Construction Company, Inc., was awarded the contract to construct for the respondent the lodge

facilities at Canaan Valley State Park. During the months of October and November of 1975, rock was encountered unexpectedly along the front line of the building. The claimant contends that the architect's representative and respondent's inspector on the construction site were advised of the rock and that claimant was advised to submit a claim for the rock excavation. The claimant did so file, in the amount of $233,750.00, which sum was based upon the excavation of 935 cubic yards of rock at $250.00 per cubic yard. The respondent denied the claim and asserted in its Answer that if the claimant had removed any rock for which it had not been paid, the compensation should be that which is recognized in the construction industry, and not $250.00 per cubic yard.

Subsequent to the pre-trial conference held in this matter, the parties filed a written stipulation with the Court in which it was agreed that the claimant should be paid $27,000.00 for the excavation of 300 cubic yards of rock at the rate of $90.00 per cubic yard.

Having considered the pleadings and the stipulation, the Court makes an award to the claimant in the amount of $27,000.00.

Award of $27,000.00.

Opinion issued February 20, 1979

MEMORIAL GENERAL HOSPITAL

vs.

DEPARTMENT OF CORRECTIONS

(No. CC-79-38)

No appearance by claimant.

Joseph C. Cometti, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

In October of 1977, hospital and outpatient services were rendered by claimant to two inmates of respondent's Huttonsville Correctional Center in the following amounts: Clarence Jenkins, $5,872.55; and Billy Elkins, $4,205.16, for a total of $10,077.71.

Respondent, in its Answer, admits all the allegations of fact made in the Notice of Claim, and further states that there were funds remaining in the respondent's appropriation at the close of the fiscal year in question from which the claim could have been paid.

Based on the foregoing, an award in the above amount is hereby made to the claimant.

Award of $10,077.71.

Opinion issued February 20, 1979

BARBARA H. SPITZER

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-164)

Claimant appeared in person.

Nancy J. Aliff, Attorney at law, for respondent.

RULEY, JUDGE:

On September 29, 1977, the respondent repaired, and in part, relocated Hollybush Road, a secondary road in Lincoln County, at a point where it adjoins or passes through property owned by the claimant. As a result of damage to the front yard of the claimant's property, which the respondent neglected to repair, the claimant was obliged to incur expense in the sum of $100.00. In addition, the respondent made a cut approximately half way through, and thereby killed, a black walnut tree upon the claimant's property. It was neither shown nor claimed by the respondent that it was necessary to cut the tree. The claimant testified that the tree was approximately two and one-half feet in diameter and that its value was $200.00. For the

foregoing reasons, it appears that an award to the claimant in the sum of $300.00 should be made.

Award of $300.00.

Opinion issued February 28, 1979

SADIE JEAN AKERS and
THOMAS E. AKERS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-132)

Claimants appeared in person.

Henry Haslebacher, Attorney at Law, for respondent.

RULEY, JUDGE:

This property damage claim in the sum of $1,600.00 grows out of an accident which happened at approximately 12:30 p.m. on May 5, 1978, on Hewitt Creek Road, a secondary road in Boone County. At the time and place of the accident, Hewitt Creek Road had a paved blacktop surface and was wide enough to accommodate two lanes of vehicular traffic. On April 11 or 12, 1978, the respondent had dug a ditch across the road, installed a drain pipe, and then backfilled the ditch. In the interim between that date until the time of the accident, the backfill settled, and on one or more occasions, additional backfill material was placed in the ditch. The claimants' home was located about one mile from the ditch. On the day of the accident, Mrs. Akers drove from her home to a service station, crossing the ditch on one side of the road uneventfully, and then began to return to her home. On the return trip, when her 1970 model Plymouth traversed the ditch on the other side of the road, its rear wheels caught. Remarkably, the wheels (along with their connecting undercarriage) were torn free from the vehicle, causing its front end to swing to the right and collide with a tree. According to the claimants' testimony, the ditch at that place and on that side of the road was six to eight inches deep, and the speed of the Plymouth, when it entered the ditch, was approximately ten miles per hour.

The respondent's Boone County Supervisor testified that he personally checked the ditch nearly five times during the 23 or 24-day period between the date it was dug and the date of the accident; that a foreman also checked it from time to time; that it was checked at least once or twice every week; that, whenever it was found that the backfill had settled, it again was leveled; and that it was re-paved on May 25, 1978. In addition, he testified that the only complaints about the ditch received before May 5 were two or three telephone calls, the gist of which were inquiries concerning re-paving and comments that the ditch was a little rough.

Although the backfilled ditch would appear to have a relatively high potential for creating a dangerous condition, due to the propensity of backfill to settle unevenly, it is not an inherently dangerous object. Its high risk potential apparently was recognized, inasmuch as the respondent checked its condition frequently and endeavored to keep the backfill even with the pavement. In view of all of the evidence, the Court cannot conclude that the respondent was guilty of negligence which proximately caused the accident, and, accordingly, this claim should be denied.

Claim disallowed.

Opinion issued March 23, 1979

ARTHUR ADKINS, JR.

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-83)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

RULEY, JUDGE:

Arthur Adkins, Jr. filed this claim against the Department of Highways in the amount of $202.25 for damages to his 1973 Pontiac automobile.

The accident occurred at 7:30 a.m. on October 21, 1977, on old West Virginia Route 61 in Hansford, West Virginia, approximately 300 yards from the claimant's home. The road was 18½ feet wide at the place of the accident. The claimant was not in his automobile at the time; it was being driven by his daughter-in-law, Sheila Adkins, who was not present to testify. Re-surfacing of the road and drainage work beside the highway had just been completed. The claimant stated that there was a drainage ditch beside the road 12 feet long and 4 feet deep at its deepest point. He further related that his daughter-in-law stopped his automobile for a school bus, and when she started up again, she drove off the road into the ditch because the elevation of the road prevented her from seeing where she was going.

Jerry Easter, an employee of the respondent, was called to the scene of the accident. He testified that West Virginia Paving Company was doing the re-surfacing and drainage work, and, in his opinion, neither the fresh blacktop nor the drainage ditch presented a problem to approaching motorists. There is no evidence in the record to show that the negligence of the respondent caused the accident. Since negligence is not shown, and since the State is neither an insurer nor a guarantor of the safety of motorists on its highways, *Adkins v. Sims,* 130 W.Va. 645, 46 S.E. 2d 81 (1947), this claim is denied.

Claim disallowed.

Opinion issued March 23, 1979

JACK D. BAILEY & BETTY LOUISE BAILEY

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-49)

Claimants appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

RULEY, JUDGE:

This claim was filed against the respondent for damages sustained by a 1972 Ford Galaxy automobile registered in the

name of the claimant, Jack D. Bailey. The claimants lived on Sweeneysburg Road, about eight miles from Beckley, West Virginia. The two-lane road is maintained by the respondent. On the morning of December 15, 1977, at approximately 10:00 a.m., the claimant, Betty Louise Bailey, was driving to Beckley on Sweeneysburg Road at 35 miles per hour. The road was wet. Nearly a mile from her home, as she was entering a curve in the road, she came upon a pickup truck belonging to the respondent parked on the right-hand side of the road facing in her direction. She testified that the wheels on the right side of the truck were on the highway. She further stated that a dump truck of the respondent was approaching from the opposite direction over the center line on the highway. The truck, proceeding slowly, returned to its lane of traffic as she approached. Mrs. Bailey slowed down, applied her brakes, and skidded into the dump truck. There were no signs or flagmen to warn of the parked pickup truck. The highway was about fifteen feet wide, and the width of the berm where the pickup was parked was about six feet.

The driver of the respondent's dump truck, Gary Wayne Rollison, testified, "I seen her way ahead of the straightaway. So, I was slowing down. She was coming around there pretty fast it seemed like to me. Now, when she come around that pickup, she just looked at me and just got scared and laid on the brakes and slid sideways and hit me. I had already put my truck in the ditch by that time." Mr. Rollison further testified that there were no flagmen because respondent's vehicle was not on the highway.

From the record, it is the opinion of the Court that claimants have not proved by a preponderance of the evidence that the accident was caused by the negligence of the respondent. Accordingly, the claim is disallowed.

Claim disallowed.

Opinion issued March 23, 1979

R. L. JARRELL

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-172)

Claimant appeared in person without counsel.

Henry Haslebacher, Attorney at Law, for respondent.

RULEY, JUDGE:

Although several residents of Greer Road, a secondary road in Mason County, joined in filing this claim, only the claimant, R. L. Jarrell, appeared and prosecuted his portion of it. His claim is for damage to his pickup truck and station wagon allegedly caused during 1977 and 1978 by disrepair of a three-mile stretch of Greer Road over which he was obliged to drive in order to reach his home. In support of his claim, an invoice in the sum of $105.77 for repair of the exhaust system on the truck, an estimate in the sum of $107.80 for replacement of four heavy-duty shock absorbers on the truck, and an estimate in the sum of $175.00 for repairs to the front end of the station wagon were offered and admitted into evidence. Mr. Jarrell testified that from September, 1977, when he moved to Greer Road, until August, 1978, when it was re-surfaced, the three-mile stretch of road was in such a state of disrepair that it took approximately fifteen minutes to drive over it, for motorists had to stop almost completely in order to negotiate the deeper holes. During that period of time, Mr. Jarrell often complained to the respondent's superintendent in Mason County, but to no avail. The respondent offered no evidence. The evidence which was adduced establishes negligence on the part of the respondent. The doctrine of assumption of risk is asserted as a defense, but it is apparent that it has no application, because it applies only when a claimant voluntarily elects to travel over a dangerous route when an alternative safe route is reasonably available. See *Ratcliff v. Dept. of Highways,* 11 Ct. Cl. 291, at 293 (1977). It does not appear that the claimant was guilty of contributory negligence by failing to exercise ordinary care for

his own safety. As stated in 13B Michie's Jurisprudence *"Negligence"*, §24:

> "The essence of contributory negligence is carelessness; of assumption of risk, venturousness."

There was no proof that the claimant was either careless or venturous. Mr. Jarrell candidly conceded that approximately twenty-five percent of the estimate for repairs to the front end of his station wagon should be charged to use before he began to travel over Greer Road and that the truck's shock absorbers previously had 20,000 miles on them. For those reasons, the Court believes that the sum of $291.42 would compensate him fairly for his damage, and an award in that sum is hereby made. All of the other claims are dismissed for failure to prosecute.

Award of $291.42.

Opinion issued March 23, 1979

LIGHT GALLERY AND SUPPLY CO.
(No. CC-79-2)

ABBOTT LABORATORIES
(No. CC-79-3)

EHRENREICH PROTO-OPTICAL IND. INC.
(No. CC-79-4)

HUBBARD PUMP CO.
(No. CC-79-5)

AIR PRODUCTS AND CHEMICALS, INC.
(No. CC-79-6)

ACE GLASS, INC.
(No. CC-79-7)

FAIRMONT SUPPLY COMPANY
(No. CC-79-8)

WARREN ASSOCIATES
(No. CC-79-9)

THE CROCKER-FELLS COMPANY
(No. CC-79-10)

STUART'S DRUG & SURGICAL SUPPLY INC.
(No. CC-79-14)

SYVA, INC.
(No. CC-79-18)

ROCHE LABORATORIES, INC.
(No. CC-79-19)

CUTTER LABORATORIES, INC.
(No. CC-79-28)

and

DIAGNOSTIC ISOTOPES, INC.
(No. CC-79-29)

vs.

BOARD OF REGENTS

No appearance by claimants.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

These claims were submitted for decision based on the allegations of the Notices of Claim and the respondent's Answers.

Claimants herein seek compensation for goods furnished and services rendered to West Virginia University. In its Answers, respondent admits the validity of each claim, and states further that there were sufficient funds on hand at the close of each fiscal year in question from which these claims could have been paid.

Based on the foregoing, an award is hereby made to each of the claimants in the following amounts:

Light Gallery and Supply Co.	$ 31.00
Abbott Laboratories	$ 637.72
Ehrenreich Photo-Optical Ind. Inc.	$ 388.95
Hubbard Pump Co.	$ 20.89
Air Products and Chemicals, Inc.	$ 204.37
Ace Glass, Inc.	$ 71.49
Fairmont Supply Company	$ 20.40
Warren Associates	$ 23.20
The Crocker-Fells Company	$ 560.86
Stuart's Drug & Surgical Supply Inc.	$ 757.16
Syva, Inc.	$ 80.48
Roche Laboratories, Inc.	$1,702.50
Cutter Laboratories, Inc.	$1,248.00
Diagnostic Isotopes, Inc.	$ 81.60

Opinion issued March 23, 1979

GREGORY K. LIPSCOMB

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-48)

Claimant appeared in person.

Henry Haslebacher, Attorney at Law, for respondent.

RULEY, JUDGE:

Claimant, Gregory K. Lipscomb, filed this claim against the Department of Highways in the amount of $200.00 for damages to his 1974 Alfa Romeo Veloce automobile sustained on Feb-

ruary 15, 1978. At approximately 11:30 p.m., the claimant was driving his automobile at 45-50 miles per hour southbound on Corridor G, also known as Route 214, between MacCorkle Avenue and Oakwood Road in Charleston, West Virginia. The road is a four-lane highway. At the intersection of Route 214 and Hickory Road, the claimant encountered ice on both southbound lanes. He lost control of his automobile and slid sideways into the median strip where his automobile was damaged by ice and snow piled there.

Claimant testified that he drove this road two to four times a day and that he had noticed ice on the road before, but not to the extent found at the accident. He further stated that on the night of the accident, there was ice and snow along the highway, but none on the roadway, except at the accident scene. No evidence was introduced to prove knowledge, either actual or constructive, that respondent was aware of the ice on the highway. The law is well established in West Virginia that the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E. 2d 81 (1947); *Jeter v. Dept. of Highways,* 11 Ct. Cl. 154 (1976). Before the respondent can be held liable, there must be some showing that the respondent knew or should have known of the existence of ice on the highway. See *Keith v. Dept. of Highways,* 12 Ct. Cl. 199 (1978). Accordingly, the Court disallows this claim.

Claim disallowed.

Opinion issued March 23, 1979

HAROLD L. WEBER, JR.

vs.

DEPARTMENT OF HEALTH

(No. CC-78-270)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of $10,144.22 for overtime worked during calendar years 1976 and 1977.

In its Answer, the respondent admits that the claimant is entitled to be compensated for the overtime in the amount of $9,791.91, as evidenced by letters from the Department of Health.

In a recent decision by this Court, involving three other overtime claims against the Department of Health, the Court held that payments on accounts for personal services would not be denied, even though such payments were incurred during a previous fiscal year wherein said agency expended all of the funds in its personal services account. *Jack L. Rader et al. vs. Department of Health* (CC-78-223).

Based on the foregoing, an award in the amount of $9,791.91 is hereby made to the claimant.

Award of $9,791.91.

Filed with Court of Claims on March 29, 1979

BLACK ROCK CONTRACTING, INC.

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-76-9)

ORDER AND STIPULATION

This day came Black Rock Contracting, Inc., claimant, by Charles L. Woody, its attorney, and came the West Virginia Department of Highways, State of West Virginia, respondent, by Stuart Reed Waters, Jr., its attorney, and jointly represented to the Court, that in view of the Opinion of the Court heretofore filed in deciding the claims of Vecellio & Grogan, Inc., vs. Department of Highways, covering Claims No. D-914, D-993, D-918 Par. C, in which the factual situation and the law applicable thereto were the same as that involved in the above styled case, the parties have agreed upon a stipulation to be filed in the above-styled action as follows:

It is hereby stipulated and agreed by and between Black Rock Contracting, Inc., claimant, and the West Virginia De-

partment of Highways, State of West Virginia, respondent, that the claimant is entitled to recover from the respondent, the West Virginia Department of Highways, State of West Virginia, the following sum of money on the following item alleged in its Notice of Claim under Item I, Presplitting Technique, 6,519 cubic yards, at $1.03 per cubic yard, $6,714.57.

It is further stipulated and agreed by and between the claimant and the respondent hereto that all other items of claim and the parts of the above set out and described item of claims not agreed to be paid in this stipulation, as set out and alleged in claimant's Notice of Claim filed in this action, are to be disallowed and not considered by the Court for any award and are to be dismissed.

Upon consideration of the claimant's and the respondent's representations, the Opinion of the Court heretofore filed in deciding the claims of Vecellio & Grogan, Inc., vs. Department of Highways, covering Claims No. D-914, D-993, D-918 Par. C, and the stipulation set out aforesaid, the Court is of the opinion to and does sustain the same and the same are hereby received, filed, and accepted; and it is hereby further ordered that the claimant be, and it is hereby granted an award against the respondent for the following sum on the following item:

Presplitting Technique	6,519 cy at $1.03	$6,714.57
Interest at the rate of 6% per annum on $6,714.57, from September 23, 1975, to February 1, 1979, in accordance with Chapter 14, Article 3, Section 1 of the Official Code of West Virginia, 1931, as amended.		$1,353.22
Total Award		$8,067.79

It is hereby further ordered that all other items of claim and the parts of claims set out and alleged in claimant's Notice of Claim, which were not allowed in the above award, are hereby disallowed.

ENTER:
John B. Garden
Judge

APPROVED BY:

BLACK ROCK CONTRACTING, INC.
claimant,

By: Charles L. Woody

Its Counsel

WEST VIRGINIA DEPARTMENT OF
HIGHWAYS, STATE OF WEST VIRGINIA,
respondent,

By: Stuart Reed Waters, Jr.
Its Counsel

Opinion issued April 10, 1979

LAWRENCE & CLAUDETTE FERGUSON

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-100)

Claimants appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

This claim, in the amount of $86.95, was filed against the Department of Highways by the claimants for damages sustained by their 1978 Delta 88 Oldsmobile automobile.

On January 27, 1978, at approximately 7:00 p.m., the claimants were traveling westerly on U. S. Route 60 just west of Montgomery, West Virginia. The claimant Lawrence Ferguson was driving at approximately 40 to 45 miles per hour. It was dark, and the road was clear. As they were proceeding around a curve, the automobile struck a pothole in the highway, damaging a tire, rims, and hubcaps. Mr. Ferguson testified that he had seen other potholes prior to the accident and that he saw the one he struck just prior to the accident, but

was unable to stop or miss it because of the traffic behind him.

The consistent position of the Court with respect to cases involving alleged highway defects is set out in the case of *Parsons v. State Road Comm'n.*, 8 Ct. Cl. 35 (1969), wherein the Court stated in part as follows: "This Court has many times held that the State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer, and its duty to travelers is a qualified one; namely, reasonable care and diligence in the maintenance of a highway under all the circumstances." The case of *Adkins v. Sims,* 130 W.Va. 645, 46 S.E. 2d 81 (1947) holds that the user of the highway travels at his own risk and that the State does not and cannot assure him a safe journey. The maintenance of highways is a governmental function, and funds available for road improvements are necessarily limited.

There is no evidence in the record that the respondent had notice of the pothole prior to the accident, and the existence of a defect in the road does not establish negligence per se. See *Bodo v. Dept. of Highways,* 11 Ct. Cl. 179 (1977) and *Light v. Dept. of Highways,* Claim No. CC-77-53.

Accordingly, the Court is of the opinion to and does disallow this claim.

Claim disallowed.

Opinion issued April 10, 1979

KAREN HALLER

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-123)

Claimant appeared in person.

Henry Haslebacher, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant filed this claim against the respondent for medical and dental expenses incurred as the result of an accident on August 16, 1975. Damages to her automobile were recovered from insurance.

About 9:00 p.m. on the evening of the accident, the claimant left her home in Montrose, West Virginia, in Tucker County, to go to Saint George to visit friends. She was driving her 1972 Ford Pinto automobile. It had rained heavily for about three hours. On her return from Saint George, she was proceeding on Route 21 approximately two and one-half miles from her home. As she approached the intersection of Local Service Route 17, she started to make a left-hand turn and encountered water across the road. Applying the brakes, she was unable to stop, and struck a portion of the road where a culvert had washed out. The impact caused her head to hit the windshield and steering wheel. She suffered injuries to her teeth and knee. A companion with her received injuries to his teeth and knees. After the accident, she and her friend opened the door of the automobile, climbed over the hood, and walked to a neighbor's house. They were taken to Tucker County Hospital in Parsons, West Virginia. Later, her mother took them to the University Hospital at West Virginia University. The claimant testified that she was familiar with the road and that the culvert was not blocked two days before the accident.

Jesse Roy, an employee of the respondent, was County Supervisor of Tucker County at the time of the accident. He testified that on the night of the accident, it was raining very hard and there were flooding conditions. The Chief of Police of Parsons notified him of the accident and told him that signs were needed. He proceeded to the accident scene, put out signs, and closed Route 21. The only way to cross the washed out area of the road was to use the car as a bridge. The water was swift. Roy further testified that no complaints had been received indicating that that particular culvert was out of shape, filled with debris, or would not carry water. He stated that heavy rains can wash timber cuttings and other debris down from the hills and block the culverts.

From the evidence, there is no showing that the respondent knew or should have known that there was a clogged culvert or other defect causing the flooding of the highway, nor was there a showing that the respondent was negligent in permitting the partial flooding of the highway. See *Varner v. Department of Highways,* 9 Ct. Cl. 219 (1973). The State is not a

guarantor of the safety of travelers on the highways, and the user of the highways travels at his own risk. *See Parsons v. State Road Commission,* 8 Ct. Cl. 35 (1969); *Adkins v. Sims,* 130 W.Va. 645, 46 S.E. 2d 81 (1947).

For the reasons herein stated, the Court disallows claimant's claim.

Claim disallowed.

Opinion issued April 10, 1979

JAMES RYAN & JOYCE RYAN

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-77-189)

Arthur M. Recht, Attorney at Law, for claimants.

Henry Haslebacher, Attorney at Law, for respondent.

GARDEN, JUDGE:

In the afternoon of March 20, 1977, the claimants were returning to their home in Wheeling from a weekend trip to Spruce Knob. They were travelling west on Interstate 70 in Ohio County, West Virginia, and were approaching what is commonly referred to as the Dallas Pike Interchange. The claimant James Ryan was driving a 1976 Honda automobile which was owned by his wife, the claimant Joyce Ryan. Interstate 70 at and near the scene of the accident is a typical interstate highway with two lanes for westbound traffic and two lanes for eastbound traffic, the westbound and eastbound lanes being separated by a wide median strip. While the weather was overcast, the roads were dry, and the claimant James Ryan testified that he was travelling 55 miles per hour and was proceeding in the curb or right-hand lane of the two westbound lanes.

James Ryan testified that traffic was heavy and that there were cars continually passing them on the left or in the passing lane. Suddenly the Honda struck a large broken section of

the right-hand lane. Ryan testified that the broken section covered the entire right-hand lane and was at least ten feet in length and covered the entire width of the curb lane. As a result of striking this defective section of the highway, the Honda turned over and left the highway, landing on its roof on the berm to the right of the westbound lanes. Both claimants testified that neither of them observed any warning signs indicating that they were approaching a section of broken pavement, nor were there any barricades erected which would have prevented motorists from striking the broken pavement.

As a result of the accident, both claimants were taken by ambulance to the emergency room at Wheeling Hospital. Mr. Ryan was x-rayed for possible broken ribs, but the x-rays were negative for any fractures. He testified that he had a pain in his chest and that the next day he experienced pain in his neck. As a result of the neck pain, he made an appointment with an orthopedic specialist in Wheeling. His appointment with the doctor could not be arranged until June 30, 1977, and by that time, Mr. Ryan testified that he had recovered from his neck injury; nevertheless, he was examined by the doctor, who was of the opinion that he has recovered from all of his injuries. Mr. Ryan also testified that after the accident he experienced some ringing in his ears and consulted another doctor for this condition. The ringing sensation eventually disappeared, and we believe it is clear that Mr. Ryan suffered no permanent injuries as a result of the accident. The total medical expenses incurred by Mr. Ryan, including ambulance service, amounted to $191.20.

The claimant Joyce Ryan, on the other hand, was more seriously injured, although not extensively, in the form of injury to her teeth. She was taken by ambulance to Wheeling Hospital, and although she was experiencing pain in her neck, she was not x-rayed, but simply treated for bruises. Mrs. Ryan testified that about ten years prior to the accident, she had fallen and chipped two of her upper right front teeth which were capped by Dr. John G. Kramer of Martins Ferry, Ohio. As a result of the accident, her upper right central incisor was fractured and was surgically removed by an oral surgeon. Dr. Kramer then fitted her with a temporary partial denture, and,

at a later date, a permanent partial denture. At the hearing, Mrs. Ryan testified that she was not suffering any pain but was concerned about her appearance from a cosmetic standpoint. In addition to the damage to her automobile, which was stipulated by counsel to be in the amount of $2,930.00, she incurred medical and dental expenses in a total amount of $825.00.

Edward L. Schafer, respondent's superintendent for Interstate 70 in Ohio County, testified that he was aware of the condition of this particular section of interstate, and he was of the opinion that the breakup of the concrete surface was due to the unstable condition of the ground below the surface of the highway. He was not certain as to when he first became aware of the condition, but upon receiving complaints, he had begun a program of filling the defective section with blacktop until permanent repairs could be effected. He described the broken-up section as rectangular in shape, covering a width of 10 feet of this 12-foot lane of traffic and a length of about 5 feet. He testified that on at least seven or eight occasions prior to the Ryan accident, this particular section of the road was filled with blacktop. Wilbur J. Breiding, an employee of the sign department of respondent in Ohio County, testified that on April 9, 1976, he and a crew of three installed a sign displaying the word "BUMP" within about 1,000 feet to the east of this defective area of the roadway, the purpose of which was to warn approaching motorists of the existence of what we deem to have been a dangerous condition.

We have consistently held that the respondent is not an insurer of the safety of the travelling public using its highways, but we also have held that the respondent is under a duty to exercise reasonable care to maintain the highways of this State in a reasonably safe condition and to warn motorists of any defects or impending dangers in the highways. To knowingly permit this dangerous condition to remain in varying degrees of defectiveness for a period of at least 11 months prior to the Ryan accident, and to fail to take more effective action to warn motorists of the condition of this highway, in our opinion, constitutes negligence. Believing that such negligence was the proximate cause of the Ryans' accident and their resulting in-

juries, we hereby make awards in favor of James and Joyce Ryan in the amounts of $800.00 and $6,250.00, respectively.

Award of $800.00 to James Ryan and

Award of $6,250.00 to Joyce Ryan.

Opinion issued April 10, 1979

PATTY SHEETS, ADMINISTRATRIX
OF THE ESTATE OF RAY SAMUEL SIX, DECEASED

vs.

DEPARTMENT OF HEALTH,
DIVISION OF MENTAL HEALTH

(No. CC-76-80)

Michael S. Francis and *David Underwood,* Attorneys at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

Patty Sheets, as Administratrix of the Estate of Ray Samuel Six, deceased, filed this claim against the respondent for damages as the result of the death of Ray Samuel Six. Patty Sheets, a daughter of the deceased, lived with her family at Star Route 1, Littleton, West Virginia. The decedent also lived in Littleton with his wife, another daughter, and her son. He was a large man in his early 70's. He retired from his employment with the Baltimore & Ohio Railroad in 1950 due to a disability.

On July 17, 1975, he was referred to Dr. Jose Mendoza, Director of the Northern Panhandle Mental Health Center in Wheeling, West Virginia, by the director of mental health in New Martinsburg for examination and commitment to Weston State Hospital. He was brought to Dr. Mendoza's office in an ambulance under restraint. Dr. Mendoza's diagnosis was that of "an old man in his 70's, very confused, disoriented" suffering from "organic brain syndrome due to arteriosclerosis . . . or dementia". Dr. Mendoza prescribed that the decedent be hos-

pitalized at Weston State Hospital with subsequent transfer to a nursing home. He was admitted to the hospital on July 18, 1975.

The claimant testified that she was very close to her father and that she had had him over for dinner on July 16, 1975. She did not know he was committed to the hospital until noon on July 18. Although she tried, she did not see him again until his admission to the University Hospital at West Virginia University on July 23, 1975. She further testified that she believed that her mother and sister had referred her father to Dr. Mendoza, and that the "people around town knew he had hardening of the arteries". On July 20, he was treated by Dr. Baldonado Hao, staff physician at the Weston hospital, for a superficial scratch on the left middle finger of his left hand, which he received while attempting to jump the fence. Dr. Hao ordered 24-hour mechanical restraints because the patient was "agitated and unmanageable, confused, disoriented, and combative". Later, Mr. Six was referred to Dr. Hao for treatment of diarrhea and fever. At 8:00 a.m. on July 21, she examined him for injuries received when he fell against the wall of his room. He received a hematoma, contusion, and ecchymosis around the left eye. She prescribed ice compress on the eye and medication for the inflammation. She further ordered x-rays of the eye and skull and ordered him transferred to the medical center at the hospital. During the examination, he did not respond, and was very confused and out of contact with reality.

At the time Mr. Six fell, he was attended by two aides, Nellie Bell Watson and James Meyers. He was in a private room furnished with two beds, a chest of drawers, and a potty chair. He was suffering from a severe case of diarrhea. The aides changed his bed four times the night of his fall. Just prior to his injury, the two aides had untied the restraints, washed and cleaned the patient, and sat him down on the potty chair while they changed the bed. Meyers was behind the bed, and Mrs. Watson was on the other side with her back to the patient. Mr. Six, unsteady on his feet, jumped up from the chair and went out into the hall. The aides found him standing in the hall and led him back to the room.

Mrs. Watson explained what happened.

"When we got in the bedroom and got inside the door, he was jerking trying to get away from us, you know, and we was trying to hold on to him. Mr. Meyers went in the door first, and then Mr. Six he had hold of his arm, and I had hold of his other arm. Then I came on in and just as I got inside the door, he hauled off and gave me a jerk and slung me over in the corner into the chest of drawers, just like a whirligig . . . When I turned back around, Mr. Meyers didn't have ahold of him, and he went staggering and he fell into the wall and hit his head against the wall . . . Mr. Meyers was standing over from Mr. Six and he didn't have ahold of Mr. Six when I turned around. Mr. Six was very unsteady on his feet, and he stumbled, and he went into the wall, hit his head against the—I call it the door facing."

Mrs. Watson further responded.

"Q. Meyers try to restrain him with force?

A. Meyers just tried to hold onto his arm same as I did to keep him from falling and to try to get him back into his room.

Q. Didn't he grab him by the arm and shake him?

A. No. He didn't shake him."

During the hearing, the hospital employees were questioned about Mr. Meyers' treatment of the patients. Apparently, there were rumors about Mr. Meyers, but that was the extent of the testimony. Mrs. Watson testified that, because of the rumors, she asked that she not be assigned to work with him again. She also stated that ". . . He seemed like a nice somebody to work with. He helped me good. I have no complaint about his working or helping me, and I never heard him say anything out of the way to any of the patients that night whatsoever."

The record indicated that Mr. Meyers was reported for insubordination and later discharged.

Mr. Six was transferred to the University Hospital at West Virginia University on July 23, 1975. Dr. G. Robert Nugent

attended him at the University Hospital. He stated that he was agitated and confused; that he would talk when made to talk, but didn't make sense.

Mr. Six's condition deteriorated, developing into pneumonia, which is a common problem with elderly people injured in falls. Mr. Six died on August 8, 1975.

Patty Sheets testified that, while in the University Hospital, her father, in response to a question as to what happened to him, responded, "They beat me". After completion of the testimony, respondent's objection to this testimony was withdrawn. However, the record does not establish that there was a physical beating of the decedent.

The claimant relied upon the doctrine of res ipsa loquitur to establish liability, which doctrine the Court finds is not applicable to this case. The doctrine of res ipsa loquitur cannot be invoked where the existence of negligence is solely a matter of conjecture and the circumstances are not proved but must themselves be presumed, or when it may be inferred that there was no negligence on the part of the defendant. The doctrine applies only in cases where defendant's negligence is the only inference that can reasonably and legitimately be drawn from the circumstances. *Davidson's Inc. v. Scott,* 149 W.Va. 470, 140 S.E. 2d 207 (1965); *Mullins v. Board of Governors of W. Va. University,* 8 Ct. Cl. 33 (1969). The testimony is unrefuted that the decedent fell after freeing himself from the hospital aides and received injuries resulting in his ultimate death. The Court finds that the claimant has failed to prove by a preponderance of the evidence that the injury and subsequent death of the decedent were caused by the negligence of the respondent. Accordingly, the claim is disallowed.

Claim disallowed.

Opinion issued April 10, 1979

CHARLES H. SPRADLING, JR.

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-68)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

RULEY, JUDGE:

This claim against the respondent, in the amount of $117.62, was filed by the claimant for damage sustained by an automobile he was driving.

On January 22, 1978, at approximately 11:45 a.m., the claimant, driving a 1973 Vega automobile belonging to one Betty Slater, entered I-64 and I-77 at the Washington Street ramp in Charleston, West Virginia. It was cold and the road was clear. There was an automobile beside him, but no one was directly in front as he approached the highway at 30-35 miles per hour. The front end of the automobile went into a hole. The claimant testified that he heard a scraping noise on the bottom of the vehicle, after which the transmission ceased to function and the transmission fluid leaked out. The claimant further stated that he returned to the scene of the accident the next day and found that a piece of steel, four inches wide, was sticking up about five inches in the middle of the hole. After the accident, he had the automobile repaired and returned it to the owner.

Robert Glen, a foreman for the respondent, testified that a courtesy patrol driver reported that equipment being operated by the Union Boiler Company caught the end of an expansion joint in the highway and lifted it above the road surface. The Union Boiler Company was employed by the respondent to assist in the removal of piles of snow from the highway. Glen stated that the notification from the patrol driver was received at approximately 10:00 a.m. on January 22, the morning of the accident. Although the testimony is not clear, Glen apparently went to the scene with other employees of the re-

spondent and with sledge hammers beat back the expansion joint, returning to the office by lunch time.

The claimant testified that the accident occurred at approximately 11:45 a.m. Mr. Glen testified that repairs were made after 10:00 a.m. Spradling also stated that the piece of steel was still there the next day.

However conflicting the testimony, general principles of tort and agency law require that the Court find the respondent liable. The Union Boiler Company, as agent for the respondent, damaged the expansion joint, and negligently failed to make any effort to notify the respondent or to warn motorists. Any such effort could have prevented the damage to the car. "Where an agent acts negligently in the regular course of his employment, the law is well settled that the principal must bear the consequences of his agent's negligence * * *". 1A M.J. *Agency* §86. The contractor negligently performed his appointed task; the respondent is therefore liable. *Bubar v. Dept. of Highways*, 12 Ct. Cl. 204 (1978).

The damage was sustained by an automobile belonging to Betty Slater. The claimant was the bailee of the automobile. "A bailee in possession may sue for and recover judgment for the wrongful damage or destruction by another of the bailed property. This principle applies to a gratuitous bailee, as well as to a bailee for hire." *Petrus v. Robbins*, 196 Va. 322, 83 S.E. 2d 408 (1954), 2B M. J. *Bailments* §8.

Accordingly, the Court makes an award to the claimant in the amount of $117.62.

Award of $117.62.

Opinion issued June 13, 1979

CAPITOL BUSINESS INTERIORS,
DIVISION OF CAPITOL BUSINESS EQUIPMENT, INC.

vs.

DEPARTMENT OF FINANCE & ADMINISTRATION

(No. CC-79-60)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of $141.00 for wire hanger clips purchased by the respondent on or before July 30, 1975. Respondent was billed on September 12, 1975, but made no payment to the claimant.

In its Answer, the respondent admits the validity of the claim and states that there were sufficient funds on hand at the close of the fiscal year in question from which the claim could have been paid.

Based on the foregoing, an award in the amount of $141.00 is hereby made to the claimant.

Award of $141.00.

Opinion issued June 13, 1979

DREMA D. GREENLEE and
STEPHEN E. GREENLEE

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-79-70)

No appearance by claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for dam-

ages in the sum of $54.00, based upon the following facts: On or about January 15, 1979, claimants were driving across the Shadle Bridge in the vicinity of Point Pleasant, in Mason County, West Virginia. While claimants were crossing the bridge, which is owned and maintained by the respondent, a piece of floor decking punctured claimants' left rear tire. Being of the opinion that the stipulation establishes legal liability on the part of the respondent, and that the sum of $54.00 is a fair and equitable estimate of the damage sustained by the claimants, an award in the above amount is hereby made.

Award of $54.00.

Opinion issued June 13, 1979

HECK'S, INC.

vs.

DIVISION OF VOCATIONAL REHABILITATION

(No. CC-79-36)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of $245.56 for unpaid bills representing small purchases made by the respondent between June, 1974 and April, 1976. In its Answer, respondent admits the validity of the claim and further states that there were sufficient funds on hand at the close of the fiscal years in question from which the claims could have been paid.

Based on the foregoing, an award in the amount of $245.56 is hereby made to the claimant.

Award of $245.56.

Opinion issued June 13, 1979

JAMES C. MACKNIGHT

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-144a)

Claimant appeared in person.

Henry Haslebacher, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant, James C. MacKnight, filed this claim against the respondent for damages to his 1977 Ford Pinto automobile.

Early in the afternoon of April 23, 1978, the claimant was driving his automobile on Route 3 south of New Haven, West Virginia, at approximately 35 miles per hour. It was cloudy and the road was wet. As he proceeded over a small rise in the highway, he came upon a hole in the road. In an attempt to miss the hole, he veered to the right onto the berm of the highway. The right front wheel struck the hole, damaging the tire and rim.

In order for negligence on the part of the Department of Highways to be shown, proof that the respondent had actual or constructive notice of the defect in the road is required. *Light v. Dept. of Highways,* 12 Ct. Cl. 61; *Lowe v. Dept. of Highways,* 8 Ct. Cl. 216 (1971). There is no evidence in the record of notice to the respondent. The State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. *Adkins v. Sims,* 130 W. Va. 645, 46 S.E. 2d 81 (1947). Accordingly, the Court disallows this claim.

Claim disallowed.

Opinion issued June 13, 1979

JAMES C. MACKNIGHT

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-144b)

Claimant appeared in person.

Henry Haslebacher, Attorney at Law, for respondent.

WALLACE, JUDGE:

This claim, originally filed against the respondent by Frances J. MacKnight, was amended by the Court substituting James C. MacKnight, husband of Frances J. MacKnight, as claimant.

On or about May 1, 1978, Frances J. MacKnight was driving her husband's 1977 Ford Pinto automobile southerly on W.Va. Route 62 in Mason County, West Virginia, taking her daughter to band practice at the high school. The weather was clear and the highway was dry. She had stopped at the traffic light located at the Pomeroy Mason County Bridge, and had started again, proceeding at approximately 15-20 miles per hour. Just before she reached the high school, the automobile struck a pothole in the highway, damaging a tire and rim.

Mrs. MacKnight testified that she travelled this road five to six times a week and that she knew the hole was there.

This Court has held many times that the State is not a guarantor of the safety of its travellers on its roads and that the user of the highways travels at his own risk. *Adkins v. Sims,* 130 W.Va. 645, 64 S.E. 2d 81 (1947); *Parsons v. State Road Comm'n.,* 8 Ct. Cl. 35 (1969). Further, the record does not establish that the respondent had notice of a defect in the highway. For the State to be found liable, it must have had either actual or constructive notice of the defect in the highway. *Keith v. Dept. of Highways,* 12 Ct. Cl. 199; *Bradshaw v. Dept. of Highways,* 12 Ct. Cl. 187.

Accordingly, the Court disallows this claim.

Claim disallowed.

Opinion issued June 21, 1979

LEWIS DALE METZ, Claimant

vs.

WEST VIRGINIA STATE BOARD OF PROBATION AND PAROLE; TO WIT: ITS AGENTS — MALCOLM LOUDEN, Chairman-Member, and LINDA MECKFESSEL, Member-Secretary,

and

WEST VIRGINIA DEPARTMENT OF CORRECTIONS; TO WIT: ITS AGENTS — STEWART WERNER, Commissioner, and BOB WILLIS, Parole Officer, Respondents.

(No. CC-77-155)

Ernest M. Douglass, Attorney at Law, for claimant.

Frank M. Ellison, Deputy Attorney General, for the respondents.

PER CURIAM:

This claim is before the Court, at this time, upon the respondents' motion to dismiss.

The claimant, who initially was not represented by counsel, has filed a claim in the sum of $5,000.00 for damages allegedly sustained as the result of the alleged unlawful revocation of his probation on May 17, 1977, and his subsequent confinement at Huttonsville Correctional Center until August 19, 1977, when he was released upon a writ of habeas corpus issued by the Circuit Court of Kanawha County.

The basis of the motion to dismiss is that the claimant has an adequate remedy at law in the federal courts under the Civil Rights Act, 42 U.S.C. §1983. The fact that a claimant might possibly have some other remedy or resource never has been held to be a bar or defense to the prosecution of a claim in this Court, but, upon occasion, proceedings in this Court have been stayed pending the outcome of a companion legal action. In addition, while in the Notice of Claim reference

is made to various constitutional provisions which might be viewed as indicating the basis for assertion of a claim under the Civil Rights Act, it also may be viewed as asserting a claim based upon the common law tort of false imprisonment.

The position of the respondents upon their pending motion to dismiss appears to be somewhat confused. On the one hand, it is asserted in their behalf that the claimant has an adequate remedy at law against them and that they are subject to prosecution in the federal courts under the Civil Rights Act. On the other hand, it is asserted in respondents' brief that they are immune from prosecution, such immunity being based on the quasi-judicial nature of their duties. The confusion arises from the circumstance that they cannot be both subject to prosecution and immune from prosecution. In any case, examination of those subjects by this Court appears to be wholly unnecessary because the Civil Rights Act applies only to "persons" who, acting under color of law, violate another's Constitutional rights, and a superficial examination of authorities indicates that a state agency, such as those designated as respondents in this case, is not a "person" within the meaning of that act. See 42 U.S.C.A. §1983, Notes 129, 131 and 135.

For the foregoing reasons, the motion to dismiss is denied as to the respondents, the West Virginia Board of Probation and Parole and the Department of Corrections.

Of course, this Court has only such jurisdiction as is conferred upon it by statute, as delineated by West Virginia Code, §14-2-13, and limited by §14-2-14. §14-2-13 provides:

"§14-2-13. Jurisdiction of the Court.

The jurisdiction of the court, except for the claims excluded by section fourteen [14-2-14], shall extend to the following matters:

1. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the State or any of its agencies, which the State as a sovereign commonwealth should in equity and good conscience discharge and pay.

2. Claims and demands, liquidated and unliquidated,

ex contractu and ex delicto, which may be asserted in the nature of setoff or counterclaim on the part of the State or any state agency.

3. The legal or equitable status, or both, of any claim referred to the court by the head of a state agency for an advisory determination."

It is clear from that statute that this Court has no jurisdiction over any individual person, and the claim must be, and is hereby, dismissed as to the individual persons named as respondents.

Accordingly, as heretofore stated, the Court grants the motion to dismiss as to the following individuals: Malcolm Louden, Linda Meckfessel, Stewart Werner, and Bob Willis, and overrules the motion to dismiss as to the following agencies: West Virginia State Board of Probation and Parole and West Virginia Department of Corrections.

Opinion issued June 30, 1979

ARNOLD W. BOLYARD

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-1)

Randy Goodrich, Attorney at Law, for claimant.
Henry Haslebacher, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant, Arnold W. Bolyard, seeks compensation for the total loss of his automobile, which occurred when he collided with a large boulder on U.S. Route 119 between Clendenin and Elkview, West Virginia.

The accident happened at approximately 5:00 a.m. on the morning of August 15, 1977. The claimant was driving in the southbound lane of the highway in his 1969 Oldsmobile Delta 88 automobile at about 35 mph. It was dark and moderately foggy. The road was dry and relatively straight. There was an automobile approaching from the opposite direction in the northbound lane. The claimant testified that he switched his

headlights from high to low beam, and, after the automobile passed, he switched back to the high beam, at which time he saw a boulder immediately ahead in the highway. He applied the brakes, skidded approximately 30 feet, and crashed into the boulder. The claimant further testified that he was told by members of a family living next to the highway that it was the practice of the local substation of the Department of Highways to supply the family with flares to warn motorists of rock slides.

Mr. Gary Huffman, a foreman employed by the respondent, testified that during his three-year tenure at the substation, he had no personal knowledge of any such procedure.

The section of Route 119 at which the accident took place is similar to stretches of highway throughout the State which are flanked by steep rock cliffs. Mr. Huffman, in his testimony, admitted that rock slides had occurred in the area, but there had been no notice of an impending rock fall. There was a "Falling Rock" sign posted approximately 100 yards north of the scene of the accident.

There is no evidence that the respondent knew or should have known of the existence of an unusually dangerous condition which would render a mere warning insufficient. *Smith v. Dept. of Highways,* 11 Ct. Cl. 221 (1977). It is apparent from the evidence that the boulder had fallen just prior to the accident. In fact, the claimant testified that he was "very positive" he was "the first car there."

The law of West Virginia is well established that the State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). "As the State is not an insurer of the safety of those travelling on the public roads, anyone injured or who sustains damage must prove that the State has been negligent in order to render the State liable." *Hanson v. State Road Comm'n.* 8 Ct. Cl. 100 (1970).

The record does not establish negligence on the part of the respondent, and, accordingly, the Court disallows the claim.

Claim disallowed.

Opinion issued June 30, 1979

LAWRENCE CHILDERS

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-63)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

This claim arises out of an automobile accident which occurred at 5:30 a.m. on February 17, 1978, on U.S. Route 50 west of Clarksburg, West Virginia, approximately one-half mile east of the junction of Routes 50 and 23. The claimant, driving his 1969 Cadillac Fleetwood automobile, was proceeding westerly from his home in Clarksburg to his place of employment at the Willow Island power station in St. Marys, West Virginia. He was accompanied by two sleeping coworkers. It was dark, the weather was clear, and the four-lane highway was dry.

The claimant testified that he was travelling at approximately 55 mph and that, as he crested a slight knoll on the highway, his headlights shone on what he perceived to be a brown grocery bag lying approximately 100 feet in front of his vehicle in the center of the right-hand lane. He was unsure whether any automobiles were beside him in the passing lane. He slowed to a speed of 40 mph and chose to straddle the unknown object on the highway. Unfortunately, the object was a large rock, which, when struck, caused an estimated $649.20 in damages to the underside of the automobile. The claimant further testified that he had driven this route every morning of the week prior to the accident and had not previously encountered any rocks on the highway in the area in question.

Marshall Bobbitt, a foreman for the respondent, testified that daily during the entire month of February, 1978, snow patrols were dispatched at regular hourly intervals to inspect an assigned section of Route 50 for snow and/or debris. No debris

of any kind was reported found in the area of the accident on the morning of February 17, 1978, prior to the accident. The evidence revealed that the section in question was not known to be a falling rock area. The claimant was of the opinion that the rock had just fallen on the highway immediately before the accident.

This Court repeatedly has adhered to the general principle of the case of *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947), that the State is not a guarantor of the safety of travelers and that the user of the highway travels at his own risk. The duty of the State in the maintenance of highways is one of reasonable care and diligence under all circumstances. In the case of *Hammond v. Department of Highways*, 11 Ct. Cl. 234 (1977), this Court held, "The unexplained falling of a rock or boulder onto a highway, without a positive showing that the Department of Highways knew or should have known of a dangerous condition and should have anticipated injury to person or property, is insufficient. . . .to justify an award."

There was no evidence presented showing any negligence on the part of the respondent. Accordingly, the Court disallows the claim.

Claim disallowed.

Opinion issued June 30, 1979

CLINIC PRIVATE DIVISION, UNIVERSITY OF VIRGINIA

vs.

DIVISION OF VOCATIONAL REHABILITATION

(No. CC-79-22)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of $842.00 for unpaid hospital bills representing services performed by the claimant for one Denny L. Hood, a client of the West Virginia Division of Vocational Rehabilitation.

In its Answer, the respondent admits the allegations set forth in the Notice of Claim and joins the claimant in requesting payment.

Based on the foregoing, an award in the amount of $842.00 is hereby made.

Award of $842.00.

Opinion issued June 30, 1979

DILL'S MOUNTAINEER ASSOCIATES, INC.

vs.

DEPARTMENT OF HEALTH

(No. CC-79-94)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of $2,406.00 for equipment which was ordered, delivered, and received, but for which no payment was made by the respondent.

In its Answer, the respondent admits the validity of the claim, stating that payment for said equipment had not been made prior to the close of the fiscal year, with the result that the funds which had been encumbered for the purchase expired.

In view of the foregoing, an award in the amount of $2,406.00 is hereby made.

Award of $2,406.00.

Opinion issued June 30, 1979

JAMES L. DYKES

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-225)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

RULEY, JUDGE:

The claimant, James L. Dykes, seeks recovery from the respondent in the amount of $68.86 for damages to his automobile which occurred on September 13, 1978.

On the day of the accident at approximately 2:00 p.m., the claimant was driving his 1974 Vega station wagon on W. Va. Route 61 between Pratt, W. Va. and East Bank, W. Va., when he approached a road construction area. The respondent was grading the sides of Route 61. Flagmen were stationed at each end of the construction area to control the flow of traffic. After being signaled forward by a flagman, the claimant proceeded at a speed of 10-15 mph following 6-8 feet behind a coal truck. While the claimant's attention was focused on a road grader adjacent to the highway, his automobile struck a rock on the highway, approximately 10 inches wide and 8 inches high, causing damage to his automobile.

If the Court were disposed to hold the respondent guilty of negligence, it is also clear from the record that the claimant failed to exercise reasonable care and caution under the circumstances. The presence of flagmen at a construction site is sufficient to alert the reasonably prudent motorist to the possibility of a dangerous condition. Notwithstanding this warning, the claimant chose to follow a coal truck at an extremely close distance, limiting his vision of the road ahead. While his vision was thus limited and his attention was on the road grader, the rock was struck.

It is the opinion of this Court that the claimant's failure to exercise reasonable care under the circumstances was the

proximate cause of the accident and resulting damages. Accordingly, the claim is hereby disallowed.

Claim disallowed.

Opinion issued June 30, 1979

NATIONWIDE INSURANCE CO.,
AS SUBROGEE OF PHILLIP W. ALEXANDER

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-79-150)

No appearance by claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a duly executed written stipulation to the effect that the respondent is liable for damages in the sum of $179.22, based upon the following facts: On or about December 6, 1977, claimant's insured, Phillip W. Alexander, was operating his vehicle on Route 94 and 17th Street in Huntington, West Virginia. A toll booth barricade on the entrance ramp on the north side of Route 94 and 17th Street had been negligently affixed by the respondent, and, as a proximate result of this negligence, the barricade was blown into the side of claimant's insured's vehicle, damaging it in the amount of $179.22.

Based on the foregoing facts, an award in the above amount is hereby made.

Award of $179.22.

Opinion issued June 30, 1979

LARRY KEITH SMITH

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-259)

No appearance by claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

This claim was filed by Mary Ann Smith against the respondent, but during the hearing, it developed that she sought recovery for damage to an automobile registered to her husband, Larry Keith Smith. The Court, on its own motion, amended the complaint and named Larry Keith Smith as the proper claimant.

On September 25, 1978, at approximately 2:00 p.m., Mary Ann Smith was driving her husband's 1972 Lincoln automobile in an easterly direction on Lake Washington Road in Wood County, West Virginia, when she struck a deep pothole, resulting in damages to the automobile in the amount of $296.30.

Lake Washington Road is a narrow, two-lane, blacktop road which connects Route 68 with Dupont Road. Just prior to the accident, Mrs. Smith encountered four or five large potholes which she avoided by driving in the other lane. Traffic was heavy in the oncoming lane and behind her. She proceeded slowly at approximately 10 to 15 mph. Rounding a curve, she struck a large hole estimated to be 12 inches deep, resulting in the claimed damages.

Mrs. Smith notified the respondent of the accident and was advised that the respondent had received complaints concerning the potholes and that repairs should have been made.

While the respondent is not an insurer of those using its highways, it does owe a duty of reasonable care and diligence in the maintenance of the highways. *Lohan v. Dept. of Highways,* 11 Ct. Cl. 39 (1975).. The respondent had notice of the

dangerous condition on the narrow, heavily-travelled road, and the necessary repairs should have been made within a reasonable time.

The Court is of the opinion that the respondent was negligent in not making the necessary repairs, and that Mrs. Smith was free from contributory negligence. Accordingly, an award is made to the claimant in the amount of $296.30 for damages to the automobile.

Award of $296.30.

Opinion issued June 30, 1979

3M COMPANY

vs.

DEPARTMENT OF MOTOR VEHICLES

(No. CC-79-77)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of $3,000.00 for 20,000 decals ordered in March, 1974, by Governor Arch Moore. The decals were received by the Department of Motor Vehicles, but were never used. An invoice for said decals remains unpaid.

In its Answer, the respondent admits the allegations of fact set forth in the Notice of Claim, but further alleges that sufficient funds were not available at the close of the fiscal year in question from which the claim could have been paid.

While we feel that this is a claim which in equity and good conscience should be paid, we are of further opinion that an award cannot be made, based on our decision in *Airkem Sales*

and Service, et al. v. Department of Mental Health, 8 Ct. Cl. 180 (1971).

Claim disallowed.

Opinion issued June 30, 1979

CHRYSTINE WINER

vs.

DEPARTMENT OF HIGHWAYS

(No. CC-78-170)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant, Chrystine Winer, seeks recovery for alleged damages in the amount of $171.12 for personal injuries suffered when, as a pedestrian, she fell after the heel of her shoe became caught in a gap between a sidewalk and curb.

Between 4:00 p.m. and 4:30 p.m. on the clear and dry day of March 31, 1978, the claimant was walking home after an appointment with her hairdresser. While crossing the intersection of Chestnut and Walnut Streets in Clarksburg, West Virginia, the claimant stepped up onto the sidewalk adjacent to the eastbound ramp to U.S. Route 50. The heel of her shoe caught in a gap, slightly more than an inch in width, which separated the curb from the sidewalk, causing the claimant to lose her balance and fall. The claimant testified that she was carrying only her pocketbook and that, while unaware of the existence of the gap between the sidewalk and the curb, she had walked the particular route where the accident occurred since 1948.

Assuming that the respondent was negligent in failing to remedy the alleged defect, and that the gap did in fact constitute a dangerous condition, the claimant failed to exercise reasonable care for her own safety. It is well settled that a pedestrian has the duty to exercise ordinary and prudent care

for his own safety and to look for and protect himself from known and visible dangers. Failure to do so under normal circumstances constitutes contributory negligence as a matter of law. *Jackson v. Cockill,* 149 W.Va. 78, 138 S.E.2d 710 (1946); *Vance v. Department of Highways,* 10 Ct. Cl. 189 (1975).

The injuries suffered by the claimant were proximately caused by her own negligence, and, accordingly, the Court disallows her claim.

Claim disallowed.

REFERENCES

ADJOINING LANDOWNERS

ADVISORY OPINIONS

ANNUAL LEAVE

Claimant was granted an award for annual days leave to which the respondent admitted the claimant was entitled when he served as an administrative officer for the respondent's agency. *Richard L. Weekly vs. Office of Emergency Services* (CC-77-219a&b) 123

ASSUMPTION OF RISK

Where the claimant sustained personal injuries when she slipped on ice on the grounds of the Capitol Complex, the Court held that the claimant was barred from recovery by virtue of the doctrine of assumption of the risk. *Pauline E. Flaherty vs. Department of Finance & Administration* (CC-77-89) 50

AUCTIONS

Claimant crushing company alleged misrepresentation on the part of the respondent at an auction sale for junk and junk cars. The Court denied said claim as the evidence clearly revealed that the bidders understood that they were bidding for the right to clear a site of the junk located there, and not for any particular number of vehicles. *Cavalier Crushing Company vs. Dept. of Highways* (CC-77-26) 206

BAILMENT

The driver of a vehicle was made an award for damage sustained by said vehicle even though it did not belong to him as he had repaired the vehicle, and the Court held that a bailee in possession may sue for and recover judgment for wrongful damage or destruction by another of bailed property. *Charles H. Spradling, Jr. vs. Department of Highways* (CC-78-68) 336

BLASTING

Where the claimant and the respondent stipulated that blasting operations conducted by the respondent caused damage to claimant's electrical equipment, the Court made an award to the claimant for the amount of the damage. *Appalachian Power Company vs. Department of Highways* (CC-76-66) 1

Claimants were granted an award for damage to their home which was caused by blasting done by the respondent incident to the excavation of a cut through a hill, since liability for damage proximately caused by blasting is absolute. *Arnold G. Heater and Geraldine Heater vs. Dept. of Highways* (CC-78-130) 310

Where blasting activities by employees of the respondent caused damage to claimants' property, the Court made an award for such damage in accordance with the stipulation filed by the parties. *John Tillinghast & Janet Tillinghast vs. Department of Highways* (CC-77-80) 159

The Court made an award to claimant contractor for blasting done on a project where the technique of presplitting was used and the respondent State agency denied the claimant contractor any tolerance on drilling behind template. The Court held that the claimant contractor was entitled to a tolerance of 12 inches. *Vecellio & Grogan, Inc. vs. Dept. of Highways* (D-914, D-993, D-918, Par. C) 294

Where blasting by employees of the respondent resulted in damage to claimants' mobile home, the Court made an award to the claimants for the damage in accordance with the stipulation submitted by the parties. *John R. Wilder and Norma J. Wilder vs. Department of Highways* (CC-77-92) 24

BOARD OF REGENTS

The decision in *Airkem Sales and Service, et al. v. Dept. of Mental Health,* 8 Ct. Cl. 180 (1970) was applied to a claim where the respondent admitted that West Virginia University purchased traverse rods from the claimant and failed to pay for the same, but there were insufficient funds remaining in the appropriation for the particular fiscal year. *Capitol Business Equipment, Inc. vs. Board of Regents* (CC-77-108) 205

Where claimant supplied room air conditioning units to the respondent, and the respondent admitted the validity of the claim and that there were sufficient funds remaining in the fiscal year from which claim could have been paid, the Court made an award to the claimant. *Climate Makers of Charleston, Inc. vs. Board of Regents* (CC-78-90) 166

In a claim for damaged personal possessions stored by the claimant in a dormitory closet at West Virginia University, the Court determined that the legal relationship existing between the respondent, Board of Regents, and the claimant was one of landlord and tenant, and, as it is the duty of the landlord to maintain the premises used in common by his tenants in a reasonably safe condition, the Court made an award to the claimant for damage to personal possessions when a water leak occurred in the dormitory. *Lillian Dalessio vs. Board of Regents* (CC-78-88) 242

Where the respondent admitted liability and recommended payment of a claim for design and art work on brochures for the Southern West Virginia Community College at Logan, West Virginia, the Court made an award to the claimant, as the respondent had sufficient funds available during the fiscal year in which the order was made. *Direct Mail Service Co. vs. Board of Regents* (CC-77-151) 49

Claimant sustained personal injuries when he fell into a large hole adjacent to a path used by students attending a Fine Arts Camp at West Virginia University. The general law is that an institution is under a duty of ordinary or reasonable care with regard to the condition of its grounds to see that they are maintained in a reasonably safe condition, and, as the respondent failed in this duty, the Court made an award to the claimant. *Jacquelyn B. Eisenberg, parent and next friend of Mark Harold Eisenberg, an infant vs. Board of Regents* (CC-76-143) 273

Where claimant suffered personal injuries as the result of a fall when leaving a ladies' restroom at Fairmont State College, the Court held that the absence of a sign in the restroom was not sufficient to establish liability on the part of the respondent. *Mary Jo Hall vs. Board of Regents* (D-1025) 232

Where claimant sustained injuries as the result of a fall when leaving a ladies' restroom at Fairmont State College, the Court determined that the accident was one which would not have occurred if the claimant had been exercising ordinary

BRIDGES

inspection in 1974 had revealed that the bridge had a low limit of zero tons, but the respondent failed to repair the bridge or post a weight limit on it, the Court made an award to the claimant for the loss of said truck. *Charles E. Schooley v. Department of Highways* (CC-76-131) 28

Claimant alleged damage to his automobile when said automobile fell through a hole in the wooden floor of an old narrow bridge near Milton, West Virginia. The evidence disclosed that the bridge had been closed and the respondent had erected barricades at each end of the bridge, but said barricades or timbers were removed by unknown third persons. The facts failed to establish any negligence on the part of the respondent, and the Court denied the claim. *Roy D. Smith vs. Department of Highways,* (CC-76-129) 29

If the claimant had exercised the reasonable care required of her under the circumstances, and maintained a proper lookout for a hole in the walkway of a bridge which she knew to be there, she would have been able to avoid the injury. Therefore, the Court denied the claim, as the condition of the bridge was not the proximate cause of the accident. *Dema Marie Welch vs. Department of Highways* (CC-77-17) 136

Where the claimant sustained personal injuries when she fell into a hole on the sidewalk of a bridge, which hole she had seen prior to crossing the bridge, the Court held that the claimand was guilty of contributory negligence as a matter of law. *Dema Marie Welch vs. Department of Highways* (CC-77-17) .. 136

Where respondent's employees negligently placed a sheet of metal over a hole in a bridge, and, as a result of this negligence, claimant's vehicle sustained damage, the Court made an award to the claimant for said damage. *Marvin Roy Welch vs. Department of Highways* (CC-77-184) 73

An award was made to claimants for damage to their home from excessive water run-off which occurred as the result of respondent's negligent re-surfacing activities and inadequate drain design and maintenance of a street and bridge adjacent to claimants' property. *Loraine White and Velma White vs. Dept. of Highways* (CC-78-139) 271

BUILDING CONTRACTS

Where the respondent and claimant contractor agreed that the claimant was entitled to recover from the respondent for a certain sum of money on a claim involving the presplitting technique of excavation, the Court made an award in accordance with the previous decision in *Vecellio & Grogan, Inc. vs. Department of Highways,* 12 Ct. Cl. 294 (1979). *Black Rock Contracting, Inc. vs. Department of Highways,* (CC-76-9) 324

Where claimant was performing a contract and was requested to make additional changes while doing the work on the representation that a change order would be issued to cover the cost, and said change order was requested but not approved, the Court made an award to the claimant in the amount of the requested change order as the work was performed in a workmanlike manner and the cost was reasonable for the materials and labor involved. *Boone Remodeling Company vs. Department of Corrections* (CC-77-130a-e) 89

Where the claimant contractor had entered into a contract to conduct extensive renovations at one of respondent's institutions, and during the performance of the contract the contractor and respondent's supervisor of maintenance entered into an agreement whereby claimant would provide certain additional electrical work in exchange for releasing the contractor from performing certain other provisions under the contract, the Court held that the claimant would be made an award only for the extra work performed, as the claimant actually received a credit against the original contract, and the contractor was unable to perform a specific portion of the contract. *Boone Remodeling Company vs. Department of Corrections* (CC-77-130a-e) 89

Where the respondent's State agencies requested an advisory determination respecting a claim based upon a duly executed purchase order between the Department of Mental Health and the claimant, whereby the claimant became obligated to construct the first phase of construction upon a Central Mental Health Complex, but said contract was cancelled several months later when an administrative decision was made to the effect that the Mental Health Complex should not be constructed at that particular site, the Court advised the respondents that the claimant contractor should be paid the proposed settlement in discharge of all obligations under the contract. *Edward L. Nezelek, Inc. vs. Department of Finance & Administration & Dept. of Health* (CC-78-2) 74

Where the claimant entered into a contract with the respondent to make a feasibility study for an activity center at Twin Falls State Park, and later the contract was cancelled by the respondent, the Court held that the respondent breached the contract and that the claimant was entitled to compensation for that portion of the work completed under the contract. *Henry Elden and Associates vs. Dept. of Natural Resources* (CC-77-190) 189

Where claimant architect had a contract to design and prepare plans for Welch Emergency Hospital and the amount of said contract was in dispute but later settled by arbitration in accordance with the contract, the Court made an award in the amount of the arbitration finding. *Henry Elden and Associates vs. Dept. of Finance & Administration and Dept. of Health* (CC-78-269) 275

The claimant contractor was granted an award for rock excavation where rock was unexpectedly encountered in the construction of Canaan Valley State Park and the parties stipulated the claim. *McCloy Construction Company, Inc. vs. Dept. of Natural Resources* (CC-77-221) 312

Claimant contractor was forced to perform additional engineering and surveying work due to an apparent mistake in the plans and specifications of the contract between the contractor and the respondent; therefore, the Court made an award for the cost overrun which occurred through no fault on the part of the claimant. *Vecellio & Grogan, Inc. vs. Dept. of Highways* (D-914, D-993, D-918 Par. C) 294

Interest will not be charged against the respondent under W. Va. Code 14-3-1 where the claimant contractor receives the tentative final estimate but does nothing for several months; however, once the claimant contractor responds to the respon-

dent on the final estimate, interest begins to run again until the point in time when the contractor is paid the final estimate. *Vecellio & Grogan, Inc. vs. Department of Highways* (D-914, D-993, D-918, Par. C) 294

The Court denied a claim by a contractor engaged by the respondent to construct a highway in Nicholas County where the contractor alleged that the price for explosives should be increased over the bid price quoted in their contract because of impost charges placed on explosive sales in accordance with Internal Revenue regulations. The Court held that a careful reading of the Federal Register failed to reveal any provision which would authorize the purchaser of explosives to pass this charge on to the ultimate consumer, in this instance, the respondent. *Vecellio & Grogan, Inc. vs. Dept. of Highways* (D-914, D-993, D-918, Par. C) 294

The Court made an award for interest to be charged against the respondent under a construction contract with the claimant in accordance with W. Va. Code 14-3-1, as the project completion date is the date from which the 150 days contemplated by the Statute commences, resulting in interest charges from the 151st day. *Vecellio & Grogan, Inc. vs. Dept. of Highways* (D-914, D-993, D-918, Par. C) 294

The Court made an award to claimant contractor for blasting done on a project where the technique of presplitting was used and the respondent State agency denied the claimant contractor any tolerance on drilling behind template. The Court held that the claimant contractor was entitled to a tolerance of 12 inches. *Vecellio & Grogan, Inc. vs. Dept. of Highways* (D-914, D-993, D-918, Par. C) 294

The Court rejected respondent's contention that claimant should not recover for liquidated damages as the Court determined that there was no evidence as to any actual damage sustained by the respondent due to delay in construction of the highway. See also *Whitmyer Brothers, Inc. vs. Department of Highways,* 12 Ct. Cl. 9 (1977). *Vecellio & Grogan, Inc. vs. Department of Highways* (D-914, D-993, D-918, Par. C) 294

Where the contract specifications referred to "in reasonably close conformity" for the location of the template line where the contractor was constructing a fill on which to locate the roadbed, the Court held that a tolerance of 12 inches beyond the template lines should be considered as being "in reasonably close conformity"; therefore, the Court made an award to the claimant based upon this permitted tolerance. *Vecellio & Grogan, Inc. vs. Department of Highways* (D-914, D-993, D-918, Par. C) 294

Where the respondent State agency made a large deduction for fat fill on claimant's contract job, which was originally bid as a waste job but became a borrow job, the Court held that the respondent's action in making the deduction was extreme, and made an award to the claimant contractor for 30% of the cubic yards deducted by the respondent. *Vecellio & Grogan, Inc. vs. Department of Highways* (D-914, D-993, D-918, Par. C) 294

Where the contract between claimant and respondent provided for the respondent to pay for all seeding and mulching within construction limits, but the claimant filed a claim for

seeding and mulching outside the construction limits, the Court denied the claim. *W & H Contracting Co., Inc. and the Burke-Parsons-Bowlby Corp. vs. Department of Highways* (D-750) 22

The Court made an award to the claimant for liquidated damages assessed and imposed by the respondent where there was no evidence as to the amount of damages, if any, sustained by the repondent as a result of the delay. *Whitmyer Brothers, Inc. vs. Department of Highways* (D-571) 9

Where contract specifications relating to the installation of fence line along an interstate were inconsistent and ambiguous, the provision must be construed in light of proven trade practice and custom; therefore, the Court made an award to the claimant for additional terminal posts as the requirement for these terminal posts caused the claimant to have excess labor and material costs and said requirement was arbitrary on the part of the respondent. *Whitmyer Brothers, Inc. vs. Department of Highways* (D-571) 9

CLOSING-OUT SALES

The Court denied a claim by owners of a business who alleged that the respondent interfered with a closing-out sale which resulted in a loss of sales. The Court concluded that the claimants did not comply with the legal requirements for conducting such sale, and there was no evidence to establish improper conduct toward the claimant on the part of the employees of the respondent. *Robert V. Heverley, Jr. and Kathleen Heverly, d/b/a Frances Shoppe, Inc. vs. Department of Labor* (CC-77-81) 251

COLLEGES AND UNIVERSITIES—See Board of Regents

CONTRACTS—See also Building Contracts

Where the claimant contractor had entered into a contract to conduct extensive renovations at one of respondent's institutions, and during the performance of the contract the contractor and respondent's supervisor of maintenance entered into an agreement whereby claimant would provide certain additional electrical work in exchange for releasing the contractor from performing certain other provisions under the contract, the Court held that the claimant would be made an award only for the extra work performed, as the claimant actually received a credit against the original contract, and the contractor was unable to perform a specific portion of the contract. *Boone Remodeling Company vs. Department of Corrections* (CC-77-130a-e) 89

Where claimant was performing a contract and was requested to make additional changes while doing the work on the representation that a change order would be issued to cover the cost, and said change order was requested but not approved, the Court made an award to the claimant in the amount of the requested change order, as the work was performed in a workmanlike manner and the cost was reasonable for the materials and labor involved. *Boone Remodeling Company vs. Department of Corrections* (CC-77-130a-e) 89

Where the respondent was prohibited by specific regulation from entering into a contract for improving offices where the

offices were leased premises, the claimant withdrew its claim since the Court would have been unable to make an award in said matter. *Boone Remodeling Company vs. Department of Corrections* (CC-77-130a-e) 89

Where claimant had a contract to supply coal to West Virginia University, but because of weather conditions, a more expensive coal had to be delivered, the Court made an award for the difference in the contract price and the actual price paid for the coal by the contractor in accordance with the pleadings filed by the respondent. *Central States Resources, Inc. vs. Board of Regents* (CC-78-18) 289

The doctrine set forth in *Airkem Sales and Service, et al. vs. Department of Mental Health,* 8 Ct. Cl. 180 (1971), was applied to a claim by Charleston Area Medical Center, Inc. against the Department of Health where the two had entered into an agreement for the State agency to reimburse the hospital for losses incurred in connection with the operation of a specific project at the hospital, as the agency had insufficient funds remaining in the appropriation at the close of the fiscal year in question from which the claim could have been paid. *Charleston Area Medical Center, Inc .vs. Department of Health* (CC-78-283) 272

Where the respondent's State agencies requested an advisory determination respecting a claim based upon a duly executed purchase order between the Department of Mental Health and the claimant, whereby the claimant became obligated to construct the first phase of construction upon a Central Mental Health Complex, but said contract was cancelled several months later when an administrative decision was made to the effect that the Mental Health Complex should not be constructed at that particular site, the Court advised the respondent that the claimant contractor should be paid the proposed settlement in discharge of all obligations under the contract. *Edward L. Nezelek, Inc. vs. Department of Finance & Administration and Dept. of Health* (CC-78-2) 74

Where claimant had a contract to provide pickup and disposal of trash and garbage, and the respondent inadvertently failed to pay the claimant for one month's service, the Court made an award in that amount in accordance with the figures in the renewal agreement. *Guyan Transfer and Sanitation, Inc. vs. Dept. of Finance & Administration* (CC-78-244) 280

Where the claimant entered into a contract with the respondent to make a feasibility study for an activity center at Twin Falls State Park, and later the contract was cancelled by the respondent, the Court held that the respondent breached the contract and that the claimant was entitled to compensation for that portion of the work completed under the contract. *Henry Elden and Associates vs. Dept. of Natural Resources* (CC-77-190) 189

Where claimant architect had a contract to design and prepare plans for Welch Emergency Hospital and the amount of the contract was in dispute but later settled by arbitration in accordance with the contract, the Court made an award in the amount of the arbitration finding. *Henry Elden and Associates vs. Dept. of Finance & Administration and Dept. of Health* (CC-78-269) 275

A claim for transportation charges related to typewriters contracted for under a lease agreement between the claimant and respondent will be allowed by the Court inasmuch as there was a specific provision in the contract relating thereto. *IBM Corporation vs. Department of Motor Vehicles* (CC-77-1) 2

Transportation charges for delivering a copier were denied by the Court where there was no contractual provision for the claimant to furnish a copier to the respondent. *IBM Corporation vs. Department of Motor Vehicles* (CC-77-1) 2

Where employees of the respondent wrongfully delayed claimant in performing a contract for printing the West Virginia State Map, and as a result, the claimant suffered financial loss, the Court made an award to the claimant for the losses in accordance with the written stipulation filed by the parties. *Morrison Printing Co., Inc. vs. Department of Highways* (CC-78-36) 142

Claimant was granted an award for parts and labor where claimant's contract for electrical work was cancelled after the claimant had ordered parts and performed certain work in accordance with the contract. *Ostrin Electric Co. vs. Department of Natural Resources* (CC-78-169) 293

Claimant was awarded an amount which represented the balance due under a contract for providing psychological services to the inmates of two institutions where the respondent failed to terminate the contract by providing 30 days' written notice to the claimant in accordance with the provisions in the contract. *Positive Peer Culture, Inc. vs. Dept. of Corrections* (CC-77-117) 285

Where the respondent, Department of Corrections, had a contract with the claimant for certain psychological services to be provided to two institutions of the respondent, and the claimant was orally notified that the contract would expire and that the claimant would receive no compensation for the last 65 days of the contract, the Court made an award, because oral notification was not in compliance with the contract provision of 30 days' written notice. *Positive Peer Culture, Inc. vs. Dept. of Corrections* (CC-77-117) 285

The Court made an award to the claimant for the construction of a fireplace at Cass Scenic Railroad. The case was submitted upon the pleadings, in which the respondent admitted liability. *Jerry Austin Rexrode vs. Department of Natural Resources* (CC-77-202) 110

Where claimant performed architectural services on a project for the respondent, but failed to pay for the same as there were insufficient funds remaining in the account from which the claim could have been paid, the Court denied the claim in accordance with *Airkem Sales and Service, et al. vs. Department of Mental Health*, 8 Ct. Cl. 180 (1970). *R. L. Smith, d/b/a Architectural Associates vs. Department of Public Safety* (CC-78-174) 218

Claimant contractor was forced to perform additional engineering and surveying work due to an apparent mistake in the plans and specifications of the contract between the contractor and the respondent; therefore, the Court made an award for the cost overrun which occurred through no fault

on the part of the claimant. *Vecellio & Grogan, Inc. vs. Dept. of Highways* (D-914, D-993, D-918, Par. C) 294

An award was made to the claimant for damages resulting from respondent's breach of an employment contract with the claimant where the parties agreed to the amount in a stipulation filed with the Court. *John M. Weber vs. Board of Regents* (CC-77-229) 270

DAMAGES

Where a business is well established, damages may be awarded for the loss of profits; therefore, where claimants' business sustained a loss as a result of an accident involving their wrecking truck, the Court did consider loss of profits in making an award for damages. *Davis vs. Department of Highways*: *Hartford Accident & Indemnity Company vs. Department of Highways* (D-996a) (D-996b) 31

Where a coal truck belonging to claimant's insured was rendered a total loss in an accident, the Court based the damages upon the fair market value of the coal truck immediately before the accident less the salvage value. *Davis vs. Department of Highways*: *Hartford Accident & Indemnity Company vs. Department of Highways* (D-996a) (D-996b) 31

Where the Court determined liability on the part of the respondent for the loss of the claimants' wrecker truck, and the evidence disclosed that the difference in the fair market value of the wrecker truck immediately before and after the accident was $25,000.00, but the cost of repair was $18,000.00, the Court made an award to the claimants for the cost of repair plus the towing charge. *Davis vs. Department of Highways*: *Hartford Accident & Indemnity Company vs. Department of Highways* (D-996a) (D-996b) 31

Claimant was granted an award for the fair market value of his trailer where employees of the respondent destroyed the trailer resulting from a misunderstanding or failure of communication, at the time of the Williamson flood, regarding the trailer's contents (contaminated meat). *Hogan Storage & Transfer Company vs. Department of Agriculture and Department of Health* (CC-77-134) 96

The standard measure of damages for injury to personal property is the loss of fair market value plus reasonable and necessary expenses incurred by the owner in connection with the injury. Where claimant's bus was totally destroyed by employees of the respondent who failed to follow statutory procedures, and the claimant expressed the value of the bus, the Court made an award to the claimant for said value. *Robert H. Johnson vs. Department of Highways* (CC-77-146) 98

Where the claimants and the respondents stipulated that a drainage ditch parallel with the road across from claimants' property became clogged, causing surface water to drain across the road and onto claimants' properties and damaging the same, the Court made an award to the claimants based upon appraisals of the properties indicating the before and after market values. *Norman Maynard & Shirley Maynard vs. Department of Highways* (CC-76-71a), *Arthur Maynard & Mollie Maynard vs. Department of Highways* (CC-76-71b) 4

The proper method of establishing damage to real estate as a result of a landslide is to determine the difference in the fair market value of the property before and after the landslide; therefore, the Court used the expert testimony of the witness who determined the damage to the real estate by this method. *Polly Stevens, Guardian of the Person and Estate of James Walter Stevens and Timothy Stevens vs. Department of Highways* (D-688) 180

The claimants sought recovery of treble damages for the wrongful cutting of trees on their property under W. Va. Code §61-3-48a. The Court refused to make such an award, as such damages are in the nature of penalties, and this Court was not created for that purpose. The Court made an award for compensatory damages only. *Fred K. Testa & Claudia I. Testa vs. Department of Highways* (D-669a), *Saleem A. Shah & Theresa A. Shah vs. Department of Highways* (D-669b) 115

The Court denied a claim by a contractor engaged by the respondent to construct a highway in Nicholas County where the contractor alleged that the price for explosives should be increased over the bid price quoted in their contract because of impost charges placed on explosive sales in accordance with Internal Revenue regulations. The Court held that a careful reading of the Federal Register failed to reveal any provision which would authorize the purchaser of explosives to pass this charge on to the ultimate consumer, in this instance, the respondent. *Vecellio & Grogan, Inc. vs. Dept. of Highways* (D-914, D-993, D-918, Par. C) 294

The Court made an award for interest to be charged against the respondent under a construction contract with the claimant in accordance with W. Va. Code 14-3-1, as the project completion date is the date from which the 150 days contemplated by the Statute commences, resulting in interest charges from the 151st day. *Vecellio & Grogan, Inc. vs. Dept. of Highways* (D-914, D-993, D-918, Par. C) 294

The Court rejected respondent's contention that claimant should not recover for liquidated damages as the Court determined that there was no evidence as to any actual damage sustained by the respondent due to delay in construction of the highway. See also *Whitmyer Brothers, Inc. vs. Department of Highways,* 12 Ct. Cl. 9 (1977). *Vecellio & Grogan, Inc. vs. Department of Highways* (D-914, D-993, D-918, Par. C) 294

The Court made an award to the claimant for liquidated damages assessed and imposed by the respondent where there was no evidence as to the amount of damages, if any, sustained by the respondent as a result of the delay. *Whitmyer Brothers, Inc. vs. Department of Highways* (D-571) 9

DEPARTMENT OF BANKING

Where claimants alleged a monetary loss due to the reorganization of a savings and loan company in which the claimants converted savings accounts into stock during the reorganization, the Court held that it did not have jurisdiction over the company, its officers, or employees. *Charles R. Evans & Ernestine Evans vs. Department of Banking* (CC-77-127) 168

Where claimant alleged that the Department of Banking unlawfully permitted the Parkersburg Savings & Loan Company

DEPARTMENT OF MOTOR VEHICLES

DRAINS AND SEWERS—See also Waters and Watercourses

Where negligence on the part of the respondent is not shown to have caused the accident, the Court will deny a claim where the claimant alleged that the driver of his vehicle went into a drainage ditch adjacent to the road. *Arthur Adkins, Jr. vs. Dept. of Highways* (CC-78-83) 316

Where the respondent State agency failed to maintain the culvert adjacent to claimants' property and the record established that the flooding did not occur prior to the installation of the culvert, the Court made an award for the damage to claimants' home. *William J. Adkins and Dorothy Marie Adkins, et al. vs. Department of Highways* (CC-77-78) 185

Where claimant sustained damage to her vehicle when she went through a ditch in the roadway, the Court held that the respondent was not guilty of negligence which proximately caused the accident as it had endeavored to check the condition of the ditch frequently to keep it backfilled and even with the pavement. *Sadie Jean Akers and Thomas E. Akers vs. Dept. of Highways* (CC-78-132) 315

Where the respondent, having knowledge of the condition which caused drainage onto claimant's property, failed to take corrective measures, the Court made an award to the claimant for the damage to the property. *Curtis Allison vs. Department of Highways* (CC-77-110) 84

Where claimant alleged damage to his truck as the result of hitting a water-filled pothole, and the evidence revealed that the respondent had attempted on several occasions to repair the hole through the use of both hot mix and cold mix, but due to a drainage problem, water would accumulate and cause the mix to wash out and re-create the pothole, the Court denied the claim, as the respondent is under a duty only to use reasonable care to keep the highways in a reasonably safe condition, and the respondent had discharged the duty in this particular case. *James R. Banhart vs. Department of Highways* (CC-78-119) 236

Where the damage to claimant's property was due to respondent's lack of proper maintenance of its road and the drain pipe under it, the Court made an award to the claimant for the damages to her property established by appraisals offered into evidence. *Minnie Lee Brown vs. Department of Highways* (D-999) 125

Where the negligence of the respondent in failing to maintain a culvert, which caused flooding on a roadway resulting in an accident damaging claimant's vehicle, the claimant's own testimony demonstrated that he was guilty of contributory negligence by failing to cross the double line when there was no approaching traffic for a distance of some 150 to 175 feet. *William C. Griffing vs. Department of Highways* (CC-77-50) 127

Claimant was denied a claim for damage to his vehicle which occurred when the vehicle struck an embankment as the Court determined that, even though the respondent was negligent in failing to maintain a culvert causing accumulation of water on the highway, the claimant was guilty of contributory negligence which proximately contributed to the accident. *Lloyd Harding Gwinn vs. Dept. of Highways* (CC-77-191) 128

A claim for personal injuries sustained by the claimant in an accident alleged to have been caused by a blocked culvert which caused water to flow across a highway, was denied by the Court, as there was no showing that the respondent knew or should have known that there was a clogged culvert, nor was there any showing that respondent was negligent in permitting the partial flooding of the highway. *Karen Haller vs. Department of Highways* (CC-77-123) 327

Where the claimants and the respondents stipulated that a drainage ditch parallel with the road across from claimants' property became clogged, causing surface water to drain across the road and onto claimants' properties and damaging the same, the Court made an award to the claimants based upon appraisals of the properties indicating the before and after market values. *Norman Maynard & Shirley Maynard vs. Department of Highways* (CC-76-71a), *Arthur Maynard & Mollie Maynard vs. Department of Highways* (CC-76-71b) 4

Where claimant alleged that its decedent was killed in an accident which resulted when the respondent failed to provide adequate drainage for a backwater pond, thereby causing water from the pond to overflow and freeze upon the highway, and the evidence failed to establish any connection whatsoever between the water in the pond and the ice on the highway, the Court denied the claim. *Meredith K. Rice, Adm. of the Estate of Syed Q. Abbas, Deceased vs. Department of Highways* (D-875) 12

The Department of Highways has a legal duty to use reasonable care to maintain a ditch line in such condition that it will carry off surface water and prevent it from passing upon property adjacent to the road. Therefore, the Court made an award where the claimant proved by a preponderance of the evidence that the respondent failed to maintain the ditch line properly, and as a result of such failure, a landslide occurred causing damage to the property of the wards of the claimant. *Polly Stevens, Guardian of the Person and Estate of James Walter Stevens and Timothy Stevens vs. Department of Highways.* (D-688) 180

Where the respondent failed to maintain a ditch adjacent to the front of claimants' property, and as a result of such failure, the claimants' home and contents were damaged by water and mud, the Court made an award for such damage in accordance with the written stipulation filed by the parties. *Charles E. and Mary P. Taylor vs. Department of Highways* (CC-78-206) 261

The failure of the respondent to exercise ordinary care must be established by a preponderance of the evidence, and, while the claimant testified that there was mud and water on the road resulting from a clogged drainage ditch, and said condition caused the claimant's accident, there was no evidence introduced to establish notice to the respondent of the condition of the roadway. The Court therefore denied the claim. *Gerald E. Tinsley and Lois C. Tinsley vs. Department of Highways* (CC-77-165) 134

The Court denied claimant's claim for damage to her property allegedly sustained as the result of diversion of a natural drain course by the respondent. The evidence would have required the Court to engage in pure speculation, which it can-

ELECTRICITY

EXPENDITURES—See also Office Equipment and Supplies

180 (1971) and disallowed the claim. *C. H. James & Co., Division of James Produce Co., Inc. vs. Department of Corrections* (CC-77-148) 30

The decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health,* 8 Ct. Cl. 180 (1971) was applied to a claim where the respondent admitted that West Virginia University purchased traverse rods from the claimant and failed to pay for the same, but there were insufficient funds remaining in the appropriation for the particular fiscal year. *Capitol Business Equipment, Inc. vs. Board of Regents* (CC-77-108) 205

Claimant sought payment for wire hanger clips purchased by the respondent where the respondent admitted the validity of the claim and that it had sufficient funds on hand at the close of the fiscal year from which the claim could have been paid; the Court made an award to the claimant. *Capitol Business Interiors, Division of Capitol Business Equipment, Inc. vs. Department of Finance & Administration* (CC-79-60) 338

Where the claim was submitted upon the pleadings, and the respondent admitted the validity of the claim and that it had sufficient funds in the budget from which the claim should have been paid, the Court made an award to the claimant for the goods sold and delivered to the respondent. *Cecil E. Jackson Equipment, Inc. vs. Department of Corrections* (CC-77-97) 58

Where claimant had a contract to supply coal to West Virginia University, but because of weather conditions, a more expensive coal had to be delivered, the Court made an award for the difference in the contract price and the actual price paid for the coal by the contractor in accordance with the pleadings filed by the respondent. *Central States Resources, Inc. vs. Board of Regents* (CC-78-18) 289

The doctrine set forth in *Airkem Sales and Service, et al. vs. Department of Mental Health,* 8 Ct. Cl. 180 (1971), was applied to a claim by Charleston Area Medical Center, Inc. against the Department of Health where the two had entered into an agreement for the State agency to reimburse the hospital for losses incurred in connection with the operation of a specific project at the hospital, as the agency had insufficient funds remaining in the appropriation at the close of the fiscal year in question from which the claim could have been paid. *Charleston Area Medical Center, Inc. vs. Department of Health* (CC-78-283) 272

Where claimant, Circuit Clerk of Kanawha County, filed a claim representing fees incident to instituting a suit for the respondent, for which the claimant was not paid, and there were sufficient funds in the budget with which to pay the claim, the Court made an award to the claimant for these fees. *Phyllis J. Rutledge, Circuit Clerk of Kanawha County, W. Va. vs. Auditor of the State of West Virginia* (CC-77-77) 56

Where claimant furnished floor tile and brush-on adhesive for use at an institution of the respondent, but claimant was not paid for said supplies as the invoice was submitted after the close of the fiscal year during which the supplies were furnished, the Court made an award in the amount of the purchase order. *Clendenin Lumber & Supply Company vs. Department of Health, Division of Mental Health* (CC-78-14) 119

Where claimant supplied room air conditioning units to the respondent, and the respondent admitted the validity of the claim and that there were sufficient funds remaining in the fiscal year from which the claim could have been paid, the Court made an award to the claimant. *Climate Makers of Charleston, Inc. vs. Board of Regents* (CC-78-90) 166

Where claimant sought payment for unpaid hospital bills representing services performed for a client of the Division of Vocational Rehabilitation, the Court made an award for the services, which were admitted by the respondent. *Clinic Private Division, University of Virginia vs. Division of Vocational Rehabilitation* (CC-79-22) 347

Where claimant's State agency underpaid its statutory contribution to the claimant, and respondent did not have sufficient funds available at the end of the pertinent fiscal year with which to pay the claim, the Court denied the claim. *Department of Employment Security vs. Department of Health* (CC-78-43) 146

Where the claimant sold and delivered a quantity of heating oil to respondent's Huttonsville Correctional Center and the invoice failed to be paid because there were no funds remaining in the appropriation for the State agency, the Court applied the *Airkem* decision and denied the claim. *Department of Highways vs. Department of Corrections* (CC-77-65) 43

Where the Department of Highways sold and delivered heating oil to respondent's Huttonsville Correctional Center, and sought an award for the amount of the invoice and interest, the record failed to disclose the existence of any contract between the parties specifically providing for the payment of interest. Therefore, pursuant to W. Va. Code 14-2-12, the Court denied the interest portion of the claim. *Department of Highways vs. Department of Corrections* (CC-77-65) 43

Where the respondent admitted liability and recommended payment of a claim for design and art work on brochures for the Southern West Virginia Community College at Logan, West Virginia, the Court made an award to the claimant, as the respondent had sufficient funds available during the fiscal year in which the order was made. *Direct Mail Service Co. vs. Board of Regents* (CC-77-151) 49

Where the respondent State agency admitted the validity of the claim but stated that it lacked the necessary funds in the appropriate fiscal year from which the claim could have been paid, the Court denied the claim where claimant sought payment of a bill for a renewal equipment performance program for a Miracode Microfilmer. See *Airkem, et al. vs. Department of Mental Health,* 8 Ct. Cl. 180 (1970). *Eastman Kodak Co. vs. Office of the Secretary of State* (CC-78-112) 167

Where respondent owed claimant the unpaid balance on the lease of a postage meter, the Court made an award in the amount of the claim. *Friden Mailing Equipment Corporation vs. Department of Corrections* (CC-77-125) 95

Where a State agency has overspent its budget during a particular fiscal year, a claim for merchandise where the agency had insufficient funds to pay for the same will be denied in accordance with the previous decision of the Court, *Airkem Sales and Service, et al. vs. Department of Mental Health,* 8

Ct. Cl. 180 (1971). *Graves-Humphreys, Inc. vs. Department of Public Institutions* (CC-77-35) 1

Where the respondent refused to pay the statement submitted by medical doctors who rendered professional services to a trooper in the employ of the respondent because the statement was submitted after the close of the fiscal year, the Court made an award for said services. *H. M. Hills, Jr. & Luis A. Loimil vs. Department of Public Safety* (CC-77-200) 70

An award was made to claimant for radiological services performed for the respondent where the respondent admitted the validity of the claim and the amount. *Kanawha Valley Radiologists, Inc. vs. Board of Vocational Education, Division of Vocational Rehabilitation* (CC-77-212 a-k) 100

Claimant hospital was granted an award for services rendered to two inmates of respondent's Huttonsville Correctional Center when the respondent failed to pay for the same during the fiscal year in which the expenses were incurred and there were sufficient funds in the respondent's budget. *Memorial General Hospital vs. Dept. of Corrections* (CC-79-38) 313

Where respondent issued a purchase order for license plate decals at an agreed price, and the claimant made an error in the billing, invoicing the respondent at an incorrect rate, the Court made an award to the claimant for the difference resulting from claimant's own error. *Moore Business Forms, Inc. vs. Department of Motor Vehicles* (CC-78-23) 104

The Court made an award to the claimant for ambulance service provided to a patient at the request of the respondent's representative, with the respondent admitting the validity of the claim and the amount. *New Martinsville/Wetzel County Emergency Squad, Inc. vs. Board of Vocational Education, Division of Vocational Rehabilitation* (CC-77-211) 105

Claimant exterminating company was granted an award where the respondent admitted liability for failure to pay for services rendered to a State institution. *Orkin Exterminating, Inc. vs. Dept. of Health, Division of Mental Health* (CC-78-96a-c) 215

Where claimant performed routine maintenance services for which it was not paid and the respondent admitted the validity of the claim, the Court made an award to the claimant. *Otis Elevator Company vs. Department of Health, Division of Mental Health* (CC-77-204) 108

The Court made an award for service performed by claimant's service shop where respondent was unable to provide payment as it was not presented with the original bill. *Patrick Plaza Dodge, Inc. vs. Office of the Treasurer* (CC-78-211) 255

Where claimants sought awards for overtime compensation while they were employed as house parents at respondent's facility at Institute, West Virginia, the respondent contended that the decision of *Airkem Sales and Service, et al. vs. Department of Mental Health,* 8 Ct. Cl. 180 (1971) applied, since insufficient funds were expired in the personal services account from which the overtime compensation claims could have been paid. The Court denied this contention based upon the case of *State ex rel. Crosier vs. Callaghan,* —W. Va.— 236 S.E.2d 321 (1977), wherein the Supreme Court held that the

liability for unpaid wages is incurred against an employer at the time liability is determined; therefore, the question of sufficient funds is immaterial. *Elva B. Petts and James M. Preston vs. Division of Vocational Rehabilitation* (D-927d) and (D-927i) 222

The respondent admitted in its Answer that it ordered, received, and used certain drugs purchased from the claimant, but due to a mistake in the drug contract book, the claimant was not paid the full amount for the drugs; however, the respondent did not have sufficient funds remaining in its appropriation from which the claim could have been paid, and the Court disallowed the claim on the basis of *Airkem Sales and Service, et al. vs. Department of Mental Health,* 8 Ct. Cl. 180 (1971). *Pfizer Corporation, Roerig Division vs. Department of Health, Division of Mental Health* (CC-77-104) 45

Claimant, an organization for the handling of bills and collection of charges for professional services rendered by physicians at the Medical Center at West Virginia University, filed a claim for such services to a patient of the respondent. The Court denied the claim, based upon the principles set forth in *Airkem Sales and Service vs. Department of Mental Health,* 8 Ct. Cl. 180 (1971), as the respondent failed to expire sufficient funds in the pertinent fiscal year. *Physicians Fee Office vs. Department of Health, Division of Mental Health* (CC-77-76) 17

Claimant sought payment for services rendered to an inmate of the Department of Corrections, but the department lacked the requisite funds in its appropriation for the fiscal year in question; therefore, the Court disallowed the claim based upon the decision in *Airkem Sales and Service, et al. vs. Department of Mental Health,* 8 Ct. Cl. 180 (1971). *Physicians Fee Office vs. Department of Corrections* (CC-78-74) 175

The Court made an award to the claimant for selling and delivering food supplies to Roney's Point Center, an institution of the respondent, as respondent is liable for merchandise delivered to it. *Polis Brothers vs. Department of Health, Division of Mental Health* (CC-77-107) 109

Where the evidence established that, the parties agreed to have a vehicle belonging to the respondent repaired, but there was a misunderstanding as to a limitation on the total cost of repairs, and the claimant exceeded the monetary limit but completely repaired the vehicle, the Court made an award to the claimant, since the State would be unjustly enriched if any other decision were made. *Raleigh Motor Sales, Inc. vs. Department of Natural Resources* (CC-76-123) 26

Claimant ambulance service was denied a claim for ambulance service calls where there was no evidence that the claimant complied with the respondent's regulation for certification by the attending physician of the transportation used. *Rick's Ambulance vs. Department of Welfare* (CC-77-213) 255

Where the respondent admitted in its Answer that invoices for goods sent by the claimant to the respondent represented valid claims, and the respondent had sufficient funds in which to pay these invoices at the end of the fiscal year, the Court made an award to the claimant for the goods. *S. B. Wallace & Co. vs. Department of Corrections* (CC-77-119) 62

Where the claimant installed carpet in offices of the respondent in accordance with a purchase order, and, after having installed said carpet, the claimant received a cancellation of the purchase order, the Court made an award for the carpeting. *Sanders Floor Covering Inc. vs. Board of Regents* (CC-77-74) 71

The Court made an award to the claimant for six special tents used by the State in a bicentennial celebration at Prickett's Fort even though the respondent alleged that the person ordering the tents had no authority to do so, and no purchase order had ever been authorized or issued to the claimant. The Court determined that the acceptance and use of the tents without payment by the respondent would constitute unjust enrichment. *Sam Siclair d/b/a Galion Canvas Products Company vs. Governor's Office of Economic and Community Development* (CC-77-95) 19

Where claimant performed architectural services on a project for the respondent, but failed to pay for the same as there were insufficient funds remaining in the account from which the claim could have been paid, the Court denied the claim in accordance with *Airkem Sales and Service, et al. vs. Department of Mental Health,* 8 Ct. Cl. 180 (1971). *R. L. Smith, d/b/a Architectural Associates vs. Department of Public Safety* (CC-78-174) 218

The Court made an award to the claimant for certain wheels and axles which it sold to the respondent and which the respondent had in its possession but was no longer able to pay for, as the fiscal year had expired. *A. A. Spagnuolo vs. Department of Highways* (CC-78-134) 180

Where the respondent unilaterally reduced the amount of merchandise which it ordered from the claimant without renegotiating a price, the Court made an award to the claimant for the additional compensation due. *State Chemical Manufacturing Co. vs. Department of Highways* (CC-77-79) 8

The Court applied the *Airkem* decision, 8 Ct. Cl. 180 (1971), to a claim for petroleum purchases made by the respondent where the respondent admitted the validity and amount of the claim, but had insufficient funds at the close of the fiscal year in which to pay said claim. *Texaco, Inc. vs. Office of the Secretary of State* (CC-78-127) 184

Where claimant delivered a quantity of furniture to the West Virginia University Medical Center under a contract for the furniture, and the respondent later cancelled the purchase order, the Court made an award to the claimant. *Thompson's of Morgantown, Inc. vs. Board of Regents* (CC-77-177) 72

A claim for decals received by the respondent, Department of Motor Vehicles, was denied by the Court as sufficient funds were not available at the close of the particular fiscal year involved. See *Airkem Sales and Service, et al. vs. Department of Mental Health,* 8 Ct. Cl. 180 (1971). *3M Company vs. Department of Motor Vehicles* (CC-79-77) 352

Where the claimant inadvertently paid twice for an order of Uniform Vehicle Identification Stamps, the Court made an award for the second payment as the agency involved had no statutory authority to make such refund. *Transport Motor Express, Inc. vs. Public Service Commission* (CC-78-4) 192

FALLING ROCKS—See also Landslides

FIRES AND FIRE PROTECTION

was a delay in appointing an administrator for decedent's estate, the Court held that the period of limitation is not tolled until an administrator is appointed; therefore, the claim was dismissed based upon the fact that the claim was not filed within the period of limitation set forth in West Virginia Code §55-7-6. *Elwood Clark, Admin. of the Estate of Sharon Marie Clark, Dec. vs. State Fire Marshal* (CC-76-102) 77

Where claimant's decedent was killed in a fire, and claimant alleged that respondent failed to inspect the hotel where claimant's decedent was in residence at the time, the Court dismissed the claim in accordance with the two-year period of limitation set forth in West Virginia Code 55-7-6, as the Court is required by statute (§14-2-21) to apply the statute of limitations. *Elwood Clark, Admin. of the Estate of Sharon Marie Clark, Dec. vs. State Fire Marshal* (CC-76-102) 77

Where claimant's property was damaged by fire when employees of the respondent were attempting to start a backfire in order to control a forest fire, the Court held that the respondent is liable for providing equitable compensation to the claimant for her loss. *Mrs. Richard L. Cooper vs. Department of Natural Resources* (CC-77-60) 93

Where the claimant sustained damage to her property as a result of a backfire started on her property by employees of the respondent who were attempting to control a forest fire, the Court held that Code §20-3-4 authorizes the respondent to start backfires and exonerates the fire fighters from criminal responsibility. However, this does not mean that a property owner's property can be destroyed without compensation for the loss. *Mrs. Richard L. Cooper vs. Department of Natural Resources* (CC-77-60) 93

FLOODING

Where the respondent State agency failed to maintain the culvert adjacent to claimants' property and the record established that the flooding did not occur prior to the installation of the culvert, the Court made an award for the damages to claimants' home. *William J. Adkins and Dorothy Marie Adkins, et al. vs. Department of Highways* (CC-77-78) 185

Where the claimant provided portable toilets to the respondent in the aftermath of the flood in Williamson, West Virginia, and several of the toilets were later found to be missing, the Court advised the respondent to pay for said toilets as the loss was the result of unlawful conversion by the respondent. *Alert Sanitation vs. Office of the Governor—Emergency Flood Disaster Relief* (CC-77-156) 76

Where claimant's house sustained damage when respondent's employees began to demolish the house in the aftermath of the Williamson flood, the Court made an award to the claimant for the damage caused by the negligence of the respondent. *Gladys Barfield vs. Office of the Governor—Emergency Flood Disaster Relief* (CC-78-173) 237

The Court denied claimant's claim for damage to his vehicle sustained when the claimant drove said vehicle into water on the highway which caused him to lose control and drive into an embankment, as the Court determined that claimant's failure to cross the double line when there was no approaching

traffic was negligence. *Lloyd Harding Gwinn vs. Dept. of Highways* (CC-77-191) 128

Where the employees of the Department of Highways blocked a stream, which caused periodic flooding on claimant's property and resulted in a slip, the Court made an award for the corrective work necessary to prevent further damage to claimant's property. *Herman F. Lilly vs. Department of Highways* (CC-77-133) 153

Claimant was granted an award for the fair market value of his trailer where employees of the respondent destroyed the trailer resulting from a misunderstanding or failure of communication, at the time of the Williamson flood, regarding the trailer's contents (contaminated meat). *Hogan Storage & Transfer Company vs. Department of Agriculture and Department of Health* (CC-77-134) 96

The Court advised the respondent to pay a claim where a contractor employed by the respondent damaged the residence of the claimant when a piece of equipment struck the rear of the residence during cleanup operations following the flood in Williamson, West Virginia. *Robert L. Massie & Mae Massie vs. Office of the Governor—Emergency Flood Disaster Relief* (CC-77-199) 82

Where the respondent engaged the services of a contractor to assist in cleaning up the debris resulting from the flood in Williamson, West Virginia, and, during said cleanup, the operator of an endloader destroyed property belonging to the claimant, the Court advised the respondent to pay said claim. *Alex Ray vs. Office of the Governor—Emergency Flood Disaster Relief* (CC-77-192) 83

Where claimant alleged that its decedent was killed in an accident which resulted when the respondent failed to provide adequate drainage for a backwater pond, thereby causing water from the pond to overflow and freeze upon the highway, and the evidence failed to establish any connection whatsoever between the water in the pond and the ice on the highway, the Court denied the claim. *Meredith K. Rice, Adm. of the Estate of Syed Q. Abbas, Deceased vs. Department of Highways* D-875) 12

Where the evidence failed to establish flooding or any connection at all between the water in a pond adjacent to the highway and the ice on the highway, which ice was alleged to have caused the accident resulting in the death of claimant's decedent, the claimant failed to prove any negligence on the part of the respondent, and the claim was denied. *Meredith K. Rice, Adm. of the Estate of Syed Q. Abbas, Deceased vs. Department of Highways* (D-875) 12

As the result of construction activities near claimant's house, water flooded claimant's basement and caused damage to personal property; therefore, the Court made an award to the claimant for the damage in accordance with the written stipulation filed by the parties. *Mae Russell vs. Department of Highways* (CC-78-81) 177

An award was made to the claimant for damage to a rock wall where employees of the State damaged the same during the cleanup of flood debris in Williamson, West Virginia.

HOSPITALS

Claimant hospital was granted an award for services rendered to two inmates of respondent's Huttonsville Correctional Center when the respondent failed to pay for the same during the fiscal year in which the expenses were incurred and there were sufficient funds in the respondent's budget. *Memorial General Hospital vs. Dept. of Corrections* (CC-79-38) 313

Where claimant had not received payment for medical expenses incurred by a patient of the respondent, the Court made an award to the claimant hospital for the medical expenses. *Private Diagnostic Clinic, Surgical Professional Programs Office vs. Division of Vocational Rehabilitation* (CC-77-224) 144

Where claimant's decedent, while a patient in a State institution, sustained injuries in a fall and later died, the Court held that the doctrine of res ipsa loquitur cannot be invoked where existence of negligence is solely a matter of conjecture or where it may be held that there was no negligence on the part of the respondent; therefore, the Court denied the claim. *Patty Sheets, Administratrix of the Estate of Ray Samuel Six, Deceased vs. Department of Health, Division of Mental Health* (CC-76-80) 332

INDEPENDENT CONTRACTOR

The Court made an award to the claimant for damages to his property when claimant's fence was struck by snow plowing equipment used during snow removal operations by an independent contractor of the Department of Highways. See *Hubbs vs. Department of Highways,* 12 Ct. Cl. 39 (1977). *Frank G. Barr vs. Department of Highways* (CC-77-141) 65

As the duty of snow removal is the responsibility of the W. Va. Commissioner of Highways within the meaning of the term "maintenance" (See W. Va. Code 17-2a-8), this particular duty cannot be delegated nor assigned; therefore, the respondent is liable for actions of negligence by an independent contractor which damaged claimant's property during the removal of snow from a highway. *Kermit Reed Hubbs vs. Department of Highways* (CC-77-83) 39

Even though the Court agreed that the National Guard occupied the position of an independent contractor when its members performed snow removal operations on behalf of the respondent, the rule of non-liability is subject to certain exceptions, one of which is where the law imposes a special duty; therefore, the Court made an award to the claimant where members of the National Guard, in removing snow from a main highway, performed their work in a negligent manner, causing damage to claimant's fence line. *Kermit Reed Hubbs vs. Department of Highways* (CC-77-83) 39

Where the evidence disclosed that the employee alleged to have caused an accident was determined to be an employee of an independent contractor, the Court held that the respondent cannot be held liable for the negligence, if any, of such employee. *R. H. Bowman Distributing Co., Inc. vs. Department of Highways* (CC-77-99) 156

Claimant was granted an award for damage to the vehicle he was driving where it struck an expansion joint, even though said damage was the result of negligent acts of an independent contractor of the respondent, as the law is well settled that

INSURANCE

INTEREST

JURISDICTION

Where claimant's decedent was killed in a fire, and claimant alleged that respondent failed to inspect the hotel where claimant's decedent was in residence at the time, the Court dismissed the claim in accordance with the two-year period of limitation set forth in West Virginia Code 55-7-6, as the Court is required by statute (§14-2-21) to apply the statute of limitations. *Elwood Clark, Admin. of the Estate of Sharon Marie Clark, Dec. vs. State Fire Marshal* (CC-76-102) 77

Where claimant alleged a monetary loss due to the reorganization of a savings and loan company in which the claimants converted savings accounts into stock during the reorganization, the Court held that it did not have jurisdiction over the company, its officers, or employees. *Charles R. Evans & Ernestine Evans vs. Department of Banking* (CC-77-127) 168

Claimant, a former employee of the Department of Welfare, requested the Court to direct the respondent, Public Employees Retirement System, to pay retirement benefits to the claimant to which claimant alleged she was legally entitled. The Court determined that it did not have statutory jurisdiction to direct the respondent to reward retirement benefits to the claimant, and, therefore, the motion to dismiss the claim was sustained. *Lillian M. Holstein vs. Public Employees Retirement System* (CC-78-78) 151

The jurisdiction of the Court of Claims is clearly set forth and limited by Code §14-2-13, which specifically excludes an action against the Board of Education in the definition of a State agency. Therefore, the Court sustained the respondent's motion to dismiss as the Court has no jurisdiction over such claims. *Timothy Rakes, by his father and next friend, Andrew Rakes, and Andrew Rakes vs. Board of Education of the County of Lincoln* (CC-77-55) 147

A claim filed by the claimant against the respondent for compensation for injuries alleged to have been received while claimant was on duty with the West Virginia National Guard in 1910 was dismissed, as the application of West Virginia Code 14-2-21, the statute of limitations, excludes the claim from the jurisdiction of the Court. *Arthur Vannort vs. Department of Veterans' Affairs and Adjutant General* (CC-77-218) 267

LANDLORD AND TENANT

Where the respondent was prohibited by specific regulation from entering into a contract for improving offices where the offices were leased premises, the claimant withdrew its claim since the Court would have been unable to make an award. *Boone Remodeling Company vs. Department of Corrections* (CC-77-130a-e) 89

Where the respondent admitted that it was indebted to the claimant for back rent, and also alleged that there were insufficient funds from which to pay the rent, the Court denied the claim in accordance with the *Airkem* decision. See *Airkem Sales & Service, et al. vs. Department of Mental Health,* 8 Ct. Cl. 180 (1971). *The County Commission of Mason County vs. Department of Public Safety* (CC-77-109) 188

In a claim for damaged personal possessions stored by the claimant in a dormitory closet at West Virginia University, the

LANDSLIDES—See also Falling Rocks

LIMITATION OF ACTIONS

road, the Court denied the claim as the claimant did not prove by a preponderance of the evidence that the accident was caused by the negligence of the respondent. *Jack D. Bailey & Betty Louise Bailey vs. Department of Highways* (CC-78-49) 317

Where employees of the respondent negligently instructed the claimant to proceed across a road onto which respondent's employees had just dumped reddog, and claimant's vehicle sustained flat tires as a result thereof, the Court made an award to the claimant for said damages. *Raymond N. Belmont vs. Department of Highways* (CC-77-84) 57

Claimant alleged damage to his vehicle when he struck a boulder which had crashed onto the highway. The Court denied the claim as the boulder had fallen just prior to the accident and there was no evidence that the respondent knew or should have known of the existence of an unusually dangerous condition. *Arnold W. Bolyard vs. Department of Highways* (CC-78-1) 344

Where claimant was operating his van and was signaled to proceed onto fresh tar, and as a result thereof the van was heavily splashed with tar, the Court made an award to the claimant for the damage to the vehicle because respondent's failure to warn the claimant of the presence of this tar constituted negligence. *Charles A. Bowman vs. Department of* Highways (CC-77-137) 66

Where a contractor of the Department of Highways damaged an expansion joint on an interstate and failed to make any effort to notify the respondent or warn motorists, the Court made an award to the claimant for damages to his automobile when he struck said expansion joint. The law is well settled that the principal must bear the consequences of his agent's negligence, and therefore, the respondent is liable to the claimant. *Jeffrey D. Bubar vs. Department of Highways* (CC-78-27) 204

Where claimants and respondent stipulated that the claimants' vehicle was damaged when it struck a large hole which was covered with water on the date of the accident, the Court made an award to the claimant in accordance with the written stipulation filed by the parties. *Darrell E. Buckner & Betty S. Buckner v. Department of Highways* (CC-77-129) 41

Where claimant sustained damage to his automobile when he struck a pothole in a portion of a road which was otherwise free from defects, the Court denied the claim. *Arnell Church vs. Department of Highways* (CC-78-79) 165

Where the employees of the respondent sprayed portions of a highway with an anti-spalling compound used for the preservation of concrete and there were no warning signs or flagmen before, during, or after the job, and as a result the claimant was involved in an accident where another automobile slid on the treated portion of the roadway and into the claimant, causing injuries thereto, the Court made an award to the claimant. *Michael H. Coen & Ruth Coen vs. Department of Highways* (D-1008) 119

Where the parties stipulated that an employee of the respondent negligently threw a rock against claimant's vehicle, breaking the windshield, the Court made an award to the

claimant for said damage. *Virginia Sue Cook vs. Department of Highways* (CC-77-144) 58

Where the evidence in a case impels the conclusion that the respondent Department of Highways, in the exercise of ordinary care, should have known of the existence of a hole in the bridge, which hole was the cause of the accident resulting in damage to claimants' truck, the Court made an award to the claimants for said damages. *Davis v. Department of Highways: Hartford Accident & Indemnity Company vs. Department of Highways* (D-996a) (D-996b) 31

Claimant was denied recovery for damage to his automobile caused when he struck a hole in the road, as the Court determined that there was no evidence to the effect that the respondent knew or should have known of the existence of the hole. *Merton M. Delancey vs. Department of Highways* (CC-78-91) 245

Where there was no evidence in the record that the respondent had notice of the hole in the road prior to the accident, a claim for damages to claimants' automobile was denied by the Court. *Lawrence & Claudette Ferguson vs. Department of Highways,* (CC-78-100) 326

An award was made for damage to claimants' gas tank which occurred when their automobile struck a large rock which had been knocked into the road by a grader and left there. The Court concluded that the accident was caused by negligence on the part of the respondent. *Teresa K. Gillispie and Johnny Wayne Gillispie vs. Dept. of Highways* (CC-78-153) 248

Where the negligence of the respondent in failing to maintain a culvert, which caused flooding on a roadway, resulted in an accident damaging claimant's vehicle, the claimant's own testimony demonstrated that he was guilty of contributory negligence by failing to cross the double line when there was no approaching traffic for a distance of some 150 to 175 feet. *William C. Griffing vs. Department of Highways* (CC-77-50) 127

Where claimant and respondent stipulated that claimant's truck was damaged as the result of a piece of metal protruding from a bridge owned and maintained by the respondent, the Court made an award to the claimant, as the negligence of the respondent was the proximate cause of the damage. *Halliburton Services vs. Department of Highways* (CC-78-264) 281

The simple existence of a pothole in the road does not make the State negligent per se, as the State must have had actual or constructive notice of the particular road defect which allegedly caused the accident. Therefore, the Court denied the claim where claimant's son, while driving his vehicle, struck a hole and caused damage to said vehicle. *William L. Hanson, Sr. & William L. Hanson, Jr. vs. Dept. of Highways* (CC-78-82) 197

Where claimant's automobile sustained damage as the result of striking construction plates which were not securely fastened down on the highway, the Court made an award to the claimant for the damages, as the negligence of the respondent was the proximate cause of the damage. *Howard A. Haynes vs. Department of Highways* (CC-78-281) 283

Claimant was granted an award for damage to his pickup truck and station wagon allegedly caused by disrepair of the

road over which claimant had to drive in order to reach his home. Claimant indicated that he had complained of the situation to the respondent but no repairs were made to the roadway; therefore, the Court made an award for the damages to said vehicles. *R. L. Jarrell vs. Dept. of Highways* (CC-78-172) 319

The standard measure of damages for injury to personal property is the loss of fair market value plus reasonable and necessary expenses incurred by the owner in connection with the injury. Where claimant's bus was totally destroyed by employees of the respondent who failed to follow statutory procedures, and the claimant expressed the value of the bus, the Court made an award to the claimant for said value. *Robert H. Johnson vs. Department of Highways* (CC-77-146) 98

Where claimant's automobile sustained damage when it struck a pothole, the Court denied the claim, as it appeared that the State had no notice at all of said hole. *James G. Keith vs. Department of Highways* (CC-77-188) 199

Claimants were granted awards for personal injuries sustained in a single-vehicle accident when the vehicle in which they were traveling came upon an area of highway with three large holes which caused the accident. The respondent was negligent in its failure to warn motorists of the danger created by the holes. *Forest Joe King, et al. vs. Dept. of Highways* (CC-77-37) 208

Even though the claimant demonstrated that there were defects in the highway which caused the damage to his automobile, to establish negligence on the part of the respondent there must be proof that the respondent either knew, or, in the exercise of ordinary care, should have known about the defects. Without such proof, the Court must disallow the claim. *John Lavender, Jr. vs. Department of Highways* (CC-77-85) 54

An award was made to claimant for paint damage to her automobile when she encountered a large paint spill on the highway and was unable to avoid going through it. *Deloris J. Lively vs. Department of Highways* (CC-77-228) 153

Where claimant sustained damage to his vehicle on a wooden bridge when a plank unexpectedly came loose and caused the damage, the Court granted an award to the claimant as the respondent had notice of the disrepair of the bridge and failed to either warn the claimant or make repairs. *Gerald J. Lynch vs. Department of Highways* (CC-77-175) 103

The claimant was denied an award for damage to his automobile which occurred when his wife, who was driving, struck a hole in the road, damaging a tire and rim. The Court has held many times that the State is not a guarantor of the safety of travelers on its roads, and the user of the highways travels at his own risk. *James C. MacKnight vs. Department of Highways* (CC-78-144b) 341

Claimant was granted an award for damage to his automobile when a "MEN WORKING" sign blew over and struck said automobile. *Harold Mahaffee vs. Department of Highways* (CC-77-136) 211

Where the claimant left an automobile on the parking lot at Parkersburg Community College and failed to make arrange-

ments to leave the vehicle on the lot with personnel after school, the Court held that there was no negligence or wrongdoing on the part of the respondent which would justify recovery by the claimant for loss of the vehicle. *David L. Mayse vs. Board of Regents* (CC-77-173) 191

Where there was no evidence, and the evidence presented was conflicting, as to the conditions of the roadway, the Court denied a claim where claimant's decedent, while driving his automobile, was involved in an accident alleged to have been caused by a wet road covered with slag and cinders. The Court concluded that if there were debris on the road, it was not caused by the negligence of the respondent. *Geraldine May McCarthy, Administratrix of the Estate of Robert Eugene McCarthy vs. Department of Highways* (CC-76-33) 139

As the evidence failed to establish that the respondent had breached any legal duty owed to the claimant, the Court denied claimant's claim for damage to his automobile where the vehicle struck a pothole. *Rodger C. Melling vs. Department of Highways* (CC-78-33) 174

Existence of gravel on a road does not establish negligence per se, and where there was no evidence in the record of any notice to respondent that gravel had washed onto the highway during the night, the Court denied a claim where claimant allegedly slid in the gravel, resulting in the destruction of her automobile. *Connie Lynn Miller vs. Department of Highways* (CC-76-124) 140

Claimant was granted an award for damage to its insured's vehicle which occurred when a barricade was blown into the vehicle and the barricade had been negligently affixed by an employee of the respondent. *Nationwide Insurance Co., as subrogee of Phillip W. Alexander vs. Department of Highways* (CC-79-150) 350

Where the respondent State agency knows that a road is too narrow for two-lane traffic, and knowlingly allows the dangerous condition to exist, the respondent will be held liable for damages sustained by a claimant whose son had an accident on said road, causing damage to claimant's automobile. *Arizona M. Offutt vs. Department of Highways* (CC-76-109) 107

The Court denied a claim for property damage to claimant's vehicle when he struck a large depression in the road. The law in West Virginia is well settled that contributory negligence on the part of the claimant, however slight, which contributes to proximately cause an accident, will preclude the recovery of damages, and under the facts of this claim, claimant failed to take the precautions necessary to protect his own safety and property. *Charles Edward Pauley vs. Department of Highways* (CC-78-136) 215

Where the parties stipulated that a flagman employed by the respondent directed claimant to drive her automobile around a repair site between an asphalt truck and a barricade, resulting in damage to her automobile when it became stuck between the two obstacles, the Court made an award for the damage. *Anna Jane Phillips vs. Department of Highways* (CC-77-131) 62

A claim for damage to an automobile as the result of striking a pothole was denied as it must be established that,

having received notice of a defect in the road, the respondent must also have sufficient time within which to take remedial action. *Dallas Poe vs. Department of Highways* (CC-78-97) 201

Where the evidence established that the parties agreed to have a vehicle belonging to the respondent repaired, but there was a misunderstanding as to a limitation on the total cost of repairs, and the claimant exceeded the monetary limit but completely repaired the vehicle, the Court made an award to the claimant, since the State would be unjustly enriched if any other decision were made. *Raleigh Motor Sales, Inc. vs. Department of Natural Resources* (CC-76-123) 26

Where a light from a sign on a bridge fell on claimant's automobile, the Court held that the respondent was responsible for the maintenance and control of the bridge, and made an award to the claimant for the damages. *Franklin Ross and Elsie M. Ross vs. Department of Highways* (CC-77-132) 111

The Court has held many times that the respondent, Department of Highways, is neither an insurer nor a guarantor of the safety of persons travelling on its highways. *Adkins v. Sims,* 130 W. Va. 645, 46 S.E. 2d 81 (1947). The Court applied this principle in denying a claim for damage to an automobile where the automobile slipped into a ditch and the evidence disclosed that the road was assigned a low priority as it was difficult to maintain due to its inaccessibility. *Romie C. Sayre vs. Department of Highways* (CC-78-64) 178

Where claimants sustained personal injuries when their vehicle struck a broken section of interstate, causing the vehicle to leave the highway and overturn, the Court made an award to the claimants as the respondent was negligent both in permitting a dangerous condition to remain on the highway and in failing to take effective action to warn motorists of the condition. *James Ryan & Joyce Ryan vs. Dept. of Highways* (CC-77-189) 329

Where respondent's employees negligently dropped hot welding slag on the windshield of claimant's automobile, the Court made an award to the claimant for the damage. *Carolyn Crisp Sherwood vs. Department of Highways* (CC-77-214) 104

The Court made an award to the claimant for damage to her vehicle where the respondent, while spray painting one of its buildings, over-sprayed, resulting in paint damage to claimant's automobile. *Mary Jo Shreve v. Department of Highways* (CC-77-70) 7

Where the parties stipulated that claimant's automobile was damaged when a metal plate became dislodged from a hole on a state highway, the Court made an award to the claimant for the damage in accordance with the stipulation. *Lawrence Craig Skaggs v. Department of Highways* (CC-77-56) 3

Claimant alleged damage to his automobile when said automobile fell through a hole in the wooden floor of an old narrow bridge near Milton, West Virginia. The evidence disclosed that the bridge had been closed and the respondent had erected barricades at each end of the bridge, but said barricades or timbers were removed by unknown third persons. The facts failed to establish any negligence on the part of the respondent, and the Court denied the claim. *Roy D. Smith v. Department of Highways,* (CC-76-129) 29

The driver of a vehicle was made an award for damage sustained by said vehicle even though it did not belong to him as he had repaired the vehicle, and the Court held that a bailee in possession may sue for the recovery judgment for wrongful damage or destruction by another of bailed property. *Charles H. Spradling, Jr. vs. Department of Highways* (CC-78-68) 336

Where claimant's vehicle struck a signpost in the road and there was no evidence that the post belonged to the respondent or was knocked from the side of the road onto the highway, the Court denied the claim. *Foster Starcher vs. Department of* Highways (CC-76-120) 157

When maintenance employees of the respondent operated a mower in such a manner as to cause rocks and gravel to damage claimant's insured's automobile, the Court made an award for the damage in accordance with the stipulation filed by the parties. *State Farm Mutual Auto Insurance Co., Subrogee of Dana Lee Selvig vs. Board of Regents* (CC-78-162) 288

Claimant was granted an award for damage to her vehicle when she struck a large hole on Route 119 near Morgantown, West Virginia, as the Court held that the road was one of the main arteries into the city, and respondent should have known of the condition of the road and failed to keep it in a reasonably safe condition. *Connie Ann Stone vs. Department of Highways* (CC-78-177) 259

The Court denied a claim for damage to the paint of an automobile where the evidence revealed that the employees of the respondent had performed no work on the roadway on the day that claimant alleged the damage was done to his vehicle. *U.S.A.A. Insurance Co. & Harold F. May vs. Department of Highways* (CC-77-215a&b) 159

The Court denied a claim where claimant alleged that while driving his vehicle along the berm of a highway his automobile struck a rock, because claimant testified that he knew the rocks were there and could have avoided driving over them. *John Thomas Weddington vs. Department of Highways* (CC-77-161) 161

Where respondent's employees negligently placed a sheet of metal over a hole in a bridge, and, as a result of this negligence, claimant's vehicle sustained damage, the Court made an award to the claimant for said damage. *Marvin Roy Welch vs. Department of Highways* (CC-77-184) 73

Where the respondent State agency negligently issued a new title to a vehicle in the name of the owner without the claimant's lien being recorded thereon, and claimant bank sustained a loss as the result of this negligence, the Court made an award to the bank for the loss. *Wood County Bank vs. Dept. of Motor Vehicles* (CC-78-209) 276

NATIONAL GUARD

Even though the Court agreed that the National Guard occupied the position of an independent contractor when its members performed snow removal operations on behalf of the respondent, the rule of non-liability is subject to certain exceptions, one of which is where by statute a special duty is imposed upon the respondent; therefore, the Court made an

effort to notify the respondent or warn motorists, the Court made an award to the claimant for damages to his automobile when he struck said expansion joint. The law is well settled that the principal must bear the consequences of his agent's negligence, and therefore, the respondent is liable to the claimant. *Jeffrey D. Bubar vs. Department of Highways* (CC-78-27) 204

Where respondent's employees negligently cut two temporary cables installed by the claimant after a slide had occurred, the Court made an award to the claimant for the damage to the cables. *C & P Telephone Company of West Virginia vs. Department of Highways* (CC-77-71) 239

Where employees of the respondent State agency negligently supervised students who were using firearms with the result that bullets damaged claimant's telephone cables, the Court made an award to the claimant for the damages. *The C & P Telephone Co. of W. Va. vs. Department of Natural Resources* (CC-78-105) 164

Where employees of the respondent negligently damaged cables belonging to the claimant while digging a trench, the Court made an award for the damages. *The C & P Telephone Company of West Virginia vs. Board of Regents* (CC-78-152) 240

Where the negligence of the respondent was the proximate cause of the accident, as it failed to provide for the safety of the traveling public during and after the application of an anti-spalling compound to the highway, the Court made an award to the claimant for injuries received in an accident when an automobile being driven in the lane opposite the claimant slid in the anti-spalling compound across the highway and into the claimant, causing the injuries to the claimant. *Michael H. Coen & Ruth Coen vs. Department of Highways* (D-1008) 119

Where the parties stipulated that an employee of the respondent negligently threw a rock against claimant's vehicle, breaking the windshield, the Court made an award to the claimant for said damage. *Virginia Sue Cook vs. Department of Highways* (CC-77-144) 58

Where the claimants sustained damage to their property due to the negligence of respondent's employees in snow removal operations, the Court held that it was negligence on the part of the operator of the equipment to fail to confine his activities within the right-of-way of the road. See also *Hubbs v. Department of Highways*, 12 Ct. Cl. 39 (1977). *Clyde W. Cummings & Betty L. Cummings v. Department of Highways* (CC-77-102) 41

Where the evidence in a case impels the conclusion that the respondent Department of Highways, in the exercise of ordinary care, should have known of the existence of a hole in the bridge, which hole was the cause of the accident resulting in damage to claimants' truck, the Court made an award to the claimants for said damages. *Davis v. Department of Highways*: *Hartford Accident & Indemnity Company v. Department of Highways* (D-996a) (D-996b) 31

The respondent Department of Highways may not be held liable for negligent maintenance of a section of highway until the date of final acceptance of the highway by the respondent;

therefore, in a claim for damage to a tractor-trailer which occurred when the driver proceeded onto the berm of an entrance ramp to I-77, and, in so doing, passed over a metallic post which extended out of the berm, the Court held that the Department of Highways was not liable since the State had not yet signed and approved the final acceptance for the highway. *Econo-Car International, Inc. vs. Department of Highways* (CC-76-32) 80

Where claimants' fence was damaged by an employee of the respondent during road grading operations, the Court made an award to the claimant for the damage. *Albert D. Fentress & Hazel S. Fentress vs. Department of Highways* (CC-77-162) 94

An award was made for damage to claimants' gas tank which occurred when their automobile struck a large rock which had been knocked into the road by a grader and left there. The Court concluded that the accident was caused by negligence on the part of the respondent. *Teresa K. Gillispie and Johnny Wayne Gillispie vs. Dept. of Highways* (CC-78-153) 248

Where claimant admitted that he was aware of the existence of the hole in the road, but was forced to drive into it, the Court held that the claimant's admission of his knowledge of the existence of the hole was proof that claimant's own negligence was the proximate cause of the accident. *Larry A. Giolitto vs. Department of Highways* (CC-78-205) 249

Claimant was denied a claim for damage to his vehicle which occurred when the vehicle struck an embankment as the Court determined that, even though the respondent was negligent in failing to maintain a culvert causing accumulation of water on the highway, the claimant was guilty of contributory negligence which proximately contributed to the accident. *Lloyd Harding Gwinn vs. Dept. of Highways* (CC-77-191) 128

Where claimant sustained injuries as the result of a fall when leaving a ladies' restroom at Fairmont State College, the Court determined that the accident was one which would not have occurred if the claimant had been exercising ordinary care, and the lack of such care was negligence on her part. *Mary Jo Hall vs. Board of Regents* (D-1025) 232

The simple existence of a pothole in the road does not make the State negligent per se, as the State must have had actual or constructive notice of the particular road defect which allegedly caused the accident. Therefore, the Court denied the claim where claimant's son, while driving his vehicle, struck a hole and caused damage to said vehicle. *William L. Hanson, Sr. & William L. Hanson, Jr. vs. Dept. of Highways* (CC-78-82) 197

Where respondent's employees negligently left pieces of welding rod material on a bridge after completing the day's work, and claimant's motorcycle tire and tube were punctured by the pieces of welding rod material, the Court made an award in accordance with the written stipulation filed by the parties. *Michael J. Hart vs. Department of Highways* (CC-77-124) 52

Claimants were made an award for damage to their property during snow removal activities (See *Hubbs vs. Highways*, 12

Ct. Cl. 39 [1977]). *Robert M. Hastings & Linda Hastings, d/b/a Hastings Stables vs. Department of Highways* (CC-77-94) 44

Where claimant's automobile sustained damage as the result of striking construction plates which were not securely fastened down on the highway, the Court made an award to the claimant for the damages, as the negligence of the respondent was the proximate cause of the damage. *Howard A. Haynes vs. Department of Highways* (CC-78-281) 283

As the duty of snow removal is the responsibility of the W. Va. Commissioner of Highways within the meaning of the term "maintenance" (See W. Va. Code 17-2A-8), this particular duty cannot be delegated nor assigned; therefore, the respondent is liable for actions of negligence by an independent contractor which damaged claimant's property during the removal of snow from a highway. *Kermit Reed Hubbs vs. Department of Highways* (CC-77-83) 39

Where the parties stipulated that the respondent negligently failed to secure a steel plate covering a large hole in Route 60 in South Charleston, and said negligence resulted in damage to claimant's car, the Court made an award to the claimant for said damages. *McHenry Hudnall, Jr. vs. Department of* Highways (CC-77-52) 26

Claimant was granted an award for damage to her automobile when her automobile ran over a sign belonging to the respondent as the Court held that leaving a sign upon the traveled portion of the highway constituted negligence. *Peggy Keyser vs. Department of Highways* (CC-78-38) 199

Claimants were granted awards for personal injuries sustained in a single-vehicle accident when the vehicle in which they were traveling came upon an area of highway with three large holes which caused the accident. The respondent was negligent in its failure to warn motorists of the danger created by the holes. *Forest Joe King, et al. vs. Dept. of Highways* (CC-77-37) 208

The Court denied a claim for damage to claimant's typewriter which occurred when an involuntarily committed patient was issued a pass to seek legal assistance from the claimant. The Court noted that an institution is not negligent per se whenever a temporarily released patient causes damage to someone's property. *James T. Kratovil vs. Department of Health, Division of Mental Health* (CC-78-54) 200

Even though the claimant demonstrated that there were defects in the highway which caused the damage to his automobile, to establish negligence on the part of the respondent there must be proof that the respondent either knew, or, in the exercise of ordinary care, should have known about the defects. Without such proof, the Court must disallow the claim. *John Lavender, Jr. vs. Department of Highways* (CC-77-85) 54

Where the claimant left an automobile on the parking lot at Parkersburg Community College and failed to make arrangements to leave the vehicle on the lot with personnel after school, the Court held that there was no negligence or wrongdoing on the part of the respondent which would justify recovery by the claimant for loss of the vehicle. *David L. Mayse vs. Board of Regents* (CC-77-173) 191

Existence of gravel on a road does not establish negligence per se, and where there was no evidence in the record of any notice to respondent that gravel had washed onto the highway during the night, the Court denied a claim where claimant allegedly slid in the gravel, resulting in the destruction of her automobile. *Connie Lynn Miller vs. Department of Highways* (CC-76-124) 140

Claimant was granted an award for damage to its insured's vehicle which occurred when a barricade was blown into the vehicle and the barricade had been negligently affixed by an employee of the respondent. *Nationwide Insurance Co., as Subrogee of Phillip W. Alexander vs. Department of Highways* (CC-79-150) 350

Where the respondent knew of dangerous road conditions caused by a tar spill on State Route 4 in Clay County, and negligently failed to correct the situation, and the respondent also knew that several accidents had occurred at this point, resulting in torn-out guardrails, the Court made an award on a stipulated claim of wrongful death where claimant's decedent died as a result of coming upon the tar spill and sliding through the torn-out guardrails into a creek where he died. *Helen L. Norvell, Executrix of the Estate of Glenn Hartsel Norvell, Deceased vs. Department of Highways* (D-936) 106

Where the respondent State agency knows that a road is too narrow for two-lane traffic, and knowingly allows the dangerous condition to exist, the respondent will be held liable for damages sustained by a claimant whose son had an accident on said road, causing damage to claimant's automobile. *Arizona M. Offutt vs. Department of Highways* (CC-76-109) .. 107

Where the record established that claimant was driving in a construction area over an avenue closed to traffic, the Court held that the claimant's negligence was the cause of the accident. *Charles C. Quigley vs. Department of Highways* (CC-76-47) 5

Where the evidence disclosed that the State had erected "Street Closed" or "Road Closed" signs in a construction area which also provided a small amount of open space as a means of ingress and egress for local residents, the Court found no negligence on the part of the respondent when the claimant drove through said area and was struck by an automobile coming from another direction. *Charles C. Quigley vs. Department of Highways* (CC-76-47) 5

Where claimant alleged that an accident occured due to the negligent design of the highway which narrowed to the left at the place of the accident, the Court held that since no proof of negligence was presented by the claimant and there were no defects in the pavement, the respondent met the required standard of care, and the claim was denied. *Marie T. Sadd vs. Department of Highways* (CC-77-36) 63

Where respondent's employees negligently dropped hot welding slag on the windshield of claimant's automobile, the Court made an award to the claimant for the damage. *Carolyn Crisp Sherwood vs. Department of Highways* (CC-77-214) 104

Where one of the claimants testified that she and her husband were familiar with the highway, traveling it several times a week, and candidly admitted that she was aware of the

existence and location of the pothole, the Court held that even if the respondent were guilty of negligence in failing to repair the hole, the claimants were guilty of contributory negligence in failing to exercise a proper lookout in order to avoid striking the hole. *Joseph and Marie Sowers vs. Department of Highways* (CC-77-51) 21

Claimant was granted an award for damage to her property and a black walnut tree, which damage occurred when respondents were repairing a road in front of claimant's property. *Barbara H. Spitzer vs. Department of Highways* (CC-78-164) 314

Claimant was granted an award for damage to the vehicle he was driving where it struck an expansion joint, even though said damage was the result of negligent acts of an independent contractor of the respondent, as the law is well settled that the principal must bear the consequences of his agent's negligence. *Charles H. Spradling, Jr. vs. Department of Highways* (CC-78-68) 336

Where respondent's agent damaged a steel expansion joint incident to snow removal and left it protruding above the surface of the highway so as to create a hazard to vehicular traffic, respondent was negligent and was liable for damage thereby done to the undercarriage of claimant's vehicle. *Charles H. Spradling, Jr. vs. Department of Highways* (CC-78-68) 336

Even though respondent was negligent in failing to repair a large hole in a tunnel, claimant was contributorily negligent when he, knowing of the large hole, drove through the unlit tunnel at a speed of 35 mph and struck the hole, causing him to drive off the roadway. *Hayes Stanley vs. Dept. of Highways* (CC-77-145) 258

When maintenance employees of the respondent operated a mower in such a manner as to cause rocks and gravel to damage claimant's insured's automobile, the Court made an award for the damage in accordance with the stipulation filed by the parties. *State Farm Mutual Auto Insurance Co., Subrogee of Dana Lee Selvig vs. Board of Regents* (CC-78-162) 288

Where the respondent negligently caused snow to be piled on claimant's property, killing certain trees, the Court made an award to the claimant for the damage sustained. *Willard P. Teets, Attorney in Fact for Percy E. Teets vs. Department of Highways* (CC-77-158) 203

Where employees of the respondent wrongfully cut down trees on property belonging to the claimants, even though the employees believed that they had a right to do so, the respondent is liable to the claimants for the damages. *Fred K. Testa and Claudia I. Testa vs. Department of Highways* (D-669a), *Saleem A. Shah & Teresa A. Shah vs. Department of Highways* (D-669b) 115

Claimant was granted an award for personal injuries sustained at a State forest when a large limb fell from a dead tree near a picnic table at which the claimant was sitting, as the respondent was negligent for failing to remove the dead tree. *Edith Ann Thompson & Roger Dale Thompson vs. Department of Natural Resources* (CC-77-7) 132

Where claimants filed a claim for personal injuries sustained in an accident at a railway underpass where a train derailment resulted in holes in the road which allegedly caused the accident, the Court denied the claim as the evidence indicated that there was a "ROUGH ROAD" sign placed by the respondent and that frequent repairs were made to the surface of the highway; therefore, the respondent was not guilty of negligence which proximately caused the accident. *Billy Joe Vinson and Paul F. Vinson vs. Department of Highways* (CC-77-157) 219

Where the claimant sustained personal injuries when she fell into a hole on the sidewalk of a bridge, which hole she had seen prior to crossing the bridge, the Court held that the claimant was guilty of contributory negligence as a matter of law. *Dema Marie Welch vs. Department of Highways* (CC-77-17) 136

Claimant alleged personal injuries suffered when she fell after the heel of her shoe became caught in a gap between a sidewalk and curb. The Court denied the claim as the claimant failed to exercise reasonable care for her own safety, for the law is well settled that a pedestrian has the duty to exercise ordinary and prudent care for his own safety and to look for and protect himself from known and visible dangers, and failure to do so constitutes contributory negligence as a matter of law. See Vance vs. Dept. of Highways, 10 Ct. Cl. 189 (1975). *Chrystine Winer vs. Dept. of Highways* (CC-78-170) 353

NOTICE

Where the respondent, having knowledge of the condition which caused drainage onto claimant's property, failed to take corrective measures, the Court made an award to the claimant for the damage to the property. *Curtis Allison vs. Department of Highways* (CC-77-110) 84

Where the respondent had actual notice of claimants' claim for relocation expense, the fact that the notice was not written in the form required by respondent did not bar the claim, because the memorandum did not have the force and effect of law; therefore, the Court made an award to the claimants for said relocation expense. *Olie G. Bastin and Priscilla Bastin vs. Department of Highways* (CC-76-24) 86

Claimant alleged damage to his vehicle when he struck a boulder which had crashed onto the highway. The Court denied the claim as the boulder had fallen just prior to the accident and there was no evidence that the respondent knew or should have known of the existence of an unusually dangerous condition. *Arnold W. Bolyard vs. Department of Highways* (CC-78-1) 344

Where claimant's automobile sustained damage when she struck a pothole, the Court determined that there was no notice of the dangerous condition of the highway, nor was there such a neglect of duty as to create liability on the part of the respondent, and the claim was disallowed. *Cynthia Lou Bradshaw vs. Department of Highways* (CC-78-30) 187

Where claimant's automobile sustained damage when it struck a rock on the highway, the Court denied the claim as there was no showing that the respondent knew or should have known of the dangerous condition, especially since the rock

had fallen on the highway immediately before the accident. *Lawrence Childers vs. Department of Highways* (CC-78-63) 346

Claimant was denied a claim for damages to her automobile when she struck a hole in the road as there was no evidence that the respondent had either actual or constructive notice of said hole. *Ilene Clark Cooksey vs. Department of Highways* (CC-77-114) 195

Where a hole in the road appeared suddenly and without warning, proof of actual or constructive notice is a prerequisite to establishing negligence; therefore, the Court denied the claim since respondent did not have notice of the particular hole in this claim in time to prevent the accident. (See *Hoskins vs. Department of Highways,* 12 Ct. Cl. 60 [1977]). *John F. Cummings vs. Department of Highways* (CC-76-77) 59

Claimant was denied recovery for damage to his automobile caused when he struck a hole in the road, as the Court determined that there was no evidence to the effect that the respondent knew or should have known of the existence of the hole. *Merton M. Delancey vs. Department of Highways* (CC-78-91) 245

A claim for damage to an automobile as a result of striking a pothole was denied as the Court held that for the State to be found liable for pothole-caused damages, the claimants must first establish that the State had actual or constructive notice of the particular hazard which caused the accident. *Aileen W. Dodrill vs. Department of Highways* (CC-78-67) .. 196

Where there was no evidence in the record that the respondent had notice of the hole in the road prior to the accident, a claim for damages to claimants' automobile was denied by the Court. *Lawrence & Claudette Ferguson vs. Department of Highways* (CC-78-100) 326

Where there was no evidence on record of prior notice to the respondent, there is insufficient evidence to establish negligence on the part of the respondent; therefore, claimant's claim for damages to his automobile when he struck a hole in the road was denied. *William C. Griffing vs. Department of Highways* (CC-77-50) 127

The simple existence of a pothole in the road does not make the State negligent per se, as the State must have had actual or constructive notice of the particular road defect which allegedly caused the accident. Therefore, the Court denied the claim where claimant's son, while driving his vehicle, struck a hole and caused damage to said vehicle. *William L. Hanson, Sr. & William L. Hanson, Jr. vs. Dept. of Highways* (CC-78-82) 197

Where the claimant struck a large hole in the inside eastbound lane of I-70 just beyond the Wheeling Tunnel, and the evidence disclosed that the hole apparently came into existence within an hour of the accident, the Court denied the claim since proof of actual or constructive notice is required. *Patricia S. Hoskins vs. Department of Highways* (CC-76-79) 60

Where claimant's automobile sustained damage when it struck a pothole, the Court denied the claim, as it appeared that the State had no notice at all of said hole. *James G. Keith vs. Department of Highways* (CC-77-188) 199

Claimants were granted awards for personal injuries sustained in a single-vehicle accident when the vehicle struck

three large potholes. The evidence indicated that the holes had been there for a substantial period of time, creating a dangerous condition of which the respondent either knew, or, in the exercise of ordinary care, should have known. *Forest Joe King, et al. vs. Dept. of Highways* (CC-77-37) 208

Where claimants' vehicle was damaged by a loose plank in a wooden bridge and the respondent had constructive knowledge of the need of repairs to the bridge, the Court made an award to the claimants for the damages. *Linda Lester and Leon Lester vs. Department of Highways* (CC-77-210) 102

Where there was no evidence in the record of any notice to the respondent of the defect in the road, the simple existence of such a defect does not establish negligence per se; therefore, the Court denied a claim for damage to claimant's vehicle, which had struck a pothole. *Daniel Lewis Light vs. Department of Highways* (CC-77-53) 61

A claim for damage to claimant's automobile, which occurred when it struck a hole in the road, was denied because there was no evidence in the record of any notice to the respondent of the defect. *James C. MacKnight vs. Dept. of Highways* (CC-78-144a) 340

The claimant was granted an award for injuries received when she fell while entering an outhouse at a State park, for the record established that the respondent knew, or, with reasonable effort should have known, of the condition of the outhouses, and the failure to properly maintain the facilities constituted negligence. *Alice Marcum vs. Department of Natural Resources* (CC-76-65) 211

A claim for damage to an automobile as the result of striking a pothole was denied as it must be established that, having received notice of a defect in the road, the respondent must also have sufficient time within which to take remedial action. *Dallas Poe vs. Department of Highways* (CC-78-97) 201

Where claimant sustained injuries to her leg when she stepped into a large hole in the roadway, the Court made an award for the injuries sustained, as the Court determined that the respondent had constructive knowledge of said hole and was negligent in failing to take remedial measures or to warn the public of the presence of the hole. *Rhoda Raynett McIntyre vs. Dept. of Highways* (D-737) 213

Where the respondent knew of dangerous road conditions caused by a tar spill on State Route 4 in Clay County, and negligently failed to correct the situation, and the respondent also knew that several accidents had occurred at this point, resulting in torn-out guardrails, the Court made an award on a stipulated claim of wrongful death where claimant's decedent died as a result of coming upon the tar spill and sliding through the torn-out guardrails into a creek where he died. *Helen L. Norvell, Executrix of the Estate of Glenn Hartsel Norvell, Deceased vs. Dpartment of Highways* (D-936) 106

Where the respondent State agency knows that a road is too narrow for two-lane traffic, and knowingly allows the dangerous condition to exist, the respondent will be held liable for damages sustained by a claimant whose son had an accident on said road, causing damage to claimant's automo-

bile. *Arizona M. Offutt vs. Department of Highways* (CC-76-109) 107

Where the respondent, Department of Corrections, had a contract with the claimant for certain psychological services to be provided to two institutions of the respondent, and the claimant was orally notified that the contract would expire and that the claimant would receive no compensation for the last 65 days of the contract, the Court made an award, because oral notification was not in compliance with the contract provision of 30 days' written notice. *Positive Peer Culture, Inc. vs. Dept. of Corrections* (CC-77-117) 285

The Court denied a claim where claimant's son, while operating claimant's automobile, struck a pothole which was filled with water as there was insufficient evidence to establish notice or constructive notice to the respondent of the pothole, and the simple existence of a pothole does not establish negligence per se. *Robert M. Pratt vs. Department of Highways* (CC-78-122) 176

It is well established that the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways, and such law is applicable to pedestrians crossing the highway. Therefore, where the claimant who suffered injuries as a result of falling in a hole in the pavement of a road, the Court held that there must be proof that the respondent had actual or constructive notice of the defect in the road in order to establish negligence. *Jeanne Robinson vs. Department of Highways* (CC-77-33) 145

Where a live tree fell across the highway and claimant's van collided with the tree, resulting in damages to the van and injuries to the claimant, the Court concluded that there was no evidence that the respondent knew or in exercise of ordinary care should have known that the tree posed a hazard to traffic on the highways; therefore, the Court denied the claim. *Randall I. Samples vs. Dept. of Highways* (CC-77-82) 217

The Court made an award to claimant for damage to an automobile when claimant's wife, while driving said vehicle, struck a hole in the road. The Court held that the respondent owes a duty of reasonable care and diligence in the maintenance of highways, especially where the respondent had notice of the dangerous condition and the repairs should have been made within a reasonable time. *Larry Keith Smith vs. Dept. of Highways* (CC-78-259) 351

The failure of the respondent to exercise ordinary care must be established by a preponderance of the evidence, and, while the claimant testified that there was mud and water on the road resulting from a clogged drainage ditch, and the condition caused the claimant's accident, there was no evidence introduced to establish notice to the respondent of the condition of the roadway. The Court denied the claim. *Gerald E. Tinsley and Lois C. Tinsley vs. Department of Highways* (CC-77-165) 134

OFFICE EQUIPMENT AND SUPPLIES

Claimant's claim for payment of merchandise which was ordered, shipped, and received by the respondent, but for which the respondent was not able to pay as there were in-

sufficient funds remaining in its appropriation for the specific fiscal year, the Court denied the claim in accordance with the *Airkem* decision. *Alling and Cory vs. Dept. of Corrections* (CC-78-232) 235

Where the respondent State agency admitted the validity of the claim but stated that it lacked the necessary funds in the appropriate fiscal year from which the claim could have been paid, the Court denied the claim where claimant sought payment of a bill for a renewal equipment performance program for a Miracode Microfilmer. See *Airkem, et al. vs. Department of Mental Health,* 8 Ct. Cl. 180 (1971). *Eastman Kodak Co. vs. Office of the Secretary of State* (CC-78-112) 167

Where the respondent admitted the validity of the claim and stated that payment for the equipment delivered by the claimant had not been made prior to the close of the particular fiscal year in which the equipment was received, the Court made an award to the claimant for the equipment. *Dill's Mountaineer Associates, Inc. vs. Department of Health* (CC-79-94) 348

Claimant was granted an award for small purchases made by the respondent as the respondent admitted the validity of the claim and that it had sufficient funds with which to pay for the purchases in the fiscal years in question. *Heck's Inc. vs. Division of Vocational Rehabilitation* (CC-79-36) 339

A claim for transportation charges related to typewriters contracted for under a lease agreement between the claimant and respondent will be allowed by the Court inasmuch as there was a specific provision in the contract relating thereto. *IBM Corporation vs. Department of Motor Vehicles* (CC-77-1) 2

The Court disallowed a claim for a service and lease agreement for copying equipment and typewriters as the respondent State agency had no funds remaining for the fiscal year in which the obligation could have been paid; the claim was barred by *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct. Cl. 180 (1971). *IBM Corporation vs. Department of Corrections* (CC-78-277) 284

Where claimant performed printing service for the respondent and the respondent admitted the validity of the claim and the amount due, the Court made an award to the claimant. *Jones Printing Company, Inc. vs. Governor's Office of Economic and Community Development* (CC-77-207) 99

Where claimant sought compensation for goods furnished and services rendered to West Virginia University, and the respondent admitted the validity of each claim and that there were sufficient funds available at the close of the fiscal year from which the claims could have been paid, the Court made awards to each of the claimants. *Light Gallery and Supply Co., et al. vs. Board of Regents* (CC-79-2) 321

Claimant was granted an award for business forms where the respondent had received and accepted the same, even though the forms were in excess of the amount of the original order. *Moore Business Forms, Inc. vs. Department of Health, Division of Mental Health* (CC-78-46) 214

The Court made an award to the claimant for unpaid invoices admitted by the respondent. *3M Business Products Sales, Inc. vs. Department of Motor Vehicles* (CC-77-194) 118

Claimant was granted an award for the cost of printed forms shipped by the claimant to the respondent, but for which the claimant failed to be paid as the invoice was received by the respondent after the close of the fiscal year. *Uarco, Inc. vs. Board of Regents* (CC-78-53) 150

PARKS AND PLAYGROUNDS

Where claimant's automobile was damaged when a limb from a live tree fell onto her car while she was visiting a State park, the Court disallowed the claim as there was no explanation of why the limb fell, nor any proof that it fell as a result of negligence on the part of the respondent. *Harold Hersom and Eleanore Hersom vs. Dept. of Natural Resources* (CC-77-170) 312

Claimants filed a claim for injuries received when a limb from a dead tree fell while claimants were fishing at North Bend State Park. The Court denied the claim as this was not an area of the park designated for fishing, nor was it patrolled or maintained by the respondent for use by the public; therefore, the respondent was not negligent in its maintenance of the area. *Frances J. Larch and William E. Larch vs. Dept. of Natural Resources* (CC-77-120) 291

The claimant was granted an award for injuries received when she fell while entering an outhouse at a State park, for the record established that the respondent knew, or, with reasonable effort should have known, of the condition of the outhouses, and the failure to properly maintain the facilities constituted negligence. *Alice Marcum vs. Department of Natural Resources* (CC-76-65) 211

Claimant was granted an award for personal injuries sustained at a State forest when a large limb fell from a dead tree near a picnic table at which the claimant was sitting, as the respondent was negligent for failing to remove the dead tree. *Edith Ann Thompson & Roger Dale Thompson vs. Department of Natural Resources* (CC-77-7) 132

PEDESTRIANS

Claimant sustained personal injuries when he fell into a large hole adjacent to a path used by students attending a Fine Arts Camp at West Virginia University. The general law is that an institution is under a duty of ordinary or reasonable care with regard to the condition of its grounds to see that they are maintained in a reasonably safe condition, and, as the respondent failed in this duty, the Court made an award to the claimant. *Jacquelyn B. Eisenberg, parent and next friend of Mark Harold Eisenberg, an infant vs. Board of Regents* (CC-76-143) 273

Where claimant sustained injuries to her leg when she stepped into a large hole in the roadway, the Court made an award for the injuries sustained, as the Court determined that the respondent had constructive knowledge of said hole and was negligent in failing to take remedial measures or to warn the public of the presence of the hole. *Rhoda Raynett McIntyre vs. Dept. of Highways* (D-737) 213

Where the claimant sustained personal injuries when she fell into a hole on the sidewalk of a bridge, which hole she

had seen prior to crossing the bridge, the Court held that the claimant was guilty of contributory negligence as a matter of law. *Dema Marie Welch vs. Department of Highways* (CC-77-17) 136

If the claimant had exercised the reasonable care required of her under the circumstances, and maintained a proper lookout for a hole in the walkway of a bridge which she knew to be there, she would have been able to avoid the injury. Therefore, the Court denied the claim, as the condition of the bridge was not the proximate cause of the accident. *Dema Marie Welch vs. Department of Highways* (CC-77-17) 136

It is well established that the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways, and such law is applicable to pedestrians crossing the highway. Therefore, where the claimant who suffered injuries as a result of falling in a hole in the pavement of a road, the Court held that there must be proof that the respondent had actual or constructive notice of the defect in the road in order to establish negligence. *Jeanne Robinson vs. Department of Highways* (CC-77-33) 145

Claimant alleged personal injuries suffered when she fell after the heel of her shoe became caught in a gap between a sidewalk and curb. The Court denied the claim as the claimant failed to exercise reasonable care for her own safety, for the law is well settled that a pedestrian has the duty to exercise ordinary and prudent care for his own safety and to look for and protect himself from known and visible dangers, and failure to do so constitutes contributory negligence as a matter of law. See *Vance vs. Dept. of Highways,* 10 Ct. Cl. 189 (1975). *Chrystine Winer vs. Dept. of Highways* (CC-78-170) 353

PERSONAL SERVICES

A claim for personal services rendered by the claimant as a consultant to the Tax Department was admitted by the respondent State agency, which requested payment of the claim, and the Court made an award to the claimant for said services. *Donald M. Bondurant vs. State Tax Department* (CC-77-142) 24

PHYSICIANS AND SURGEONS—See also Hospitals

Where claimant physician rendered professional services to a patient at a State hospital, for which services claimant was not paid because the agency failed to have sufficient funds in its budget, the Court applied the *Airkem* decision and denied the claim. *Pedro N. Ambrosio vs. Department of Health, Division of Mental Health* (CC-77-90) 15

Where the respondent refused to pay the statement submitted by medical doctors who rendered professional services to a trooper in the employ of the respondent because the statement was submitted after the close of the fiscal year, the Court made an award for said services. *H. M. Hills, Jr. & Luis A. Loimil vs. Department of Public Safety* (CC-77-200) 70

Claimant sought payment for services rendered to an inmate of the Department of Corrections, but the Department lacked the requisite funds in its appropriation for the fiscal year in question; therefore, the Court disallowed the claim based upon the decision in *Airkem Sales and Service, et al. vs. Depart-*

PRISONS AND PRISONERS

PUBLIC EMPLOYEES RETIREMENT SYSTEM

PUBLIC INSTITUTIONS

The Court denied a claim for damage to claimant's typewriter which occurred when an involuntarily committed patient was issued a pass to seek legal assistance from the claimant. The Court noted that an institution is not negligent per se whenever a temporarily released patient causes damage to someone's property. *James T. Kratovil vs. Department of Health, Division of Mental Health* (CC-78-54) 200

Where the claimant filed a claim alleging damages sustained as the result of an alleged unlawful revocation of his probation and subsequent confinement at Huttonsville Correctional Center, the Court overruled respondent's motion to dismiss based upon the theory that the claimant had an adequate remedy at law in the federal courts under the Civil Rights Act, 42 U.S.C. §1983. The Court held that the agencies, West Virginia Board of Probation and Parole and West Virginia Department of Corrections, named in the complaint as respondents, are not considered "persons" within the meaning of the Civil Rights Act. *Lewis Dale Metz vs. State Board of Probation and Parole and Dept. of Corrections* (CC-79-155) 342

Claimant was awarded an amount which represented the balance due under a contract for providing psychological services to the inmates of two institutions where the respondent failed to terminate the contract by providing 30 days' written notice to the claimant in accordance with the provisions in the contract. *Positive Peer Culture, Inc. vs. Dept. of Corrections* (CC-77-117) 285

Where the respondent, Department of Corrections, had a contract with the claimant for certain psychological services to be provided to two institutions of the respondent, and the claimant was orally notified that the contract would expire and that the claimant would receive no compensation for the last 65 days of the contract, the Court made an award, because oral notification was not in compliance with the contract provision of 30 days' written notice. *Positive Peer Culture, Inc. vs. Dept. of Corrections* (CC-77-117) 205

Where claimant's decedent, while a patient in a State institution, sustained injuries in a fall and later died, the Court held that the doctrine of res ipsa loquitur cannot be invoked where existence of negligence is solely a matter of conjecture or where it may be held that there was no negligence on the part of the respondent; therefore, the Court denied the claim. *Patty Sheets, Administratrix of the Estate of Ray Samuel Six, deceased vs. Department of Health, Division of Mental Health* (CC-76-80) 332

Claimant was granted an award for damage to his vehicle when two inmates from Huttonsville Correctional Center walked away from the institution, stole the vehicle, and damaged it. To deny the claim would amount to imposing a penalty upon a citizen of the State for living near a correctional institution. *Albert K. Tyre vs. Dept. of Corrections* (CC-78-178) 263

The Court made an award to the claimant for damage to his vehicle caused by inmates who had walked away from Huttonsville Correctional Center and stolen the vehicle. A review of the law by the Court regarding acts of escapees from institutions made it apparent that each claim must be

PUBLIC OFFICERS

REAL ESTATE

Where claimants' fence was damaged by an employee of the respondent during road grading operations, the Court made an award to the claimant for the damage. *Albert D. Fentress & Hazel S. Fentress vs. Department of Highways* (CC-77-162) .. 94

Where a portion of claimant's fence was damaged by the respondent during snow removal operations, the Court made an award to the claimant for the damages. *Douglas Haney vs. Dept. of Highways* (CC-78-226) 250

Claimants were made an award for damage to their property during snow removal activities. (See *Hubbs vs. Highways*, 12 Ct. Cl. 39, 1977). *Robert M. Hastings & Linda Hastings, d/b/a Hastings Stables vs. Department of Highways* (CC-77-94) 44

Claimants were granted an award for damage to their home which was caused by blasting done by the respondent incident to the excavation of a cut through a hill, since liability for damage proximately caused by blasting is absolute. *Arnold G. Heater and Geraldine Heater vs. Dept. of Highways* (CC-78-130) 310

Even though the Court agreed that the National Guard occupied the position of an independent contractor when its members performed snow removal operations on behalf of the respondent, the rule of non-liability is subject to certain exceptions, one of which is where by statute a special duty is imposed upon the respondent; therefore, the Court made an award to the claimant where members of the National Guard, in removing snow from a main highway, performed their work in a negligent manner, causing damage to claimant's fence line. *Kermit Reed Hubbs vs. Department of Highways* (CC-77-83) 39

Where respondent's employees sprayed a weed killer adjacent to claimants' property, and said weed killer caused damage to trees and shrubs on claimants' property, the Court made an award to the claimants in accordance with the written stipulation filed by the parties. *Theodore Korthals & Emile Korthals vs. Department of Highways* (D-1041) 59

Where the employees of the Department of Highways blocked a stream, which caused periodic flooding on claimant's property and resulted in a slip, the Court made an award for the corrective work necessary to prevent further damage to claimant's property. *Herman F. Lilly vs. Department of Highways* (CC-77-133) 153

The Department of Highways has a legal duty to use reasonable care to maintain a ditch line in such condition that it will carry off surface water and prevent it from passing upon property adjacent to the road. Therefore, the Court made an award where the claimant proved by a preponderance of the evidence that the respondent failed to maintain the ditch line properly, and as a result of such failure, a landslide occurred causing damage to the property of the wards of the claimant. *Polly Stevens, Guardian of the Person and Estate of James Walter Stevens and Timothy Stevens vs. Department of Highways* (D-688) 180

The proper method of establishing damage to real estate is to determine the difference in the fair market value of the property before and after the landslide; therefore, the Court used the expert testimony of the witness who determined the

damage to the real estate via this method. *Polly Stevens, Guardian of the Person and Estate of James Walter Stevens and Timothy Stevens vs. Department of Highways* (D-688) 180

An award was made to the claimant for damage to a rock wall where employees of the State damaged the same during the cleanup of flood debris in Williamson, West Virginia. *Thelma J. Stone vs. Office of the Governor — Emergency Flood Disaster Relief* (CC-78-11) 202

Where the respondent failed to maintain a ditch adjacent to the front of claimants' property, and as a result of such failure, the claimants' home and contents were damaged by water and mud, the Court made an award for such damage in accordance with the written stipulation filed by the parties. *Charles E. and Mary P. Taylor vs. Department of Highways* (CC-78-206) 261

The Court denied claimant's claim for damage to her property allegedly sustained as the result of diversion of a natural drain course by the respondent. The evidence would have required the Court to engage in pure speculation, which it cannot do. *Ruth Ann Toppings vs. Department of Highways* (D-1007) 261

An award was made to claimants for damage to their home from excessive water run-off which occurred as the result of respondent's negligent re-surfacing activities and inadequate drain design and maintenance of a street and bridge adjacent to claimants' property. *Loraine White and Velma White vs. Dept. of Highways* (CC-78-139) 271

RELOCATION ASSISTANCE

Where the respondent had actual notice of claimants' claim for relocation expense, the fact that the notice was not written in the form required by respondent did not bar the claim, because the memorandum did not have the force and effect of law; therefore, the Court made an award to the claimants for said relocation expense. *Olie G. Bastin and Priscilla Bastin vs. Department of Highways* (CC-76-24) 86

SCOPE OF EMPLOYMENT

Where the actions of the claimant as an employee of the respondent were not within the scope of his employment, and were not the type of actions reasonably expected of an employee in the type of work he was performing, the Court denied claimant's claim for attorney fees and a settlement in the civil action wherein the employee of the respondent was involved in an altercation with the employee of a contractor of the respondent. *Robert A. Heater vs. Department of Highways* (CC-77-179) 137

SICK LEAVE

Where the respondent State agency improperly deducted a period of absences from claimant's pay and the claimant had accumulated sufficient sick leave to cover that period, the Court made an award for the wage deduction made by the respondent. *A. M. Fredlock, II vs. Dept. of Highways* (CC-78-3) 197

STATE AGENCIES

Where respondent's agent damaged a steel expansion joint incident to snow removal and left it protruding above the sur-

face of the highway so as to create a hazard to vehicular traffic, respondent was negligent and was liable for damage thereby done to the undercarriage of claimant's vehicle. *Charles H. Spradling, Jr. vs. Department of Highways* (CC-78-68) 336

STATUTES

The failure of the postal service to deliver a Notice of Claim within three days does not provide legal ground for the Court to deny respondent's Motion to Dismiss said claim when the claim was not received by the Clerk and was not filed until after the two-year period of limitation set forth in West Virginia Code §55-7-6. *Elwood Clark, Admin. of the Estate of Sharon Marie Clark, dec. vs. State Fire Marshal* (CC-76-102) 77

Where claimant contended that the period of limitation was tolled due to the incapacity of the decedent's mother, and there was a delay in appointing an administrator for decedent's estate, the Court held that the period of limitation is not tolled until an administrator is appointed; therefore, the claim was dismissed based upon the fact that the claim was not filed within the period of limitation set forth in West Virginia Code §55-7-6. *Elwood Clark, Admin. of the Estate of Sharon Marie Clark, dec. vs. State Fire Marshal* (CC-76-102) 77

Where the claimant sustained damage to her property as a result of a backfire started on her property by employees of the respondent who were attempting to control a forest fire, the Court held that Code §20-3-4 authorizes the respondent to start backfires and exonerates the fire fighters from criminal responsibility. However, this does not mean that a property owner's property can be destroyed without compensation for the loss. *Mrs. Richard L. Cooper vs. Department of Natural Resources* (CC-77-60) 93

The Court denied a claim by owners of a business who alleged that the respondent interfered with a closing-out sale which resulted in a loss of sales. The Court concluded that the claimants did not comply with the legal requirements for conducting such sale, and there was no evidence to establish improper conduct toward the claimant on the part of the employees of the respondent. *Robert V. Heverley, Jr. and Kathleen Heverley, d/b/a Frances Shoppe, Inc. vs. Department of Labor* (CC-77-81) 251

Where the claimant filed a claim alleging damages sustained as the result of an alleged unlawful revocation of his probation and subsequent confinement at Huttonsville Correctional Center, the Court overruled respondent's motion to dismiss based upon the theory that the claimant had an adequate remedy at law in the federal courts under the Civil Rights Act, 42 U.S.C. §1983. The Court held that the agencies, West Virginia Board of Probation and Parole and West Virginia Department of Corrections, named in the complaint as respondents, are not considered "persons" within the meaning of the Civil Rights Act. *Lewis Dale Metz vs. State Board of Probation and Parole and Dept. of Corrections* (CC-79-155) 342

The Claimant filed a claim for damages allegedly sustained as the result of the alleged unlawful revocation of his probation and subsequent confinement at Huttonsville Correctional Center when he was released upon a writ of habeas corpus.

The respondent made a motion to dismiss the claim based upon the theory that claimant had an adequate remedy at law in the federal courts under the Civil Rights Act, 42 U.S.C. §1983. The Court sustained the motion to dismiss as to specific individuals named in the claim in accordance with W. Va. Code 14-2-13, since under the provision, the Court has no jurisdiction over any individual person. *Lewis Dale Metz vs. State Board of Probation and Parole and Dept. of Corrections* (CC-77-155) 342

The jurisdiction of the Court of Claims is clearly set forth and limited by Code §14-2-13, which specifically excludes an action against the Board of Education in the definition of a State agency. Therefore, the Court sustained the respondent's motion to dismiss as the Court has no jurisdiction over such claims. *Timothy Rakes, by his father and next friend, Andrew Rakes, and Andrew Rakes vs. Board of Education of the County of Lincoln* (CC-77-55) 147

The claimants sought recovery of treble damages for the wrongful cutting of trees on their property under W. Va. Code §61-3-48a. The Court refused to make such an award, as such damages are in the nature of penalties, and this Court was not created for that purpose. The Court made an award for compensatory damages only. *Fred K. Testa & Claudia I. Testa vs. Department of Highways* (D-669a), *Saleem A. Shah & Theresa A. Shah vs. Department of Highways* (D-669b) 115

Where the claimant inadvertently paid twice for an order of Uniform Vehicle Identification Stamps, the Court made an award for the second payment as the agency involved had no statutory authority to make such refund. *Transport Motor Express, Inc. vs. Public Service Commission* (CC-78-4) 192

Interest will not be charged against the respondent under W. Va. Code 14-3-1 where the claimant contractor receives the tentative final estimate but does nothing for several months; however, once the claimant contractor responds to the respondent on the final estimate, interest begins to run again until the point in time when the contractor is paid the final estimate. *Vecellio & Grogan, Inc. vs. Department of Highways* (D-914, D-993, D-918, Par. C) 294

STIPULATION AND AGREEMENT

Where claimant and respondent stipulated that claimant's automobile was damaged when it struck a hole which was full of water and obscured from view, the Court made an award to the claimant. *David E. Alvis vs. Department of Highways* (CC-77-62) 47

Where claimant's automobile struck a hole which was full of water and obscured from view, the Court made an award for damage to the automobile based upon the stipulation filed by the parties. *David E. Alvis v. Department of Highways* (CC-77-62) 47

An award was made to claimant for services rendered when the claim was submitted to the Court upon pleadings which indicated that the services were received and the amount was reasonable. *Arthritis Care Associates vs. Division of Vocational Rehabilitation* (CC-77-220) 85

Where claimant and respondent stipulated that the claimant's truck sustained damage due to a plate and bolts protruding from the highway, the Court made an award to the claimant, as the negligence on the part of the respondent was the proximate cause of the damage. *Wayne Bayliss vs. Dept. of Highways* (CC-78-276) 279

Where employees of the respondent tore down a damaged building on property belonging to the claimant, the Court made an award for the damages to the building in accordance with the stipulation entered into by the parties. *Boone Sales, Inc. vs. Department of Highways* (CC-76-119) 92

Where claimants and respondent stipulated that the claimants' vehicle was damaged when it struck a large hole which was covered with water on the date of the accident, the Court made an award to the claimant in accordance with the written stipulation filed by the parties. *Darrell E. Buckner & Betty S. Buckner vs. Department of Highways* (CC-77-129) 41

Where employees of the respondent negligently damaged telephone cables belonging to the claimant, the Court made an award for the damage in accordance with the stipulation filed by the parties. *The C & P Telephone Company of W. Va. vs. Department of Highways* (CC-76-132) 194

Where employees of the respondent State agency negligently supervised students who were using firearms with the result that bullets damaged claimant's telephone cables, the Court made an award to the claimant for the damages. *The C & P Telephone Co. of W. Va. vs. Department of Natural Resources* (CC-78-105) 164

Where respondent's sign crew damaged claimant's water main while installing a stop sign, the Court made an award for the damage in accordance with the stipulation filed by the parties. *Claywood Park Public Service District vs. Dept. of Highways* (CC-78-87) 192

Where the parties stipulated that an employee of the respondent negligently threw a rock against claimant's vehicle, breaking the windshield, the Court made an award to the claimant for said damage. *Virginia Sue Cook vs. Department of Highways* (CC-77-144) 58

The Court made an award to the claimant in accordance with the stipulation filed by the parties which indicated that in the performance of stone quarry operations a degree of damage was caused to claimant's property. *B. H. Cottle and B. H. Cottle, Executor of the Estate of Lucy M. Cottle, deceased vs. Department of Highways* (CC-77-49) 167

Claimant's automobile sustained damage when his wife was driving the vehicle across a bridge where a metal plate became loose and struck the undercarriage of the vehicle. The Court made an award for the damage in accordance with the stipulation filed by the parties. *Rush Fields vs. Department of Highways* (CC-78-77) 149

Where the parties stipulated that the respondent had knowledge of a large hole on a ramp of Interstate 64, but had made no repairs and failed to erect any warning signs, the Court made an award to the claimant in the amount stipulated for the damage sustained by the vehicle after striking the hole.

resulting in torn-out guardrails, the Court made an award on a stipulated claim of wrongful death where claimant's decedent died as a result of coming upon the tar spill and sliding through the torn-out guardrails into a creek where he died. *Helen L. Norvell, Executrix of the Estate of Glenn Hartsel Norvell, deceased vs. Department of Highways* (D-936) 106

The Court made an award to the claimant for the construction of a fireplace at Cass Scenic Railroad. The case was submitted upon the pleadings, in which the respondent admitted liability. *Jerry Austin Rexrode vs. Department of Natural Resources* (CC-77-202) 110

As the result of construction activities near claimant's house, water flooded claimant's basement and caused damage to personal property; the Court made an award to the claimant for the damage in accordance with the written stipulation filed by the parties. *Mae Russell vs. Department of Highways* (CC-78-81) 177

Where the parties stipulated that the claimant lawfully drove his dump truck across a bridge belonging to the respondent, which bridge collapsed, and the evidence was that an inspection in 1974 had revealed that the bridge had a low limit of zero tons, but the respondent failed to repair the bridge or post a weight limit on it, the Court made an award to the claimant for the loss of said truck. *Charles E. Schooley vs. Department of Highways* (CC-76-131) 28

Where the parties stipulated that claimant's automobile was damaged when a metal plate became dislodged from a hole on a state highway, the Court made an award to the claimant for the damage in accordance with the stipulation. *Lawrence Craig Skaggs vs. Department of Highways* (CC-77-56) 3

Where the respondent failed to maintain a ditch adjacent to the front of claimants' property, and as a result of such failure, the claimants' home and contents were damaged by water and mud, the Court made an award for such damage in accordance with the written stipulation filed by the parties. *Charles E. and Mary P. Taylor vs. Department of Highways* (CC-78-206) 261

Where blasting activities by employees of the respondent caused damage to claimants' property, the Court made an award for such damage in accordance with the stipulation filed by the parties. *John Tillinghast & Janet Tillinghast vs. Department of Highways* (CC-77-80) 159

Where damage to the foundation of claimant's dwelling was caused by water run-off from a nearby road right-of-way maintained by the respondent, the Court made an award for the damage as it was stipulated that negligence on the part of the respondent was the proximate cause of the damages. *W. F. Webb vs. Department of Highways* (CC-78-191) 204

An award was made to the claimant for damages resulting from respondent's breach of an employment contract with the claimant where the parties agreed to the amount in a stipulation filed with the Court. *John M. Weber vs. Board of Regents* (CC-77-229) 270

STREETS AND HIGHWAYS—See also Falling Rocks; Landslides; Motor Vehicles; Negligence

The Court made an award to the claimant for personal injuries and damages to his automobile where the stipulation filed by the parties indicated that the claimant struck a water-filled hole in the surface of the highway approximately 7½ inches deep and two to three feet wide, which hole had existed for some time prior to the accident. *Elvin S. Alford vs. Department of Highways* (D-990) 14

Where claimant alleged damage to his truck as the result of hitting a water-filled pothole, and the evidence revealed that the respondent had attempted on several occasions to repair the hole through the use of both hot mix and cold mix, but due to a drainage problem, water would accumulate and cause the mix to wash out and re-create the pothole, the Court denied the claim, as the respondent is under a duty only to use reasonable care to keep the highways in a reasonably safe condition, and the respondent had discharged the duty in this particular case. *James R. Banhart vs. Department of Highways* (CC-78-119) 236

Where claimant and respondent stipulated that the claimant's truck sustained damage due to a plate and bolts protruding from the highway, the Court made an award to the claimant, as the negligence on the part of the respondent was the proximate cause of the damage. *Wayne Bayliss vs. Dept. of Highways* (CC-78-276) 279

Where claimant's automobile sustained damage when she struck a pothole, the Court determined that there was no notice of the dangerous condition of the highway, nor was there such a neglect of duty that would create liability on the part of the respondent, and the claim was disallowed. *Cynthia Lou Bradshaw vs. Department of Highways* (CC-78-30) 187

Where a contractor of the Department of Highways damaged an expansion joint on an interstate and failed to make any effort to notify the respondent or warn motorists, the Court made an award to the claimant for damages to his automobile when he struck said expansion joint. The law is well settled that the principal must bear the consequences of his agent's negligence, and therefore, the respondent is liable to the claimant. *Jeffrey D. Bubar vs. Department of Highways* (CC-78-27) 204

Where claimant sustained damage to his automobile when he struck a pothole in a portion of a road which was otherwise free from defects, the Court denied the claim. *Arnell Church vs. Department of Highways* (CC-78-79) 165

Where the employees of the respondent sprayed portions of a highway with an anti-spalling compound used for the preservation of concrete and there were no warning signs or flagmen before, during, or after the job, and as a result, the claimant was involved in an accident where another automobile slid on the treated portion of the roadway and into the claimant, causing injuries thereto, the Court made an award to the claimant. *Michael H. Coen & Ruth Coen vs. Department of Highways* (D-1008) 119

Where the negligence of the respondent was the proximate cause of the accident, as it failed to provide for the safety of

the traveling public during and after the application of an anti-spalling compound to the highway, the Court made an award to the claimant for injuries received in an accident when an automobile being driven in the lane opposite the claimant slid in the anti-spalling compound across the highway and into the claimant, causing the injuries to the claimant. *Michael H. Coen & Ruth Coen vs. Department of Highways* (D-1008) 119

Where claimant's fencing was damaged during snow removal operations being performed by the respondent, the Court held the respondent liable for the damage. *Stanley N. Cosner vs. Department of Highways* (CC-78-182) 240

Where the claimants sustained damage to their property due to the negligence of respondent's employees in snow removal operations, the Court held that it was negligence on the part of the operator of the equipment to fail to confine his activities within the right-of-way of the road. See also *Hubbs vs. Department of Highways,* 12 Ct. Cl. 39 (1977). *Clyde W. Cummings & Betty L. Cummings vs. Department of Highways,* (CC-77-102) 41

Where a hole in the road appeared suddenly and without warning, proof of actual or constructive notice is a prerequisite to establishing negligence; therefore, the Court denied the claim since respondent did not have notice of the particular hole in this claim in time to prevent the accident. (See *Hoskins vs. Department of Highways,* 12 Ct. Cl. 60, 1977). *John F. Cummings vs. Department of Highways* (CC-76-77) 59

Where the claimant struck a rock in a construction area after having been signaled forward by a flagman, the Court denied the claim as the evidence disclosed that the claimant failed to exercise reasonable care under the circumstances, since the presence of a flagman at a construction site is sufficient to alert a motorist to the possibility of a dangerous condition. *James L. Dykes vs. Department of Highways* (CC-78-225) 349

The respondent Department of Highways may not be held liable for negligent maintenance of a section of highway until the date of final acceptance of the highway by the respondent; therefore, in a claim for damage to a tractor-trailer which occurred when the driver proceeded onto the berm of an entrance ramp to I-77 and, in so doing, passed over a metallic post which extended out of the berm, the Court held that the Department of Highways was not liable since the State had not yet signed and approved the final acceptance for the highway. *Econo-Car International, Inc. vs. Department of Highways* (CC-76-32) 80

Due to a lack of evidence presented in the claim, the Court denied a claim against the respondent for the cost of gas lost by reason of a break in a private gas line alleged to have been caused by respondent's snowplow. *Evans Lumber Company vs. Department of Highways* (CC-78-109) 246

Where the parties stipulated that the respondent had knowledge of a large hole on a ramp of Interstate 64, but had made no repairs and failed to erect any warning signs, the Court made an award to the claimant in the amount stipulated for the damage sustained by the vehicle after striking the hole. *Bradford G. Frazier vs. Department of Highways* (CC-77-201) 69

Where claimant's automobile was damaged when it struck a loose piece of blacktop, and the claimant failed to establish that the respondent either knew, or in the exercise of ordinary care, should have known about the defect in the road, the Court denied the claim. *Charles W. Grose vs. Department of Highways* (CC-77-75) 25

Claimant was denied a claim for damage to his vehicle which occurred when the vehicle struck an embankment as the Court determined that, even though the respondent was negligent in failing to maintain a culvert causing accumulation of water on the highway, the claimant was guilty of contributory negligence which proximately contributed to the accident. *Lloyd Harding Gwinn vs. Dept. of Highways* (CC-77-191) 128

The Court denied claimant's claim for damage to his vehicle sustained when the claimant drove his vehicle into water on the highway which caused him to loose control and drive into an embankment, as the Court determined that claimant's failure to cross the double line when there was no approaching traffic was negligence. *Lloyd Harding Gwinn vs. Dept. of Highways* (CC-77-191) 128

A claim for personal injuries sustained by the claimant in an accident alleged to have been caused by a blocked culvert, which caused water to flow across a highway, was denied by the Court as there was no showing that the respondent knew or should have known that there was a clogged culvert, nor was there any showing that respondent was negligent in permitting the partial flooding of the highway. *Karen Haller vs. Department of Highways* (CC-77-123) 327

Where a portion of claimant's fence was damaged by the respondent during snow removal operations, the Court made an award to the claimant for the damages. *Douglas Haney vs. Dept. of Highways* (CC-78-226) 250

Where claimant's automobile sustained damage as the result of striking construction plates which were not securely fastened down on the highway, the Court made an award to the claimant for the damages as the negligence of the respondent was the proximate cause of the damage. *Howard A. Haynes vs. Department of Highways* (CC-78-281) 283

Where the claimant struck a large hole in the inside eastbound lane of I-70 just beyond the Wheeling Tunnel, and the evidence disclosed that the hole apparently came into existence within an hour of the accident, the Court denied the claim since proof of actual or constructive notice is required. *Patricia S. Hoskins vs. Department of Highways* (CC-76-79) 60

Where the evidence indicated that a dangerous condition appeared suddenly and that the respondent moved promptly to take safety precautions as soon as it became aware of the problem, the Court denied a claim where the claimant struck a large hole which had appeared within an hour of the accident, because negligence on the part of the respondent was not proved. *Patricia S. Hoskins vs. Department of Highways* (CC-76-79) 60

Where the parties stipulated that the respondent negligently failed to secure a steel plate covering a large hole in Route 60 in South Charleston, and said negligence resulted in damage to claimant's car, the Court made an award to the

claimant for said damages. *McHenry Hudnall, Jr. vs. Department of Highways* (CC-77-52) 26

The claimant was granted an award for damage to his automobile when a portion of ceiling tile fell from the Wheeling Tunnel onto the automobile, because the respondent, Department of Highways, is responsible for the maintenance of the Wheeling Tunnel. *Alvin O. Hunter vs. Dept. of Highways* (CC-77-68) 198

Claimant was granted an award for damage to her automobile when her automobile ran over a sign belonging to the respondent as the Court held that leaving a sign upon the traveled portion of the highway constituted negligence. *Peggy Keyser vs. Department of Highways* (CC-78-38) 199

Claimants were granted awards for personal injuries sustained in a single-vehicle accident when the vehicle struck three large potholes. The evidence indicated that the holes had been there for a substantial period of time, creating a dangerous condition of which the respondent either knew, or, in the exercise of ordinary care, should have known. *Forest Joe King, et al. vs. Dept. of Highways* (CC-77-37) 208

Even though the claimant demonstrated that there were defects in the highway which caused the damage to his automobile, to establish negligence on the part of the respondent there must be proof that the respondent either knew, or, in the exercise of ordinary care, should have known about the defects. Without such proof, the Court must disallow the claim. *John Lavender, Jr. vs. Department of Highways* (CC-77-85) 54

A claim for damage to the tire and rim of claimant's automobile was denied where there was no showing that the respondent had knowledge of the hole in the road which was alleged to have caused the damage as the claimant failed to prove a positive neglect of duty on the part of the respondent. *Gregory D. Lavinder vs. Department of Highways* (CC-77-19) 16

Where there was no evidence in the record of any notice to the respondent of the defect in the road, the simple existence of such a defect does not establish negligence per se; therefore, the Court denied a claim for damage to claimant's vehicle, which had struck a pothole. *Daniel Lewis Light vs. Department of Highways* (CC-77-53) 61

The Court denied a claim for damage to claimant's vehicle when said vehicle slid upon ice on the highway into a median strip. There was no showing that the respondent knew or should have known of the existence of ice on the highway, and the law is well established that the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. See *Adkins vs. Sims*, 130 W. Va. 645, 46 S.E. 2d 81 (1974). *Gregory K. Lipscomb vs. Dept. of Highways* (CC-78-48) 322

An award was made to claimant for paint damage to her automobile when she encountered a large paint spill on the highway and was unable to avoid going through it. *Deloris J. Lively vs. Department of Highways* (CC-77-228) 153

The claimant was denied an award for damage to his automobile which occurred when his wife, who was driving, struck a hole in the road, damaging a tire and rim. The Court has

held many times that the State is not a guarantor of the safety of travelers on its roads, and the user of the highways travels at his own risk. *James C. MacKnight vs. Dept. of Highways* (CC-78-144b) 341

Where there was no evidence, and the evidence presented was conflicting, as to the conditions of the roadway, the Court denied a claim where claimant's decedent, while driving his automobile, was involved in an accident alleged to have been caused by a wet road covered with slag and cinders. The Court concluded that if there were debris on the road, it was not caused by the negligence of the respondent. *Geraldine May McCarthy, Administratrix of the Estate of Robert Eugene McCarthy vs. Department of Highways* (CC-76-33) 139

Where claimant sustained injuries to her leg when she stepped into a large hole in the roadway, the Court made an award for the injuries sustained, as the Court determined that the respondent had constructive knoweldge of said hole and was negligent in failing to take remedial measures or to warn the public of the presence of the hole. *Rhoda Raynett McIntyre vs. Dept. of Highways* (D-737) 213

As the evidence failed to establish that the respondent had breached any legal duty owed to the claimant, the Court denied claimant's claim for damage to his automobile where the vehicle struck a pothole. *Rodger C. Melling vs. Department of Highways* (CC-78-33) 174

Where the respondent knew of dangerous road conditions caused by a tar spill on State Route 4 in Clay County, and negligently failed to correct the situation, and the respondent also knew that several accidents had occurred at this point, resulting in torn-out guardrails, the Court made an award on a stipulated claim of wrongful death where claimant's decedent died as a result of coming upon the tar spill and sliding through the torn-out guardrails into a creek where he died. *Helen L. Norvell, Executrix of the Estate of Glenn Hartsel Norvell, deceased vs. Department of Highways* (D-936) 106

The Court denied a claim for property damage to claimant's vehicle when he struck a large depression in the road. The law in West Virginia is well settled that contributory negligence on the part of the claimant, however slight, which contributes to proximately cause an accident, will preclude the recovery of damages, and under the facts of this claim, claimant failed to take the precautions necessary to protect his own safety and property. *Charles Edward Pauley vs. Department of Highways* (CC-78-136) 215

Where an accident occurred in a manhole on property not owned nor maintained by the respondent, the Court denied the claim. *Maxine V. Pauley vs. Department of Highways* (CC-77-208) 143

A claim for damage to an automobile as the result of striking a pothole was denied as it must be established that, having received notice of a defect in the road, the respondent must also have sufficient time within which to take remedial action. *Dallas Poe vs. Department of Highways* (CC-78-97) 201

The Court denied a claim where claimant's son, while operating claimant's automobile, struck a pothole which was filled with water as there was insufficient evidence to establish

notice or constructive notice to the respondent of the pothole, and the simple existence of a pothole does not establish negligence per se. *Robert M. Pratt vs. Department of Highways* (CC-78-122) 176

Where the claimant admitted knowledge of the existence of the condition of the road and of the particular pothole which caused damage to her automobile when she was forced by oncoming traffic to go into said hole, the Court denied the claim because of the lack of due care on her part. *Tom Proffit and Myrna Proffit vs. Department of Highways* (CC-77-69) 18

Where claimant alleged that its decedent was killed in an accident which resulted when the respondent failed to provide adequate drainage for a backwater pond, thereby causing water from the pond to overflow and freeze upon the highway, and the evidence failed to establish any connection whatsoever between the water in the pond and the ice on the highway, the Court denied the claim. *Meredith K. Rice, Adm. of the Estate of Syed Q. Abbas, deceased vs. Department of Highways* (D-875) 12

Where the evidence failed to establish flooding or any connection at all between the water in a pond adjacent to the highway and the ice on the highway, which ice was alleged to have caused the accident resulting in the death of claimant's decedent, the claimant failed to prove any negligence on the part of the respondent, and the claim was denied. *Meredith K. Rice, Adm. of the Estate of Syed Q. Abbas, deceased vs. Department of Highways* (D-875) 12

It is well established that the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways, and such law is applicable to pedestrians crossing the highway. Therefore, where the claimant suffered injuries as a result of falling in a hole in the pavement of a road, the Court held that there must be proof that the respondent had actual or constructive notice of the defect in the road in order to establish negligence. *Jeanne Robinson vs. Department of Highways* (CC-77-33) 145

Where claimants sustained personal injuries when their vehicle struck a broken section of interstate, causing the vehicle to leave the highway and overturn, the Court made an award to the claimants as the respondent was negligent both in permitting a dangerous condition to remain on the highway and in failing to take effective action to warn motorists of the condition. *James Ryan & Joyce Ryan vs. Dept. of Highways* (CC-77-189) 329

Where claimant alleged that an accident occured due to the negligent design of the highway which narrowed to the left at the place of the accident, the Court held that since no proof of negligence was presented by the claimant and there were no defects in the pavement, the respondent met the required standard of care, and the claim was denied. *Marie T. Sadd vs. Department of Highways* (CC-77-36) 63

The Court has held many times that the respondent, Department of Highways, is neither an insurer nor a guarantor of the safety of persons travelling on its highways. *Adkins vs. Sims*, 130 W. Va. 645, 46 S.E. 2d 81 (1947). The Court applied this principle in denying a claim for damage to an automobile

where the automobile slipped into a ditch and the evidence disclosed that the road was assigned a low priority as it was difficult to maintain due to its inaccessibility. *Romie C. Sayre vs. Department of Highways* (CC-78-64) 178

The Court made an award to claimant for damage to an automobile when claimant's wife, while driving the vehicle, struck a hole in the road. The Court held that the respondent, which owes a duty of reasonable care and diligence in the maintenance of highways, had notice of the dangerous condition, and repairs should have been made within a reasonable time. *Larry Keith Smith vs. Dept. of Highways* (CC-78-259) 351

Where one of the claimants testified that she and her husband were familiar with the highway, traveling it several times a week, and candidly admitted that she was aware of the existence and location of the pothole, the Court held that even if the respondent were guilty of ngligence in failing to repair the hole, the claimants were guilty of contributory negligence in failing to exercise a proper lookout in order to avoid striking the hole. *Joseph and Marie Sowers vs. Department of Highways* (CC-77-51) 21

The claimant was granted an award for damage to an automobile which he was driving but which did not belong to him where the automobile struck a damaged expansion joint, because the independent contractor of the respondent, who damaged the expansion joint, negligently failed to make any effort to notify the respondent or to warn motorists. *Charles H. Spradling, Jr. vs. Department of Highways* (CC-78-68) 336

Where claimant's vehicle struck a signpost in the road and there was no evidence that the post belonged to the respondent or was knocked from the side of the road onto the highway, the Court denied the claim. *Foster Starcher vs. Department of Highways* (CC-76-120) 157

Claimant was granted an award for damage to her vehicle when she struck a large hole on Route 119 near Morgantown, West Virginia, when the Court held that the road was one of the main arteries into the city, and respondent should have known of the condition of the road and failed to keep it in a reasonably safe condition. *Connie Ann Stone vs. Department of Highways* (CC-78-177) 259

Where claimants filed a claim for personal injuries sustained in an accident at a railway underpass where a train derailment resulted in holes in the road which allegedly caused the accident, the Court denied the claim as the evidence indicated that there was a "ROUGH ROAD" sign placed by the respondent and that frequent repairs were made to the surface of the highway; therefore, the respondent was not guilty of negligence which proximately caused the accident. *Billy Joe Vinson and Paul F. Vinson vs. Department of Highways* (CC-77-157) 219

Claimant alleged personal injuries suffered when she fell after the heel of her shoe became caught in a gap between a sidewalk and curb. The Court denied the claim as the claimant failed to exercise reasonable care for her own safety, for the law is well settled that a pedestrian has the duty to

exercise ordinary and prudent care for his own safety and to look for and protect himself from known and visible dangers, and failure to do so constitutes contributory negligence as a matter of law. See *Vance vs. Dept. of Highways,* 10 Ct. Cl. 189 (1975). *Chrystine Winer vs. Dept. of Highways* (CC-78-170) .. 353

TAXATION

Where the claimant requested a refund of the 5% tax paid to the Department of Motor Vehicles when she purchased a second-hand automobile, but returned the automobile and was refused the refund because the tax had already been sent by the dealer to the department, the Court determined that the sale was nullified by mutual agreement, and the claimant should be refunded the tax. *Sandra S. Clemente vs. Department of Motor Vehicles* (CC-77-167) 48

The claimant was refunded the 5% tax on an automobile purchased, and the two-dollar title fee, when the Court determined that the parties nullified the transaction and the Department of Motor Vehicles was unable to make a refund of the tax. *George M. Custer vs. Department of Motor Vehicles* (CC-77-86) 48

Claimant was granted an award for the refund of the 5% tax paid on the purchase of an automobile where the sale between the parties was nullified and the sales price refunded, and the respondent's State agency was unable to make a refund of the tax. *Anthony R. Rosi vs. Department of Motor Vehicles* (CC-77-138) 110

TREES AND TIMBER

An award was made to the claimant, in accordance with the stipulation filed by the parties, where claimant's vehicle struck a fallen limb on a West Virginia highway, which limb was from a dead tree located near the highway. *Charles R. Gore vs. Department of Highways* (CC-77-197) 172

Where claimant's automobile was damaged when a limb from a live tree fell onto her car while she was visiting a State park, the Court disallowed the claim as there was no explanation of why the limb fell, nor any proof it fell as a result of negligence on the part of the respondent. *Harold Hersom and Eleanore Hersom vs. Dept. of Natural Resources* (CC-77-170) 312

Claimants filed a claim for injuries received when a limb from a dead tree fell while claimants were fishing at North Bend State Park. The Court denied the claim as this was not an area of the park designated for fishing, nor was it patrolled or maintained by the respondent for use by the public; therefore, the respondent was not negligent in its maintenance of the area. *Frances J. Larch and William E. Larch vs. Dept. of Natural Resources* (CC-77-120) 291

Where a live tree fell across the highway and claimant's van collided with the tree, resulting in damages to the van and injuries to the claimant, the Court concluded that there was no evidence that the respondent knew or in exercise of ordinary care should have known that the tree posed a hazard to traffic on the highways; therefore, the Court denied the claim. *Randall I. Samples vs. Dept. of Highways* (CC-77-82) .. 217

WAGES

The Court made an award to the claimant for overtime services rendered to the respondent State agency. *Joseph Larry Garrett vs. Department of Public Safety* (CC-78-237) 247

The Court made an award to the claimant for the difference between an agreed-upon salary and a salary actually paid the claimant after she went to work for the respondent State agency, as the respondent admitted the validity of the claim and the amount due her. *Peggy S. Gott vs. Department of Health, Division of Mental Health* (CC-77-153) 95

The claimant filed a claim for compensatory time worked over two years before the filing of the action, and the Court held that the claim was barred by the statute of limitations under Code §21-5C-8. *Nathan Haddad, Jr. vs. Department of Motor Vehicles & Department of Finance & Administration* (CC-77-2) 130

The Court made an award to an employee of the respondent who was dismissed but later reinstated, where the amount of the claim was for wages for the period of the suspension. *Thomas F. Lambert vs. Department of Welfare* (CC-77-193) 101

An award for overtime was made to the claimant where his request for overtime had not been honored because it was not presented for payment within the fiscal year in which the services were rendered. *Harry Glenn Lucas, Jr. vs. Department of Public Safety* (CC-78-253) 253

An award for overtime was made to the claimant where the request for payment had not been made within the fiscal year in which the services were rendered. *Lowell J. Maxey vs. Dept. of Public Safety* (CC-78-238) 254

Where claimants sought awards for overtime compensation while they were employed as houseparents at respondent's facility at Institute, West Virginia, the respondent contended that the decision of *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct. Cl. 180 (1971), applied, since insufficient funds were expired in the personal service account from which the overtime compensation claims could have been paid. The Court denied this contention based upon the case of *State ex rel. Crosier vs. Callaghan,* 236 S.E. 2d 321 (1977), wherein the Supreme Court held that the liability for unpaid wages is incurred against an employer at the time liability is determined; therefore, the question of sufficient funds is immaterial. *Elva B. Petts and James M. Preston vs. Division of Vocational Rehabilitation* (D-927d) and (D-927i) 222

Where the record was entirely silent on the question of whether or not an express or an implied agreement that sleeping hours and lunch periods were to be considered hours worked, the Court held that the time would be considered hours worked in accordance with regulations of the West Virginia Department of Labor, specifically, Section 3.11 of Regulation 3. The Court considered these hours in determining awards to claimants who sought awards for overtime compensation while employed as houseparents at respondent's faciltity at Institute, West Virginia. *Elva B. Petts and James M. Preston vs. Division of Vocational Rehabilitation* (D-927d) and (D-927i) 222

Due to a clerical error, the claimant was not paid in his specific classification under Civil Service, and the Court made