STATE OF WEST VIRGINIA

Report

of the

Court of Claims

1981-1983

Volume

14

STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the Period from July 1, 1981
to June 30, 1983

By
CHERYLE M. HALL
CLERK

VOLUME XIV

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PERSONNEL
OF THE
STATE COURT OF CLAIMS

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

HONORABLE JAMES C. LYONS ..... Judge

HONORABLE WILLIAM W. GRACEY ..... 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

HONORABLE JOHN B. GARDEN ..... July 1, 1974
—December 31, 1981

HONORABLE DANIEL A. RULEY, JR. ..... July 1, 1976
—February 28, 1983

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 eighty-one to June thirty, one thousand nine hundred eighty-three.

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.

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§14-2-27. Conclusiveness of determination.
§14-2-28. Award as condition precedent to appropriation.
§14-2-29. Severability.

§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 fifteen 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: Provided, that in computing the number of days served, days utilized solely for the exercise of duties assigned to judges and commissioners by the provisions of article two-A [§ 14-2A-1 et seq.] of this chapter shall be disregarded. 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 expediture 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 requistion 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 payments 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

Amended May 3, 1982.)

TABLE OF RULES

Rules of Practice and Procedure

RULE

1. Clerk, Custodian of Papers, etc.
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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 8 1/2 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 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 note 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 $10,000.00 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 therefor, 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. ORIGINAL 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 AND INTERROGATORIES.

(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 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.

(d) Unless otherwise permitted by the Court for good

cause, no party shall serve upon any other party, at one time or cumulatively, more than 30 written interrogatories, including parts and subparts. Sufficient space for insertion of the answer shall be provided after each interrogatory or subpart thereof. The original shall be filed with the Clerk, and two copies shall be served upon the answering party. After inserting answers on the copies served him, the answering party shall file one copy with the Clerk and serve one copy on the issuing party. If there is insufficient space on the original for insertion of answers, the answering party may attach supplemental pages.

RULE 15. REHEARINGS.

A rehearing shall not be allowed except where good cause is shown. A motion for rehearing may be entertained and considered ex parte, unless the Court otherwise directs, upon the petition and brief filed by the party seeking the rehearing. 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 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.
Amended May 3, 1982.

CHERYLE M. HALL, Clerk

REPORT OF THE COURT OF CLAIMS

For the Period July 1, 1981 to June 30, 1983

(1) Approved claims and awards not satisfied but to be referred to the 1984 Legislature for final consideration and appropriation:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-81-55	Appalachian Engineers, Inc.	Board of Regents	$ 9,434.53	$ 9,434.53	6-30-83
CC-83-111	Appalachian Power Company	Department of Public Safety	29.36	29.36	5-25-83
CC-83-118	Appalachian Power Company	Department of Public Safety	106.80	106.80	5-25-83
CC-83-35	Bailey, Incorporated	Board of Regents	131.01	131.01	5-25-83
CC-80-405	Wayne K. Baker, d/b/a Baker Coal Company	Department of Highways	22,800.00	9,000.00	3-16-83
CC-83-30	Beckman Instruments, Inc.	Department of Health	198.50	198.50	4-22-83
CC-80-252	James Burcham and Patricia J. Burcham	Department of Highways	2,006.67	1,605.33	4-22-83
CC-81-204	Armeda Jean Bush	Department of Highways	50,000.00	1,050.00	6-30-83
CC-81-440	Butler Corporation	Department of Highways	752.00	752.00	4-22-83
CC-82-103	C. W. Lewis, Inc.	Department of Corrections	410.20	410.20	3-16-83
CC-79-527	Betty Cook	Department of Highways	25,000.00	18,910.00	6-29-83
CC-83-153	Foster & Creighton Company and Vecellio & Grogan, Inc.	Department of Highways	2,499.74	2,499.74	6-13-83
CC-80-373	Millard A. Harmon	Department of Highways	200,000.00	14,805.79	5-19-83
CC-80-173	U. G. Harrison and Edna Harrison	Department of Highways	32,400.84	8,800.00	5-19-83
CC-80-415	Lois V. Haynes and E. Robert Haynes	Department of Highways	250,000.00	50,000.00	5-19-83
CC-83-28	Holzer Medical Center	Department of Health	99.00	99.00	4-22-83
CC-80-334	Norman Lewis	Department of Highways	50,000.00	3,000.00	6-30-83
CC-78-248	Robert Marcum and Loretta Marcum	Department of Highways	25,000.00	10,799.00	5-19-83

REPORT OF THE COURT OF CLAIMS (Continued)

(1) Approved claims and awards not satisfied but to be referred to the 1984 Legislature for final consideration and appropriation:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-81-90	Andrew S. McGalla	Board of Regents	610.00	610.00	5-19-83
CC-78-222	Lillian Akers Meade, Administratrix of the Estate of Gary Wayne Akers, deceased	Department of Highways	44,050.34	44,050.34	6-30-83
CC-78-222	Lillian Akers Meade, as guardian for and on behalf of Christopher Lewis Akers	Department of Highways	38,061.33	38,061.33	6-30-83
CC-78-222	Lillian Akers Meade, as guardian for and on behalf of Steven Wayne Akers	Department of Highways	38,061.33	38,061.33	6-30-83
CC-81-396	Paul E. Miller and Marguerite Miller	Department of Highways	39,000.00	39,000.00	6-24-83
CC-83-43	Miller's Implement, Inc.	Department of Health	92.65	92.65	5-25-83
CC-79-679	Francis L. Parker	Department of Health	12,000.00	8,000.00	6-29-83
CC-83-26	S.S. Logan Packing Company	Board of Regents	819.86	819.86	5-25-83
CC-78-165	Shelly & Sands, Inc.	Department of Highways	39,300.00	50,665.56	6-1-83
CC-81-359	Donald F. Udell	Board of Regents	102.00	102.00	4-22-83
CC-81-425	Vecellio & Grogan, Inc.	Department of Highways	12,930.32	12,930.32	5-19-83
CC-82-92	Vecellio & Grogan, Inc.	Department of Highways	1,911.88	1,911.88	5-19-83
CC-83-40	Edwin O. Walker	Department of Health	30.00	30.00	5-25-83

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, 1981 to June 30, 1983:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-78-145	Michael Conley	Department of Highways	1,500.00	1,500.00	12-1-82
CC-78-145	Robert Conley	Department of Highways	2,995.00	2,995.00	12-1-82
CC-81-168	County Commission of Webster County	Office of the Supreme Court of Appeals	3,020.00	3,020.00	11-25-81
CC-82-204	William E. Coy	Department of Health	90.14	90.14	1-25-83
CC-81-10	Crosby Beverage Co., Inc.	Nonintoxicating Beer Commission	688.42	688.42	8-24-81
CC-78-236	Michael Crouch	Department of Highways	2,500.00	1,350.00	12-6-82
CC-82-323	Chad Cunningham	Department of Health	7.34	7.34	1-28-83
CC-81-341	Clifford Cupp	Department of Health	137.25	137.25	11-9-81
CC-81-355	Dairyland Insurance Company, subrogee of Wesley D. Myers	Department of Public Safety	423.00	423.00	2-1-82
CC-83-51	Harold E. Darlington	Supreme Court of Appeals	4,500.00	4,500.00	2-18-83
CC-83-52	E. W. Day	Supreme Court of Appeals	4,500.00	4,500.00	2-18-83
CC-81-114	Jacqueline E. Delazio	Department of Highways	169.72	169.72	11-9-81
CC-82-260a	Department of Employment Security	Department of Corrections	14,760.02	11,588.42	2-14-83
CC-82-260b	Department of Employment Security	Department of Corrections	20,204.50	17,074.63	2-14-83
CC-82-260c	Department of Employment Security	Department of Corrections	16,055.64	12,559.57	2-14-83
CC-82-260d	Department of Employment Security	Department of Corrections	37,436.16	37,335.36	2-14-83
CC-82-260e	Department of Employment Security	Department of Corrections	59,852.35	47,621.09	2-14-83

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, 1981 to June 30, 1983:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-82-329	Department of Employment Security	Department of Corrections	1,472.54	1,420.00	2-14-83
CC-82-330	Department of Employment Security	Department of Corrections	10,990.47	10,642.46	2-14-83
CC-82-331	Department of Employment Security	Department of Corrections	4,146.50	3,998.55	2-14-83
CC-82-334	Department of Employment Security	Department of Corrections	16,134.76	14,026.92	2-14-83
CC-82-262	Department of Employment Security	Department of Culture and History	3,670.29	2,822.00	2-14-83
CC-82-263a	Department of Employment Security	Department of Health	3,865.01	2,149.23	2-14-83
CC-82-332	Department of Employment Security	Department of Health	6,934.11	6,686.70	2-14-83
CC-82-266	Department of Employment Security	Department of Public Safety	1,781.69	1,341.64	2-14-83
CC-82-261	Department of Employment Security	Farm Management Commission	6,117.30	5,308.35	2-14-83
CC-82-264	Department of Employment Security	Human Rights Commission	17,099.74	13,577.00	2-14-83
CC-82-265	Department of Employment Security	Insurance Commission	6,272.56	5,511.92	2-14-83
CC-82-333	Department of Employment Security	Secretary of State	3,273.06	2,279.12	2-14-83
CC-81-93	Edward E. Dilling and Jennifer Dilling	Department of Highways	100.00	75.00	7-1-82
CC-83-53	C. P. Dingler	Office of the Supreme Court of Appeals	4,500.00	4,500.00	2-18-83

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, 1981 to June 30, 1983:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-80-365	James W. Dixon and Doris A. Dixon	Department of Highways	14,500.00	14,500.00	12-16-81
CC-83-54	Ruth A. Donaldson	Office of the Supreme Court of Appeals	4,500.00	4,500.00	2-18-83
CC-83-55	Peter H. Dougherty	Office of the Supreme Court of Appeals	4,500.00	4,500.00	2-18-83
CC-81-386	Eastman Kodak Company	Department of Finance and Administration	4,391.50	4,391.50	2-1-82
CC-81-443	Energy Technology Consultants, Inc. D & M Weather Service	Board of Regents	350.00	350.00	2-1-82
CC-82-249	Evans Lumber Company	Division of Vocational Rehabilitation	458.97	458.97	1-25-83
CC-81-196	Fibair, Inc.	Department of Highways	29,482.48	29,482.48	2-14-83
CC-81-402	Firestone Tire & Rubber Company	Department of Natural Resources	852.72	852.72	2-1-82
CC-82-314	C. Elaine Friend	Office of the Supreme Court of Appeals	165.00	165.00	1-28-83
CC-80-121	Victor Frisco and Janet Frisco	Department of Natural Resources	1,956.00	500.00	1-25-83
CC-81-369	Richard D. Frum	Office of the State Auditor	38.32	38.32	10-7-81
CC-81-172	Rabert Lee Fulks, Jr.	Department of Education	800.00	684.95	11-9-81
CC-80-386	General Accident F/L Assurance Corp., Ltd. Subrogee of Innovative Industries	Department of Highways	9,054.19	9,054.19	8-24-81
CC-81-80	General Communications Company	Board of Regents	400.00	400.00	8-6-81

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, 1981 to June 30, 1983:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-82-46	General Motors Acceptance Corporation	Department of Motor Vehicles	4,259.64	4,245.98	12-1-82
CC-81-7	Alonzo Gibson	Department of Highways	500.00	480.00	11-9-81
CC-81-301	Silbern D. Goddard and Metta Goddard	Department of Corrections	2,723.00	2,723.00	12-6-82
CC-82-192a	David R. Gold and Louis H. Khourey, d/b/a Gold & Khourey	Office of the State Auditor (Mental Hygiene Fund)	42.50	42.50	10-26-82
CC-82-192a	David R. Gold and Louis H. Khourey, d/b/a Gold & Khourey	Office of the State Auditor (Needy Persons Fund)	1,140.50	1,140.50	10-26-82
CC-82-192b	David R. Gold and Louis H. Khourey, d/b/a Gold & Khourey	Public Legal Services (Needy Persons Fund)	422.50	422.50	10-26-82
CC-82-192b	David R. Gold and Louis H. Khourey, d/b/a Gold & Khourey	Public Legal Services (Mental Hygiene Fund)	65.00	65.00	10-26-82
CC-82-216	Margaret Graff	Board of Regents	1,096.50	1,096.50	12-16-82
CC-82-190	Richard D. Graham, Jr.	Office of the Supreme Court of Appeals	4,500.00	4,500.00	10-12-82
CC-82-64	Larry Greathouse	Department of Health	204.00	204.00	5-21-82
CC-82-194	Green Tab Publishing	Department of Corrections	3,856.47	3,856.47	10-12-82
CC-83-56	Glen Greene	Office of the Supreme Court of Appeals	4,950.00	4,500.00	2-18-83
CC-82-162	Paul Gyke and Joe Ann Gyke	Department of Highways	452.97	83.97	12-6-82

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, 1981 to June 30, 1983:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-80-258	H & A Coal & Hauling, Inc.	Department of Highways	1,000.00	1,000.00	8-24-81
CC-80-397	L. D. Hall	Department of Highways	2,000.00	800.00	11-9-81
CC-81-442	Patricia Ann Hall and Lacy Hall	Department of Highways	1,846.78	1,846.78	7-1-82
CC-81-381	Donald A. Harman	Department of Corrections	994.90	497.45	1-25-83
CC-81-431	Hawes Electric Co.	Department of Health	1,126.00	1,126.00	2-1-82
CC-78-234	Christine E. Henderson and Rodgers Paul Henderson	Department of Highways	100,000.00	1,305.00	8-24-81
CC-81-175	Henry F. Ortlieb Brewing Co.	Nonintoxicating Beer Commission	3,004.87	3,004.87	2-1-82
CC-82-96	Benjamin C. Henry	Department of Highways	8,434.82	4,500.00	1-28-83
CC-82-137	The Hertz Corporation	Department of Public Safety	600.00	600.00	7-1-82
CC-80-183	Mr. & Mrs. Stephen Kent Hill	Board of Regents	93.35	93.35	12-6-82
CC-82-183	Glenn E. Hiller	Department of Highways	155.76	155.76	12-1-82
CC-80-375	Mark A. Hissam and Julia A. Hissam	Department of Highways	3,395.37	3,395.37	12-6-82
CC-83-16	Donald R. Hogsett	Department of Health	60.00	60.00	2-16-83
D-893	Holly, Kenney, Schott, Inc.	Department of Highways	13,755.00	13,755.00	2-9-83
CC-81-367	Howard Uniform Company	Department of Public Safety	244.30	244.30	12-6-81
CC-80-329	Ricky S. Howerton	Department of Highways	40,000.00	20,000.00	12-6-82
CC-81-450	Hughes-Bechtol, Inc.	Board of Regents	1,275,570.70	542,982.11	7-26-82
CC-82-182	Industrial Gas & Supply Company	Department of Highways	2,389.42	2,389.42	12-6-82
CC-82-229	Robert A. Isner	Office of the Supreme Court of Appeals	4,923.00	4,500.00	10-12-82
CC-79-297	Patricia Ann Jarboe	Department of Highways	18,000.00	1,040.00	8-7-81
CC-79-297	Robert N. Jarboe	Department of Highways	18,000.00	3,676.00	8-7-81

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, 1981 to June 30, 1983:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-79-297	Robert N. Jarboe, as next friend of Stephanie Jarboe	Department of Highways	18,000.00	50.00	8-7-81
CC-78-17	Waitman D. Jett and Marilyn Jett	Department of Highways	935.00	935.00	10-26-82
CC-81-316	Johnson Controls, Inc.	Department of Finance and Administration	2,376.75	2,376.75	2-1-82
CC-81-454	Johnson Controls, Inc.	Department of Finance and Administration	4,160.00	4,160.00	2-1-82
CC-82-87	Johnson Controls, Inc.	Department of Finance and Administration	2,856.20	2,856.20	7-1-82
CC-81-35	Charles W. Jones	Board of Regents	213.75	213.75	8-6-81
CC-76-51	Chester Jones	Department of Highways	24,200.00	9,000.00	9-23-82
CC-81-447	Kanawha County Commission	Department of Highways	2,362.08	2,362.08	2-14-83
CC-81-116	Kanawha Valley Regional Transportation Authority	Department of Highways	3,744.80	3,744.80	11-9-81
CC-80-146	Henry A. Kay and Charles E. Kay	Department of Natural Resources	3,800.00	3,800.00	12-1-82
CC-82-168	Teddy Keiffer	Department of Highways	3,875.17	3,557.14	12-16-82
CC-80-396	Thomas G. Kimble	Department of Public Safety	230.03	230.03	8-24-81
CC-79-667	William P. Knight	Office of the State Treasurer	152.94	152.94	2-1-82
CC-80-391	Barbara B. Krantz	Department of Highways	130.49	104.39	2-16-82
CC-82-230	Ruth A. Krippene	Department of Highways	3,152.65	3,152.65	1-25-83
CC-82-167	Lester A. Kubski	Department of Health	126.05	88.07	12-6-82
CC-81-70	L. Robert Kimball & Associates	State Tax Department	2,824.42	2,824.42	8-6-81
CC-82-147	Robert Howard Latta	Department of Highways	150.00	150.00	12-6-82
CC-82-245	Thomas E. Layton, II	Department of Highways	235.36	235.36	2-16-83
CC-82-285	Doris Leslie	Department of Highways	146.47	146.47	1-25-83

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, 1981 to June 30, 1983:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-81-93	Liberty Mutual Ins. Company, Subrogee of Edward E. Dilling and Jennifer Dilling	Department of Highways	3,231.14	2,423.35	7-1-82
CC-81-186	Ernest E. Lowe	Department of Education	195.00	195.00	11-9-81
CC-83-14	Lucas Tire, Inc.	Department of Highways	1,804.07	1,804.07	2-14-83
CC-81-356	Lundia, Myers Industries, Inc.	Board of Regents	125.30	125.30	12-16-81
CC-83-108	Nat Marino	Office of the Supreme Court of Appeals	4,500.00	4,500.00	2-18-83
CC-78-231	James C. Martin, Jr. and Shirley B. Martin	Department of Highways	83,853.40	6,846.00	1-27-83
CC-80-131	Donald C. Master	Department of Highways	1,000.00	1,000.00	8-24-81
CC-81-165	John T. May	Department of Highways	379.25	303.40	12-6-82
CC-81-206	Raymond L. Maynard	Board of Regents	15,000.00	1,061.74	9-23-82
D-1031	McAnallen Brothers, Inc.	Board of Regents	20,228.00	20,228.00	10-12-82
CC-81-400	Charles E. McCarty	Office of the Supreme Court Administrator	55.00	55.00	2-22-82
CC-81-371	Charles E. McCarty	Office of the State Auditor	240.00	240.00	10-7-81
CC-81-124	McDonnell Douglas Corporation	Department of Education	28,132.00	28,132.00	8-7-81
CC-82-12	Jeffrey O. McGeary	Human Rights Commission	110.64	110.64	2-16-82
CC-81-20	William B. McGinley	Board of Regents	35,000.00	500.00	12-1-82
CC-81-100	Thomas E. McNamee	Department of Highways	423.21	423.21	11-9-81
CC-82-35	The Michie Company	Department of Health	163.31	163.31	5-21-82
CC-82-3	The Michie Company	Office of the Supreme Court Administrator	56.13	56.13	2-1-82
CC-82-116	Monongahela Power Company	Department of Highways	38.38	38.38	9-23-82

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, 1981 to June 30, 1983:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-82-298	Moore Business Forms, Inc.	Department of Education	201.11	60.97	2-14-83
CC-82-41	Moore Business Forms, Inc.	Department of Public Safety	2,586.61	2,586.61	2-1-82
CC-82-179	Irlant E. Moore and Robert L. Moore	Department of Highways	43.15	43.15	10-26-82
CC-82-337	Mountaineer Office Supply, a division of F&M Supply Co., Inc.	Secretary of State	1,860.00	1,860.00	2-9-83
CC-82-209	Howard R. Nordeck	Office of the Supreme Court of Appeals	4,500.00	4,500.00	10-12-82
CC-78-175	Novo Corporation	Department of Highways	373,982.00	162,929.00	4-26-82
CC-82-111	John Orndoff	Department of Highways	104.16	104.16	10-26-82
CC-83-57	Garry Osburn	Office of the Supreme Court of Appeals	4,500.00	4,500.00	2-18-83
CC-81-132	Jimmy Polk	Department of Highways	392.67	392.67	11-9-81
CC-81-163	Sidney Pozell and Lillian Pozell	Department of Highways	144.00	144.00	9-23-82
CC-82-79	Angela Preston	Attorney General's Office	110.00	110.00	5-21-82
CC-81-169	Frank E. Redd	Department of Highways	51.00	51.00	9-23-82
CC-81-426	Region V—Regional Education Service Agency	Department of Employment Security	2,145.25	2,145.25	2-1-82
CC-82-28	Reynolds Memorial Hospital, Inc.	Department of Corrections	53,321.95	53,321.95	12-1-82
CC-81-166	Stanley T. Ruckman	Department of Highways	78.75	78.75	9-23-82
CC-80-422	James Scott Sadler	Department of Highways	744.30	595.44	8-7-81
CC-81-14	Savage Construction Company, Inc.	Department of Highways	6,788.75	4,488.75	12-1-82
CC-82-102	Ethea M. Scott	Department of Highways	38.00	38.00	12-6-82

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, 1981 to June 30, 1983:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-80-175	Selected Risks Insurance Company, as Subrogee of Shell C. Brady	Department of Highways	33,650.00	33,650.00	10-9-81
CC-82-83	Harry R. Sellards and Francis A. Sellards	Department of Highways	432.10	122.00	7-13-82
CC-81-138	Eugene J. Sellaro, Jr.	Office of the State Auditor	433.95	433.95	12-9-81
CC-81-95	Daniel Serge, Jr.	Department of Highways	139.05	139.05	11-9-81
CC-81-202	Charles R. Shaffer	Department of Highways	255.33	255.33	9-29-81
CC-82-86	Shane Meat Company	Board of Regents	1,450.44	1,412.52	9-23-82
CC-82-189	Roy G. Shawver	Department of Highways	833.49	833.49	2-9-83
CC-81-142	Sterl F. Shinaberry	Office of the State Auditor	1,500.00	1,500.00	12-18-81
CC-78-168	Ruby E. Shrader	Department of Highways	20,000.00	18,310.00	1-27-83
CC-82-311	C. O. Smith, Jr.	Department of Highways	630.00	630.00	2-9-83
CC-81-129	Southern Chemical Co.	Adjutant General	98.76	98.76	9-29-81
CC-81-271	St. Paul's Protestant Episcopal Church	Department of Highways	122.00	122.00	1-27-83
CC-80-193	Stark Electric, Inc.	Department of Highways	26,699.30	10,800.00	12-1-82
CC-81-385	State Distributing Company	Nonintoxicating Beer Commission	11,068.92	11,068.92	2-1-82
CC-81-65	Ronald P. Stewart	Department of Highways	259.76	259.76	11-9-81
CC-83-58	Sharrell Stickler	Office of the Supreme Court of Appeals	3,375.00	3,375.00	2-18-83
CC-81-12	Charles W. W. Stultz and Mary N. Stultz	Department of Highways	5,126.91	5,126.91	12-6-82
CC-83-59	Eugene C. Suder	Office of the Supreme Court of Appeals	3,375.00	3,375.00	2-18-83
CC-82-15	Larry N. Sullivan	Office of the State Auditor	170.00	170.00	2-16-82

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, 1981 to June 30, 1983:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-2	Janet T. Surface	Department of Health	132.00	132.00	1-28-83
CC-82-280	Janet T. Surface	Workmen's Compensation Fund	6,828.33	6,828.33	12-6-82
CC-80-249	Velma Sutton	Department of Highways	2,969.36	2,969.36	12-16-82
CC-82-301	Swain Window Cleaning Services	Department of Finance and Administration	3,511.74	2,332.00	2-9-83
CC-83-109	Norma Tarr	Office of the Supreme Court of Appeals	4,500.00	4,500.00	2-18-83
CC-82-283	Terra Aqua Conservation	Department of Highways	854.78	854.78	12-6-82
CC-82-44	James D. Terry	Office of the State Auditor	345.00	345.00	9-23-82
CC-81-372	Gerald M. Titus, Jr.	Office of the State Auditor	940.85	940.85	10-7-81
CC-81-192	John F. Tomblyn	Department of Highways	721.82	649.64	2-1-82
CC-82-227	Thomas R. Treadway	Department of Highways	140.28	140.28	12-6-82
CC-82-173 a&b	Tri-City Welding Supply Company	Department of Highways	1,831.00	1,831.00	10-26-82
CC-80-258	United States Fidelity & Guaranty Company, subrogee of H & A Coal & Hauling, Inc.	Department of Highways	191.35	191.35	8-24-81
CC-83-60	D. M. VandeLinde	Office of the Supreme Court of Appeals	3,375.00	3,375.00	2-18-83
CC-83-61	Lester Warner	Office of the Supreme Court of Appeals	3,375.00	3,375.00	2-18-83
CC-82-109	Wayne Concrete Co.	Department of Highways	2,642.84	2,642.84	10-26-82
CC-82-156	Weslakin Corporation	Department of Corrections	95.67	95.67	12-6-82
CC-81-24	West Virginia Automobile & Truck Dealers Association	Department of Motor Vehicles	1,174.37	1,174.37	8-6-81

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, 1981 to June 30, 1983:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-81-133	Wheeling Multi-Service Center, Inc.	Division of Vocational Rehabilitation	5,220.00	5,220.00	2-1-82
CC-80-331	Harold E. Wiley	Department of Motor Vehicles	20.00	14.00	12-6-82
CC-83-62	Wetzel K. Workman	Office of the Supreme Court of Appeals	4,500.00	4,500.00	2-18-83
CC-81-135	Zummach-Peerless Chemical Coatings Corporation	Department of Natural Resources	918.29	918.29	9-29-81

(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).

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
D-773	A. B. Engineering Company	Department of Highways	291,401.00	Disallowed	10-9-81
CC-79-554	Thomas Harold Anderson, Sr. and Edith Iolene Anderson	Department of Welfare	30,520.00	Disallowed	2-9-83
CC-81-180	H. R. Arrowood	Department of Highways	18,000.00	Disallowed	4-22-83
CC-81-54	Leona Asbury and Tom Asbury	Department of Highways	383.95	Disallowed	10-9-81
CC-82-61	Donald E. Ashley	Department of Highways	227.43	Disallowed	7-2-82
CC-81-389	Connie Lawrence Bailey	Department of Highways	1,962.16	Disallowed	3-11-83
CC-80-145	James E. Bailey, Jr.	Department of Highways	616.20	Disallowed	3-16-83
CC-82-294	David R. Bassett	Department of Highways	167.62	Disallowed	3-16-83
CC-81-203	Gary L. Batton	Civil Service Commission and Department of Natural Resources	3,500.00	Disallowed	2-2-82
CC-81-36	Steven Bellman, d/b/a Baskin-Robbins	Department of Highways	4,500.00	Disallowed	2-1-82
CC-79-16	Pearl Hughes Bolling and Charles Hughes	Department of Highways	13,140.00	Disallowed	2-17-82
CC-81-176	Anna Lou Booten	Department of Highways	25,000.00	Disallowed	4-22-83
CC-80-342	Doris Jane Bowen, Wanda Sue Hanley, Larry Jenkins, and Lana Jean Jenkins	Department of Highways	1,000.00	Disallowed	8-6-81
CC-82-267	Teresa Britt	Department of Highways	258.30	Disallowed	2-9-83
CC-81-457	Robert R. Brock	Workmen's Compensation Fund	200,000.00	Disallowed	4-26-82
CC-80-352	John Charles Bungard	Department of Welfare	2,313.00	Disallowed	10-9-81
CC-82-84	Arlene Burgess and Charles E. Burgess	Department of Highways	169.22	Disallowed	6-30-82

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-80-318	Robert W. Burke	Department of Highways	9,000.00	Disallowed	6-30-83
CC-78-278	D. A. Burner	Department of Public Safety	346.50	Disallowed	10-9-81
CC-82-158	Albert G. Capinpin	Department of Highways	205.54	Disallowed	12-7-82
CC-81-38	Bernard F. Carney	Department of Highways	365.81	Disallowed	10-9-81
D-986	Haywood Jobe Casto, Jr.	Department of Corrections	16,767.59	Disallowed	6-30-83
CC-79-116	Willard Casto	Office of the State Auditor	16,607.00	Disallowed	12-16-81
CC-79-161	Chafin Coal Company	Workmen's Compensation Fund	33,101.04	Disallowed	2-1-82
CC-81-62	Pius B. Chumbow	Department of Highways	3,012.05	Disallowed	1-27-83
CC-82-123	Roger K. Clay	Board of Regents	329.00	Disallowed	12-7-82
CC-77-3b	Mary Lou Cole	Department of Highways	25,000.00	Disallowed	1-26-83
CC-77-3a	Wilson R. Cole	Department of Highways	3,000.00	Disallowed	1-26-83
CC-77-3d	Wilson R. Cole, Admin. of the Estate of Mary Jacqueline Cole	Department of Highways	11,760.78	Disallowed	1-26-83
CC-77-3c	Wilson R. Cole, Admin. of the Estate of Timothy Ray Cole	Department of Highways	11,760.78	Disallowed	1-26-83
CC-80-292	Lillian West Collins and John Collins	Department of Highways	4,261.85	Disallowed	4-1-82
CC-80-154	William Conner and Lois Conner	Department of Highways	31,000.00	Disallowed	3-11-83
CC-82-21	Dreama Dawn Cook	Department of Highways	133.45	Disallowed	9-23-82
CC-82-157	Mary Lynn Cook	Department of Public Safety	53,074.40	Disallowed	1-21-83
CC-83-114	Jesse J. Crank	Department of Highways	308.76	Disallowed	6-24-83
CC-81-378	Doy P. Crites	Department of Highways	2,500.00	Dismissed	3-16-83
CC-82-196	Ronald E. Cyrus	Department of Highways	4,500.00	Disallowed	1-24-83

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-82-10	Dairyland Insurance Company, subrogee of Jesse W. Cobern, Jr.	Department of Highways	1,035.09	Disallowed	12-7-82
CC-81-170	Maurice V. Davis	Department of Highways	113.40	Disallowed	10-9-81
CC-79-632	Azile Dean, Individually, and as Executrix of the Estate of Virgil Dean, dec.	Department of Highways	50,000.00	Disallowed	12-20-82
CC-80-336	Charles Dennis	Department of Public Safety	3,000.00	Disallowed	12-7-82
CC-82-335	Department of Employment Security	Department of Finance and Administration	6,457.34	Disallowed	3-16-83
CC-82-263b	Department of Employment Security	Department of Health	52,730.71	Disallowed	3-16-83
CC-82-263c	Department of Employment Security	Department of Health	21,213.07	Disallowed	3-16-83
CC-81-92	Norma Dornbos, d/b/a The Party Beer Store	Department of Welfare	260.66	Disallowed	3-11-83
CC-81-103	June Dorton	Workmen's Compensation Fund		Disallowed	4-26-82
CC-81-181	Charles N. Durbin	Department of Highways	420.15	Disallowed	12-7-82
CC-80-401a-h	James D. Eads, et al.	Department of Highways	2,857.24	Disallowed	6-30-83
CC-82-193	Jerry M. Edwards and Edgar E. Edwards	Department of Highways	96.92	Disallowed	1-26-83
CC-82-274	Kenneth N. Ellison	Department of Highways	214.05	Disallowed	2-9-83
CC-81-49	William P. Estep, Sr.	Department of Highways	140.00	Disallowed	10-9-81
CC-80-339	Nellie Evans	Department of Highways	462.11	Disallowed	8-6-81
CC-81-43	Veda E. Evans	Department of Highways	892.69	Disallowed	2-17-82
CC-81-153	Kathleen R. Fewell	Department of Highways	62.38	Disallowed	11-25-81
CC-82-50	Cheryl M. Fidler	Department of Highways	24.25	Disallowed	6-30-82

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-82-52	Dae Anne Fletcher and Paul Norman Fletcher	Department of Highways	100.00	Disallowed	9-23-82
D-1010	Nelson Eddie Furner, an Incompetent, sues by and through Ava Elizabeth Furner Young, his next friend, and Ava Elizabeth Furner Young, individually	Department of Health	125,000.00	Disallowed	10-26-82
CC-79-682	G. M. McCrossin, Inc.	Board of Regents	152,809.00	Disallowed	12-1-82
CC-82-68	Gates Engineering Company, et al.	Board of Regents	143,225.68	Disallowed	6-30-83
CC-80-353	John J. Gaughan	Department of Highways	156.42	Disallowed	2-17-82
CC-81-161	Dorothy M. Gore	Department of Highways	700.00	Disallowed	7-2-82
CC-79-357	Henry W. Gould	Board of Regents	317.50	Disallowed	12-7-82
CC-80-385	Susan L. Green	Office of the Supreme Court of Appeals	22,935.00	Disallowed	3-14-83
CC-79-307	Nelson Gregory	Department of Highways	50,000.00	Disallowed	1-26-83
CC-81-151	John Grey	Board of Examiners for Registered Nurses	26,100.00	Disallowed	2-14-83
CC-82-125	Earl F. Guthrie	Department of Highways	631.00	Disallowed	12-7-82
CC-81-139	Diana Lynn Hackney	Department of Highways	298.70	Disallowed	11-25-81
CC-76-89	Lester Rollings Haines	Department of Corrections	200,000.00	Disallowed	5-19-83
CC-82-40	Atholl W. Halstead	Department of Highways	84.50	Disallowed	6-30-82
CC-81-86	John A. Hannigan and Carolyn Ann Hannigan	Department of Highways	129.39	Disallowed	8-6-81
CC-80-134	Ronald H. Harper and Sarah E. Harper	Department of Highways	10,000.00	Disallowed	11-25-81

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-79-685	Robert Hart, d/b/a Bob's Bake Shop	Department of Highways	40,000.00	Disallowed	4-22-83
CC-78-227	Forrest C. Hatfield	Department of Highways	25,000.00	Disallowed	9-23-82
CC-78-13	Barbara Haynes	Board of Regents	25,000.00	Disallowed	12-20-82
CC-80-340	Francis J. Hennessy	Board of Regents	4,086.00	Disallowed	2-1-82
CC-79-367	Henry Elden & Associates	Department of Health and Department of Finance and Administration	63,000.00	Disallowed	12-7-82
CC-78-241	Geneva Hill	Department of Highways	200.00	Disallowed	10-26-82
CC-80-150	Ida M. Hiner and Norman F. Hiner, d/b/a Hercules Construction Company	Department of Natural Resources	2,000,000.00	Dismissed	3-16-83
CC-81-191	Bobbie E. Holmes and Neva I. Holmes	Department of Highways	2,495.21	Disallowed	1-26-83
CC-80-337	Hooten Equipment Company	Board of Regents	31,051.00	Disallowed	6-30-83
CC-81-238	Joyce Hupp	Office of the Chief Medical Examiner	392.96	Disallowed	7-13-82
CC-80-291	James David Hutchinson	Department of Highways	2,475.00	Disallowed	1-24-83
CC-81-324	Claude W. Jarrell	Department of Highways	3,125.00	Disallowed	3-11-83
CC-81-140	John D. Tonkovich and Sons, Inc.	Department of Highways	11,563.00	Disallowed	6-30-83
CC-81-29	Keller Industries, Inc.	Department of Highways	663.44	Disallowed	3-11-83
CC-78-219	Douglas Edward Keller and Patty Keller	Adjutant General and Department of Highways	65,000.00	Disallowed	8-24-81
CC-80-164	Margo A. Keyser	Department of Highways	5,000.00	Disallowed	9-29-81
CC-82-110	Tommy Kinder	Department of Highways	217.92	Disallowed	12-7-82

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-81-61	L. P. King, Jr. and Evelyn King	Department of Highways	725.24	Disallowed	11-25-81
CC-79-696	Charles L. Kinney and Joyce I. Kinney, d/b/a The Southwood Carryout	Department of Highways	240,000.00	Disallowed	7-2-82
CC-79-122	David H. Kisor, Admin. of the Estate of Julia Kisor, dec.	Department of Highways	10,000.00	Disallowed	6-30-83
CC-81-107	Eugene A. Knotts	Department of Highways	657.76	Disallowed	2-1-82
CC-82-70	Sandra W. Phillips Larese	Department of Highways	258.80	Disallowed	6-30-82
CC-82-235	L. R. Lewis and B. L. Lewis	Department of Finance & Administration and Department of Welfare	28,200.00	Disallowed	1-24-83
CC-80-421	Virginia Lewis	Department of Highways	176.90	Disallowed	8-6-81
CC-81-41	Richard J. Lindroth	Workmen's Compensation Fund	90.00	Disallowed	11-9-81
CC-79-58	Lucille Linville	Department of Highways	3,500.00	Disallowed	3-11-83
CC-81-177	Willard Lucas	Department of Highways	20,000.00	Disallowed	4-22-83
CC-79-578	Bernard C. Lyons and Helen V. Lyons	Department of Highways	45,000.00	Disallowed	1-26-83
CC-81-111	Martha White Foods	Department of Highways	101.64	Disallowed	2-17-82
CC-81-19	Davton O. B. Matthews and Alline L. Matthews	Department of Highways	178.07	Disallowed	2-17-82
CC-81-246	Juanita McClarin	Department of Highways	207.81	Disallowed	4-22-83
CC-81-31	Dores D. McDonnell, Sr.	Department of Highways	131.78	Disallowed	8-6-81
CC-81-421	Cynthia Catherine McGrath	Department of Motor Vehicles	35.00	Disallowed	4-1-82
CC-78-50	Ronald G. McGraw	Department of Corrections	45,000.00	Disallowed	5-19-83
CC-81-59	John McKendrick	Department of Highways	1,000.00	Disallowed	2-17-82
CC-77-150	The Melbourne Brothers Construction Company	Department of Highways	5,796.23	Disallowed	9-23-82

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-82-327	Laird Minor and Nancy G. Minor	Department of Highways	397.97	Disallowed	6-24-83
CC-78-282	Monsanto Company	Board of Regents	13,010.00	Disallowed	10-26-82
CC-80-137	Carl R. Moore	Governor's Office of Economic and Community Development	1,299.23	Disallowed	3-14-83
CC-76-127	Charles E. Moore	Department of Public Institutions	4,000,000.00	Dismissed	3-16-83
CC-80-97a	D. Albert Moore	Department of Highways	700.00	Disallowed	3-11-83
CC-80-240	Delores Moore	Department of Highways	50,000.00	Disallowed	7-2-82
CC-83-116	Robert B. Moran	Department of Motor Vehicles	6.00	Disallowed	6-24-83
CC-82-69	Earl G. Muck	Department of Highways	670.95	Disallowed	7-2-82
CC-78-157	John Mullenax, Admin. of the Estate of Edith Mullenax, dec.	Department of Agriculture	100,000.00	Disallowed	12-20-82
CC-82-8	Eugene P. Mullins	Department of Highways	155.78	Disallowed	6-30-82
CC-80-355	Nelva Munson	Department of Highways	20,000.00	Disallowed	4-1-82
CC-79-125	James Pack and Ella Mae Pack	Department of Highways	12,467.52	Disallowed	1-24-83
CC-80-357	Kenneth Page	Alcohol Beverage Control Commissioner	33,600.00	Disallowed	6-29-83
CC-81-162	Herbert O'Dell Parsons, III	Department of Highways	56.65	Disallowed	11-25-81
CC-78-186	Catherine Pasceri	Department of Highways	1,882.60	Disallowed	12-7-82
CC-79-315	Kenneth H. Patrick, Jr.	Department of Highways	20,000.00	Disallowed	4-22-83
CC-82-310	David E. Paul and Dolores R. Paul	Department of Highways	128.68	Disallowed	6-24-83
CC-79-719	Frank A. Payne	Department of Highways	3,475.00	Disallowed	12-20-82

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-80-243	Dale R. Pennington and Gloria Mae Pennington	Department of Highways	60,000.00	Disallowed	6-30-83
CC-82-246	Mary E. Peterson	Department of Highways	184.11	Disallowed	2-9-83
CC-82-47	Richard T. Philpot	Department of Highways		Disallowed	7-2-82
CC-81-30	Michael A. Piazza	Department of Highways	259.56	Disallowed	11-9-81
CC-76-148	The Pioneer Company and Mountain State Construction Company, Inc.	Department of Highways	41,498.99	Disallowed	10-26-82
CC-81-101	Donald E. Platt and Linda L. Platt	Department of Highways	258.00	Disallowed	11-9-81
CC-81-91	Donna F. Porterfield	Department of Highways	300.70	Disallowed	1-28-83
D-732	Tammy Lynn Priestley, an infant who sues by her mother, Carolyn Priestley, and Carolyn Priestley	Department of Highways	10,000.00	Disallowed	11-25-81
CC-81-418	Gary L. Pritt and Jeanette Pritt	Department of Highways	114.00	Disallowed	4-22-83
CC-81-350	Rainbow Development Corporation	Department of Highways	26,000.00	Disallowed	9-23-82
CC-81-178	Glen L. Ramey	Department of Highways	250,000.00	Disallowed	4-22-83
CC-76-12	Doris Randolph, Frank Randolph, her husband and Yvonette (Suzie) Randolph, infant	Department of Highways	50,000.00	Disallowed	9-23-82
CC-81-458	Roger Richmond and Sandra Richmond	Department of Highways	67.44	Disallowed	4-22-83
CC-82-288	Robert G. Riner	Department of Highways	244.25	Disallowed	3-16-83
CC-80-82	Keith Ray Roberts	Department of Highways	500,000.00	Disallowed	8-24-81

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-82-16	Randall E. Rowley	Department of Highways	201.62	Disallowed	7-2-82
CC-82-60	Eldean Russell	Department of Highways	98.00	Disallowed	6-30-82
CC-80-381	Ryder Truck Rental, Inc.	Department of Highways	9,261.63	Disallowed	3-14-83
CC-82-319	Calvin L. Sargent	Department of Highways	1,410.19	Disallowed	3-16-83
CC-82-98	Richard L. Sargent	Department of Highways	43.45	Disallowed	12-7-82
CC-82-55	Robert C. Schumacher	Department of Highways	221.02	Disallowed	12-7-82
CC-81-428	Martha C. Scruggs	Department of Highways	140.00	Disallowed	3-11-83
CC-82-131	Clarence Shiflet and Florence Shiflet	Department of Highways	697.36	Disallowed	1-24-83
CC-80-242	Harry W. Shoemaker and Winifred G. Shoemaker	Department of Highways	70,000.00	Disallowed	6-30-83
CC-79-194	Terry Skeen	Board of Regents	25,000.00	Disallowed	3-11-83
CC-82-177	Alfred W. Smith	Department of Highways	1,500.00	Disallowed	1-28-83
CC-81-5	Oscar D. Smith	Department of Highways	109.32	Disallowed	8-6-81
CC-79-56	Southern Gas and Oil, Inc.	State Fire Marshal	8,000.00	Disallowed	2-17-82
CC-80-185	Margaret Spatafore and Joseph Robert Spatafore	Department of Highways	72.68	Disallowed	8-7-81
CC-80-223	Richard A. Spotloe	Administrative Office of the Supreme Court of Appeals	4,000.00	Disallowed	11-9-81
CC-80-349	State Farm Mutual Automobile Insurance Company as subrogee of Barbara A. Howe	Department of Highways	154.50	Disallowed	11-9-81
CC-79-35	Bessie M. Stone, by Charles H. Stone, her Attorney in Fact	Department of Highways		Disallowed	4-26-82
CC-81-261	George A. Stover and Carma Stover	Department of Highways	677.35	Disallowed	3-14-83

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-81-50	Larry Lee Stricker	Department of Highways	155.60	Disallowed	8-6-81
CC-81-416	Billy Sutphin	Department of Highways	926.99	Disallowed	3-11-83
CC-82-243	Jack L. Taylor	Department of Highways	832.15	Disallowed	2-9-83
CC-82-163	Bertie Gibbs Thomas and Carolyn Thomas	Department of Highways	300.38	Disallowed	12-7-82
CC-79-48	Audrey P. Tittle, Admin. of the Estate of Steven B. Parcell	Department of Highways	250,000.00	Disallowed	4-26-82
CC-83-113	Alex Toth	Department of Highways	491.95	Disallowed	6-24-83
CC-81-376	William M. Truman	Office of Emergency Services	5,620.00	Disallowed	9-23-82
CC-82-93	United Farm Bureau Mutual Insurance Company	Department of Public Safety	6,080.75	Disallowed	3-14-83
CC-83-122	Carole E. Updyke and Lionel Joe Updyke	Department of Highways	86.97	Disallowed	6-24-83
CC-82-115	David E. Utt	Department of Highways	142.00	Disallowed	9-23-82
CC-82-304	Robert Varney	Department of Highways	208.97	Disallowed	3-16-83
CC-81-343	Vecellio & Grogan, Inc., for Peraldo Construction Company	Department of Highways	11,585.20	Disallowed	4-22-83
CC-78-113	Charles S. Ward, guardian of Charles F. Ward	Department of Corrections	125,000.00	Disallowed	1-27-83
CC-81-145	Ranson Bailey Ward and Debra Dawn Ward	Department of Highways	255.42	Disallowed	11-9-81
CC-81-122	John J. West	Department of Highways	209.21	Disallowed	2-17-82
CC-81-219	Michael E. Whalen and Ann Whalen	Department of Health	43,000.00	Disallowed	6-30-83
CC-82-39	Drema Faye Wheeler	Department of Highways		Disallowed	7-2-82
CC-80-338	Cecil Whitt, Sr.	Department of Highways	602.00	Disallowed	9-29-81

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-82-207	Wayne F. Wiggins	Department of Highways	449.82	Disallowed	2-9-83
CC-82-63	Renna J. Wilcox	Department of Highways	116.28	Disallowed	6-30-82
CC-79-466	A. B. Williams	Department of Highways	14,067.92	Disallowed	6-24-83
CC-83-117	Roy Franklin Williams, Jr. and Beverly Williams	Department of Highways	85.54	Disallowed	6-24-83
CC-82-100	Bob E. Willis and Ragene Willis	Department of Highways	119.38	Disallowed	12-7-82
CC-77-103	Clyde Wood	Department of Highways	950.00	Disallowed	10-12-82
CC-80-241	James Woody and Lottie L. Woody	Department of Highways	80,000.00	Disallowed	6-30-83
CC-82-132	Gary L. Workman and Brenda Workman	Department of Highways	394.43	Disallowed	4-22-83
CC-80-380	Martha P. Yoak, by her agent, Judson K. Yoak	Department of Highways	60,000.00	Disallowed	3-16-83
CC-81-75	Andrew S. Young	Department of Highways	3,995.55	Disallowed	1-26-83

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-81-388	Department of Employment Security	Department of Corrections	26,599.96	Disallowed	12-16-81
CC-82-58	Department of Highways	Farm Management Commission	8,379.91	Disallowed	7-13-82
CC-82-76	Welding, Inc.	Department of Corrections	22,950.00	22,950.00	5-20-82
CC-81-413	West Virginia University Hospital	Department of Corrections	7,440.43	Disallowed	2-2-82
CC-82-145	West Virginia University Pharmacy	Department of Corrections	117.50	Disallowed	10-26-82

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriations by the Legislature:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-82-315	A. H. Robins Co.	Department of Corrections	259.54	Disallowed	2-9-83
CC-82-78	Ace Adjustment Service, Inc., Agent for United Hospital Center, Inc.	Department of Corrections	325.00	Disallowed	6-30-82
CC-81-289	C. K. Agarwal	Department of Corrections	70.00	Disallowed	11-5-81
CC-82-211	C. K. Agarwal	Department of Corrections	1,235.00	Disallowed	10-26-82
CC-81-293	Agway, Inc.	Farm Management Commission	412.07	Disallowed	11-4-81
CC-81-217	Hassan Amjad	Department of Corrections	295.00	Disallowed	11-5-81
CC-82-208	Jett S. Andrick	Department of Corrections	843.00	Disallowed	10-26-82
CC-81-245	Appalachian Mental Health Center	Department of Corrections	4,400.00	Disallowed	11-5-81
CC-81-299	Appalachian Regional Hospital	Department of Corrections	1,690.00	Disallowed	11-5-81
CC-81-282	Ayerst Laboratories	Department of Corrections	411.57	Disallowed	11-5-81
CC-82-259*	B. & S. Air Taxi Service	Office of the Secretary of State	304.50	Disallowed	12-1-82
CC-82-214	Beckley Medical Arts, Inc.	Department of Corrections	60.00	Disallowed	10-26-82
CC-81-254	Beckley Radiology Associates	Department of Corrections	323.50	Disallowed	11-5-81
CC-81-314	Beckley Veterinary Hospital, Inc.	Farm Management Commission	188.00	Disallowed	11-4-81
CC-81-444	Bennett Publishing Company	Department of Corrections	100.91	Disallowed	1-28-82
CC-81-250	Bernhardt's Clothing, Inc.	Department of Corrections	3,215.38	Disallowed	11-5-81
CC-81-352	Bessire & Company, Inc.	Farm Management Commission	540.70	Disallowed	11-4-81
CC-81-466	Bill Henning, Inc.	Farm Management Commission	25.00	Disallowed	1-28-82
CC-81-306	Blue Grass Equipment, Inc.	Farm Management Commission	117.40	Disallowed	11-4-81
CC-82-62	Gordon A. Bobbitt	Department of Corrections	265.25	Disallowed	5-21-82

*This claim was omitted from the Claims Bill by the 1983 Legislature.

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriations by the Legislature:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-81-239	Boso Agri-Center, Inc.	Farm Management Commission	8,406.83	Disallowed	11-4-81
CC-82-318	Boso Agri-Center, Inc.	Farm Management Commission	2,288.94	Disallowed	2-9-83
CC-81-315	Boury, Inc.	Department of Corrections	1,984.28	Disallowed	11-5-81
CC-82-150	Bowlings, Inc.	Department of Corrections	407.74	Disallowed	12-1-82
CC-81-423	Buckeye Gas Products Company	Farm Management Commission	95.39	Disallowed	12-9-81
CC-82-226	Butler's Pharmacy	Department of Corrections	2,466.18	Disallowed	12-1-82
CC-81-247	C. H. James & Co.	Department of Corrections	1,149.18	Disallowed	11-5-81
CC-82-326	C. H. James & Co.	Department of Corrections	2,332.18	Disallowed	2-9-83
CC-81-295	Frank J. Cary—Mountainland Animal Hospital	Farm Management Commission	3,344.55	Disallowed	11-4-81
CC-81-338	Cecil E. Jackson Equipment, Inc.	Farm Management Commission	65.06	Disallowed	11-4-81
CC-82-297	Chandra P. Sharma, M.D., Inc.	Department of Corrections	250.00	Disallowed	12-16-82
CC-81-462	Charleston Area Medical Center	Department of Corrections	299.50	Disallowed	1-28-82
CC-81-439	Clarksburg Drug Company	Department of Corrections	714.83	Disallowed	1-28-82
CC-82-4	Copy Graphics, Inc.	Insurance Department	522.13	Disallowed	2-1-82
CC-81-218	Corder Tractor & Equipment Company	Farm Management Commission	210.52	Disallowed	11-4-81
CC-81-393	Craig Motor Service Co., Inc.	Department of Corrections	256.35	Disallowed	12-9-81
CC-81-226	G. Jay Crissman	Farm Management Commission	265.00	Disallowed	11-4-81
CC-82-186	J. P. Currence	Office of the Secretary of State	143.00	Disallowed	1-25-83
CC-81-344	Saryu P. Dani	Department of Corrections	40.00	Disallowed	11-5-81

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriations by the Legislature:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-81-279	Darwin O. Fike, d/b/a Surge Sales & Service	Farm Management Commission	208.30	Disallowed	11-4-81
CC-81-337	James L. Davison	Farm Management Commission	122.25	Disallowed	11-4-81
CC-81-222	Dearing Brothers, Inc.	Farm Management Commission	591.34	Disallowed	11-4-81
CC-81-311	Dentists Fee Office	Department of Corrections	300.00	Disallowed	11-5-81
CC-81-117*	Department of Finance & Administration	Department of Corrections	13,702.00	Disallowed	8-6-81
CC-81-383*	Department of Highways	Department of Corrections	3,693.73	Disallowed	11-5-81
CC-82-57*	Department of Highways	Department of Corrections	194.63	Disallowed	5-21-82
CC-81-317	Dorsey Laboratories	Department of Corrections	156.90	Disallowed	11-5-81
CC-81-455	E. R. Squibb & Sons, Inc.	Department of Corrections	214.60	Disallowed	1-28-82
CC-81-211	Eglon Farm Service	Farm Management Commission	16,709.35	Disallowed	11-4-81
CC-81-394	Elkins Dental Lab	Department of Corrections	67.00	Disallowed	12-9-81
CC-81-294	Elkins Machine & Electric Co.	Farm Management Commission	556.00	Disallowed	11-4-81
CC-81-229	Elkins Tire Company	Farm Management Commission	140.76	Disallowed	11-4-81
CC-81-395	Equitable Gas, Inc.	Department of Corrections	45,831.75	Disallowed	12-9-81
CC-81-456	Exxon Company, USA	Department of Corrections	229.74	Disallowed	1-28-82
CC-82-136	Exxon Co., U.S.A.	Farm Management Commission	219.71	Disallowed	9-23-82
CC-82-244	F. M. Mingo	Department of Corrections	99.00	Disallowed	12-1-82
CC-82-222	FMRS Mental Health Council, Inc.	Department of Corrections	96.00	Disallowed	12-1-82
CC-81-354	Fairmont State College	Department of Corrections	1,819.99	Disallowed	11-5-81
CC-81-336	Firestone Stores	Farm Management Commission	119.50	Disallowed	11-4-81
CC-81-384a	The Firestone Tire and Rubber Company	Department of Corrections	574.34	Disallowed	11-5-81

*The claim was omitted from the Claim Bill by the Legislature.

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriations by the Legislature:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-81-384b	The Firestone Tire and Rubber Company	Farm Management Commission	51.60	Disallowed	11-4-81
CC-81-286	Robert M. Flesher—Upshur Veterinary Hospital	Farm Management Commission	55.00	Disallowed	11-4-81
CC-81-227	Frank's Service Center	Farm Management Commission	110.43	Disallowed	11-4-81
CC-81-231	Fullen Fertiziler Company, Inc.	Farm Management Commission	453.65	Disallowed	11-4-81
CC-81-318	Fulton-Thompson Tractor Sales, Inc.	Farm Management Commission	675.00	Disallowed	11-4-81
CC-81-368	Gall's, Inc.	Department of Corrections	2,296.94	Disallowed	11-5-81
CC-81-327	Gibson's Scale Service	Farm Management Commission	677.40	Disallowed	11-4-81
CC-81-276	Grafton City Hospital	Department of Corrections	3,777.94	Disallowed	11-5-81
CC-82-36	Grafton City Hospital	Department of Corrections	108.00	Disallowed	5-21-82
CC-81-392	Greenbrier Physicians Inc.	Department of Corrections	50.00	Disallowed	12-9-81
CC-81-438	Greenbrier Physicians Inc.	Department of Corrections	1,348.50	Disallowed	1-28-82
CC-82-250	Greenbrier Physicians Inc.	Department of Corrections	550.00	Disallowed	12-1-82
CC-81-234	Greenbrier Tractor Sales, Inc.	Farm Management Commission	4,717.67	Disallowed	11-4-81
CC-81-264	Greenbrier Valley Farm Center, Inc.	Farm Management Commission	3,212.90	Disallowed	11-4-81
CC-81-277	Greenbrier Valley Hospital	Department of Corrections	4,644.52	Disallowed	11-5-81
CC-81-347	Greenbrier Valley Hospital	Department of Corrections	898.18	Disallowed	11-5-81
CC-82-5	Greenbrier Valley Hospital	Department of Corrections	700.17	Disallowed	1-28-82
CC-82-210	Harold E. Harvey, M.D., Inc.	Department of Corrections	75.00	Disallowed	10-26-82
CC-81-270	Hedlund Manufacturing Co., Inc.	Farm Management Commission	1,622.07	Disallowed	11-4-81
CC-81-230	Henderson Implement Company	Farm Management Commission	618.14	Disallowed	11-4-81
CC-81-305	Henry Schein, Inc.	Department of Corrections	397.25	Disallowed	11-5-81

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriations by the Legislature:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-81-221	Heritage Equipment Company	Farm Management Commission	268.12	Disallowed	11-4-81
CC-81-335	Humberson Farm Equipment	Farm Management Commission	595.67	Disallowed	11-4-81
CC-81-260	Eugene E. Hutton, Jr.	Department of Corrections	5,038.00	Disallowed	11-5-81
CC-81-364	Independent Dressed Beef Company, Inc.	Department of Corrections	3,738.90	Disallowed	11-5-81
CC-81-333	J. D. Woodrum, M.D., Inc.	Department of Corrections	95.00	Disallowed	11-5-81
CC-81-273	J. H. Holt Plumbing and Heating, Inc.	Farm Management Commission	1,000.40	Disallowed	11-4-81
CC-81-382	Jefferds Corporation	Farm Management Commission	747.24	Disallowed	11-4-81
CC-81-187	Jenkins Concrete Products, Co.	Farm Management Commission	940.50	Disallowed	12-9-81
CC-81-320	E. L. Jimenez	Department of Corrections	860.00	Disallowed	12-9-81
CC-81-232	Jealde Sales & Service	Farm Management Commission	35.87	Disallowed	11-4-81
CC-81-298	Johnson's Boiler Sales & Service, Inc.	Department of Corrections	13,883.22	Disallowed	11-5-81
CC-81-274	Johnston Alternator and Trailer Sales, Inc.	Farm Management Commission	425.54	Disallowed	11-4-81
CC-81-243	Keefer's Service Center	Farm Management Commission	3,219.64	Disallowed	11-4-81
CC-81-285	Lawson Products, Inc.	Farm Management Commission	922.28	Disallowed	11-4-81
CC-81-263	Lewis & Burge, Inc.	Farm Management Commission	170.96	Disallowed	11-4-81
CC-81-242	Liggett's Supply	Farm Management Commission	638.48	Disallowed	11-4-81
CC-82-299	Lois McElwee Memorial Clinic	Department of Corrections	140.00	Disallowed	12-16-82
CC-81-214	Marlinton Electric Co., Inc.	Department of Corrections	80,609.40	Disallowed	11-5-81
CC-81-255	Marshall County Cooperative, Inc.	Farm Management Commission	78.00	Disallowed	11-4-81
CC-81-360	Mason County D.H.I.A., Inc.	Farm Management Commission	527.46	Disallowed	11-4-81

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriations by the Legislature:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-81-398	Matthew Bender & Company	Department of Corrections	1,459.00	Disallowed	1-28-82
CC-82-255	Matthew Bender & Company, Inc.	Department of Corrections	95.00	Disallowed	12-1-82
CC-81-223	McGhee & Company	Farm Management Commission	13.25	Disallowed	11-4-81
CC-82-218	William D. McLean	Department of Corrections	64.00	Disallowed	12-1-82
CC-81-297	McNeil Pharmaceutical	Department of Corrections	131.87	Disallowed	11-5-81
CC-81-365	Memorial General Hospital Association	Department of Corrections	133,500.35	Disallowed	11-5-81
CC-82-256	Memorial General Hospital Association, Inc.	Department of Corrections	165,695.32	Disallowed	12-6-82
CC-81-237	Mercer Radiology, Inc.	Department of Corrections	130.00	Disallowed	11-5-81
CC-81-362	Monongahela Power Company	Department of Corrections	17,192.85	Disallowed	11-5-81
CC-82-220	Monongahela Power Company	Department of Corrections	66,033.70	Disallowed	10-26-82
CC-83-13	Ellery H. Morgan	Public Employees Insurance Board and ABC Commissioner	2,189.24	Disallowed	5-25-83
CC-81-346	Motor Car Supply Company	Farm Management Commission	67.46	Disallowed	1-28-82
CC-81-233	Mountain Mobile Milling	Farm Management Commission	200.75	Disallowed	11-4-81
CC-82-106	Mountaineer Motor Sales, Inc.	Farm Management Commission	86.87	Disallowed	7-13-82
CC-81-310	Nasco	Farm Management Commission	48.65	Disallowed	11-4-81
CC-81-224	North Central Dairy Herd Improvement Association	Farm Management Commission	270.07	Disallowed	11-4-81
CC-81-303	Norwich-Eaton Pharmaceuticals	Department of Corrections	412.06	Disallowed	11-5-81
CC-81-278	Nova Rubber Company, Inc.	Department of Corrections	540.00	Disallowed	11-5-81
CC-81-89	Ohio Valley Medical Center	Department of Corrections	125.80	Disallowed	8-6-81
CC-82-276	Ohio Valley Medical Center, Inc.	Department of Corrections	22,614.68	Disallowed	12-7-82

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriations by the Legislature:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-81-272	Orthopedic Clinic, Inc.	Department of Corrections	350.00	Disallowed	11-5-81
CC-81-328	Overnite Transportation Co.	Farm Management Commission	28.20	Disallowed	11-4-81
CC-81-262b	B. Payman	Department of Corrections	110.00	Disallowed	11-5-81
CC-82-205	B. Payman	Department of Corrections	1,199.00	Disallowed	10-26-82
CC-81-287	Perrmont Chemical Company	Department of Corrections	3,400.00	Disallowed	11-5-81
CC-82-185	Peters Fuel Corp.	Department of Corrections	30,097.20	Disallowed	10-26-82
CC-81-366	Pfizer, Inc.	Department of Corrections	558.97	Disallowed	11-5-81
CC-81-257	Physicians Associates, Inc.	Department of Corrections	245.00	Disallowed	11-5-81
CC-81-312a	Physicians Fee Office	Department of Corrections	2,001.14	Disallowed	11-5-81
CC-81-312b	Physicians Fee Office	Department of Corrections	3,528.25	Disallowed	11-5-81
CC-81-448	Physicians Fee Office	Department of Corrections	823.00	Disallowed	1-28-82
CC-82-284	Physicians Fee Office	Department of Corrections	2,773.00	Disallowed	12-16-82
CC-81-235	Pickens Hardware Co., Inc.	Farm Management Commission	239.49	Disallowed	11-4-81
CC-81-256	Picker Corporation	Department of Corrections	1,043.51	Disallowed	11-5-81
CC-81-339	Pioneer Harvestore Systems, Inc.	Farm Management Commission	205.34	Disallowed	11-4-81
CC-83-37	Potomac Valley Hospital	Department of Corrections	56.10	Disallowed	5-25-83
CC-81-373	Princeton Community Hospital	Department of Corrections	90.00	Disallowed	11-5-81
CC-81-225	Princeton Internists	Department of Corrections	87.00	Disallowed	11-5-81
CC-82-206	Professional Laboratory & X-Ray	Department of Corrections	32.00	Disallowed	10-26-82
CC-81-267	Raleigh General Hospital, Inc.	Department of Corrections	1,541.25	Disallowed	11-5-81
CC-81-307	Raleigh General Hospital, Inc.	Department of Corrections	150.95	Disallowed	11-5-81
CC-81-296a	Raleigh Orthopaedic Assoc., Inc.	Department of Corrections	100.00	Disallowed	11-5-81
CC-81-296b	Raleigh Orthopaedic Assoc., Inc.	Department of Corrections	2,310.00	Disallowed	11-5-81

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriations by the Legislature:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-82-286	Mario C. Ramas	Department of Corrections	110.00	Disallowed	12-16-82
CC-82-217	D. L. Rasmussen	Department of Corrections	665.00	Disallowed	12-1-82
CC-81-283	Reed & Carnrick	Department of Corrections	970.08	Disallowed	11-5-81
CC-81-198	Reynolds Memorial Hospital, Inc.	Department of Corrections	1,480.50	Disallowed	11-5-81
CC-81-212	Reynolds Memorial Hospital, Inc.	Department of Corrections	4,535.90	Disallowed	11-5-81
CC-81-265	Reynolds Memorial Hospital, Inc.	Department of Corrections	39,476.17	Disallowed	11-5-81
CC-82-212a	Reynolds Memorial Hospital, Inc.	Department of Corrections	79,281.45	Disallowed	12-16-82
CC-82-212b	Reynolds Memorial Hospital, Inc.	Department of Corrections	15,899.49	Disallowed	12-16-82
CC-81-287b	SK&F Co.	Department of Corrections	20.82	Disallowed	11-5-81
CC-81-387a	SK&F Lab Co.	Department of Corrections	399.60	Disallowed	11-5-81
CC-82-165	Scott Saw Sales & Service	Farm Management Commission	42.44	Disallowed	9-23-82
CC-81-403	Seneca Mental Health Mental Retardation Council, Inc.	Department of Corrections	3,000.00	Disallowed	12-9-81
CC-82-22	Chandra P. Sharma	Department of Corrections	815.00	Disallowed	2-16-82
CC-81-329	Adnan N. Silk-Beckley Neurosurgical Clinic	Department of Corrections	80.00	Disallowed	11-5-81
CC-82-130	Charles H. Simmons, d/b/a Simmons' Hauling	Department of Corrections	1,926.80	Disallowed	12-1-82
CC-81-236	Rajendra P. Singh	Department of Corrections	215.00	Disallowed	11-5-81
CC-81-241	Skyland Hospital Supply	Farm Management Commission	77.00	Disallowed	11-4-81
CC-81-194	Southern Chemical Co.	Department of Corrections	1,316.00	Disallowed	11-5-81
CC-81-244	Southern Chemical Co.	Department of Corrections	372.50	Disallowed	11-5-81

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriations by the Legislature:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-81-453	Southern States Cooperative	Farm Management Commission	455.31	Disallowed	1-28-82
CC-81-348	Southern States Elkins Coop., Inc.	Farm Management Commission	24,591.24	Disallowed	11-4-81
CC-81-269	Southern States Marlinton, Coop.	Farm Management Commission	29.85	Disallowed	11-4-81
CC-82-241	Steven Richman, DO, Inc.	Department of Corrections	495.00	Disallowed	12-1-82
CC-81-262a	Summers Community Clinic	Department of Corrections	103.02	Disallowed	11-5-81
CC-82-232	Summers Community Clinic Pharmacy	Department of Corrections	29.90	Disallowed	10-26-82
CC-81-263	Summers County Hospital	Department of Corrections	13,341.30	Disallowed	11-5-81
CC-82-202	Summers County Hospital	Department of Corrections	13,456.65	Disallowed	10-26-82
CC-82-2	Superior Parts Service, Inc.	Farm Management Commission	56.25	Disallowed	1-28-82
CC-81-213	Swisher's Feed and Supply	Farm Management Commission	2,068.40	Disallowed	11-4-81
CC-81-460	T. H. Mirza, M.D., Inc.	Department of Corrections	115.00	Disallowed	1-28-82
CC-81-401	Taylor County Commission	Department of Corrections	248.00	Disallowed	1-28-82
CC-81-304	John R. Tomlinson—Fairlea Animal Hospital	Farm Management Commission	249.00	Disallowed	11-4-81
CC-81-331	Town & Country Veterinary Clinic	Farm Management Commission	1,588.50	Disallowed	11-4-81
CC-81-253	Tri-State Ambulance and Rentals	Department of Corrections	569.00	Disallowed	11-5-81
CC-81-321	Tygarts Valley D.H.I.A.	Farm Management Commission	85.30	Disallowed	11-4-81
CC-81-228	Tygarts Valley Sanitation, Inc.	Farm Management Commission	60.00	Disallowed	11-4-81
CC-81-340	Union Oil Company of California	Department of Corrections	8,452.08	Disallowed	11-5-81
CC-81-405	Union Oil Company of California	Department of Corrections	1,149.19	Disallowed	12-9-81

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriations by the Legislature:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-81-407	Union Oil Company of California	Department of Corrections	2,554.93	Disallowed	12-9-81
CC-81-252	Union Oil Company of California	Farm Management Commission	7,958.58	Disallowed	11-4-81
CC-81-195	Union Oil Company of California	Farm Management Commission	44.40	Disallowed	11-4-81
CC-81-281	The Upjohn Company	Department of Corrections	791.07	Disallowed	11-5-81
CC-82-300	Utah Valley Hospital	Department of Corrections	1,825.16	Disallowed	12-16-82
CC-82-253	Alfredo C. Velasquez	Department of Corrections	1,430.00	Disallowed	12-1-82
CC-81-258	Virginia Harvestore, Inc.	Farm Management Commission	1,146.72	Disallowed	11-4-81
CC-81-284	G. W. Wandling	Farm Management Commission	150.00	Disallowed	11-4-81
CC-81-201	Walter J. Klein Company, Ltd.	Board of Regents	350.00	Disallowed	9-29-81
CC-81-330	Ward Auto Parts Co.	Farm Management Commission	667.16	Disallowed	11-4-81
CC-81-259	Wechsler Coffee Corporation	Department of Corrections	3,669.12	Disallowed	11-5-81
CC-81-357	West Virginia Artificial Breeders Cooperative, Inc.	Farm Management Commission	2,748.00	Disallowed	11-4-81
CC-81-290	West Virginia Paper, Inc.	Department of Corrections	3,478.25	Disallowed	11-5-81
CC-81-461	West Virginia School of Osteopathic Medicine	Department of Corrections	6,290.60	Disallowed	1-28-82
CC-81-464	West Virginia School of Osteopathic Medicine Clinic, Inc.	Department of Corrections	20,305.17	Disallowed	1-28-82
CC-82-306	West Virginia School of Osteopathic Medicine Clinic, Inc.	Department of Corrections	14,709.50	Disallowed	1-25-83

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriations by the Legislature:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-81-280	West Virginia Turnpike Commission	Farm Management Commission	28.00	Disallowed	11-4-81
CC-82-221	Westinghouse Electric Supply Company	Department of Corrections	732.76	Disallowed	12-6-82
CC-81-300	Weston Veterinary Clinic	Farm Management Commission	273.00	Disallowed	11-4-81
CC-81-391	White Sulphur Pharmacy, Inc.	Department of Corrections	399.30	Disallowed	12-9-81
CC-81-313	Whitman Exterminating Company	Farm Management Commission	68.00	Disallowed	11-4-81
CC-82-258	Wilson Welding Supply Company	Railroad Maintenance Authority	340.00	Disallowed	12-6-82
CC-81-249	Winchester Equipment Co.	Farm Management Commission	155.34	Disallowed	11-4-81
CC-81-420	Xerox Corporation	Department of Corrections	2,801.94	Disallowed	12-9-81
CC-81-240	Young's, Inc.	Farm Management Commission	211.00	Disallowed	11-4-81

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

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

Opinion issued August 6, 1981

DORIS JANE BOWEN
WANDA SUE HANLEY
LARRY JENKINS
LANA JEAN JENKINS

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-342)

Omega Perdue appeared in person.

Douglas Hamilton, Attorney at Law, for respondent.

WALLACE, JUDGE:

Omega Perdue, formerly Omega Jenkins, filed this claim against the respondent for damages to her tobacco crop and loss of topsoil and fertilizer caused by the flooding of her tobacco field.

She testified that she and her four children owned an eighty-four acre farm located on the waters of Jenkins Creek near Milton, West Virginia. She was asked by the Court to furnish the deed to the farm so that the Court could determine the proper ownership and claimants in this matter. This she failed to do. The Court made its own investigation, and found that Omega Perdue and her former husband, Willie Jenkins, conveyed the farm in 1959 to their four children, Doris Jane Jenkins, now Bowen; Wanda Sue Jenkins, now Hanley; Larry Jenkins, and Lana Jean Jenkins. Accordingly, Omega Jenkins owns no interest in the property, and the

Court, on its own motion, amended the notice of claim to dismiss Omega Perdue as a claimant and to substitute the four children as claimants.

Jenkins Creek flows past a tobacco field located on the farm, then turns at right angles through two six-foot culverts under Local Service Road #9, also known as Dudley Gap Road. A second creek flows easterly under the road through a five-foot culvert located in the immediate area of the six-foot culverts.

On August 4, 1980, there occurred a heavy rainstorm overflowing the banks of Jenkins Creek and flooding a portion of the tobacco field. None of the claimants live on the farm and none were present during the storm. Omega Perdue contends that the culverts were clogged with debris, causing the creek to back up and flood the field. She testified that the culverts had been blocked on previous occasions, and she had made complaints to the respondent.

Lonnie Clagg, an employee of the respondent, testified that he had occasion to pass through the area of claimants' farm immediately after the storm; that Jenkins Creek and Trace Creek had flooded above and below the culverts; that the water was over Local Service Road #9, and that he had to proceed through the water.

Donald Turner, respondent's Maintenance Supervisor for Cabell County, testified that he had no knowledge or record of complaints made by Omega Perdue other than a call received after the August 4, 1980 storm advising of the damage to the tobacco crop.

The evidence in the record does not establish that the culverts were actually clogged at the time of the August 4, 1980 storm. None of the claimants were present during the storm, and there was not actual proof that the culverts were, in fact, stopped up at the time of the storm. On the contrary, the testimony of Lonnie Clagg established that the storm was of such magnitude that the run-off went over the culverts and the road, flooding the entire area above and below the cul-

verts. No negligence on the part of the respondent was proved. Accordingly, the Court must deny the claim.

Claim disallowed.

Opinion issued August 6, 1981

DEPARTMENT OF FINANCE AND ADMINISTRATION

vs.

DEPARTMENT OF CORRECTIONS

(CC-81-117)

No appearance by claimant.

Joseph C. Cometti, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $13,702.00 on unpaid invoices for supplies furnished to the West Virginia Penitentiary. Respondent admits the validity of the claim, but also states that there were no funds remaining in the respondent's appropriation for the fiscal year in question 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 also of the 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 6, 1981

NELLIE EVANS

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-339)

Claimant appeared in person.

W. Douglas Hamilton, Attorney at Law, for respondent.

WALLACE, JUDGE:

Sometime in mid-July of 1980, claimant Nellie Evans was

operating her 1976 Cadillac Coupe DeVille on W. Va. Route 10 north from Logan to Mitchell Heights when traffic was stopped for 1½ hours. During that time, the claimant ran her car's engine at certain intervals to operate the air conditioner because of the intense heat. Finally, the vehicle overheated, and the antifreeze boiled out. Claimant incurred an expense of $16.44 for the replacement of the radiator and thermostat.

The following month, along the same stretch of highway, the claimant was again stopped in traffic, that time, for 2½ hours. Ms. Evans testified that a flagman was present on both occasions, and that the temperature was 100° or more. The car once again overheated, resulting in a transmission repair bill of $400.67. Claimant seeks to recover a total of $462.11 for damage to her vehicle allegedly resulting from respondent's traffic control on West Virginia Route 10.

Testifying on behalf of the respondent was Ludrus Gore, a blacktop inspector who was on the Route 10 project in Logan County during the months involved here. Mr. Gore stated that an independent contractor, State Construction, was laying the blacktop on that particular project, and that the flagmen posted in the area were employed by State Construction. The only employees of the Department of Highways at the site were Mr. Gore and another inspector.

It is clear from the record in this case that negligence on the part of the respondent has not been established. State Construction was an independent contractor, and this Court has held that "the respondent may not be held accountable for the contractor's negligent acts." *Safeco Insurance Company v. Department of Highways,* 9 Ct.Cl. 28 (1971). In another decision by this Court, involving a flagman employed by an independent contractor, the Court found that the respondent could not be held liable for the negligence, if any, of the flagman. *R. H. Bowman Distributing Co., Inc. v. Department of Highways,* 12 Ct.Cl. 156 (1978). Accordingly, this claim must be denied.

Claim disallowed.

Opinion issued August 6, 1981

GENERAL COMMUNICATIONS COMPANY

vs.

BOARD OF REGENTS

(CC-81-80)

No appearance by claimant.

Ann V. Dornblazer, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant seeks payment of the sum of $400.00 for radio equipment lost by the West Virginia Network for Educational Telecomputing (WVNET).

As the respondent's Answer admits the validity and amount of the claim, and sufficient funds remained in the respondent's appropriation for the fiscal year in question from which the obligation could have been paid, the Court makes an award of $400.00 to the claimant.

Award of $400.00.

Opinion issued August 6, 1981

JOHN A. HANNIGAN AND
CAROLYN ANN HANNIGAN

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-86)

Claimant appeared in person.

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

WALLACE, JUDGE:

Claimant filed this claim against the respondent for damage sustained by his automobile after striking a pothole as he approached the Montgomery Bridge in Montgomery, West Virginia.

On Friday, February 20, 1981, at approximately 6:15 p.m., the claimant was driving his 1977 Ford Granada westerly on U.S. Route 60 at approximately 20 to 25 miles per hour. It

was raining. He turned off U.S. Route 60 onto the approach to the bridge over the river to Montgomery, and his automobile struck a large pothole in the pavement, bursting a tire and damaging a rim and hubcap.

The claimant testified that he travelled this bridge three to four times a week; that he knew the hole was there; that the hole had been patched by the respondent on prior occasions; and that he had made no complaints to the respondent. Claimant's insurance company paid for the rim and the hubcap. His remaining damage is for a tire, alignment, and balancing in the amount of $129.39.

In the course of the hearing, it developed that the automobile was titled in the name of the claimant and his wife, Carolyn Ann Hannigan. The Court, on its own motion, amended the claim to include Carolyn Ann Hannigan as an additional claimant.

The State neither insures nor guarantees the safety of motorists travelling on its highways. *Adkins vs. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damages caused by road defects of this type, the claimant must prove that the respondent had actual or constructive knowledge of the existence of the defect and a reasonable amount of time to take suitable corrective action. *Davis vs. Department of Highways,* 11 Ct.Cl. 150 (1977). Since the claimant did not meet that burden of proof, this claim must be denied.

Claim disallowed.

Opinion issued August 6, 1981

CHARLES W. JONES

vs.

BOARD OF REGENTS

(CC-81-35)

Claimant appeared in person.

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

WALLACE, JUDGE:

Claimant filed this claim against the respondent in the amount of $289.50 for items damaged and destroyed as the

result of the falling of a shelf in claimant's apartment. The amount of the claim was amended at the hearing to $213.75.

The claimant and his wife had just completed moving into an apartment in the University Heights Housing Complex owned and maintained by Marshall University in Huntington, West Virginia. Certain household items were placed on a shelf in the bedroom closet. On June 23, 1980, for no apparent reason, the shelf fell, and certain items listed in Claimant's Exhibit No. 1 were damaged beyond repair. The claimant notified the maintenance personnel and the housing office, and was informed that this was not an isolated incident and that it had happened in other apartments in the complex. The claimant had not been advised of this when he moved into the apartment.

The Court finds that the respondent was negligent in failing to remedy the shelf defect, and therefore makes an award to the claimant in the amount of $213.75.

Award of $213.75.

Opinion issued August 6, 1981

L. ROBERT KIMBALL & ASSOCIATES

vs.

TAX DEPARTMENT

(CC-81-70)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $2,824.42 for damages caused by respondent's breach of a contract with the claimant.

Respondent, having admitted the validity of the claim, states that there were sufficient funds available in its appropriation for the fiscal year in question from which the obligation could have been paid.

Based on the foregoing, the Court makes an award to the claimant in the amount of $2,824.42.

Award of $2,824.42.

Opinion issued August 6, 1981

VIRGINIA LEWIS

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-421)

Claimant appeared in person.

W. Douglas Hamilton, Attorney at Law, for respondent.

WALLACE, JUDGE:

Claimant seeks payment of the sum of $176.90 for damages sustained by her automobile as the result of striking a pothole.

The claimant, a resident of South Charleston, West Virginia, is the owner of a 1976 Chevrolet Nova. On the morning of December 20, 1980, she was traveling on Campbell's Creek Road, a two-lane, State-maintained highway, when she struck a hole in her lane of traffic approximately six inches from the berm. Two tires were damaged. The claimant testified that she had traveled the road two weeks before the accident, and knew that there were several holes in the highway because coal trucks frequently traveled the area.

The State is neither an insurer nor guarantor of the safety of persons traveling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). To be found liable, the respondent must have had either actual or constructive notice of the particular hazard which caused the damage. *Davis v. Dept. of Highways,* 11 Ct.Cl. 150 (1976). In this case, statements by the claimant that holes in the highway existed two weeks before the accident tend to show that the respondent had at least constructive notice of the road's condition. However, it is the opinion of the Court that the claimant, with her prior knowledge of the hazardous condition of the highway, was also negligent. She stated that "They have to frequently pave and repatch holes in that area" (Transcript, p. 10).

Following the doctrine of comparative negligence, this Court declares that the claimant's negligence was equal to or greater than that of the respondent. Therefore, the claim must

be denied. *Hull v. Dept. of Highways,* 13 Ct.Cl. 408 (1981); *Spatafore v. Dept. of Highways,* 14 Ct.Cl. 18 (1981); *Bayer v. Dept. of Highways,* 13 Ct.Cl. 388 (1981).

Claim disallowed.

Opinion issued August 6, 1981

DORES D. MCDONNELL, SR.

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-31)

Claimant appeared in person.

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

WALLACE, JUDGE:

Claimant filed this claim against the respondent in the amount of $131.78 for damage to his 1980 Toyota Corolla automobile.

On November 17, 1980, claimant was driving his son's automobile westerly on Interstate 64. His son was following him in claimant's automobile. At 10:00 p.m., while crossing Rocky Step Bridge at approximately milepost 41, he noticed in his rearview mirror his son blinking his lights. He pulled off the highway and his son stopped behind him and stated that he had a flat tire. They changed the tire and proceeded on. The next morning, the claimant examined the tire and discovered that it had been cut on the inside of the tire and the inside of the rim was bent as though some metal object had struck it. Claimant testified that he did not know what caused the damage, but surmised that there may have been a metal plate placed on the bridge by the respondent during repair work. He further stated that when he crossed the bridge in front of his son, he saw nothing unusual, nor did he see anything the next evening when he travelled the same section of the highway.

The law in West Virginia is well established that the State is not an insurer of the safety of a traveller on its highways.

Adkins vs. Sims, 130 W.Va. 645, 46 S.E.2nd 81 (1947), *Parsons vs. State Road Commission,* 8 Ct.Cl. 35 (1969). Anyone who sustains damage must prove that the negligence of the State caused the damage, in order for the State to be held liable. See *Eller vs. Department of Highways,* 13 Ct.Cl. 402 (1980). The record does not establish any negligence on the part of the respondent; in fact, the claimant testified that he did not know what caused the damage. In order to reach a conclusion as to what caused the damage to the claimant's automobile, the Court would have to resort to speculation or conjecture, which, of course, is prohibited. See *Miller vs. Department of Highways,* 13 Ct.Cl. 414 (1981). Accordingly, the Court disallows this claim.

Claim disallowed.

Opinion issued August 6, 1981

OHIO VALLEY MEDICAL CENTER

vs.

DEPARTMENT OF CORRECTIONS

(CC-81-89)

No appearance by claimant.

Joseph C. Cometti, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant herein seeks payment of the sum of $125.80 for medical services furnished to an inmate of the West Virginia Penitentiary. In its Answer, the respondent admits the validity of the claim, but also states that there were no funds remaining in the respondent's appropriation for the fiscal year in question 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 also of the 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 6, 1981

OSCAR D. SMITH

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-5)

Claimant appeared in person.

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

WALLACE, JUDGE:

Claimant filed this claim in the amount of $109.32 against the respondent for damage sustained by his automobile. In the early part of June, 1981, claimant was driving his 1980 Eagle automobile on West Virginia Route 10, a highway maintained by the respondent. At approximately 12:30 p.m., near Baileysville, West Virginia, claimant struck a pothole in the highway which was located about two feet from the edge of the road. It had been snowing and the hole was full of water. A tire and rim on the passenger side of the vehicle were damaged. Claimant testified that he had not driven this road for approximately one year, and the hole was not there at that time. He further stated that he did not know how long the hole had been there, nor did he know if the respondent had been notified of its existence.

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. Dept. of Highways*, 12 Ct.Cl. 31 (1977). The record in this case contains no evidence of any notice to the respondent or failure to act on respondent's part. Thus, the respondent cannot be found negligent. Recognizing that the State is neither an insurer nor a guarantor of the safety of persons travelling on its highways (*Adkins vs. Sims*, 130 W.Va. 645 [1947]), and that, no award can be made without proof of negligence, the Court must disallow this claim. See *Hanson vs. Dept. of Highways*, 12 Ct.Cl. 198 (1978).

Claim disallowed.

Opinion issued August 6, 1981

LARRY LEE STRICKER

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-50)

Claimant appeared in person.

Douglas Hamilton, Attorney at Law, for respondent.

WALLACE, JUDGE:

Claimant filed this claim against the respondent for damage to his automobile as the result of striking a hole in the road.

In the latter part of January, 1981, the claimant was driving his 1980 Datsun 210 automobile easterly on Hunter Road, in Kanawha County, West Virginia. Hunter Road is a one-lane, blacktop road maintained by the respondent. It was approximately 9:00 p.m., and the claimant was proceeding at four to five miles per hour with his lights on low beam. It was raining and there were patches of fog. The claimant's automobile struck a hole in the pavement, and a piece of the pavement hit the side of the vehicle, damaging the door, quarter panel, and running board. Two estimates of repair, Claimant's Exhibits 3 and 4, show amounts of $155.60 and $179.22, respectively. The claimant testified that he was familiar with the road but had not traveled it for about a month, at which time "it was normal." He further stated that he did not see the hole until a moment before he struck it and that there were no other bad holes in the roadway.

Every user of the highways travels thereon at his own risk. The State does not, and cannot, assure him a safe journey. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2nd 81 (1947). For the respondent to be held liable for damages caused by road defects of this type, the claimant must prove that the respondent had actual or constructive knowledge of the existence of the defect and a reasonable amount of time to take suitable corrective action. *Davis vs. Dept. of Highways,* 11 Ct.Cl. 150 (1976). Since the claimant did not meet that burden of proof, this claim is disallowed.

Claim disallowed.

Opinion Issued August 6, 1981

WEST VIRGINIA AUTOMOBILE AND TRUCK DEALERS ASSOCIATION

vs.

DEPARTMENT OF MOTOR VEHICLES

(CC-81-24)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $1,174.37 for processing and postage costs incurred as the result of respondent's erroneous reporting of registered vehicles in West Virginia.

As the respondent admits the validity and amount of the claim, and sufficient funds remained in its appropriation for the fiscal year in question from which the obligation could have been paid, the Court makes an award of $1,174.37 to the claimant.

Award of $1,174.37.

Opinion issued August 7, 1981

ROBERT N. JARBOE, PATRICIA ANN JARBOE, AND ROBERT N. JARBOE AS NEXT FRIEND OF STEPHANIE JARBOE, AN INFANT

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-297)

Henry Haslebacher, Attorney at Law, for the claimants.

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

RULEY, JUDGE:

On Saturday, February 17, 1979, at approximately 5:00 p.m., Robert Jarboe, his wife Patricia, and their daughter Stephanie, the claimants, were travelling south on a section of U.S. Route 119 near Hernshaw, in Kanawha County, in a 1978 model Ford pickup truck owned by Robert and being driven by Patricia.

They were returning to their home in Peytona from a shopping trip in Charleston when they encountered a large sheet of ice covering the entire pavement. The truck was equipped with snow tires and carried cement blocks in its bed for additional traction. Although Mrs. Jaboe, the driver, saw the ice and slowed to a speed of 30 mph, she still lost control of the truck and slid off the pavement, striking a parked car and a house. Mrs. Jarboe sustained a concussion, temporary impairment of vision, and a broken wisdom tooth in the accident. She suffered from dizziness for four months thereafter and incurred medical expenses in the sum of $837.57. Mr. Jarboe was uninjured, but his truck was a total loss, its fair market value being $4,500.00. Stephanie's injuries required only an emergency-room examination, which amounted to an expense of $76.00.

For the Court to conclude that the accident was caused by the negligence of the respondent, it must be shown that the respondent had actual or constructive knowledge of the obviously dangerous condition of the highway and failed to take suitable action to remedy it or warn motorists of it. Mr. Jarboe testified that the same spot iced over every winter due to the fact that there was no ditch line on the upper side of the road. Water ran off the neighboring hillside, across the road, and into a creek. He also stated that he had telephoned a complaint about that spot to the respondent during the preceding winter and that there were no signs posted to warn motorists of the potentially hazardous condition.

Deborah Hanning, who resides in a trailer near the accident site, testified that she had telephoned the respondent on the morning of the 17th and informed it of the presence of ice on the road. In addition, she stated that she had complained to the respondent by telephone about the same hazard many times prior to the 17th, and that there had been eight or nine accidents at that place prior to that date.

In its defense, the respondent claimed that the road had been treated with salt and cinders the preceding night, and the temperature had dropped sharply from 36° F to 9° F in the 24 hours preceding the accident.

It appears that the respondent did have actual knowledge of the dangerous condition of the highway both before and on the day of this accident, but failed to take suitable action to remedy it or to warn motorists of it. Mrs. Jarboe, however, also knew of the propensity of ice to freeze upon the highway at the place of the accident, and should have exercised greater care when approaching and traversing it. The Court finds that the negligence of the respondent was a proximate cause of the accident and the claimants' resulting injuries and damages, but the negligence of Patricia Jarboe contributed, to the extent of 20 per cent, to cause the accident. In 7A Am. Jur.2d *"Automobiles and Highway Traffic"*, §753, it is stated:

> "In most cases it has been held that the presence of the owner in his motor vehicle while it is being driven by a member of his family creates a rebuttable presumption or inference that he has or retains control over its operation, by virtue of which the negligence of the driver is imputable to him in an action against a third person. The fact that the owner refrains from directing the operation of the vehicle does not change his right of control, nor prevent the driver's negligence from being imputed to him.* * *"

In view of that authority, and in view of the circumstance that it appears that Mr. and Mrs. Jarboe were engaged in a joint enterprise at the time and place of the accident, the contributory negligence of Patricia should be imputed to Robert. Of course, it cannot be imputed to Stephanie inasmuch as she was a child of tender age at the time of the accident. See 13B M.J. *"Negligence"*, §44.

In view of the relatively minor nature of their injuries, the Court concludes that Patricia Jarboe should receive an award of $1,300.00, diminished by 20 per cent attributable to contributory negligence, and that Stephanie should receive an award of $50.00. The award to Robert Jarboe will be $4,500.00, diminished by 20 per cent attributable to contributory negligence, plus $76.00 for medical expense incurred as a result of Stephanie's injuries.

Award of $1,040.00 to Patricia Ann Jarboe.

Award of $3,676.00 to Robert N. Jarboe.

Award of $50.00 to Robert N. Jarboe, as next friend of Stephanie Jarboe.

Opinion issued August 7, 1981

McDONNELL DOUGLAS CORPORATION

vs.

DEPARTMENT OF EDUCATION

(CC-81-124)

C. Stephen Kriegh, Attorney at Law, for claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $28,132.00 for coal miner teaching programs purchased by the respondent. No payment was made by the respondent due to the claimant's failure to submit an invoice for the merchandise during the fiscal year in which it was ordered.

As the respondent's Answer admits the validity and amount of the claim, and sufficient funds remained in its appropriation for the fiscal year in question from which the obligation could have been paid, the Court makes an award of $28,132.00 to the claimant.

Award of $28,132.00.

Opinion issued August 7, 1981

JAMES SCOTT SADLER

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-422)

Claimant appeared in person.

W. Douglas Hamilton, Attorney at Law, for the respondent.

RULEY, JUDGE:

On October 16, 1980, at about 7:00 a.m., the claimant, James Scott Sadler, was driving his 1978 Toyota automobile east on

Route 25 near Institute in Kanawha County. The weather was clear and dry. It was not yet daylight, and Mr. Sadler had his headlights on low beam. His speed was approximately 40 mph.

Eastward toward Institute from Nitro, Route 25 changes from a two-lane to a four-lane highway at a point just before it intersects Goff Mountain Road. A concrete median approximately six inches high and twenty inches wide separates the two eastbound and two westbound traffic lanes. As the claimant entered the four-lane divided highway, he collided with the median, causing damages to his car of $744.30. He claimed that negligence on the part of the respondent was the cause of this accident, citing the following facts:

a) the section of two-lane highway leading into the four-lane, plus part of the four-lane itself, had recently been repaved, and no dividing lines had been painted on the new pavement;

b) there were no signs or other devices to warn motorists of the elevated median;

c) the median itself was not painted and had no reflecting devices on it;

d) an eastbound vehicle maintaining a straight course from the two-lane section would collide with the elevated median.

The respondent asserted that the claimant's own negligence was the proximate cause of the accident, and there does seem to be some justification for this argument. Mr. Sadler testified that he had travelled that portion of the road before, although not recently. He also stated that, when the accident happened, traffic was proceeding in both directions on the road, and he had observed cars ahead of him bear to the right upon entering the four-lane section. However, he had maintained his position because he had intended to turn left at the intersection of Goff Mountain Road.

In view of all of the evidence, the Court is constrained to conclude that the respondent was guilty of negligence which

was a proximate cause of the accident and the claimant's resulting damages. In addition, the claimant himself was guilty of negligence which was a proximate contributing cause of the accident and his resulting damages; therefore, the Court allocates the negligence 80% to the respondent and 20% to the claimant. Accordingly, an award of $595.44 should be, and is hereby, made.

Award of $595.44.

Opinion issued August 7, 1981

MARGARET SPATAFORE AND
JOSEPH ROBERT SPATAFORE

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-185)

Claimant, *Margaret Spatafore,* for claimants.

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

WALLACE, JUDGE:

Margaret Spatafore filed this claim against the Department of Highways in the amount of $72.68 for damages to a 1975 Buick automobile. As the record indicated that the automobile was jointly owned by Margaret Spatafore and Joseph Robert Spatafore, the Court, on its own motion, amended the style of the claim to reflect both parties in interest.

The claimants' automobile was damaged when Margaret Spatafore was proceeding north on Kelly Hill in Clarksburg, West Virginia, at approximately 3:00 p.m. on March 27, 1980. As she proceeded up the hill, the automobile struck a large pothole in her lane of travel, damaging the left front tire. It was raining at the time of the accident. The claimant testified that there were two holes ". . .and to keep from hitting one, you have to hit the other. . . ." She was unable to avoid the holes because of oncoming traffic.

The claimant also testified that, a month before the accident, she had called the Clarksburg District Office of the Depart-

ment of Highways to report the existence of these two holes. Mrs. Spatafore further stated that she passed the area of the accident every day and knew of the existence of the pothole in question.

The State is neither an insurer nor a guarantor of the safety of motorists travelling upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). To be found liable, the respondent must have had either actual or constructive notice of the particular hazard which caused the damage. *Davis v. Dept. of Highways*, 11 Ct.Cl. 150 (1976). From the evidence, it appears that the respondent was negligent in failing to repair the road after being notified of the potholes. However, the claimant, with her knowledge of the road's condition, was also negligent.

This Court is constrained to follow its prior application of the doctrine of comparative negligence in the case of *Hull v. Dept. of Highways*, 13 Ct.Cl. 408 (1981), in which the claimant's negligence, as in the case at hand, was equal to or greater than that of the respondent. The claim must therefore be denied.

Claim disallowed.

Opinion issued August 24, 1981

CROSBY BEVERAGE CO., INC.

vs.

NONINTOXICATING BEER COMMISSION

(CC-81-10)

George E. Crosby appeared on behalf of the claimant.

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

PER CURIAM:

Claimant herein seeks payment of the sum of $688.42 in taxes paid on 1,580 cases of beer rendered unfit as the result of severe storms and flooding. Subsequent destruction of the

beer was supervised by a federal agent of the Bureau of Alcohol, Tobacco, and Firearms Division of the United States Treasury Department.

In its Answer, the respondent admits the validity of the claim and joins the claimant in requesting that an award be made in favor of the claimant in the amount requested.

The question of beer tax refunds has been before this Court on several occasions. Where the State has not been damaged, the Court has held that retention of the taxes paid would amount to unjust enrichment on the part of the State. *Central Investment Corporation vs. Nonintoxicating Beer Commission,* 10 Ct.Cl. 182 (1975). See also *Falls City Industries, Inc., Formerly Falls City Brewing Co. vs. Nonintoxicating Beer Commission,* 13 Ct.Cl. 186 (1980).

Based on the foregoing, the Court makes an award to the claimant in the amount of $688.42.

Award of $688.42.

Opinion issued August 24, 1981

GENERAL ACCIDENT F/L
ASSURANCE CORP., LTD.,
SUBROGEE OF INNOVATIVE INDUSTRIES

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-386)

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 1978 International Trans Star tractor-trailer truck, in the amount of $9,054.19, were caused when the southbound lane of Interstate 79 near Jane Lew, West Virginia, collapsed as the truck crossed over a portion of the roadway under which

a tunnel existed; and to the effect that this occurred because of the negligence of the respondent in failing to properly maintain said highway, proximately causing the damages sustained, the Court finds the respondent liable, and awards the claimant the amount agreed upon by the parties.

Award of $9,054.19.

Opinion issued August 24, 1981

CHRISTINE E. HENDERSON AND
RODGERS PAUL HENDERSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-234)

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

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

PER CURIAM:

This claim was submitted for decision based upon a stipulation filed by the parties which reveals the facts which follow.

On or about September 29, 1976, claimant Christine Henderson was a passenger in a jeep owned and operated by claimant Rodgers Paul Henderson. They were proceeding north on Route 250 in Marion County near Fairmont, West Virginia. Along this highway, owned and maintained by the respondent, construction work was being performed by a Department of Highways crew.

In the course of this construction work, respondent's flagman acted negligently in his flagging procedures, causing claimant's vehicle to be struck by another vehicle. As a result, claimant Christine Henderson sustained personal injuries, and claimant Rodgers Paul Henderson suffered the loss of his wife's services, society, and companionship, for which they filed this claim against the Department of Highways in the amount of $100,000.00.

As the accident and resultant injuries were proximately caused by the respondent's negligence, the Court finds the respondent liable, and makes an award to the claimants of $1,305.00, the amount agreed upon by the parties.

Award of $1,305.00.

Opinion issued August 24, 1981

DOUGLAS EDWARD KELLER
AND PATTY KELLER

vs.

ADJUTANT GENERAL AND
DEPARTMENT OF HIGHWAYS

(CC-78-219)

Randy R. Goodrich, Attorney at Law, for the claimants.

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

RULEY, JUDGE:

Joseph Keller, Jr., aged 22 years, was employed during the severe winter weather in January, 1978, to plow snow with his bulldozer upon the Wetzel County Road in Preston County. On January 24, 1978, his brother, Douglas, who then was aged 17 years, pursuant to his request, followed him with a pickup truck so that he might have a place to get warm. As the Keller bulldozer met and passed a bulldozer being operated by the West Virginia National Guard, the Keller bulldozer slid off or partly off the roadway and was unable to get back on it under its own power. There was a conflict in the testimony as to whether there was any contact between the two bulldozers, but, since no damage to the Keller bulldozer is claimed, that point is not significant.

In any event, the National Guard bulldozer, manned by an operator and an assistant, was stopped so that its winch could be used to assist the Keller bulldozer back upon the roadway. The operator's assistant got off the vehicle and moved to its rear to disengage the hook upon the winch cable. At that

time, Douglas was nearby. Despite the fact that the motor was running, Douglas, believing that he heard the operator tell him to "Pull it out" (although the operator disputed that testimony), unfortunately took hold of the cable with his right hand. Douglas testified that he was aware that winches and winch cables were dangerous but "assumed it was safe for the time being". At that moment, the operator, being unaware of the danger into which Douglas had placed his hand, "kicked it in reverse just a little bit" so that his assistant "could get enough slack so he could unhook it". At virtually the same time, he saw that "the boy had his hand in the cable" and "kicked it back into forward and he got his hand out".

Douglas sustained a compound fracture of the distal phalanx of his right middle finger and soft tissue injuries resulting in 50% disability of his right middle finger, those injuries being the basis of this claim. While the Court is sympathetic to the claimants, it cannot conclude that the operator of the bulldozer should be held to a standard of care which would require him to anticipate or foresee that a person would place his hand in such a dangerous position. Accordingly, this claim must be denied.

Claim dissallowed.

Opinion issued August 24, 1981

THOMAS G. KIMBLE

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-80-396)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $230.03 as reimbursement for property taxes he paid on certain real estate purchased by the respondent. By the terms of the deed, the Department of

Public Safety was responsible for the payment of the 1978 real property taxes, which were paid by the claimant and for which he was only partially reimbursed. The $230.03 claimed herein represents the remainder owed to the claimant.

As the respondent's Answer acknowledges the validity and amount of the claim, and sufficient funds were available in the proper fiscal year from which the obligation could have been paid, the Court makes an award to the claimant in the amount requested.

Award of $230.03.

Opinion issued August 24, 1981

DONALD C. MASTER

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-131)

Henry W. Morrow, Sr., Attorney at Law, for claimant.

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

PER CURIAM:

In this claim, submitted for decision upon a stipulation filed by the parties, claimant seeks payment of the sum of $1,000.00 for damage to his property on Bakerton Road in Charles Town, West Virginia.

It was stipulated that Department of Highways crews from Jefferson County negligently altered the drainage on Bakerton Road, causing mud and debris to be carried onto claimant's property. As a result, claimant's house sustained structural damage, and new drainpipe had to be installed beneath the driveway. In addition, bathroom tile was damaged, and a furnace combustion chamber, which heats the water year-round, was cracked.

Respondent's negligence in altering the drainage was the proximate cause of the damages sustained by the claimant;

therefore, the Court makes an award to the claimant in the amount stipulated.

Award of $1,000.00.

Opinion issued August 24, 1981

KEITH RAY ROBERTS

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-82)

James Young, Jr., Attorney at Law, for the claimant.

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

RULEY, JUDGE:

On December 21, 1978, at about 8:30 p.m., the claimant was driving his 1971 Chevrolet south on U.S. Route 52, the Big Sandy Road, in Wayne County. The weather was clear and dry. At a point one mile north of Whites Creek Road (milepost 10.90), Mr. Roberts encountered a rock slide and collided with a large rock approximately five feet in diameter. As a result of this collision, Mr. Roberts suffered lacerations of the face, groin, and left thigh, plus a broken left ankle and two broken toes on his left foot. He remained hospitalized for thirteen days and missed nine weeks of work, and his car irreparably damaged.

The main issue in this case is the location of the large rock at the time of the collision. Mr. Roberts testified that it was upon the west berm, that it had been there for at least two months and that he was obliged by a rock slide to veer off the pavement onto the berm where his car struck the rock. That evidence was completely rebutted, however, by the testimony of the investigating State Police officer and by photographs taken shortly after the accident occurred which clearly demonstrate that the rock was located at about the middle of the southbound lane at the time the collision occurred, and that it remained there until it was removed to the berm later

that night. It had fallen and rolled into the southbound lane shortly before the accident happened. The accident occurred in an area where rock slides were common, and the claimant testified that he was aware of that fact.

It is well established that 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, and, accordingly, this claim must be disallowed.

Claim disallowed.

Opinion issued August 24, 1981

UNITED STATES FIDELITY &
GUARANTY COMPANY, SUBROGEE OF
H & A COAL & HAULING, INC.
AND H & A COAL & HAULING, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-258)

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 1978 Mack truck in the amount of $1,191.35 were caused when the roadway surface of Interstate 79 near Jane Lew, West Virginia, collapsed as the truck crossed over an area under which a tunnel existed; and to the effect that this occurred because of the negligence of the respondent in failing to properly maintain said highway, proximately causing the

damages sustained, the Court finds the respondent liable, and awards the claimant the amount agreed upon by the parties.

Award of $191.35 to United States Fidelity & Guaranty Company.

Award of $1,000.00 to H & A Coal & Hauling, Inc.

Opinion issued September 29, 1981

MARGO A. KEYSER

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-164)

Claimant appeared in person.

W. Douglas Hamilton, Attorney at Law, for the respondent.

RULEY, JUDGE:

This claim for property damage in the sum of $5,000.00 grows out of a single-vehicle accident which happened at about 7:30 p.m. on Monday, January 22, 1979, on Little Seven Mile Road near Barboursville, Cabell County, West Virginia. The claimant, an employee of the Veteran's Administration, was travelling alone in her 1973 model Chevrolet automobile on her way from Washington, D.C., to her home in Huntington. At the time and place of the accident, it was dark and raining. The claimant was familiar with the road. As she approached a bridge across the Guyandotte River, she didn't see the water which covered the highway, and drove into it a speed that "couldn't have been more than 25." She continued to a point where, when her car stalled and she left it, she was in water that was "hip deep." The claimant saw no warning signs as she approached the hazard caused by the water, but testified that the highway at the place of the accident was subject to recurrent flooding. She also testified that she could see as far as the illumination extended by the automobile headlights, which were on low beam.

Records maintained by the respondent, which were admitted into evidence, reflected that the Little Seven Mile Road had

been closed at 4:30 p.m. on January 22, 1979, and reopened at 2:40 a.m. on January 24, 1979. The witness who identified those records testified that normal procedure incident to such a road closure would have entailed placement of large warning signs reading "High Water" at each end of the roadway closed, but the witness did not personally know whether or not such signs were erected at the time of the accident.

West Virginia Code §17C-15-20(b) requires that motor vehicles be equipped with head lamps providing "a lowermost distribution of light, or composite beam, so aimed and of sufficient intensity to reveal persons and vehicles at a distance of at least one hundred feet ahead." Such lighting should have enabled the claimant to see the flood water before she drove into it and to avoid damage to her automobile, had she been exercising ordinary care under all of the facts and circumstances existing at the time and place of the accident. The Court concludes that, even though the respondent may have been negligent in failing to warn motorists of the flooded road, such negligence was equalled or exceeded by the negligence of the claimant herself. Accordingly, this claim must be denied.

Claim disallowed.

Opinion issued September 29, 1981

CHARLES R. SHAFFER

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-202)

No appearance by claimant.

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

PER CURIAM:

Upon written stipulation to the effect that damage to the rear bumper of claimant's automobile in the amount of $255.33 was caused when said vehicle struck an improperly secured metal sheet covering a road repair hole on Route 20 in Upshur County, West Virginia, a highway owned and maintained by the respondent; that this occurred because of the negligence of the respondent in failing to properly install the metal sheet,

which negligence was the proximate cause of the damage sustained, the Court finds the respondent liable, and makes an award to the claimant in the amount stipulated.

Award of $255.33.

Opinion issued September 29, 1981

SOUTHERN CHEMICAL CO.

vs.

ADJUTANT GENERAL

(CC-81-129)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $98.76 for merchandise purchased by the respondent for which no payment was received.

The respondent admits that the claim is valid and that sufficient funds remained in its appropriation for the proper fiscal year from which the obligation could have been paid. Therefore, the Court makes an award to the claimant in the amount requested.

Award of $98.76.

Opinion issued September 29, 1981

WALTER J. KLEIN COMPANY, LTD.

vs.

BOARD OF REGENTS

(CC-81-201)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $350.00 for a damaged

16mm film mailed by the respondent to the claimant. The film was sent uninsured, and arrived damaged. The respondent admits the validity of the claim, but also states that there were no funds remaining in the respondent's appropriation for the fiscal year in question from which the claim could have been paid.

Although this a claim which, in equity and good conscience, should be paid, we believe 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 September 29, 1981

CECIL WHITT, SR.

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-338)

Claimant appeared in person.

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

WALLACE, JUDGE:

This claim is in the sum of $602.00 for property damage sustained by the claimant's Ford pickup truck in an accident which happened at approximately 4:10 p.m. on September 12, 1980, at Glen Ferris, West Virginia. The claimant, who had been travelling west on Route 60, pulled into a service station where he refueled and checked the air in his tires. At that time, there was a storm drain with a steel grate cover located upon the berm of Route 60 in proximity to the point where the pavement of the highway was joined by an exit from the service station. In order to prevent motorists from running over the grate, the respondent had installed a vertical steel beam on each side of it. The steel beams projected about two feet above the surface of the ground and were painted white, and each had a reflector upon it. The claimant testified that, when he left the station using that exit, he did not see the steel beams

because his view of them was blocked by the hood of his truck. He collided with one of them, damaging his truck.

While the claimant's view of the steel beams may have been blocked by the hood of his truck when he was close to them, it is obvious that, whether or not his view was blocked completely, or the extent to which it was blocked, depends upon distance. At some time (and distance) as he approached the beams, they must have been within his view, and he would have seen them had he been maintaining a reasonable lookout. In addition, it appears that, if he had kept his vehicle upon the pavement and not driven onto the berm there would have been no collision. For those reasons, the Court concludes that, even if the respondent's conduct in erecting and maintaining the steel beams could be viewed as negligence, the claimant himself was guilty of negligence which equalled or exceeded it. Accordingly, this claim must be denied.

Claim disallowed.

Opinion issued September 29, 1981

ZUMMACH-PEERLESS
CHEMICAL COATINGS CORP.

vs.

DEPARTMENT OF NATURAL RESOURCES

(CC-81-135)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $918.29 for redwood stain purchased by the Department of Natural Resources for which the claimant received no payment.

As the respondent admits the validity of the claim, and as sufficient funds remained in its appropriation for the proper fiscal year from which the claim could have been paid, the Court makes an award to the claimant in the amount requested.

Award of $918.29.

Opinion issued October 7, 1981

RICHARD D. FRUM
vs.
OFFICE OF THE STATE AUDITOR
(CC-81-369)

RICHARD H. BRUMBAUGH
vs.
OFFICE OF THE STATE AUDITOR
(CC-81-370)

CHARLES E. McCARTY
vs.
OFFICE OF THE STATE AUDITOR
(CC-81-371)

GERALD M. TITUS, JR.
vs.
OFFICE OF THE STATE AUDITOR
(CC-81-372)

No appearance by claimants.

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

PER CURIAM:

These claims have been consolidated by the Court on its own motion since all of the claims are governed by the same principles of law.

The claimants are attorneys who served as counsel for criminal indigents in juvenile, misdemeanor, or felony proceedings pursuant to the provisions of West Virginia Code Chapter 51, Article 11. Claimants' fees were denied by the respondent because the fund was exhausted.

The factual situations in these claims are identical to that in *Richard K. Swartling, et al. v. Office of the State Auditor*, issued on November 5, 1979. Accordingly, the Court hereby grants awards to the claimants as follows:

Richard D. Frum — $38.32

Richard H. Brumbaugh — $124.00

Charles E. McCarty — $240.00

Gerald M. Titus, Jr. — $940.85

Opinion issued October 29, 1981

MATTA L. BRADY, ADMINISTRATRIX
OF THE ESTATE OF SHELL C. BRADY, DECEASED,
AND SELECTED RISKS INSURANCE COMPANY,
AS SUBROGEE OF SHELL C. BRADY

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-175)

G. David Brumfield, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

This claim was filed against the respondent by Matta L. Brady as the administratrix of the estate of Shell C. Brady, deceased, for damages resulting from the death of the deceased.

Shell C. Brady owned a 1977 International tandem-type truck with which he operated his own business hauling gravel and other materials. On July 25, 1979, he was hauling gravel from the James River Hydrate Company in Swords Creek, Virginia, to respondent's garage in Williamson, West Virginia. Linus Holt, a truck driver for C&R Trucking Company, was also delivering gravel between those points on the same day, using the same routes. Both trucks proceeded to Williamson over Mary Taylor Mountain on West Virginia Secondary Route 9 at approximately 10:30 a.m. It was a cloudy day, and there was dry dirt on the surface of the mountain highway. Mr. Holt made no complaint about the dirt when he arrived at the garage. Both trucks, after unloading the gravel, were returning to Virginia and had stopped for lunch at about 12:30 p.m. at a small restaurant in Taylorsville, West Virginia, situated at the foot of Mary Taylor Mountain. After lunch, they left the restaurant and proceeded up the mountain on West Virginia Secondary Route 9. The decedent was in the lead about 200 feet in front of Mr. Holt, who followed in his truck. It was raining very hard. The mountain road was steep and had many curves. There were no guardrails. Mr. Holt testified that both trucks were proceeding at a speed of 20-25 miles per

hour, and, as the decedent's truck "topped over the mountain," it slid sideways down the highway and went over the side of the mountain, front end first. The road was covered with mud one quarter to one-half inch thick for about 200 feet. Mr. Holt's truck slid down the road, but he was able to stop and move his truck off the highway. An automobile was forced back down the mountain to prevent a collision with the Holt truck. Mr. Holt called for assistance on his CB radio, got out of his truck, slipped and fell on the muddy road, then managed to go down the mountain side with another motorist to the point where the truck had come to rest. The decedent was pinned under the truck. Trooper Barry M. Henry and Trooper D. A. Hamlin, of the West Virginia State Police, reached the scene of the accident from Williamson 30 minutes after being notified. An ambulance arrived 30 minutes later. The police, ambulance crew, and others took the injured man by stretcher farther down the mountain to where the highway curved around the mountain below the accident scene. Mr. Brady died en route to the hospital.

Mr. Holt, Trooper Henry, Cecil Diamond, and Deputy Wallace Baisden, witnesses for the claimant, testified that the road was covered with mud for about 150 to 200 feet, and all but Trooper Henry testified that there were no warning signs or watchmen posted to warn of the dangerous condition.

Wallace Baisden, Chief Field Deputy Sheriff of Mingo County, was notified of the accident while in his office in Williamson. He met the ambulance coming off the mountain, and proceeded up the mountain to clear traffic. Deputy Baisden testified, "I couldn't get my cruiser up the left side of the traffic. . .so I got it as far as I could and then I had to walk, but I got up to the scene where the truck went over and the mud was so slick that I couldn't stand on it." He further testified that he returned to his cruiser and radioed his office to notify the respondent to send trucks with gravel. The driver of a truck filled with gravel that was on the mountain agreed that his load could be spread on the highway. The deputy and others spread the gravel on the road. Respondent's truck arrived later with gravel or flyash.

Jake T. Watts, Jr., testified that he was respondent's grader operator on the mountain on the day of the accident. He stated that the work crew consisted of his boss, H. P. Maynard, two flagmen, and himself as the grader operator. He stated that his job was to remove slate and clay which slid off the mountain and filled the ditch line and covered the berm. With the grader, he pulled the dirt from the ditch line and berm and pushed it across the road and down the mountain. He further stated that there was too much material to move with the grader and he had complained to his boss that the equipment was insufficient. He started to work at about 8:15 a.m. The dirt and clay piled up on the surface of the road. It began to rain, and the material became slick. He removed as much of the material as he could. The crew was then moved to another site near Red Jacket, West Virginia, where they finished out the day. When the crew left, the warning signs were removed and the flagmen went with the crew. Apparently, no provisions were made for additional signs or flagmen.

James E. Webb, respondent's assistant county supervisor at the time of the accident, testified that it was the practice to remove all of the materials from the hillside of the road to the other side to build up the berm. This was the procedure at the scene of the accident.

The record establishes that the respondent was negligent, and its negligence was the proximate cause of the decedent's death. A written stipulation filed with the Court stipulated that, as a result of the death of Shell C. Brady, the following expenses were incurred: burial marker, $702.00; flowers, $78.00; hospital charges, $148.00; and funeral bill, $2,319.94. Also stipulated and entered into evidence were life expectancy tables, wages and tax statements from previous employers, and income tax returns for 1976, 1977, and 1978. A Pecuniary Loss Report prepared by Dr. Richard Raymond, Ph.D. of Economics, showing net income loss to claimant's estate in the amount of $188,361.00, was received in the stipulation. The deceased, Mr. Brady, was 38 years old at the time of his death. He had a life expectancy of 34.8 years and a work-life expectancy of 24.8 years. He had no children and was survived by

a wife, Matta Brady, age 39. Mrs. Brady suffers from rheumatoid arthritis and is unable to work. She receives no social security or monthly income and must support herself from savings. West Virginia Code §55-7-6 provides that, in an action from wrongful death, a jury may award such damages as it may deem fair and just, and determine what portions shall be distributed to the surviving spouse and children. In this case, there were no children.

The written stipulation filed also indicated that the 1977 model International truck, which was destroyed in the accident, had a fair market value at the time of loss of $35,380.00. The claimant received $33,650.00 from Selected Risks Insurance Company for this loss, with a provision for a deductible of $100.00.

The Court, having considered the relevant facts, the stipulation of the parties, and the opinion of Dr. Richard Raymond in his Pecuniary Loss Report, concludes that damages should be awarded to Matta L. Brady, Administratrix of the Estate of Shell C. Brady, deceased, in the amount of $203,347.94, and to Selected Risks Insurance Company, as subrogee of Shell C. Brady, in the amount of $33,650.00.

Award of $203,347.94 to Matta L. Brady, Admin. of the Estate of Shell C. Brady, deceased.

Award of $33,650.00 to Selected Risks Insurance Company, as subrogee of Shell C. Brady.

Opinion issued November 4, 1981

FULLEN FERTILIZER COMPANY, INC., ET AL.

vs.

FARM MANAGEMENT COMMISSION

(CC-81-231)

No appearance by claimants.

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

PER CURIAM:

These claims against the Farm Management Commission were submitted for decision upon the pleadings. The claimants

seek payment for various goods and services furnished to the respondent as follows:

Claim No.	Claimant	Amount
CC-81-231	Fullen Fertilizer Company, Inc.	$ 453.65
CC-81-211	Eglon Farm Service	$ 16,709.35
CC-81-213	Swisher's Feed and Supply	$ 2,068.40
CC-81-218	Corder Tractor & Equipment Company	$ 210.52
CC-81-221	Heritage Equipment Company	$ 268.12
CC-81-222	Dearing Brothers, Inc.	$ 591.34
CC-81-223	McGhee & Company	$ 13.25
CC-81-224	North Central Dairy Herd Improvement Association	$ 270.07
CC-81-226	G. Jay Crissman, D.V.M.	$ 265.00
CC-81-227	Frank's Service Center	$ 110.43
CC-81-228	Tygarts Valley Sanitation, Inc.	$ 60.00
CC-81-229	Elkins Tire Company	$ 140.76
CC-81-230	Henderson Implement Company	$ 618.14
CC-81-232	Joalde Sales & Service	$ 35.87
CC-81-233	Mountain Mobile Milling	$ 200.75
CC-81-234	Greenbrier Tractor Sales, Inc.	$ 4,717.67
CC-81-235	Pickens Hardware Co., Inc.	$ 239.49
CC-81-239	*Boso Agri-Center, Inc.	$ 8,585.13
CC-81-240	Young's Inc.	$ 211.00
CC-81-241	Skyland Hospital Supply	$ 77.00
CC-81-242	Liggett's Supply	$ 638.48
CC-81-243	Keefer's Service Center	$ 3,219.64
CC-81-249	Winchester Equipment Co.	$ 155.34
CC-81-195 & CC-81-252	Union Oil Company of California	$ 8,002.98
CC-81-255	Marshall County Cooperative, Inc.	$ 78.00
CC-81-258	**Virginia Harvestore, Inc.	$ 1,146.72
CC-81-264	Greenbrier Valley Farm Center, Inc.	$ 3,212.90
CC-81-268	Lewis & Burge, Inc.	$ 170.96
CC-81-269	Southern States Marlinton, Cooperative	$ 29.85

* Amended by Court Order to $8,406.83.

** Interest and/or finance charges denied.

Claim No.	Claimant	Amount
CC-81-270	Hedlund Manufacturing Co., Inc.	$ 1,622.07
CC-81-273	J. H. Holt Plumbing and Heating, Inc.	$ 1,000.40
CC-81-274	Johnston Alternator and Trailer Sales, Inc.	$ 425.54
CC-81-279	Darwin O. Fike, d/b/a Surge Sales and Service	$ 208.30
CC-81-280	West Virginia Turnpike Commission	$ 28.00
CC-81-284	G. W. Wandling	$ 150.00
CC-81-285	*Lawson Products, Inc.	$ 922.28
CC-81-286	Robert M. Flesher, D.V.M.-Upshur Veterinary Hospital	$ 55.00
CC-81-293	Agway, Inc.	$ 412.07
CC-81-294	Elkins Machine & Electric Co.	$ 556.00
CC-81-295	Frank J. Cary, D.V.M.-Mountainland Animal Hospital	$ 3,344.55
CC-81-300	Weston Veterinary Clinic	$ 273.00
CC-81-304	John R. Tomlinson, D.V.M.-Fairlea Animal Hospital	$ 249.00
CC-81-306	Blue Grass Equipment, Inc.	$ 117.40
CC-81-310	Nasco	$ 48.65
CC-81-313	Whitman Exterminating Company	$ 68.00
CC-81-314	Beckley Veterinary Hospital, Inc.	$ 188.00
CC-81-318	Fulton-Thompson Tractor Sales, Inc.	$ 675.00
CC-81-321	Tygarts Valley D.H.I.A.	$ 85.30
CC-81-327	Gibson's Scale Service	$ 677.40
CC-81-328	Overnite Transportation Co.	$ 28.20
CC-81-330	Ward Auto Parts Co.	$ 667.16
CC-81-331	Town & Country Veterinary Clinic	$ 1,588.50
CC-81-335	Humberson Farm Equipment	$ 595.67
CC-81-336	Firestone Stores	$ 119.50
CC-81-337	James L. Davison	$ 122.25
CC-81-338	Cecil E. Jackson Equipment, Inc.	$ 65.06
CC-81-339	Pioneer Harvestore Systems, Inc.	$ 205.34
CC-81-348	Southern States Elkins Coop., Inc.	$ 24,591.24
CC-81-352	Bessire & Company, Inc.	$ 540.70

* Interest and/or finance charges denied.

Claim No.	Claimant	Amount
CC-81-357	West Virginia Artificial Breeders	$ 2,748.00
CC-81-360	Mason County D.H.I.A., Inc.	$ 527.46
CC-81-382	Jefferds Corporation	$ 747.24
CC-81-384b	The Firestone Tire and Rubber Company	$ 51.60

The respondent admits the validity and amounts of these claims, but further alleges that sufficient funds were not available at the close of the fiscal years in question from which the obligations could have been paid.

While we feel that these claims should, in equity and good conscience, be paid, we further believe that awards cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct.Cl. 180 (1971).

Claims disallowed.

Opinion issued November 5, 1981

GREENBRIER VALLEY HOSPITAL, ET AL.

vs.

DEPARTMENT OF CORRECTIONS

(CC-81-347)

No appearance by claimants.

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

PER CURIAM:

These claims against the Department of Corrections were submitted for decision upon the pleadings. The claimants seek payment for various goods and services furnished to the respondent as follows:

Claim No.	Claim Against Anthony Center	Amount
CC-81-347	Greenbrier Valley Hospital	$ 898.18

Claim No.	Claims Against West Virginia Penitentiary	Amount
CC-81-198 & CC-81-265	Reynolds Memorial Hospital, Inc.	$ 40,956.67
CC-81-298	Johnson's Boiler Sales & Service, Inc.	$ 13,883.22
CC-81-315	Boury, Inc.	$ 1,984.28

Claim No.	Claims Against West Virginia Prison for Women	Amount
CC-81-212	Reynolds Memorial Hospital, Inc.	$ 4,535.90
CC-81-236	Rajendra P. Singh, M.D.	$ 215.00
CC-81-237	Mercer Radiology, Inc.	$ 130.00
CC-81-253	Tri-State Ambulance and Rentals	$ 569.00
CC-81-262a	Summers Community Clinic	$ 103.02
CC-81-262b	B. Payman, M.D.	$ 110.00
CC-81-263	Summers County Hospital	$ 13,341.30
CC-81-267	Raleigh General Hospital, Inc.	$ 1,541.25
CC-81-277	Greenbrier Valley Hospital	$ 4,644.52
CC-81-289	C. K. Agarwal, M.D.	$ 70.00
CC-81-296a	Raleigh Orthopaedic Assoc., Inc.	$ 100.00
CC-81-312a	Physicians Fee Office	$ 2,001.14
CC-81-333	J. D. Woodrum, M.D., Inc.	$ 95.00
CC-81-344	Saryu P. Dani, M.D.	$ 40.00
CC-81-225	Princeton Internists	$ 87.00
CC-81-329	Adnan N. Silk, M.D., P.C. Beckley Neurosurgical Clinic	$ 80.00
CC-81-217	Hassan Amjad, M.D.	$ 295.00
CC-81-373	Princeton Community Hospital	$ 90.00

Claim No.	Claims Aginst Huttonsville Correctional Center	Amount
CC-81-194 & CC-81-244	Southern Chemical Co.	$ 1,688.50
CC-81-245	Appalachian Mental Health Center	$ 4,400.00
CC-81-247	C. H. James & Co.	$ 1,149.18
CC-81-250	Bernhardt's Clothing, Inc.	$ 3,215.38
CC-81-254	Beckley Radiology Associates	$ 323.50
CC-81-256	Picker Corporation	$ 1,043.51
CC-81-257	Physicians Associates, Inc.	$ 245.00

Claim No.	Claims Against Huttonsville Correctional Center	Amount
CC-81-259	Wechsler Coffee Corporation	$ 3,669.12
CC-81-260	Eugene E. Hutton, Jr., M.D.	$ 5,038.00
CC-81-307	Raleigh General Hospital	$ 150.95
CC-81-272	Orthopedic Clinic, Inc.	$ 350.00
CC-81-276	Grafton City Hospital	$ 3,777.94
CC-81-278	Nova Rubber Company, Inc.	$ 540.00
CC-81-281	The Upjohn Company	$ 791.07
CC-81-282	Ayerst Laboratories	$ 411.57
CC-81-283	Reed & Carnrick	$ 970.08
CC-81-287	Perrmont Chemical Company	$ 3,400.00
CC-81-290	West Virginia Paper, Inc.	$ 3,478.25
CC-81-296b	Raleigh Orthopaedic Assoc., Inc.	$ 2,310.00
CC-81-297	McNeil Pharmaceutical	$ 131.87
CC-81-299	Appalachian Regional Hospital	$ 1,690.00
CC-81-303	Norwich-Eaton Pharmaceuticals	$ 412.06
CC-81-305	Henry Schein, Inc.	$ 397.25
CC-81-311	Dentists Fee Office	$ 300.00
CC-81-312b	Physicians Fee Office	$ 3,528.25
CC-81-317	Dorsey Laboratories	$ 156.90
CC-81-340	Union Oil Company of California	$ 8,452.08
CC-81-214	Marlinton Electric Co., Inc.	$ 80,609.40
CC-81-354	Fairmont State College	$ 1,819.99
CC-81-362	Monongahela Power Company	$ 17,192.85
CC-81-364	Independent Dressed Beef Company, Inc.	$ 3,738.90
CC-81-365	Memorial General Hospital Association	$133,500.35
CC-81-366	Pfizer, Inc.	$ 558.97
CC-81-368	Gall's Inc.	$ 2,296.94
CC-81-383	West Virginia Department of Highways	$ 3,698.73
CC-81-387a	SK&F Lab Co.	$ 399.60
CC-81-387b	SK&F Co.	$ 20.82
CC-81-384a	The Firestone Tire and Rubber Company	$ 574.34

The respondent admits the validity and amounts of these claims, but further alleges that sufficient funds were not avail-

able at the close of the fiscal years in question from which the obligations could have been paid.

While we feel that these claims should, in equity and good conscience, be paid, we further believe that awards cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct.Cl. 180 (1971).

Claims disallowed.

Opinion issued November 9, 1981

A. B. ENGINEERING COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(D-773)

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

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

WALLACE, JUDGE:

This claim arises from a contract dated October 5, 1966, between the State Road Commission of West Virginia and two partnerships: James G. Angelaras, Alvin R. Schwab, and Richard A. Haber, doing business as the A. B. Engineering Company, and Vladimir V. Barstow and Robert D. Mulligan, doing business as Barstow and Mulligan, Consulting Engineers. The two partnerships entered into the contract as a joint venture.

The claim was filed by A. B. Engineering Company as the claimant. At the outset of the hearing, the respondent raised the question of joining Barstow and Mulligan, Consulting Engineers, as a necessary party. Counsel for the respondent represented to the Court that a small amount was owing to Barstow and Mulligan by the claimant, and, if an award were made by this Court, the claimant would pay Barstow and Mulligan whatever amount was still due.

Under the terms of the contract, the claimant agreed to design Project APD-282(31), a section of the Appalachian

Development Highway, U.S. Route 50, in the location of the selected line, 3-A, 3-F, 3-B of Sverdrup and Parcel and Associates' Reconnaissance Report (furnished by respondent) from west of Secondary Route 11, Doddridge County, West Virginia, near Arnold Creek, to Secondary Route 50/13, Doddridge County, at Sherwood, for a distance of approximately 10.01 miles. The contract contemplated that the 10.01 miles of the highway be divided into two projects:

1) From west of Secondary Route 11 near Arnold Creek to west of Secondary Route 18, 3.01 miles.

2) From west of Secondary Route 18 to Secondary Route 50/13 at Sherwood, 7 miles.

The claimant was to be paid, for all services rendered under the contract for the construction contract plans, a lump-sum fee of $376,500.00. In addition to this lump-sum payment, the claimant would be paid for additional services as set out in the contract, a total estimated fee of $505,930.00.

The contract further provided:

> "In the event of a substantial change in the scope and character of the work, such as the addition or deletion of interchanges or bridges, or any other changes requiring an increase or decrease in the fee payments, when ordered by the Commission in writing, the fees will be adjusted accordingly by a supplemental agreement on the basis of a lump sum fee or the actual cost of direct technical labor plus overhead and expenses and a fixed fee to cover profits only."

The claimants contends that, subsequent to the award of the contract, the design criteria were upgraded by the respondent and the Bureau of Public Roads; that the selected line upon which claimant's fee was predicated envisaged the use of the existing U.S. Route 50 for two lanes of a four-lane highway for five miles; and that the new criteria ruled out such use in that the existing U.S. Route 50 met neither the vertical nor the horizontal alignment requirements. The claimant further contends that the change in design criteria resulted in increased costs beyond those originally estimated, and con-

stituted a substantial change in the scope and character of the work, for which claimant would be entitled to additional compensation in the amount of $253,337.00. In addition to this amount, claimant is claiming $27,012.13 for monies withheld for payment of B & O tax due the State of West Virginia and for work performed by survey teams provided by the respondent.

After the pre-trial hearing on July 31, 1978, hearings were held on November 13 and 14, 1978, and January 3 and 4, 1979. At the hearing on November 14, 1978, the claimant advised the Court that it was not going to pursue the claim pertaining to the withholding of monies for B & O tax and survey matters, but would pursue that portion of its claim pertaining to the change in the scope of the work, for which it claims $253,337.00.

At the close of the hearing on January 4, 1979, claimant reserved the right to cross-examine certain of respondent's witnesses and indicated it would be necessary to depose certain witnesses on its behalf. Nothing further transpired until the claimant filed its motion in November of 1980 asking permission to "proceed further . . . . as relates to the proving of damages . . . . upon a quantum merit basis." The respondent then filed its motion in opposition and further moved the Court to dismiss the claim for failure to prosecute. These motions were heard by the Court on January 21, 1981, at which time they were taken under advisement. Counsel for the claimant and respondent then represented to the Court that all the evidence had been presented as relates to liability and asked that the claim be bifurcated and that the issue of liability be decided before the question of damages, to which the Court agreed.

According to the S & P Report, a portion of claimant's contract was to design two new lanes of highway and to incorporate a part of existing Route 50 into the final design contract. The claimant contends that the subsequent design change of two lanes to four lanes involved major changes in the design work required in the earthwork, drainage, rights of way, intersections and the necessity to take into account the steeper terrain.

In contrast to the claimant's contentions, Mr. Thomas P. Kirk, a civil engineer and former employee of the respondent, testified that there are numerous problems encountered in designing two lanes next to an existing two lanes that are not encountered when designing four new lanes. These problems include utilities running parallel with the existing lanes, adjacent houses and parcels of land and access thereto, survey problems in existing traffic, and adequate drainage. He further stated that a new location can have problems, but normally, the contractor would be dealing with larger parcels of land where the same problems do not exist.

The claimant made no request for additional compensation claimed as a result of a change in the scope of work until December of 1968. This was after over 74% of the work had been performed. The respondent denied the request, but did recognize certain work which it considered a change in the scope of work for which supplemental agreements were executed and the claimant paid.

From the record, the Court is of the opinion that the claimant designed the highway within the intent and scope of the agreement for which it has been properly compensated, and the claim of the claimant is disallowed. Consequently, the claimant's motion to proceed upon a quantum merit basis is dismissed as is the respondent's motion to dismiss for lack of prosecution.

Claim disallowed.

Opinion issued November 9, 1981

LEONA ASBURY AND TOM ASBURY

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-54)

Claimant *Leona Asbury* appeared in person.

W. Douglas Hamilton, Attorney at Law, for respondent.

GARDEN, JUDGE:

At about 5:30 p.m. on September 8, 1980, the claimant, Leona Asbury, was operating a 1974 Oldsmobile automobile

owned by her husband, Tom Asbury, in a southerly direction on Route 52. Route 52 is a two-lane, paved highway running generally in a north-south direction between Kenova and Prichard, West Virginia. According to the testimony of the claimant, Leona Asbury, a slip had occurred during the spring of 1980, which had partially blocked the southbound lane of Route 52. At the point of the slip, claimant Leona Asbury moved to the left to avoid it, and met a northbound truck owned by the Guepel Construction Co. The truck moved to its right, partially left the road, and, in passing the car operated by Leona Asbury, threw rocks which damaged the windshield of the southbound Oldsmobile, necessitating repairs in a total amount of $383.95.

Leona Asbury, while testifying that the condition in the southbound lane had existed since the spring of 1980, candidly admitted that she had never complained to the respondent about the condition of this particular area of Route 52. Even if a showing of negligence had been demonstrated by claimants, it would appear that an intervening act of negligence on the part of the northbound truck was the proximate cause of the damage to the claimants' vehicle.

Claim disallowed.

Opinion issued November 9, 1981

W. H. BALLARD, II, AND
G. DAVID BRUMFIELD

vs.

DEPARTMENT OF NATURAL RESOURCES

(CC-81-44)

G. David Brumfield, Attorney at Law, appeared on behalf of himself and W. H. Ballard, II.

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

GARDEN, JUDGE:

The admitted operative facts as set forth in the verified Notice of Claim reflect that on June 12, 1977, one Ronald Lee

Young was employed by the respondent as Assistant Superintendent of the Panther State Park located at Panther, McDowell County, West Virginia. On that date, Young, in the performance of his official duties, became involved in an altercation with one Mack Lee Birchfield. As a result, Birchfield was shot by Young, necessitating the amputation of the middle finger of Birchfield's left hand.

Thereafter, on July 26, 1978, Birchfield filed a civil action in the Circuit Court of McDowell County against Young and the respondent herein, seeking compensatory damages in the amount of $25,000.00, and punitive damages in the amount of $5,000.00. Robert D. Pollitt, Assistant Attorney General, appeared on behalf of the defendants, and, prior to trial, was successful in having the respondent herein dismissed as a party defendant in the civil action. At that point, Mr. Pollitt determined that it would be improper for him to continue his representation of Young, in view of the dismissal of the State agency from the civil action.

Mr. Pollitt thereupon contacted the claimants, who agreed to represent Young, with the understanding that their fee and expenses would be paid by the respondent. The claimants proceeded to take the necessary steps to prepare their client's defense, and the case was tried to a jury over a period of two days in August of 1980. The jury returned a verdict in favor of the defendant Young. Claimants then submitted a statement for services rendered and expenses in a total amount of $3,593.00, but payment was not made, resulting in the filing of the claim in this Court.

The respondent, in its Answer, admitted the allegations of the Notice of Claim, but alleged that it was uninformed regarding the amount of time spent by the claimants in representing Young, and the value of the legal services. The Answer called upon the claimants to submit strict proof of said services. Claimant Brumfield, at the hearing, offered as an exhibit a three-page itemization of the services rendered, which reflected a total of 32 1/4 hours of "out-of-court time" at an hourly rate of $60.00, and 16 hours of "in-court time" at an hourly rate of $100.00, for a total fee of $3,535.00. The exhibit

further indicated that expenses in an amount of $58.00 were incurred. On cross-examination, claimant Brumfield testified that, in his opinion, the hourly charges were reasonable and in keeping with the charges of other attorneys in McDowell County.

Considering the amount of time devoted to the defense of the case, the responsibility assumed, the intricacies of the work involved, and, most importantly, the results attained, this Court is of the opinion that the fee charged was more than reasonable, and an award is thus made in favor of the claimants in the amount of $3,593.00.

Award of $3,593.00.

Opinion issued November 9, 1981

JOHN CHARLES BUNGARD

vs.

DEPARTMENT OF WELFARE

(CC-80-352)

Larry L. Rowe, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

Claimant filed this claim against the respondent for damages sustained by reason of a ward of the State wrecking his automobile.

The claimant was a welfare worker for Area 9 working out of respondent's Grafton, West Virginia, office. He was a Social Worker IV in charge of the specialized foster care program. The Grafton area had received a Federal grant establishing specialized foster care, setting up eight foster homes for training foster parents to deal with problem children who had no success with institutional care. As part of the program, the claimant carried a limited caseload of eight in order to give intensive service in an attempt to bring about a change where normal foster care had not.

Since July of 1979, the claimant had been working with a 17-year-old juvenile with a history of behavioral problems. At the time he was referred to the specialized foster care program, the juvenile was on probation as a result of an arson charge. Claimant saw him at least twice a week and sometimes daily. On April 21, 1980, the claimant picked up his ward at his foster home and took him to a motorcycle repair shop where the boy had applied for a job. After the visit to the repair shop, they stopped at the nearby welfare office. Claimant parked his automobile in the parking lot. The ward wanted to listen to the car radio, so the claimant left him with the keys and went into the office. After making several phone calls, the claimant returned to the parking lot and found that his automobile and his ward were gone. He later learned that the ward had taken the automobile and wrecked it. No charges were placed against the juvenile. The automobile, a 1975 Datsun B-210, was totalled. The book value at the time of the accident was $2,225.00, and wrecker charges were $88.00. Claimant testified that the salvage value of the automobile was $200.00. The claimant further testified that the respondent did not furnish him an automobile; that he was required to use his automobile in his work; and that he frequently counseled in it so that he could have more privacy. The respondent reimbursed the claimant for the use of his automobile at the rate of $.20 per mile and required the claimant to maintain liability insurance. The claimant did not have collision insurance.

The claimant testified that he had entrusted his ward with the keys to his automobile on previous occasions, but that this practice occurred late in his relationship with him. He stated that he was trying to teach the child responsibility and reliability, that he made the decision to trust him, and that no one instructed him to do so.

No evidence was introduced in this case with regard to any negligent behavior on the part of the respondent. The record indicates that the claimant was well aware of the juvenile's behavior problems. Nevertheless, he permitted the boy to remain alone in his car with the keys in it. Claimant therefore assumed the risk of any loss which resulted. *Claudine Hinkle v. Department of Welfare,* 13 Ct.Cl. 199 (1980).

This negligent act on the part of the claimant himself, in leaving his vehicle ready for anyone to convert to his own use, was the proximate cause of any subsequent harm done to the vehicle. *LePera v. Department of Corrections*, 13 Ct.Cl. 49 (1979. Accordingly, this claim must be denied.

Claim disallowed.

Opinion issued November 9, 1981

D. A. BURNER

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-78-278)

The claimant appeared in person.

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

WALLACE, JUDGE:

The claimant filed this claim against the respondent in the amount of $346.50 for a dental bill incurred as a result of injuries received while in the employ of the respondent.

The claimant was formerly a member of the Department of Public Safety, West Virginia State Police. On December 9, 1972, while so employed, claimant was assisting members of the Webster Springs Volunteer Fire Department in the removal of the body of a man who had drowned in the Desert Fork of the Holly River near Skelt, West Virginia. A pike pole inserted in the belt of the victim was being used to free his body from between rocks. The belt broke and the metal hook on the end of the pole struck the claimant on the left side of his face damaging his teeth and existing dental work.

The claimant testified that the respondent was to pay the bill for the dental work which was done in 1973, 1974, and 1975 as a result of his injuries. Claimant further testified that he turned the bill in and it was to have been mailed through company headquarters in Elkins to Charleston for payment. The bill was not paid, and a collection agency attempted to collect from the claimant in 1978.

The bill represents damages incurred as a result of the injuries sustained in 1972. This claim, filed with the Court on November 21, 1978, is obviously barred by the Statute of Limitations. This Court specifically lacks jurisdiction of the claim under the provisions of Chapter 14, Article 2, Section 21 of the Code of West Virginia, and the claim is therefore disallowed.

Claim disallowed.

Opinion issued November 9, 1981

BERNARD F. CARNEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-38)

Claimant appeared in person.

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

GARDEN, JUDGE:

On February 4, 1981, at about 7:50 a.m., the claimant was proceeding in an easterly direction on Interstate 64 from his home in Hurricane to his place of employment at Nitro High School. He was operating his 1980 Chevette in the outside lane, and there was another eastbound car about two lengths in front of him in the inside lane. Claimant indicated that he was travelling at a speed between 55 and 60 miles per hour. Suddenly, the car in the inside lane in front of the claimant struck a rather large loose piece of concrete in the highway, dislodging it. This large piece of concrete, which claimant estimated to be the size of a football or basketball, then rolled into claimant's lane of travel, and the claimant was unable to avoid striking it.

As a result, the claimant's car sustained rather severe damage to its front end, including the front bumper, radiator, and radiator fan. Temporary repairs were effected at Dunlap's Radiator Exxon in Nitro at an expense of $44.92. Thereafter,

complete repairs were effected at Landers Chevrolet at an expense of $320.89. Claimant is thus seeking a total award of $365.81.

No evidence was introduced at the hearing to establish that the respondent was aware of, or had any knowledge of, the existence of this loose concrete on the subject section of I-64. This Court has consistently held that the State is not an insurer of the safety of motorists using its highways; thus, as there was no showing of negligence on the part of the respondent, the Court denies the claim.

Claim disallowed.

Opinion issued November 9, 1981

CARTER'S SAFETY SYSTEMS, INC.

vs.

DEPARTMENT OF FINANCE AND ADMINISTRATION

(CC-81-189)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $974.82 for four Monitrex speed and theft control units which, after being tested by the State Automobile Motor Pool, were mailed back to the claimant but never arrived.

A bailee is liable where he fails to exercise ordinary care for the safety of property in his hands. 2B M.J. *Bailments* §11. This is true even though an "act of God" is a factor involved; if the occurrence could reasonably have been anticipated and precautions taken to avoid the injury or loss, liability will be imposed upon him whose responsibility it was to have taken such precautions and failed to do so. *Iron City Sand & Gravel Div. of McDonough Co. v. West Fork Towing Corp.*, 298 F. Supp. 1091 (N.D.W.Va. 1969).

Although it may be a sad comment on the times, it is the opinion of this Court that the loss of an item in the mail is an occurrence that reasonably can be anticipated, and the respondent's failure to take precautions, such as insuring the items mailed, resulted directly in the claimant's loss. Inasmuch as the respondent admits the validity of the claim and states that sufficient funds were available in the fiscal year in question from which the obligation could have been paid, the Court makes an award to the claimant in the amount requested.

Award of $974.92.

Opinion issued November 9, 1981

CLIFFORD CUPP

vs.

DEPARTMENT OF HEALTH

(CC-81-341)

No appearance by claimant.

Curtis G. Power, III, Assistant Attorney General, for respondent

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks an award of $137.25 for back wages improperly withheld by the Department of Health while the claimant was a patient at Weston State Hospital.

As the respondent's Answer admits the validity of the claim and states that sufficient funds were available in its appropriation for the fiscal year in question from which the claim could have been paid, the Court makes an award to the claimant in the amount requested.

Award of $137.25.

Opinion issued November 9, 1981

MAURICE V. DAVIS

VS.

DEPARTMENT OF HIGHWAYS

(CC-81-170)

Claimant appeared in person.

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

WALLACE, JUDGE:

Claimant filed this claim against the respondent in the amount of $113.40 for damages to his 1979 Chevrolet Malibu station wagon.

At approximately 10:00 p.m. on May 22, 1981, the claimant was driving his automobile southerly on W.Va. Route 119 proceeding from Kanawha City to Racine, West Virginia. It was raining. He was traveling 35-40 miles per hour on the two-lane highway. There was no traffic in front of or behind him. About 4½ miles from Marmet, the claimant's automobile struck a hole in the pavement about one foot from the berm on the right-hand side of the highway. The right front tire and wheel were damaged. The claimant testified that he travelled the road once or twice a month, and that he did not see the hole.

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. Dept. of Highways,* 12 Ct.Cl. 31 (1977). The record in this case contains no evidence of any notice to the respondent or failure to act on respondent's part. Thus, the respondent cannot be found negligent. Recognizing 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]), and that no award can be made without proof of negligence, the Court must disallow this claim.

See *Hanson v. Dept. of Highways*, 12 Ct.Cl. 198 (1978). *Smith v. Dept. of Highways*, 14 Ct.Cl. 11 (1981).

Claim disallowed.

Opinion issued November 9, 1981

WILLIAM P. ESTEP, SR.

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-49)

Claimant appeared in person.

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

WALLACE, JUDGE:

Claimant filed this claim against the respondent in the amount of $140.00 for damages to his 1981 VW Rabbit automobile.

At 8:55 a.m. on February 6, 1981, the claimant was driving his automobile westerly on I-70 just outside Elm Grove, West Virginia, on his way to Wheeling. The road was wet but not icy. He was driving 45 to 50 miles per hour, five or six car lengths behind another automobile. There were cinders on the highway which were thrown against claimant's car windshield by the wheels of the vehicle in front of him. The claimant had insurance, but stated that he made no claim for the damages to his windshield. Claimant testified, "I figured they loaded that truck too heavy and hit them chuckholes and those heavy frozen clumps fell out in the road and when that guy run over them, he throwed it back in my windshield."

The State neither insures nor guarantees the safety of motorists travelling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2nd 81 (1947). There is nothing in the record in the instant case to show that the respondent had notice of any dangerous condition on the highway. For the respondent to be held liable, the claimant must prove that the respondent had actual or constructive knowledge of the situation and a rea-

sonable amount of time to take corrective action. *Davis vs. Dept. of Highways,* 11 Ct.Cl. 150 (1977). Since the claimant did not meet that burden of proof, this claim is disallowed.

Claim disallowed.

Opinion issued November 9, 1981

RABERT LEE FULKS, JR.

vs.

DEPARTMENT OF EDUCATION

(CC-81-172)

ERNEST E. LOWE

vs.

DEPARTMENT OF EDUCATION

(CC-81-186)

Claimant *Rabert Lee Fulks, Jr.,* appeared in person.

Claimant *Ernest E. Lowe* appeared in person.

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

WALLACE, JUDGE:

The above-styled claims arose out of the same factual situation, and, upon motion of the respondent, the Court consolidated them for hearing.

Both claimants were employed by the respondent — Rabert Lee Fulks, Jr., as graphic arts supervisor, and Ernest E. Lowe as a graphic artist. Certain photographic equipment belonging to the claimants was stolen from respondent's darkroom located in Room 015 in the basement of "B" Building in the Capitol complex. The theft was discovered on May 29, 1981. To enter the darkroom, it was necessary to proceed through two locked doors. There was no forced entry. Mr. Fulks, in his testimony, surmised that someone had left the doors unlocked.

Among the items stolen, Mr. Fulks lost a Myamia 645 camera, a light meter, and thermometer, all valued at $1,184.95. His insurance covered $500.00 of this loss. Mr. Lowe lost a

accommodate the respective northbound and southbound motorists. Claimant testified that he was travelling at a speed of 15 to 20 miles per hour, and was following the vehicle ahead by about a car length. The claimant further stated that he never saw the hole until after his automobile had struck it. The hole, according to the claimant, was at least two feet in diameter and extended to a depth where the steel reinforcing bars were clearly visible.

As a result of striking the hole, the front suspension system of the claimant's automobile was ruined, the exhaust system was damaged beyond repair, and the gas tank was torn from the car. The testimony established that the cost of repairing the damage would amount to $480.00.

Credible evidence was introduced at the hearing which established that respondent was aware of the existence of this particular hole prior to claimant's accident. Even absent such testimony, the respondent should have been aware of the existence of this serious defect. The Patrick Street Bridge is part of U.S. Route 60, and, as such, is certainly one of the most heavily-travelled highways in the City of Charleston. Being of the opinion that the respondent was negligent and that such negligence was the proximate cause of the damage to the claimant's automobile, the Court hereby makes an award in favor of the claimant in the amount of $480.00.

Award of $480.00.

Opinion issued November 9, 1981

L. D. HALL

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-397)

Claimant appeared in person.

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

WALLACE, JUDGE:

The claimant, an employee of the respondent at Havaco, West Virginia, filed this claim against the respondent for the value of certain tools stolen from respondent's premises.

Series 900 Polaroid camera valued at $195.000, but had no insurance.

Claimant Fulks did the photographic work for the respondent and its newspaper, *State Ed.* The respondent did not furnish a camera for this purpose, and Mr. Fulks' supervisor, Elnora Pepper, the Director of the Office of Public Information and Publications, requested that he keep his camera "on hand" and use it in the respondent's work.

Claimant Lowe had entrusted his camera to the editor who wanted to use it to see if that type of camera would be helpful in meeting deadlines and saving time and expense.

Both claimants herein had furnished their cameras and other items to be used in respondent's work pursuant to requests from their superiors. The items were stolen due to no fault of the claimants. Accordingly, the Court makes an award to claimant Fulks in the amount of $684.95, and to claimant Lowe in the amount of $195.00.

Award of $684.95 to Rabert Lee Fulks, Jr.

Award of $195.00 to Ernest E. Lowe.

Opinion issued November 9, 1981

ALONZO GIBSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-7)

Claimant appeared in person.

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

GARDEN, JUDGE:

At about noon on December 29, 1980, the claimant was involved in an accident on the Patrick Street Bridge in Charleston, West Virginia. At the time, he was operating his 1970 Chevrolet Camaro automobile in a southerly direction on the bridge. Apparently, construction work was being done in the center of the bridge, and only one lane of traffic was open to

The claimant had stored his tools in respondent's garage in Havaco, West Virginia. They were in a locked toolbox inside a locker, which also was locked. On September 1, 1980, someone broke into the garage, and, with chain cutters, removed both locks and stole claimant's tools. Claimant testified that an employee of the respondent, Gladys Smith, was supposed to have been on duty as watchman but wasn't able to work that night, and the respondent did not furnish a replacement. He further testified that the employees had been taking their tools home, but after a watchman was put on duty, the tools were left in the garage. The claimant introduced as his Exhibit No. 1 a list of the tools that were stolen. Some were new and others, used. He stated that they were worth $800.00, and that it would cost over $1,000.00 to replace them new.

Randall Buller, respondent's Director of the Maintenance Division in Putnam County, testified that the respondent did not provide general night watchmen for all its facilities; that he was not familiar with a Gladys Smith but he was not in a position to deny that she was an employee of the respondent; and that the respondent, from time to time, provided watchmen "to break the chain of theft which sometimes develops in certain facilities. It is done periodically. It is not done as a matter of routine course."

In response to the question, "In certain positions such as the position Mr. Hall has, as a mechanic, are the mechanics required to keep, to own their own tools at the Department of Highways?", Mr. Buller replied, "Yes, they are."

The claimant further testified that he could take his tools home, but, after there was a watchman, he and other employees left their tools in the garage. The claimant was required to furnish his own tools and he stored them in the locker provided by the respondent. He relied on a watchman being present after working hours and had no reason to suspect that his tools might be stolen. The watchman failed to report for work and no replacement was furnished.

From the record, the Court makes an award to the claimant in the amount of $800.00.

Award of $800.00.

Opinion issued November 9, 1981

KANAWHA VALLEY REGIONAL
TRANSPORTATION AUTHORITY

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-116)

Sarah G. Sullivan, Attorney at Law, for claimant.

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

PER CURIAM:

Upon written stipulation that damages to claimant's 1980 GMC bus in the amount of $3,744.80 were caused when the vehicle struck a steep plate covering a hole on Route 61/119 in Charleston, West Virginia; and that negligence on the part of the respondent in failing to properly anchor the plate proximately caused the damage suffered by the claimant, the Court finds the respondent liable, and makes an award to the claimant in the amount stipulated.

Award of $3,744.80.

Opinion issued November 9, 1981

RICHARD J. LINDROTH

vs.

WORKMEN'S COMPENSATION FUND

(CC-81-41)

Claimant appeared in person.

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

GARDEN, JUDGE:

On April 1, 1980, claimant Richard J. Lindroth, an attorney,

was employed as an Executive Secretary with the Workmen's Compensation Fund. When he reported for work, Mr. Lindroth discovered that there was no dictating equipment available for his use. While equipment had been ordered, it appeared that it could not be delivered for four to six weeks. Because the commissioner's office used cassette dictators, the claimant decided to use his own Panasonic cassette dictator.

Several weeks later, the claimant discovered that his cassette had been stolen from the unlocked desk where he stored it during the evenings and on weekends. Claimant contends that the respondent was under a legal duty to keep the offices locked and to provide locks for the desks of personnel employed in its offices. Mr. Lindroth asserts that the Panasonic had a fair market value of $70.00 to $90.00.

The record is not clear as to the exact legal basis that the claimant contends would impose liability on the respondent agency for the value of the cassette. Certainly the law of bailment would have no application, for the claimant never actually or constructively delivered the cassette to the respondent. The legal duty owed by the respondent to the claimant in situations such as this is discussed in 53 Am.Jur.2d *Master and Servant* §131 (1970) as follows:

> "The law does not impose upon the employer an obligation to rescue his employee's property from the consequences of a destructive agency for which the employer is not in any way responsible. *And it has been held that a master is under no duty to take reasonable care to prevent the theft of his servant's effects.*" (Emphasis supplied.)

The Court, being of the opinion that the respondent owed no legal duty to the claimant in respect to the subject cassette, and, being of the opinion that the claimant assumed the risk attendant upon leaving his cassette in an unlocked desk, must refuse to make an award.

Claim disallowed.

Opinion issued November 9, 1981

THOMAS E. McNAMEE

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-100)

ALLSTATE INSURANCE COMPANY AS SUBROGEE OF JACQUELINE E. DELAZIO AND JACQUELINE E. DELAZIO, INDIVIDUALLY

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-114)

Claimants appeared in person.

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

GARDEN, JUDGE:

The above-designated claims were consolidated for hearing. The accident in each of the claims occurred on February 16, 1981, on the same bridge on Interstate 81 in Berkeley County, West Virginia, just north of the Route 9 exit. Claimant Thomas E. McNamee's accident occurred at approximately 5:15 p.m., and the accident of claimant Jacqueline E. Delazio happened at approximately 7:30 p.m. It was raining and the road was wet but not freezing.

Claimant McNamee was driving his 1971 Volvo automobile northerly in the inside or slow lane of I-81. He was very familiar with this road as he travelled it every Monday in his business. There was traffic to the front and rear, and in the passing lane. He was travelling in excess of 50 miles per hour, it was getting dark, and his headlights were on low beam. Upon entering the bridge, Mr. McNamee saw a hole in the northerly portion of the bridge deck about 25 to 30 feet in front of him. Traffic conditions were such that he could not slow down nor swerve into the left lane. His automobile struck the hole and sustained damage in the amount of $423.21. He stated that, apparently, a part of the concrete bridge deck "had

dropped out," leaving a hole approximately 4 feet square. Claimant further stated that he did not know how long the hole had existed, and that he notified the State police and the respondent the next day.

The facts surrounding the action of the claimant Jacqueline E. Delazio were substantially the same as those of claimant McNamee. She was driving her 1975 Mazda automobile northerly in the inside or slow lane of I-81 at a speed of approximately fifty miles per hour. It was raining and the traffic was heavy. The vehicles in front of her apparently straddled the hole because Ms. Delazio did not see the hole until her automobile struck it. She stated that she literally "flew in the air" when the accident occurred. The claimant Delazio left the scene of the accident with another motorist and returned later when a wrecker removed her vehicle. She stated that, on her return, the State police had closed the damaged section of the bridge. She further testified that the people at the service station where she had gone stated that people "had been hitting it all day." According to the claimant's testimony, her automobile sustained damage to a door, the muffler, tail pipe, hubcaps, and tires in the amount of $618.51. Ms. Delazio indicated that Allstate Insurance Company paid her $448.79 and is joined in this proceeding as a subrogee of the claimant.

Gary R. Klavuhm, respondent's district bridge maintenance engineer, testified that he was notified of the damaged bridge at approximately 9:30 p.m., but the respondent's office had been notified at about 8:00 p.m. by the State police, after which the decision was made to close that particular lane of bridge traffic. Mr. Klavuhm further testified that the respondent had received a report (Respondent's Exhibit 1) on December 4, 1980, made by the Materials Testing and Control Division in Charleston regarding this specific bridge. He stated, "The report basically indicated that there were severe distress and disintegration in the top, essentially in the top two inches of the six-inch concrete deck down to about the top of reinforcement steel." Mr. Klavuhm also said, "There was nothing to lead us to believe that there would be an imminent full depth structural failure in this particular bridge." There had been

no such failure on any other bridges on I-81. The Court then asked Mr. Klavuhm the following question concerning the report:

> Q. "Okay, well, we have this report. Now, you've indicated that there were also regular inspections reports made — reported to the Department of Highways. Did those reports coupled with this report that was made or per tests that were conducted in the summer of 1980, taking all those together, did they give the Department of Highways any notice, however slight, of that possibility of a collapse of that portion of the bridge deck such as occurred here on February 16, 1981?
>
> A. Yes, sir, they did."

The evidence is not clear as to the actual time that the dangerous condition appeared. Ms. Delazio testified that individuals at the service station stated that people "had been hitting it all day"; however, no one testified to this. Mr. Klavuhm testified that the Department of Highways was notified at 8:00 p.m., and he was notified at 9:30 p.m. The lane of traffic was closed as soon as the State Police and the respondent knew of the condition.

It appears to the Court from the record in this claim that the respondent had reason to believe that this concrete section of the bridge might fail. In view of the fact that this bridge was part of a major interstate system, the respondent had a duty to maintain the bridge in such a way as to prevent a major deck failure, such as occurred in this instance. Therefore, this Court is of the opinion that negligence on the part of the respondent caused the resultant damages sustained by the vehicles belonging to the claimants herein, and makes the following awards:

Award of $423.21 to Thomas E. McNamee.

Award of $169.72 to Jacqueline E. Delazio.

Award of $448.79 to Allstate Insurance Company as subrogee of Jacqueline E. Delazio.

Opinion issued November 9, 1981

MICHAEL A. PIAZZA

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-30)

Claimant appeared in person.

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

WALLACE, JUDGE:

The claimant is seeking an award of $259.56 from the respondent for damage sustained by his 1979 Cadillac Eldorado automobile.

On December 10, 1980, the claimant's wife, Katherine N. Piazza, was driving to work in claimant's automobile on Interstate 70 at approximately 5:40 a.m. It was dark, and there were no adverse road conditions. She was proceeding westerly at about 45 miles per hour in the center lane through the Mount de Chantal area of Wheeling, West Virginia. Interstate 70 at this point has three westbound lanes. Mrs. Piazza testified that she uses I-70 every day when going to and from work; that there were no vehicles in front of her, and that she suddenly came upon a pothole and it was too late to avoid hitting it . The automobile struck the pothole, damaging the right front wheel and rim. She stated that the hole was not very large, but that it was deep, and had not been there the previous day.

The claimant testified that he drove his 1981 Ford Van through the same area at 9:00 a.m. on the same day and saw the hole. He stated that he drove this road daily but hadn't seen the hole before.

The law of West Virginia is well established that the State is neither an insurer nor a guarantor of the safety of motorists travelling on its highways. *Adkins vs. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be guilty of negligence, proof of actual or constructive notice of the defect in the road is required. *Davis Auto Parts vs. Dept. of Highways,* 12 Ct.Cl. 31 (1977). 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 *Bobo vs. Dept. of Highways,* 11 Ct.Cl. 179 (1977). Since negligence has not been proven, this claim must be disallowed. *Duskey vs. Dept. of Highways,* 13 Ct.Cl. 401 (1981).

Claim disallowed.

Opinion issued November 9, 1981

DONALD E. PLATT AND
LINDA L. PLATT

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-101)

Claimant *Linda L. Platt* appeared in person.

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

GARDEN, JUDGE:

In the early evening of March 23, 1981, the claimants were travelling down Van Voorhis Road in Morgantown, West Virginia, a road maintained by the respondent, in their 1975 Volkswagen Rabbit. They had lived in the area for about ten months and both were thoroughly familiar with this section of Van Voorhis Road, travelling it daily to and from work. The road at the point of the accident is two-laned.

Mrs. Platt testified that she and her husband were aware of the existence of three rather large potholes in a row on the right-hand side of their lane of travel, the same having been in existence for two or three weeks prior to the accident. As they approached these holes at a speed of 25 to 30 miles per hour, they observed three vehicles approaching from the opposite direction. With a very narrow berm to their right, they were prevented from taking any evasive action, although Mrs. Platt stated that her husband was "gearing down" in order to reduce his speed. The right rear wheel of their car struck the middle pothole, ruining the tire and rim, and knocking the car

out of alignment. In addition to the cost of repairs, Mr. Platt, a salesman, missed two and a half days of work due to lack of transportation. Mrs. Platt testified that neither she nor her husband had ever called the respondent's headquarters to complain about these potholes.

Proof of actual or constructive notice is a prerequisite of establishing negligence on the part of the respondent. *Davis v. Department of Highways,* 12 Ct.Cl. 31 (1977); *Cummings v. Department of Highways,* 12 Ct.Cl. 59 (1977). Such proof cannot be found in the record in this claim. The case of *Adkins v. Sims,* 131 W.Va. 645, 46 S.E.2d 81 (1947), clearly holds that the State is neither an insurer nor a guarantor of the safety of motorists using its highways. For these reasons, this claim must be denied.

Claim disallowed.

Opinion issued November 9, 1981

JIMMY POLK

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-132)

No appearance by claimant.

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

PER CURIAM:

Upon written stipulation to the effect that damage to claimant's automobile in the amount of $392.67 was caused when a road sign belonging to the respondent fell and struck the right front fender and windshield of the vehicle; that this occurred on Prince Street in Beckley, Raleigh County, West Virginia, a highway owned and maintained by the respondent; that the respondent's negligence in failing to properly secure the sign

was the proximate cause of the accident and resultant damage, the Court finds the respondent liable, and makes an award to the claimant in the amount stipulated.

Award of $392.67.

Opinion issued November 9, 1981

DANIEL SERGE, JR.

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-95)

Claimant appeared in person.

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

GARDEN, JUDGE:

Shortly after midnight on March 20, 1981, the claimant was operating his new Chevrolet Citation automobile in a southerly direction on Route 250 between Farmington and Fairmont in Marion County, West Virginia. He was returning from his place of employment at Consolidation Coal Company to his home in Fairmont. The weather conditions were very bad in that the roads were icy and at least one inch of snow had fallen. The claimant was following another car on this two-lane road when he observed a northbound truck which appeared to be spreading cinders or salt on the highway.

Upon observing the approaching truck, which was travelling, in the opinion of the claimant, at a speed of 40 to 45 miles per hour, the claimant moved to the right of his lane of travel and came to a complete stop with both of his right wheels on the berm. As the truck, with activated flashing lights, passed claimant's car, salt and/or cinders were thrown against his car, damaging it to the extent of $139.05. Claimant candidly admitted that he did not observe any sign or logo on the truck identifying it as a vehicle belonging to the respondent, but

he was sure, by reason of the color of the vehicle, that it was the respondent's vehicle. The respondent, in its Answer, while not admitting that the subject truck was one of its units, did not deny ownership. Furthermore, the respondent offered no evidence at the hearing to dispute the ownership of the vehicle.

The Court, being of the opinion that the claimant did establish by a preponderance of the evidence that the offending truck was owned and operated by the respondent, and that its operator was negligently operating it at an excessive speed under the conditions then prevailing, makes an award to the claimant in the amount of $139.05.

Award of $139.05.

Opinion issued November 9, 1981

RICHARD A. SPOTLOE

vs.

ADMINISTRATIVE OFFICE OF THE SUPREME COURT OF APPEALS

(CC-80-223)

Mark D. Nigh, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

In 1976, claimant Richard A. Spotloe and William Dadisman were elected magistrates in Barbour County, West Virginia. In 1975, Barbour County had a population of 15,126, and in 1980, the population had increased to 16,400. The election of two magistrates was proper, for W.Va. Code §50-1-2 provides, inter alia, that in each county which has less than thirty thousand in population, there shall be elected two magistrates.

On June 1, 1978, Magistrate Dadisman resigned, and his successor, Magistrate Joseph E. Moats, was not appointed until

December 1, 1978. Magistrate Moats resigned on February 11, 1980, and his successor, Linda Stafford, was not appointed until July 1, 1980. As a result, the claimant was the only acting magistrate in Barbour County from June 1, 1978 to December 1, 1978, and again from February 11, 1980 to July 1, 1980, for a total of six months and 18 weeks. Consequently, the claimant is requesting additional compensation for the period of time that he was the only acting magistrate in Barbour County.

With respect to salaries to magistrates, W.Va. Code §50-1-3, as it existed prior to July of 1980, provided as follows:

> "The salary of each magistrate shall be paid by the State. Magistrates who serve less than ten thousand in population shall be paid annual salaries of ten thousand dollars. Magistrates who serve ten thousand or more in population but less than fifteen thousand in population shall be paid annual salaries of fourteen thousand dollars. Magistrates who serve fifteen thousand or more in population shall be paid annual salaries of eighteen thousand dollars. *For the purpose of determining the population served by each magistrate, the number of magistrates authorized for each county shall be divided into the population of each county.* Magistrates shall be paid once a month." (Emphasis supplied.)

As can be observed, magistrates who serve more than 5,000 in population but less than 10,000 in population shall be paid annual salaries of $10,000.00. However, the above-quoted statute sets forth the method of determining the population served, and that is by dividing the number of *authorized* magistrates into the population of the county. Two magistrates were authorized by statute to serve in Barbour County. Dividing that figure into the total population, it is obvious that the claimant received his proper salary, i.e., $10,000 per year. For the reasons stated above, the claim is disallowed.

Claim disallowed.

Opinion issued November 9, 1981

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AS SUBROGEE OF BARBARA A. HOWE

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-349)

James A. Smith, Assistant Claims Superintendent for State Farm, appeared on behalf of claimant.

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

GARDEN, JUDGE:

South York Street on Wheeling Island in Wheeling, West Virginia, generally runs in a north-south direction. It passes beneath I-70 which is elevated over Wheeling Island and runs in an east-west direction. To keep trespassers away from the piers and abutments of I-70, the respondent erected a chain-link fence on both sides of South York Street. On the west side of South York Street, the fence stands eight feet west of and parallel to the westerly curb line of South York Street. To provide ingress and egress to the fenced-off area, the respondent installed a 12-foot gate in the chain-link fence. As a result, when the gate is fully opened in the direction of South York Street, it extends three feet into South York Street.

On July 8, 1980, the claimant's insured, Barbara A. Howe, legally parked her 1980 Chevrolet pickup truck on the west side of South York Street. Sometime later, Ms. Howe returned to her truck and found that the gate had been opened and was resting against the right side of her truck. Ms. Howe was unable to state who had opened the gate, which resulted in damage to the right side of her truck in the amount of $154.50. Ms. Howe was paid the amount of the damage under the comprehensive provision of her insurance policy with the claimant. She also signed a subrogation receipt on March 5, 1981, authorizing the claimant to file this claim against the respondent in order to recoup its loss.

Lara Bishop, respondent's supervisor of interstate employees and facilities in Ohio County, testified on behalf of the respondent. She testified that she was quite familiar with the gate in question and that it was the respondent's policy to keep the gate locked; however, due to vandalism, sometimes the lock would be broken. Ms. Bishop recalled being notified by a Mr. Graham, who apparently had been contracted by Ms. Howe, that the gate was unlocked, and that she, Ms. Bishop, sent a man over and had a new lock put on the gate. She further testified that she had no prior knowledge that the gate was unlocked.

In order to sustain an award in this case, it is necessary for a claimant to prove by a preponderance of the evidence that the respondent was guilty of negligence which proximately caused the damage to the vehicle of claimant's insured. There was a complete failure on the part of the claimant to establish such negligence; therefore, this claim must be disallowed.

Claim disallowed.

Opinion issued November 9, 1981

RONALD P. STEWART

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-65)

Claimant appeared in person.

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

GARDEN, JUDGE:

After nightfall on February 9, 1981, the claimant was operating his automobile in a westerly direction on Route 91 in the Village of Bethlehem in Ohio County, West Virginia, when

both of his right wheels struck a large pothole on the right-hand side of the west lane of travel. According to the testimony, the hole was almost unobservable because of the configuration of the road at that particular point.

The claimant's testimony indicated that the hole was at least two feet in diameter and at least two feet deep. He stated that he was unaware of its existence and did not see the hole until the impact. The claimant further testified that he was travelling at a speed of 25 miles per hour in a 30-mile-per-hour speed zone. As a result of this incident, damages in a total amount of $259.76 were inflicted upon claimant's car.

William B. Leasure, a police officer employed by the Village of Bethlehem, testified on behalf of the claimant. He indicated that he was on duty on the evening of the accident and was following the claimant on Route 91. Officer Leasure confirmed the fact that the claimant was not exceeding the speed limit. He also confirmed the fact that it was almost impossible to detect the presence of the hole before striking it. Officer Leasure testified that the hole had been in existence for at least three weeks prior to February 9, 1981, and that he and the Mayor of the Village of Bethlehem had struck the hole on several occasions. He further testified that numerous complaints had been telephoned, including one of his own, to the respondent, but to no avail.

This Court has consistently held that the respondent is not an insurer of the safety of persons using the highways of this State. However, where it has been demonstrated that the respondent had actual knowledge of a dangerous defect in a highway and took no action to remedy the defect, an award has been made. The evidence in this claim clearly demonstrates that the respondent had notice of the defect and negligently failed to repair it. For that reason, an award of $259.76 is made in favor of the claimant.

Award of $259.76.

Opinion issued November 9, 1981

RANSON BAILEY WARD AND
DEBRA DAWN WARD

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-145)

Claimant Ranson Bailey Ward appeared in person.

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

WALLACE, JUDGE:

Ranson Bailey Ward filed this claim against the respondent in the amount of $255.42 for damages to the 1979 Chevrolet Chevelle automobile owned by the claimant and his wife.

Testimony revealed that the automobile was titled in the names of Ranson Bailey Ward and Debra Dawn Ward. The Court, on its own motion, amended the claim to include Debra Dawn Ward as an additional claimant.

At approximately 11:00 a.m. on April 2, 1981, claimant Ranson Bailey Ward was driving the automobile southerly on W.Va. Route 61 between Montgomery and Oak Hill, West Virginia, at 40-45 miles per hour. He stated that the weather conditions were "beautiful, sunny and nice" and the road conditions were "excellent." A pickup truck was proceeding northerly in the opposite lane of the highway. There were no vehicles in front of or behind Mr. Ward. As the two vehicles passed, the Ward automobile struck a hole on the right-hand side of the road about eight inches inside the white exterior line. The right front and rear tires burst and the rims were damaged.

Every user of the highways travels thereon at his own risk. The State does not and cannot assure him a safe journey. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damages caused by road defects of this type, the claimant must prove that the respondent

had actual or constructive knowledge of the existence of the defect and a reasonable amount of time to take suitable corrective action. *Davis v. Dept. of Highways,* 11 Ct.Cl. 150 (1976). Since the claimant did not meet that burden of proof, this claim is disallowed.

Claim disallowed.

Opinion issued November 25, 1981

COUNTY COMMISSION OF WEBSTER COUNTY

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-81-168)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks an award of $3,020.00 for the payment of jury commissioners and special jury commissioners in accordance with West Virginia Code §52-1-3, which states, in part:

> "Jury commissioners shall receive as compensation for their services, while necessarily employed, an amount to be fixed by the judge of the circuit court, or the chief judge thereof, in accordance with rules of the supreme court of appeals, which shall be payable out of the state treasury upon orders of the circuit court or the chief judge thereof."

The respondent, in its Answer, admits the validity and amount of the claim. As sufficient funds remained in respondent's appropriation for the fiscal year in question from which

the obligation could have been paid, the Court hereby makes an award to the claimant in the amount of $3,020.00.

Award of $3,020.00.

Opinion issued November 25, 1981

KATHLEEN R. FEWELL

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-153)

Claimant appeared in person.

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

WALLACE, JUDGE:

Claimant herein seeks an award of $62.38, which was the cost of replacing a tire ruined as the result of striking a pothole on Route 60 in South Charleston, West Virginia, at about 8:30 p.m. on May 3, 1981.

The claimant testified that she was travelling on this four-lane highway in the right-hand lane of the two lanes reserved for westbound traffic; that she rarely drove this particular highway; that she was proceeding at a speed of 40 to 45 miles per hour, but was slowing down as she approached the stoplight at the Montrose intersection; and that she did not observe the pothole before striking it with her right front tire. Claimant testified that the pothole extended from the berm on the right into her lane of travel. There was no testimony regarding the length of time this particular defect had existed in the highway, nor was any evidence introduced indicating that the respondent had actual knowledge of the existence of the defect. The claimant did not stop after striking the pothole, and thus could not testify as to its size.

Under the facts as set forth above, and in accordance with myriad prior decisions of this Court, this claim must be denied.

Claim disallowed.

Opinion issued November 25, 1981

DIANA LYNN HACKNEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-139)

Claimant appeared in person.

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

WALLACE, JUDGE:

Claimant's 1972 Porsche automobile was damaged on February 21, 1981, at about 5:30 p.m., when she struck a pothole on Campbell's Creek Road, a two-lane, blacktop road in Kanawha County, West Virginia. Her car was repaired by Bert Wolfe Ford for the sum of $298.70, and she is seeking an award in this amount on the theory that the respondent was negligent in failing to properly maintain this road.

Ms. Hackney testified that she was returning to her home in Blount from her place of employment in Charleston. She quite candidly admitted that she was aware of the existence of this hole near the edge of her lane of travel, but had been able to avoid it on prior occasions by steering to her left toward the center line of the road. On the evening of the accident, however, the road was covered by several inches of water, according to the claimant's testimony. This water prevented her from observing the exact location of the hole. To compound the problem, she could not steer to her left because a vehicle was approaching from the opposite direction. The claimant neither testified as to the dimensions of the hole, nor stated whether she had ever notified the respondent of the existence of the hole prior to the accident.

By reason of the foregoing, the Court is of the opinion that the claimant has failed to establish actionable negligence on the part of the respondent. On the contrary, the evidence establishes that the accident and resultant damages to the claimant's car was due to her own negligence. For these reasons, this claim is disallowed.

Claim disallowed.

Opinion issued November 25, 1981

RONALD H. HARPER AND
SARAH E. HARPER

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-134)

Walter L. Wagner, Jr., Attorney at Law, for claimants.

W. Douglas Hamilton, Attorney at Law, for respondent.

RULEY, JUDGE:

The claimants have asserted this claim in the sum of $10,000.00 for damages to unimproved real property allegedly caused by the respondent. The lot or parcel of real property to which the claim relates is a lot containing 0.46 acre which the claimants had surveyed in October, 1978. It is part of a larger tract of 8.8 acres located upon the waters of Tuppers Creek in Kanawha County, which the claimants bought in 1973 for $6,000.00. The lot lies between a horseshoe curve in State Local Service Route 21/10 so that both its west end and its east end abut upon that route. It also lies on a hillside, its west end being approximately 70 feet higher than its east end. It is 220 feet long on its south side and about 170 feet long on its north side. There is a 24-inch culvert under the roadway at about the midpoint of each end of the lot.

The burden of the claim is that, in the last four or five years, there has been an increase in the volume of surface water draining onto the west end of the lot, which has increased, in both depth and width, the size of a ditch which runs through the lot. The undisputed evidence, however, is that the respondent has made no change in the roadway or the culverts since the claimants bought their property. In addition, it is undisputed that the ditch is a natural drainage course. Although the volume of surface water flowing through the ditch and the lot may have increased in recent years, there is no evidence from which the Court could infer that such increase is attributable to any legal fault on the part of the respondent. For those reasons, the claim must be denied.

Claim disallowed.

Opinion issued November 25, 1981

L. P. KING, JR. AND EVELYN KING

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-61)

John S. Hrko, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

At about 10:00 a.m. on November 17, 1980, th claimant, L. P. King, Jr., was operating a 1979 Thunderbird on Route 54 in Raleigh County, West Virginia. The automobile was owned by his wife, Evelyn King, who is also a claimant. Mr. King, a resident of Mullens, was taking his young son to the YMCA in Beckley. In proceeding from Lester to Glen White, the automobile was severely damaged when it struck a pothole near the edge of the road in Mr. King's lane of travel. A written stipulation was filed by counsel for the parties reflecting that the cost of repairing the automobile amounted to $645.14. The claimant spent a considerable length of time effecting emergency repairs to the car and was unable to report for his shift work with the N & W Railway Co. The stipulation further reflects that as a result he lost one day's wages in the amount of $80.10.

Mr. King testified that he was familiar with Route 54 between Mullens and Beckley as a result of travelling that way a few times a week. As he proceeded down a hill between Lester and Glen White and into a turn to his right at a speed of between 35 and 40 miles per hour, he encountered two or three potholes within a distance of 20 to 25 feet of each other, located on the right-hand side of his lane of travel. He indicated that he was unable to avoid the holes by moving to his left because another vehicle was approaching from the opposite direction. As a result, he struck one of the holes, which he estimated to be 14 to 18 inches in diameter and 8 to 9 inches in depth. According to Mr. King, the hole covered the width of the white line on the right-hand side of his lane and extended an addi-

tional 6 inches into his lane of travel. Mr. King further testified that he was aware of the existence of these holes in that he had observed them for two months prior to the accident. He stated that he had not reported the holes to the respondent because he was a resident of Wyoming County, and he felt sure that someone from Raleigh County would have reported them.

Jennings Martin, respondent's Raleigh County supervisor, testified on behalf of the respondent. He indicated that his office had not received any specific complaints concerning potholes on Route 54 in the Glen White vicinity prior to November 17, 1980. Mr. Martin also stated that, according to his records, his crew had conducted routine maintenance on October 10, 1980, which included patching on Route 54 in the Glen White area. On cross-examination, Mr. Martin testified that a week after the maintenance work had been performed, he had inspected the work and did not observe any potholes at any place on Route 54. While he would not deny that the potholes might have been present on November 17, 1980, he stated that he was unaware of it.

The case of *Adkins v. Sims,* 130 W. Va. 645, 46 S.E.2d 81 (1947), has often been cited by the Court as the leading case in West Virginia for establishing the legal principle that the State is neither an insurer nor a guarantor of the safety of motorists travelling upon its highways. We have further held, in the many pothole claims that have been presented over the years, that in order to predicate liability upon the respondent, the claimant must establish notice, either actual or constructive, to the respondent of the existence of a defect or pothole. *Davis v. Dept. of Highways,* 11 Ct.Cl. 150 (1976); *Spatafore v. Dept. of Highways,* 14 Ct.Cl. 18 (1981); *Piazza v. Dept. of Highways,* 14 Ct.Cl. 65 (1981).

Following these principles, the Court is of the opinion that the claimant has failed to establish by a preponderance of the evidence a case of liability against the respondent; accordingly, an award is hereby denied.

Claim disallowed.

Opinion issued November 25, 1981

HERBERT O'DELL PARSONS, III

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-162)

Claimant appeared in person.

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

WALLACE, JUDGE:

On May 8, 1981, the claimant was operating his 1981 Subaru Brat truck on a highway maintained by the respondent between Cass and Stony Bottom in Pocahontas County, West Virginia. It was mid-afternoon in nice weather, and the respondent's crew was engaged in clearing brush and timber from its right of way, using a mulching machine in the operation. As a result, a certain amount of debris and cuttings were left on the highway. The respondent's crew directed the claimant to proceed through the debris-covered area, which was about ½ mile in length. The debris covered both lanes, and a small piece of tree cutting punctured one of the tires on the claimant's vehicle. The piece of cutting was introduced into evidence, and it measured about 2 1/2 inches in length and less than 1/4 inch in diameter.

During a project such as the clearing of brush and timber, it is inevitable that a certain amount of debris will remain on the highway. The small particle of wood that punctured claimant's tire, which cost $56.65 to replace, should have been equally observable to the claimant and the employees of the respondent. The Court, being of the opinion that the claimant has failed to establish negligence on the part of the respondent, disallows this claim.

Claim disallowed.

Opinion issued November 25, 1981

TAMMY LYNN PRIESTLEY, AN INFANT
WHO SUES BY HER MOTHER, CAROLYN PRIESTLEY,
AND CAROLYN PRIESTLEY

vs.

DEPARTMENT OF HIGHWAYS

(D-732)

Robert N. Bland, Attorney at Law, for claimant.

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

RULEY, JUDGE:

This claim grows out of an accident which happened at about 2:30 p.m. on February 29, 1972, when Tammy Lynn Priestley, who then was ten years of age and a fifth-grade student at Taft Elementary School, stepped into a hole in the sidewalk along Althea Street in Charleston. The hole apparently was related to a water line or meter and had been covered by a circular steel frame with a small lid or grating which fit inside it. At the time of the accident, the surrounding sidewalk was broken in numerous places, a part of the steel frame was missing, and the lid or grating also was missing. Tammy's only significant injury consisted of a laceration about one inch long above her right knee which was closed with six sutures. Medical expense incurred as of the time of the hearing was under $100.00, but there was evidence that the cost of removing the residual scar would be about $1,000.00. Damages in the sum of $10,000.00 are sought.

It was stipulated that, as of February 29, 1972, the respondent had acquired the properties adjacent to Althea Street for interstate highway construction, and it was proven that buildings on those properties had been, and were being, demolished by contractors to whom the respondent had awarded a contract for that purpose.

There was evidence that this claim previously had been prosecuted in the Circuit Court of Kanawha County against the West Virginia Water Company, the Cleveland Wrecking Company, and the City of Charleston in Civil Action Number 24,894-C. It was proven that, in connection with that case, a

general release was executed on February 26, 1979, for the sum of $1,000.00, and that the action was dismissed with prejudice. Despite the fact that on that date Tammy still was a minor, there apparently was no judicial approval of that settlement.

While the hole in question certainly constituted a defect in the sidewalk, there is no evidence before the Court from which it can infer that the respondent had actual or constructive knowledge of it, and, in the exercise of ordinary care, should have repaired it before February 29, 1972. For those reasons, the Court cannot conclude that the respondent was guilty of negligence which proximately caused the accident and the resulting injury, and must disallow this claim. Other problems in the proof which may appear from the foregoing discussion of the claim are not considered.

Claim disallowed.

Opinion issued December 9, 1981

BUCKEYE GAS PRODUCTS COMPANY

vs.

FARM MANAGEMENT COMMISSION

(CC-81-423)

JENKINS CONCRETE PRODUCTS CO.

vs.

FARM MANAGEMENT COMMISSION

(CC-81-187)

No appearance by claimants.

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

PER CURIAM:

These claims against the Farm Management Commission were submitted for decision upon the pleadings. The claimants seek payment for various goods and services furnished to the respondent as follows:

Claimant	**Amount**
Buckeye Gas Products Company	$ 95.39
Jenkins Concrete Products Co.	$ 940.50

The respondent admits the validity and amounts of these claims, but further alleges that sufficient funds were not available at the close of the fiscal years in question from which the obligations could have been paid.

While we feel that these claims should, in equity and good conscience, be paid, we further believe that awards cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct.Cl. 180 (1971).

Claims disallowed.

Opinion issued December 9, 1981

E. L. JIMENEZ, M.D., ET AL.

vs.

DEPARTMENT OF CORRECTIONS

(CC-81-320)

No appearance by claimants.

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

PER CURIAM:

These claims against the Department of Corrections were submitted for decision upon the pleadings. The claimants seek payment for various goods and services furnished to the respondent as follows:

Claim No.	Claim Against West Virginia Prison for Women	Amount
CC-81-320	E. L. Jimenez, M.D.	$ 860.00

Claim No.	Claims Against Huttonsville Correctional Center	Amount
CC-81-394	Elkins Dental Lab	$ 67.00
CC-81-420	Xerox Corporation	$ 2,801.94

Claim No.	Claims Against Industrial School for Boys	Amount
CC-81-395	Equitable Gas, Inc.	$ 45,831.75
CC-81-407	Union Oil Company of California	$ 2,554.93

Claim No.	Claims Against Anthony Center	Amount
CC-81-391	White Sulphur Pharmacy, Inc.	$ 399.30
CC-81-392	Greenbrier Physicians, Inc.	$ 50.00
CC-81-393	Craig Motor Service Co., Inc.	$ 256.35
CC-81-403	Seneca Mental Health-Mental Retardation Council, Inc.	$ 3,000.00
CC-81-405	Union Oil Company of California	$ 1,149.19

The respondent admits the validity and amounts of these claims, but further alleges that sufficient funds were not available at the close of the fiscal years in question from which the obligations could have been paid.

While we feel that these claims should, in equity and good conscience, be paid, we further believe that awards cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claims disallowed.

Opinion issued December 9, 1981

EUGENE J. SELLARO, JR.

vs.

OFFICE OF THE STATE AUDITOR

(CC-81-138)

No appearance by claimant.

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

PER CURIAM:

The claimant is an attorney who served as counsel for criminal indigents in juvenile, misdemeanor, or felony proceedings pursuant to the provisions of West Virginia Code Chapter 15, Article 11. Claimant's fees were denied by the respondent because the fund was exhausted.

The factual situation in this claim is identical to that in *Richard K. Swartling, et al. v. Office of the State Auditor*, issued on November 5, 1979. Accordingly, an award is made in the amount indicated below to the claimant.

Award of $433.95.

Opinion issued December 16, 1981

WILLARD CASTO

vs.

STATE AUDITOR'S OFFICE

(CC-79-116)

Claimant appeared in person.

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

RULEY, JUDGE:

The claimant seeks to recover damages allegedly caused by respondent's negligence in certifying a certain parcel of real estate for sale to the Commissioner of Delinquent and Forfeited Lands.

The alleged negligent certification led to litigation between claimant and Marlea Corporation, the owner of the real property in question, which culminated in the West Virginia Supreme Court of Appeals in *Marlea Corp. v. Casto*, ___ W.Va. ___, 242 S.E.2d 923 (1978). The facts of the case were set forth in the Supreme Court's opinion, as follows:

> "In 1951, W. D. Burrus and his wife bought 1.6 acres in Kanawha County. In 1952 they jointly conveyed .18 acres of the 1.6 acre tract to Ida Rupp. The entire tract remained assessed to Burrus until 1966 when Burrus, his wife, and Ida Rupp conveyed to Marlea Corporation what was intended to be the entire 1.6 acres originally purchased by the Burruses. An erroneous metes and bounds description appears in the deed to Marlea which encompassed only the .18 acre tract conveyed from Burrus to Rupp instead of the full 1.6 acres conveyed by the general description.
>
> After recordation of the deed to Marlea, the assessor, apparently relying upon the incorrect metes and bounds description rather than the general description, both contained in the deed to Marlea, assessed .18 acre in the name of Marlea Corporation and assessed .88 acre in the name of Burrus. As a result of the two land book entries, Marlea

did not receive a tax ticket for the .88 acre portion of the parcel. Taxes were not paid on this portion in 1966 and 1967, and the parcel was purchased for the state by the sheriff at the auctions for each of these years.

The record shows that Marlea's principal officer, Lee Lewis, and his lawyer, A. T. Ciccarello, went to the auditor's office in February of 1969 to attempt to redeem the property. Carl Fisher, Assistant to the Director of the Land Department in the auditor's office, testified by deposition that he remembered when the two came to his office to redeem the property and to pay all the taxes, that there was some error, and that all the taxes were not paid. He later, at a hearing held subsequent to this deposition, offered the incredible testimony that the defendant "wasn't interested" in redeeming the land in question.

Appellant's [Marlea] most forceful exhibit is the Certificate of Redemption acquired from the auditor. This certificate dated February 28, 1969, notes the receipt of $408.09 "in full payment of taxes, interest and costs due, for the years shown, against the land described . . . This certificate is a receipt for the money paid and a release of the State's title or claim to the land redeemed for the years shown." The years shown are 1966 and 1968 for property assessed in the name of "Burrus, W. D. and B. R." and in the name of "Marlea Corporation, Inc."

Lewis and Ciccarello later checked to make certain that the redemption was recorded in the assessor's records as well as in the auditor's office at the Capitol. Pages from the assessor's land books show the notation "redeemed from auditor 1966 thru 1968 ext." for both the Marlea and Burrus parcels.

Nevertheless, the auditor certified to the Commissioner of Delinquent and Forfeited Lands the .88 acre for nonpayment of taxes and upon certification the Commissioner sold for $1,275.00 the .88 acre to appellee Casto for nonpayment of 1967 taxes.

On August 30, 1971, the parcel was conveyed to Casto by the Deputy Commissioner of Forfeited and Delinquent

Lands. Marlea filed suit to enjoin Casto from interfering with the property and to set aside this deed. Casto filed a crosscomplaint for rents owed. The circuit court referred the case to Riggs, a commissioner, who found that the sale to Casto by the Deputy Commissioner of Forfeited and Delinquent Lands was in compliance with the Code and served to convey unto Casto the .88 acre in dispute. The Commissioner's findings were ratified and adopted by the circuit court."

The Supreme Court held that Marlea had indeed redeemed its property and that the Deputy Commissioner of Forfeited and Delinquent Lands had no jurisdiction to sell land that has been redeemed. The case was remanded for an accounting. Ultimately, it was settled by the parties and a release was executed. The claimant seeks recovery of the purchase price paid, real property taxes and business and occupation taxes paid, attorney fees incurred, the settlement payment made by him to Marlea Corporation and other incidental expenses that the claimant incurred while he possessed the subject property.

West Virginia Code, §11A-4-25, provides a legal remedy by which the claimant may recover the purchase money which he paid, as follows:

"§11A-4-25. Return of purchase money.

Whenever, after sale and before confirmation thereof, it is discovered that the land sold was nonexistent, or that it had been the subject of a duplicate or improper assessment, or was transferred to others under the provisions of section 3, article XIII of the Constitution, the purchaser shall be entitled to a return of the purchase money. Upon request of a purchaser so entitled, it shall be the duty of the deputy commissioner to apply to the circuit court for an order directing the sheriff to return the purchase money. If satisfied that the application is proper, the court shall enter the order applied for, but no costs shall be taxed in connection with such an application. If the ground for entering the order was that the land was nonexistent or the subject of a duplicate assessment, the

order shall also direct the assessor to drop the erroneous entry of such lands from the land books."

West Virginia Code, §11-1-2A, provides a legal remedy for the recovery of taxes improperly required. For those reasons, those facets of the claim are expressly excluded from this Court's jurisdiction by West Virginia Code, §14-2-14(5).

All of the remaining items of damage claimed relate either to costs of litigation or to ownership and maintenance of the property. If this is viewed as a tort claim, the Court could not conclude that such items of expense were proximately caused by the respondent's error. If this is viewed as a contract claim, those items of expense could not be considered "forseeable" and, for that reason, their recovery would be precluded by the time honored doctrine enunciated in *Hadley v. Baxendale,* 89 Exch. 341. Accordingly, the claim must be denied.

Claim disallowed.

Advisory Opinion issued December 16, 1981

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

DEPARTMENT OF CORRECTIONS

(CC-81-388)

Jack O. Friedman, Attorney at Law, for claimant.

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

PER CURIAM:

This claim was submitted for an advisory determination pursuant to West Virginia Code §14-2-18. The facts indicate that Huttonsville Correctional Center underpaid its statutory contribution to the claimant for fiscal year 1980-81 in the amount of $24,996.90. Claimant also seeks interest on this amount at the rate of one percent per month pursuant to West Virginia Code §21A-5-17. The accrued interest as of the date of an itemized statement from the Department of Employ-

ment Security to Huttonsville amounted to $1,603.06, for a total claim of $26,599.96.

In its Answer, the respondent admits the validity of the principal obligation set forth in the Notice of Claim, but also states that there were not sufficient funds in its appropriation for the fiscal year in question from which the obligation could have been paid. While such a claim should, in equity and good conscience, be paid, an award cannot be made, based on the Court's decision in *Airkem Sales and Service, et al. v. Dept. of Mental Health,* 8 Ct.Cl. 180 (1971).

With respect to the claim for accrued interest, the Court concludes that, as the restrictions of Code §14-2-12 prevent an award of interest unless a claim arises under a contract specifically providing for the payment of interest, the respondent is not liable therefor.

The Clerk of this Court is hereby directed to file this opinion and to forward copies thereof to the respective department heads of claimant and respondent.

Opinion issued December 16, 1981

JAMES W. DIXON AND
DORIS A. DIXON

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-365)

Richard L. Vital, Attorney at Law, for claimants.

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

PER CURIAM:

This claim was submitted for decision upon a written stipulation filed by the parties which revealed the following facts. Claimants are the owners of a residence and tract of land on Ousley Gap Road, a highway owned and maintained by the respondent in the vicinity of Barboursville, Cabell County, West Virginia.

In November of 1978, the Department of Highways cut into a hillside on Ousley Gap Road in the vicinity of claimants' property. In so doing, the respondent broke a water line, causing a saturated soil condition in the area.

A slide occurred on the claimants' property, damaging it in the amount of $14,500.00. Said damages were the direct and proximate result of respondent's negligent cutting of the hillside.

Based on the foregoing, an award is made to the claimants in the amount agreed upon by the parties.

Award of $14,500.00.

Opinion issued December 16, 1981

HOWARD UNIFORM COMPANY

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-81-367)

No appearance by claimant.

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

PER CURIAM:

In this claim submitted on the pleadings, claimant seeks payment of the sum of $244.30 for two officers' blouses purchased by the respondent.

Respondent's Answer admits the validity and amount of the claim, and states that sufficient funds were available in its appropriation for the fiscal year in question from which the obligation could have been paid. The Court therefore makes an award of $244.30 to the claimant.

Award of $244.30.

Opinion issued December 16, 1981

LUNDIA, MYERS INDUSTRIES, INC.

vs.

BOARD OF REGENTS

(CC-81-356)

No appearance by claimant.

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

PER CURIAM:

In this claim submitted on the pleadings, claimant seeks payment of the sum of $125.30 for the installation of book shelves at West Virginia State College.

As the respondent's Answer admits the validity and amount of the claim, and as sufficient funds remained in its appropriation for the fiscal year in question from which the obligation could have been paid, the Court makes an award of $125.30 to the claimant.

Award of $125.30.

Opinion issued January 28, 1982

BENNETT PUBLISHING COMPANY, ET AL.

vs.

DEPARTMENT OF CORRECTIONS

(CC-81-444)

No appearance by claimants.

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

PER CURIAM:

These claims against the Department of Corrections were submitted for decision upon the pleadings. The claimants seek payment for various goods and services furnished to the respondent as follows:

Claim No.	Claim against West Virginia State Penitentiary	Amount
CC-81-444	Bennett Publishing Company	$ 100.91

Claim No.	Claims against West Virginia Prison for Women	Amount
CC-81-438	Greenbrier Physicians, Inc.	$ 1,348.50
CC-81-460	T. H. Mirza, M.D., Inc.	$ 115.00

Claim No.	Claims against Huttonsville Correctional Center	Amount
CC-81-439	Clarksburg Drug Company	$ 714.83
CC-81-448	Physicians Fee Office	$ 823.00
CC-81-455	E. R. Squibb & Sons, Inc.	$ 214.60
CC-81-462	Charleston Area Medical Center	$ 299.50
CC-81-398	Matthew Bender & Company	$ 1,459.00

Claim No.	Claims against Anthony Center	Amount
CC-81-401	Taylor County Commission	$ 248.00
CC-81-456	Exxon Company, USA	$ 229.74
CC-81-461	West Virginia School of Osteopathic Medicine	$ 6,290.60
CC-81-464	West Virginia School of Osteopathic Medicine Clinic, Inc.	$ 20,305.17
CC-82-5	Greenbrier Valley Hospital	$ 700.17

The respondent admits the validity and amounts of these claims, but further alleges that sufficient funds were not available at the close of the fiscal years in question from which the obligations could have been paid.

While we feel that these claims should, in equity and good conscience, be paid, we further believe that awards cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct.Cl. 180 (1971).

Claims disallowed.

Opinion issued January 28, 1982

MOTOR CAR SUPPLY COMPANY, ET AL.

vs.

FARM MANAGEMENT COMMISSION

(CC-81-346)

No appearance by claimants.

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

PER CURIAM:

These claims against the Farm Management Commission were submitted for decision upon the pleadings. The claimants seek payment for various goods and services furnished to the respondent as follows:

Claim No.	Claim	Amount
CC-81-346	Motor Car Supply Company	$ 67.46
CC-81-453	Southern States Cooperative	$ 455.31
CC-81-466	Bill Henning, Inc.	$ 25.00
CC-82-2	Superior Parts Service, Inc.	$ 56.25

The respondent admits the validity and amounts of these claims, but further alleges that sufficient funds were not available at the close of the fiscal years in question from which the obligations could have been paid.

While we feel that these claims should, in equity and good conscience, be paid, we further believe that awards cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claims disallowed.

Opinion issued December 18, 1981

STERL F. SHINABERRY

vs.

OFFICE OF THE STATE AUDITOR

(CC-81-142)

No appearance by claimant.

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

PER CURIAM:

The claimant is an attorney who served as counsel for a

criminal indigent in felony proceedings pursuant to the provisions of West Virginia Code Chapter 51, Article 11. For his services, claimant submitted a voucher for $1,571.10. The respondent State agency has denied $71.10 of the claim based upon the fact that this amount is in excess of the statutory limit imposed by West Virginia Code §51-11-8. The amount of $1,500.00 was not paid by the respondent as the needy persons fund from which this amount should have been paid was exhausted.

The Court has reviewed the facts here presented and denies the amount of $71.10 as the law governing this situation was enunciated by the Court in the case of *George M. Cooper v. Administrative Office of the Supreme Court of Appeals,* 13 Ct.Cl. 394 (1981).

The remaining amount of this claim, $1,500.00, is hereby awarded to the claimant in accordance with the decision rendered by the Court in *Richard K. Swartling, et al. v. Office of the State Auditor,* issued on November 5, 1979.

Award of $1,500.00.

Opinion issued February 1, 1982

A.B. DICK COMPANY

vs.

WORKMEN'S COMPENSATION FUND

(CC-81-323)

No appearance by claimant.

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

PER CURIAM:

Claimant seeks payment of the sum of $9,264.00 for merchandise delivered to the respondent. The pleadings filed herein reveal that the respondent State agency ordered 150 cartons of file film from the claimant. There was an overshipment on the order of 48 cartons. Instead of returning the

surplus cartons, the Workmen's Compensation Fund used the film in its operations.

Respondent's Answer admits the claim's validity, and states that sufficient funds remained in its appropriation for the fiscal year involved from which the obligation could have been paid. Accordingly, the Court makes an award to the claimant in the amount requested.

Award of $9,264.00.

Opinion issued February 1, 1982

ONCIE E. ARCHER AND THE HEIRS OF HOMER THOMPSON - MISSOURI THOMPSON, WILLIAM THOMPSON, TRUMAN THOMPSON, GROVER THOMPSON, CHLOIE BATTEN, NELLIE SUMMERVILLE, ETTA INGRAM, ONCIE ARCHER, DORA LIFE, AND HELEN LOCKHART

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-390)

Claimant Oncie E. Archer appeared in person.

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

WALLACE, JUDGE:

Claimants seek payment of the sum of $787.41 for damage to their property resulting from negligent acts of the respondent. Originally filed by Oncie E. Archer as sole claimant, the claim is hereby amended by the Court to reflect the names of all those who have an interest in said property according to the testimony produced at the hearing.

Claimants allege, and respondent does not deny, that in October of 1979, employees of the Department of Highways were clearing space for a bus turnaround on the property adjacent to claimants' farm on Route 1 in Wood County, West Virginia. In the process of this excavation, respondent used heavy equip-

ment to tear down claimants' fence, posts, and two hickory trees, and dug up and removed a certain amount of dirt from the area.

No evidence was presented on behalf of the respondent to refute any of claimants' testimony. It is therefore clear to the Court that claimants' losses were a direct and proximate result of respondent's negligent acts during the period of construction involved. An award is made to the claimants in the amount requested.

Award of $787.41.

Opinion issued February 1, 1982

STEVEN BELLMAN d/b/a
BASKIN-ROBBINS

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-36)

Claimant appeared in person.

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

WALLACE, JUDGE:

The claimant filed this claim against the respondent for loss of business, resulting from the construction of a highway.

The record indicates that the respondent had contracted with the Cameron Construction Company to relocate and widen from two lanes to four lanes, West Virginia Route 705 from the intersection of University Avenue and Patterson Drive to Stewartstown Road in Morgantown, West Virginia. The construction work included Chestnut Ridge Road parallel to the Suburban Lanes Shopping Center where the claimant operated, under a franchise, a Baskin-Robbins store selling ice cream, ice cream cakes, pies, and party items.

The claimant contends that the inability of customers to readily reach his place of business during the construction caused a loss in his business of $4,500.00.

Witnesses for the respondent testified that there was at least one access open to the shopping center at all times during construction and most of the time there were two.

Highway construction involves considerable inconvenience to the public or to businesses that are close to the construction project, but without proof of negligence on the part of the respondent causing damage to the claimant, there can be no recovery. The record discloses that an independent contractor was performing the construction work and the only employees of the respondent on the construction site were inspectors. The record further discloses that at least one access and most of the time two accesses were maintained to the shopping center.

"The inconvenience and damage which a property owner suffers from these temporary obstructions are incident to city life and must be endured. The law gives him no right to relief, recognizing that he recoups his damage in the benefit which he shares with the general public in the ultimate improvement which is being made." *Farrell v. Rose*, 253 NY 73, 170 N.E. 498, 68 ALR 1505 (1930).

For the reasons herein set out, the claim is disallowed.

Claim disallowed.

Opinion issued February 1, 1982

CHAFIN COAL COMPANY

vs.

WORKMEN'S COMPENSATION FUND

(CC-79-161)

Stephen P. Goodwin, Attorney at Law, for claimant.

Donald L. Hall, Attorney at Law, for respondent.

RULEY, JUDGE:

This claim was submitted for decision following the filing of a written stipulation by the parties and brief oral argument.

The stipulation states that, as a subscriber to the Coal-

Worker's Pneumoconiosis Fund, claimant inadvertently paid excessive premiums in 1974, 1975, and 1976 which amounted to $33,101.04. The respondent refused to refund this amount or to give claimant credit on future premiums. The gist of respondent's argument is that claimant did not comply with Section 5.01 of the *Rules and Regulations of the Coal-Worker's Pneumoconiosis Fund* (effective December 2, 1973), under which Chafin Coal could have applied for reclassification of its business.

Section 5.01 provides: "A subscriber may, *at anytime during the first six months of a subscription year,* make a written request for partial or total reclassification of his business, or for the exclusion of certain of his operations, or for specific employments." (Emphasis supplied.) Section 5.02 states that a subscriber shall be entitled to a refund of an excess premium paid "based upon an evaluation of the experience of the subscriber during the subscription year."

The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act. 1A M.J., Administrative Law, §17; *Gates v. Woods*, 169 F.2d 440 (4th Cir. 1948). It is apparent that claimant herein failed to seek relief under the available regulations, and, for that reason, the Court is obligated to deny this claim.

Claim disallowed.

Opinion issued February 1, 1982

COPY GRAPHICS, INC.

vs.

INSURANCE DEPARTMENT

(CC-82-4)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted upon the pleadings, claimant seeks

payment of the sum of $522.13 on unpaid rental invoices for a Savin Model 780 plain paper copier.

Respondent admits the validity and amount of the claim, but its Answer further states that sufficient funds were not available at the end of the fiscal year in question from which the obligation could have been paid.

While we feel that this claim should, in equity and good conscience, be paid, we cannot make an award, 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 February 1, 1982

DAIRYLAND INSURANCE COMPANY,
SUBROGEE OF WESLEY D. MYERS

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-81-355)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted on the pleadings, claimant is seeking $423.00 as reimbursement for storage charges incurred when claimant's insured's burned automobile was held by the State Police pending an investigation of arson. The car was released when arson could not be proved, and the claimant paid the cost of the vehicle's storage.

Respondent admits the validity and amount of the claim, stating that sufficient funds were available in its appropriation for the fiscal year involved from which the obligation could have been paid. Accordingly, the Court makes an award to the claimant in the amount requested.

Award of $423.00.

Opinion issued February 1, 1982

EASTMAN KODAK COMPANY

vs.

DEPARTMENT OF FINANCE AND ADMINISTRATION

(CC-81-386)

Thomas D. Cornell, Sales Representative, appeared for claimant.

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

PER CURIAM:

On May 15, 1979, claimant and respondent entered into a rental agreement for the use of a Kodak EKTAPRINT Copier/Duplicator. Claimant seeks payment of the sum of $4,391.50 in rent due on the equipment.

The respondent Department of Finance and Administration transferred the machine, for a time, to the office of Legislative Services in an arrangement worked out by a representative of the claimant. According to the testimony presented, the equipment was utilized by the respondent, in both departments, for the period of time alleged in the invoices for the rental fees, and the claimant should therefore be reimbursed.

Based on the foregoing facts, the Court makes an award of $4,391.50 to the claimant.

Award of $4,391.50.

Opinion issued February 1, 1982

ENERGY TECHNOLOGY CONSULTANTS, INC.,
D & M WEATHER SERVICE

vs.

BOARD OF REGENTS

(CC-81-443)

No appearance by claimant.

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

PER CURIAM:

Claiment herein seeks payment of the sum of $350.00 for

weather forecasting services provided West Virginia University.

Respondent admits the validity and amount of the claim, and states in its Answer that sufficient funds remained at the close of the proper fiscal year from which the claim could have been paid.

Based on the foregoing, the Court makes an award to the claimant in the amount requested.

Award of $350.00.

Opinion issued February 1, 1982

FIRESTONE TIRE & RUBBER COMPANY

vs.

DEPARTMENT OF NATURAL RESOURCES

(CC-81-402)

Robert K. Lewis, Jr., Attorney at Law, for claimant.

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

PER CURIAM:

According to the pleadings filed herein, claimant seeks payment of the sum of $852.72 for twenty-four passenger tires purchased by the respondent. As the respondent admits the validity and amount of the claim, and sufficient funds remained in its appropriation for the fiscal year in question from which the claim could have been paid, the Court makes an award of $852.72 to the claimant.

Award of $852.72.

Opinion issued February 1, 1982

HAWES ELECTRIC CO.

vs.

DEPARTMENT OF HEALTH

(CC-81-431)

No appearance by claimant.

Curtis G. Power, III, Assistant Attorney General, for respondent.

PER CURIAM:

In this claim, submitted upon the pleadings, claimant seeks

payment of the sum of $1,126.00 for the installation of a new fire alarm system at Huntington State Hospital. Respondent admits the validity and amount of the claim, and states that sufficient funds were available in its appropriation for the fiscal year in question from which the obligation could have been paid.

Accordingly, the Court makes an award of $1,126.00 to the claimant.

Award of $1,126.00.

Opinion issued February 1, 1982

FRANCIS J. HENNESSY

vs.

BOARD OF REGENTS

(CC-80-340)

Walton S. Shepherd, III, Attorney at Law, for claimant.

Ann V. Dornblazer, Assistant Attorney General, for respondent.

RULEY, JUDGE:

The claimant filed this claim against the Board of Regents for breach of contract while he was employed as President of the West Virginia School of Osteopathic Medicine. The claimant was appointed President on May 23, 1978, to serve effective September 1, 1978. The letter informing the claimant of the appointment also quoted the annual salary rate. In May, 1979, Dr. Hennessy received a second letter advising the claimant, then serving as President, of the annual salary effective July 1, 1979.

It is the claimant's contention that these letters created a contract of employment between the claimant and the Board of Regents.

During a meeting of the Board of Regents in April, 1980, the Board requested the resignation of the claimant and informed him that his services would no longer be needed as of

May 31, 1980, with the month of June, 1980, to be taken as claimant's annual leave. It is the position of the Board that administrative officials serve at the will and pleasure of the Board, that services of the claimant could be terminated at any time, and that the claimant was not under contract during his term as President of the school.

The claimant asserted that the letter of May 9, 1979, created a year's contract from July 1, 1979 through June 30, 1980, and, therefore, claimant is entitled to full salary for June, 1980, and annual leave for July, 1980.

The Court does not perceive the letter of appointment of May 26, 1978, or the letter of May 9, 1979, informing claimant of the annual salary rate for fiscal 1979-1980, to be contract documents. These letters reflected only the rate of salary of the claimant while in the employ of the Board.

As the Board determined to terminate the services of the claimant as of May 31, 1980, it accorded the claimant annual leave for June, 1980, and the claimant has been paid for that annual leave.

It is therefore the opinion of the Court that the claimant is entitled to no recovery in this action.

Claim disallowed.

Opinion issued February 1, 1982

HENRY F. ORTLIEB BREWING CO.

vs.

NONINTOXICATING BEER COMMISSION

(CC-81-175)

No appearance by claimant.

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

PER CURIAM:

Claimant herein seeks payment of the sum of $3,004.87 as a refund of prepaid State excise taxes for the months of June,

August, and September of 1980. Claimant did not renew its contract for 1981. In accordance with West Virginia Code §11-16-6, claimant paid barrel taxes based upon estimated monthly sales, and liability for those taxes, when based upon actual sales, fell below the amount paid by the claimant.

The respondent admits the validity and amount of the claim, and joins the claimant in requesting that an award be made.

Tax refund cases are not uncommon in cases that have come before this Court, and, where the State has not been damaged, it has been held that the retention of such taxes would result in the unjust enrichment of the State. *Crosby Beverage Co., Inc. vs. Nonintoxicating Beer Commission,* 14 Ct.Cl. 20 (1981), *Falls City Industries, Inc. vs. Nonintoxicating Beer Commission,* 13 Ct.Cl. 186 (1980), *Central Investment Corporation vs. Nonintoxicating Beer Commission,* 10 Ct.Cl. 182 (1975).

Based on the foregoing, the Court makes an award to the claimant in the amount requested.

Award of $3,004.87.

Opinion issued February 1, 1982

JOHNSON CONTROLS, INC.

vs.

DEPARTMENT OF FINANCE AND ADMINISTRATION

(CC-81-316)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted on the pleadings, claimant seeks payment of the sum of $2,376.75 in labor and materials for the repair of a computerized central control system serving five buildings in the State Capitol Complex. Respondent's Answer admits the validity and amount of the claim, and, as sufficient

funds remained in its appropriation for the proper fiscal year from which the obligation could have been paid, the Court makes an award of $2,376.75 to the claimant.

Award of $2,376.75.

Opinion issued February 1, 1982

JOHNSON CONTROLS, INC.

vs.

DEPARTMENT OF FINANCE AND ADMINISTRATION

(CC-81-454)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted upon the pleadings, claimant seeks payment of the sum of $4,160.00 for maintenance services on the air-conditioning, temperature, and humidity systems in seven State Capitol buildings.

Respondent admits the amount and validity of the claim, stating in its Answer that sufficient funds remained in its appropriation for the fiscal year in question from which the obligation could have been paid.

Based on the foregoing, the Court makes an award to the claimant in the amount requested.

Award of $4,160.00.

Opinion issued February 1, 1982

WILLIAM P. KNIGHT

vs.

TREASURER'S OFFICE

(CC-79-667)

Claimant appeared in person.

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

RULEY, JUDGE:

This claim against the Treasurer's Office was originally filed

against the State Tax Department, but has been amended by the Court for reasons which will be made apparent by the facts which follow.

Claimant William P. Knight and his wife at the time, Marjorie A. Knight, filed a joint West Virginia personal income tax return for 1977 showing a refund due. The Tax Department requested that the Treasurer's Office and the Auditor issue a warrant for $305.88, the amount of the refund. The warrant, issued March 15, 1978, was made payable to William P. Knight and Marjorie A. Knight, who, during this period, were in the process of obtaining a divorce. William allegedly forged the endorsement of Marjorie and then cashed the check.

On the advice of counsel, William paid the $305.88 back to the Treasurer. Marjorie then applied to the Treasurer for reissuance of another warrant. The new warrant, in the sum of $305.88, issued April 11, 1979, was made payable to Marjorie A. Knight only. Subsequently, she cashed the check and left the State. William proceeded to file this claim against the State Tax Department in the amount of $152.94, representing his share of the improperly issued refund.

At the hearing, it was admitted by the respondent that "apparently there was an error made by the State officials". The evidence indicates that the error was made by the Treasurer's Office, and not by the State Tax Department; therefore, the claim has been amended by the Court to name the Treasurer's Office as respondent.

Tax refunds are provided for by West Virginia Code §11-21-86, which states, in part, that "the tax commissioner shall refund the amount of the overpayment to the taxpayer." As for the actual payment, or disposition of revenue, §11-21-93 provides: "Of the revenue collected under this article the state treasurer shall retain in his hands such amount as the tax commissioner may determine to be necessary for refunds to which taxpayers shall be entitled. . .".

In the case at bar, taxpayer William P. Knight was entitled to one-half of the refund, which, because of the respondent's

error, he did not receive. Accordingly, the claim should be allowed.

Award of $152.94.

Opinion issued February 1, 1982

EUGENE A. KNOTTS

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-107)

Claimant appeared in person.

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

WALLACE, JUDGE:

The claimant filed this claim in the amount of $300.00 against the respondent for damages sustained to his 1978 Thunderbird automobile. It developed at the hearing that damages sustained to the automobile were $657.76, and the Court amended the complaint to correspond with the evidence.

On February 10, 1981, the claimant was driving his automobile southerly on W.Va. Route 14 from Vienna, West Virginia to Valley Road in Parkersburg. It was cold and clear and the highway was dry. The claimant was proceeding at 30-35 miles per hour in the outside lane of Route 14, which is a fourlane highway. At the intersection of 23rd Street in Vienna, claimant's automobile struck a pothole in the left-hand side of the traffic lane in which he was travelling. The hole was in the berm adjacent to the median and extended a short distance into the highway. The left front and rear wheels and tires were damaged.

The claimant testified that he travelled the road frequently but had never seen the hole that he struck and that there were no southbound vehicles in front of him.

This Court has, over the years, been presented with claims of a similar nature, and with few exceptions, has declined to

make awards primarily on the basis that respondent is not an insurer of motorists using the highways of this State. See *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). There must be proof that the respondent knew or should have known of the existence of the particular pothole and that the respondent had sufficient time within which to repair the same. The record is devoid of any such evidence and, accordingly, the Court must deny this claim. *Blackwell v. Dept. of Highways,* 13 Ct.Cl. 121 (1980).

Claim disallowed.

Opinion issued February 1, 1982

THE MICHIE COMPANY

vs.

OFFICE OF THE SUPREME COURT ADMINISTRATOR

(CC-82-3)

No appearance by claimant.

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

PER CURIAM:

Claimant herein seeks payment of the sum of $56.13 for two Replacement Volumes of the West Virginia Code purchased by the respondent.

As respondent's Answer admits the validity and amount of the claim, and sufficient funds remained in its appropriation for the proper fiscal year, the Court makes an award of $56.13 to the claimant.

Award of $56.13.

Opinion issued February 1, 1982

REGION V — REGIONAL EDUCATION SERVICE AGENCY

vs.

DEPARTMENT OF EMPLOYMENT SECURITY

(CC-81-426)

No appearance by claimant.

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

PER CURIAM:

In October of 1980, the Regional Education Service Agency, claimant herein, loaned the respondent certain video equipment which subsequently was lost or stolen. The Notice of Claim reveals a replacement cost of $2,145.25.

The respondent's Answer admits the validity and amount of the claim, and, as sufficient funds remained in its appropriation for the fiscal year in question from which the obligation could have been paid, the Court makes an award to the claimant in the amount sought.

Award of $2,145.25.

Opinion issued February 1, 1982

STATE DISTRIBUTING COMPANY

vs.

NONINTOXICATING BEER COMMISSION

(CC-81-385)

No appearance by claimant.

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

PER CURIAM:

Claimant herein seeks payment of the sum of $11,068.92 in taxes paid on 26,180 cases of beer rendered unfit for human consumption as the result of flooding. Destruction of the beer was carried out under the supervision and inspection of the

West Virginia Department of Agriculture and the respondent Beer Commission.

The respondent admits the validity of the claim and joins the claiment in requesting that an award be made to the claimant in the amount requested.

In numerous prior decisions of this Court, it has been held that the retention of taxes paid in such situations would amount to unjust enrichment on the part of the State. *Crosby Beverage Co., Inc. vs. Nonintoxicating Beer Commission,* 14 Ct.Cl. 20 (1981), *Falls City Industries, Inc. vs. Nonintoxicating Beer Commission,* 13 Ct.Cl. 186 (1980), *Central Investment Corporation vs. Nonintoxicating Beer Commission,* 10 Ct.Cl. 182 (1975).

Based on the foregoing, the Court makes an award to the claimant of $11,068.92.

Award of $11,068.92.

Opinion issued February 1, 1982

JOHN F. TOMBLYN

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-192)

Claimant appeared in his own behalf.

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

RULEY, JUDGE:

This claim in the sum of $721.82 for property damage to the claimant's 1980 model Ford automobile arises out of an unusual accident which happened at about 1:00 p.m. on June 4, 1981, upon a public highway in Buckhannon, West Virginia.

At the time and place of the accident, the vehicle was parked and the accident occurred when a tree limb broke in part with its smaller branches falling upon the top of the vehicle. Two

employees of the respondent came to that scene, responsive to the claimant's call, and attempted to solve the problem by pulling the limb to one side. When they executed that maneuver, the limb's remaining attachment to the tree broke and the butt of the limb fell upon the trunk of the car, denting it deeply. The claimant testified that the limb was not rotten and there was no explanation of why the initial break occurred. Accordingly, there is no liability for damage caused by the initial break. *Hersom v. Department of Natural Resources,* 12 Ct.Cl. 312 (1979). It is equally clear, however, that the respondent's employees failed to exercise ordinary care in their effort to maneuver the limb away from the claimant's car, and, for that reason, the claimant is entitled to recover damages resulting therefrom. Finding that 90% of the damage was caused by the respondent's negligence, the Court makes an award in the sum of $649.64.

Award of $649.64.

Opinion issued February 1, 1982

WHEELING MULTI-SERVICE CENTER, INC.

vs.

DIVISION OF VOCATIONAL REHABILITATION

(CC-81-133)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted on the pleadings, claimant seeks payment of the sum of $5,220.00 for rent due under a lease agreement with the respondent for office space in Wheeling, West Virginia. Respondent admits the validity and amount of the claim, and states that sufficient funds remained in its appropriation for the fiscal year in question from which the obligation could have been paid.

Opinion issued February 2, 1982

GARY L. BATTON

vs.

CIVIL SERVICE COMMISSION

AND

DEPARTMENT OF NATURAL RESOURCES

(CC-81-203)

Claimant appeared in person.

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

PER CURIAM:

On March 27, 1980, claimant was suspended from duty and from pay as a Building Maintenance Mechanic in the Division of Wildlife Resources pending the outcome of criminal proceedings against him. The indefinite period of suspension was to last no longer than six months.

Eleven months later, on February 23, 1981, the Department of Natural Resources returned the claimant to duty since there had been no court action in his case. By letter dated April 9, 1981, claimant asked the Civil Service Commission for back pay relating to his suspension time, if the suspension had not been legally correct. The Commission subsequently conducted a review of the suspension, and denied the request for back pay because the request had not been made within the thirty-day period following the suspension, as required by West Virginia Code §29-6-15.

In essence, claimant is asking this Court to rule upon the decision rendered by the Civil Service Commission. The Commission's Order, denying the request for back pay, relies entirely upon the statute cited above, which reads:

> "Any employee in the classified service. . .who is suspended for more than thirty days in any one year, may, within thirty days after such dismissal. . .appeal to the commission for review thereof." (W.Va. Code §29-6-15)

Based on the foregoing, the Court makes an award of $5,220.00 to the claimant.

Award of $5,220.00.

Opinion issued February 2, 1982

AUTO TECH, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-436)

No appearance by claimant.

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

PER CURIAM:

Originally filed indicating Ron Samples as claimant, this claim was amended by the Court to reflect the actual ownership of the vehicle involved.

According to a written stipulation filed by the parties, on or about June 17, 1981, Ron Samples was operating a 1978 Cadillac Seville titled in the name of claimant Auto Tech, Inc., on Interstate 64 in Cabell County, West Virginia, a highway owned and maintained by the respondent.

Between the Twenty-Ninth Street Exit and the Sixteenth Street Exit of I-64 West into Huntington, Mr. Samples passed a mower owned and operated by the respondent, and gravel was thrown against claimant's vehicle. As a result, damage to the paint, body, and windshield occurred, which amounted to $325.50 in repairs.

The damages suffered by the claimant were the direct and proximate result of the respondent's negligent operation of its mower. Therefore, the Court makes an award to the claimant in the amount stipulated by the parties.

Award of $325.50.

The crucial phrase appears to be "within thirty days after such dismissal." Claimant's suspension was *supposed* to end no later than six months from March 27, 1980, which would place his thirty-day appeal period *from September 27, 1980, to October 27, 1980.* His suspension *actually* ended on February 23, 1981, which would place his thirty-day appeal period *from February 23, 1981, to March 23, 1981.* At any rate, claimant did not appeal to the Commission until April 9, 1981. The decision of the Commission was, therefore, correct.

Claim disallowed.

Opinion issued February 2, 1982

MASON M. CLAY

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-397)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that the respondent is liable for damages in the sum of $150.00 as the result of an accident which occurred on or about September 22, 1981. At approximately 12:10 p.m. on that date, claimant was operating his 1980 Datsun pickup truck on West Virginia Route 16, a highway owned and maintained by the respondent, in Crab Orchard, West Virginia.

In the course of this travel, claimant's vehicle passed over a drain culvert cover which flipped up and damaged the truck's frame and emergency brake cable. This occurred because of the negligence of the respondent in not securing the culvert cover, proximately causing the damages suffered by the claimant.

Based on the foregoing facts, an award is made to the claimant in the amount stipulated by the parties.

Award of $150.00.

Advisory opinion issued February 2, 1982

WEST VIRGINIA UNIVERSITY HOSPITAL

vs.

DEPARTMENT OF CORRECTIONS

(CC-81-413)

Bernard G. Westfall, Associate Administrator, for claimant.

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

PER CURIAM:

This claim was submitted for an advisory determination pursuant to West Virginia Code §14-2-18. Claimant seeks payment of the sum of $7,440.43 for medical care rendered to patients who were detainees of respondent's Anthony Center.

In its Answer, the respondent admits the validity and amount of the claim, but does not concede that an award should be made against the respondent as the claimant is a State-supported institution. Respondent further states that no funds remained in its appropriation for the fiscal year in question 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 also of the 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). As this is an advisory determination, the Clerk of the Court is hereby directed to file this Opinion and forward copies thereof to the proper parties within West Virginia University Hospital and the Department of Corrections.

Opinion issued February 16, 1982

BARBARA B. KRANTZ

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-391)

Claimant appeared in her own behalf.

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

GARDEN, JUDGE:

On October 11, 1980, at about 1:00 p.m., the claimant's hus-

band, Daniel Krantz, was backing claimant's 1974 Chevrolet station wagon out of a paved parking area at the New River Gorge observation point in Fayette County when the right rear wheel of the vehicle dropped into an unmarked hole at the edge of the pavement. The hole was at the end of a drainpipe, and resultant damages to the exhaust system amounted to $130.49. According to Mr. Krantz's testimony, the hole was two to three feet deep. It was not marked in any manner, and was unobservable from his position.

The Court believes that the testimony and photographs presented clearly establish the respondent's negligence, and that such negligence was the principal cause of the accident and the resulting damage to the claimant's vehicle. However, the Court also believes that negligence on the part of the driver of the claimant's vehicle, i.e., his failure to remain on the paved portion of the parking area, also contributed to cause this accident and resulting damage. The Court is disposed to allocate 80% of the negligence to the respondent and 20% to the claimant's husband, and makes an award of $104.39.

Award of $104.39.

Opinion issued February 16, 1982

JEFFREY O. McGEARY

vs.

HUMAN RIGHTS COMMISSION

(CC-82-12)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted upon the pleadings, claimant seeks payment of the sum of $110.64 in expenses incurred over and above the money advanced to him by the State to attend a conference in San Diego. Claimant traveled to an EEOC Con-

ference in San Diego as the chairman of the West Virginia Human Rights Commission.

Respondent's Answer admits the validity and amount of the claim, and states that sufficient funds remained in its appropriation for the fiscal year in question from which the obligation could have been paid.

Accordingly, the Court makes an award to the claimant in the amount of $110.64.

Award of $110.64.

Opinion issued February 16, 1982

CHANDRA P. SHARMA

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-22)

No appearance by claimant.

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

PER CURIAM:

This claim against the Department of Corrections was submitted for decision upon the pleadings. The claimant seeks payment for medical services furnished to the respondent, West Virginia Prison for Women, in the amount of $815.00.

The respondent admits the validity and amount of the claim, but further alleges that sufficient funds were not available at the close of the fiscal year in question from which the obligation could have been paid.

While we feel that this claim should, in equity and good conscience, be paid, we further believe 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 February 16, 1982

LARRY N. SULLIVAN

vs.

OFFICE OF THE STATE AUDITOR

(CC-82-15)

No appearance by claimant.

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

PER CURIAM:

The claimant is an attorney who served as counsel for criminal indigents in juvenile, misdemeanor, or felony proceedings pursuant to the provisions of West Virginia Code Chapter 51, Article 11. Claimant's fee was denied by the respondent because the fund was exhausted.

The factual situation in this claim is identical to that in *Richard K. Swartling, et al. v. Office of the State Auditor*, issued on November 5, 1979. Accordingly, an award is made to the claimant in the amount of $170.00.

Award of $170.00.

Opinion issued February 17, 1982

PEARL HUGHES BOLLING
AND CHARLES HUGHES

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-16)

Eugene D. Pecora, Attorney at Law, for the claimants.

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

RULEY, JUDGE:

In their notice of claim, filed on January 9, 1979, the claimants allege that the respondent destroyed a stone wall

upon real property owned by Carol Brown in Glen White, West Virginia, incident to improving and widening a public road in 1973. Claimants seek damages in the sum of $13,140.00.

The respondent has filed a motion to dismiss based upon the two-year period of limitations for which provision is made in West Virginia Code §55-2-12, as follows:

> "§55-2-12. Personal actions not otherwise provided for.
>
> Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; . . . ."

West Virginia Code §14-2-21, which provides:

> "§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."

precludes this Court from taking jurisdiction of any claim barred by any applicable period of limitations. In *Shered v. Department of Highways,* 9 Ct.Cl. 137 (1972), it was stated:

> "This Court is bound 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."

It appears that the theory of this claim is that it is ex delicto, and, for that reason, the quoted statute applies and the motion must be granted. However, the Constitution of West Virginia, Article III, Section 9, provides that private property shall not be taken or damaged for public use without just compensation, and it may be that mandamus would lie in a proper forum to compel the respondent to institute an eminent domain proceeding.

Motion to dismiss granted.

Opinion issued February 17, 1982

VEDA E. EVANS

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-43)

Claimant appeared in her own behalf.

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

RULEY, JUDGE:

At about 4:15 a.m. on November 28, 1980, Carlene Evans, daughter of the claimant, was driving claimant's 1979 Chevrolet Chevette on Campbell's Creek Drive in Kanawha County when she encountered a trench three feet wide and eight inches deep extending across the roadway. Miss Evans entered the trench, causing considerable damage to the car. Claimant contends that negligence on the part of the State was the cause of this accident, and seeks to recover $892.69.

According to her testimony, Miss Evans was travelling at approximately 12 miles per hour with her headlights on low beam and her foot on the brake. The trench was located in a straight section of the road, and Miss Evans knew of its existence. She had been driving over that particular road for ten years prior to the accident.

James M. Mills, a project supervisor for the respondent, testified that the trench had been dug by State Construction Co., Inc., for drainage purposes. An 18" corrugated pipe had been placed in the trench and it had been backfilled with compacted stone to the level of the pavement. Mr. Mills inspected the trench on November 26, 1980, less than two days before the accident, and found it to be in satisfactory condition.

From the testimony of Mr. Mills, it was clear that the Department of Highways had been inspecting the area regularly and had no prior knowledge of the dangerous condition that existed on the morning of November 28, 1980. Thus, we cannot find the State guilty of any negligence with regard to the maintenance of the trench.

Further, in view of Miss Evans' testimony that she was quite familiar with the road and that she was aware of the trench, the Court is of the opinion that her own negligence was, in large part, the cause of the accident. While Miss Evans claimed that she was exercising proper caution, the Court is compelled to believe that, if she were travelling only 12 miles per hour and had been maintaining a reasonable lookout, she would have perceived the dangerous depth of the trench and been able to stop before entering it.

This Court consistently has followed the decisions of the West Virginia Supreme Court of Appeals in holding that the State is not an insurer of the safety of persons travelling upon its highways, and its duty to travellers is a qualified one, namely, reasonable care and diligence in the maintenance of highways. Accordingly, this claim must be denied.

Claim disallowed.

Opinion issued February 17, 1982

JOHN J. GAUGHAN

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-353)

Claimant appeared in his own behalf.

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

GARDEN, JUDGE:

On September 16, 1980, the claimant was driving his 1978 Chrysler Newport westward across the Market Street Bridge between West Virginia Route 2 in Brooke County and Steubenville, Ohio. As he left the bridge, claimant noticed that his car was pulling to the right, and, when he arrived at his home two miles away, he discovered that both tires on the passenger side of the vehicle were flat. The claimant seeks to recover damages of $156.42, the cost of replacing those two tires.

Claimant alleges that the damage to his tires was caused by

steel spurs protruding from the bridge surface. According to his undisputed testimony, the bridge surface was constructed of steel decking and was in generally poor condition at the time of the accident. The claimant had driven over the bridge many times and was familiar with it. The damaged tires were Goodyear steel-belted radials that had been driven for approximately 10,000 miles. The damage occurred in the center of the tread on each tire. The claimant also testified that accidents of this type had happened to several other people, including the claimant's son.

While it appears that the damage to the tires of the claimant's vehicle probably was sustained while it traveled over the bridge, there is no proof respecting what defect, if any, in the bridge surface caused the damage. The only evidence was that the bridge surface was in generally poor condition. In the absence of such proof, the Court is obligated to deny this claim.

Claim disallowed.

Opinion issued February 17, 1982

MARTHA WHITE FOODS

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-111)

David C. Myers appeared on behalf of the claimant.

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

GARDEN, JUDGE:

On February 17, 1981, the claimant's agent, David C. Myers, was driving a 1980 Chevrolet Citation, leased by the claimant, eastward on U.S. Route 50 near Salem when he struck a pothole, damaging the right front tire and rim of the automobile. The claimant seeks to recover $101.64 for that damage.

The State neither insures nor guarantees the safety of motorists travelling on its highways. *Adkins v. Sims*, 130 W.Va.

645, 46 S.E.2d 81 (1947). For the respondent to be held liable for road defects of this type, the claimant must prove that the respondent had actual or constructive knowledge of the defect, and a reasonable amount of time to take suitable corrective action. *Davis v. Department of Highways*, 11 Ct.Cl. 150 (1976). Since the claimant did not meet that burden of proof, this claim must be denied.

Claim disallowed.

Opinion issued February 17, 1982

DAYTON O. B. AND ALLINE L. MATTHEWS

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-19)

Claimants appeared in their own behalf.

Douglas Hamilton, Attorney at Law, for the respondent.

RULEY, JUDGE:

On November 27, 1980, at approximately 10:30 p.m., claimant Alline L. Matthews and her two grandchildren were travelling east on State Route 60 in claimant's 1980 Volkswagen Rabbit. At a point near the Montgomery Bridge, the two eastbound lanes merged into one, and claimant's vehicle collided with several dome-shaped metal lane dividers approximately three inches high, causing damage to the vehicle in the amount of $178.07.

Mrs. Matthews testified that she had been travelling at 35-45 miles per hour and that, due to rain, visibility was limited to 35-40 feet, in her estimation. Her testimony also revealed that she normally drove over that same route two or three times per week, that she was aware that it was under construction, and that she had seen a sign warning motorists that there was a single lane ahead before she collided with the lane dividers.

For the respondent, project supervisor Carl Osborne testified that the decks on the Montgomery Bridge and its approaches were being replaced, which necessitated the rerouting of east-bound traffic into Montgomery and restriction of part of Route 60 to a single lane of traffic. White pavement markers were used to indicate that single lane. According to Mr. Osborne, the markers were eight inches wide, slightly less than three inches high, and reflectorized. In addition to these markers, two signs were placed to warn motorists approaching the single lane, and yellow tape and traffic arrows were used to direct motorists into the single lane. Mr. Osborne also testified that the metal markers had been in place for months before the accident.

The preponderance of the evidence in this case indicates that, if there were any negligence involved, it was on the part of Mrs. Matthews. She travelled the road frequently, knew of the construction, and had observed a sign warning motorists of the approaching single lane. Also, despite the fact that it was raining and visibility was only 35-40 feet, Mrs. Matthews maintained a speed of 35-45 miles per hour. For those reasons, the claim must be denied.

Claim disallowed.

Opinion issued February 17, 1982

JOHN McKENDRICK

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-59)

Claimant appeared in his own behalf.

Douglas Hamilton, Attorney at Law, for the respondent.

RULEY, JUDGE:

On January 9, 1981, at about 4:00 p.m., the claimant was driving his 1970 Cadillac in a southerly direction on Raccoon

Creek Road in Cabell County when he collided with a 1972 Volkswagen driven by Phillip Chapman. The accident occurred at a point about 1½ miles from the McComas School, where the two-lane blacktop road was curved and banked. As Mr. McKendrick rounded this curve at approximately 15 miles per hour, his vehicle slipped on a patch of ice, slid across the center of the road, and collided with Mr. Chapman's vehicle, which was rounding the curve from the opposite direction. Damage in the sum of $650.00 was sustained by the Chapman vehicle, and $350.00 by the McKendrick vehicle. The claimant paid Mr. Chapman for the damage to his vehicle and now seeks to recover the damage to both vehicles, namely, $1,000.00. Mr. McKendrick claims that the Department of Highways was negligent in failing to divert the water flow across the highway and in failing to salt the road surface after it froze.

During cross-examination, Mr. McKendrick testified that the ice patch had just formed on the day of the accident, as it was not there when he had driven over the highway earlier in the day.

Testifying for the respondent was Donald Turner, the Department of Highways maintenance supervisor for Cabell County, who stated that, for snow and ice removal or treatment, Raccoon Creek Road was rated at a priority of 4 on a scale of 6, with numbers 1-3 being interstates, primary roads, and feeder roads; that, before any work could be done on a priority 4 road, all roads in the county having higher priority numbers must have been judged safe for passage; and that the maintenance men simply had not yet reached priority 4 roads at the time of the accident. If the flow of water across the road were caused by a defect in its drainage, there could be no liability on the part of the respondent in the absence of proof that it had actual or constructive knowledge of the defect. See *Davis Auto Parts v. Dept. of Highways,* 12 Ct.Cl. 31 (1977) and *Lowe v. Dept. of Highways,* 8 Ct.Cl. 210 (1971). For those reasons, this claim must be denied.

Claim disallowed.

Opinion issued February 17, 1982

SOUTHERN GAS & OIL, INC.

vs.

STATE FIRE MARSHAL

(CC-79-56)

Lawrence E. Morhous, Attorney at Law, for claimant.

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

RULEY, JUDGE:

The claimant asserts that on January 23, 1978, its retail gasoline service station on West Virginia Route 20 in Athens, Mercer County, West Virginia, was closed upon the oral order of the respondent acting through an Assistant State Fire Marshal, Frank Ubeda, due to the presence of gasoline vapors or fumes in the Mountain Lion Motel which is located upon adjacent property. It also is asserted that, although the results of air tests upon claimant's gasoline tanks, which were negative, were given to the respondent later that same month, the respondent negligently refused to permit the station to reopen until June 28, 1978. Claimant seeks recovery of $6,000.00 for loss of profit and $539.52 in expense incurred in draining and testing its tanks.

West Virginia Code §29-3-14 refers to the state fire marshal, and provides in part:

> ". . .whenever he may find in any building or upon any premises any combustible, flammable or explosive substance or material, or other conditions dangerous to the safety of persons occupying the building or premises and adjacent premises or property, he may make reasonable *orders in writing,* directed to the owner of such build-in, structure or premises, for the repair or demolition of such building or structure, or the removal of the combustible, flammable or explosive substance or material, as the case may be, and the remedying of any conditions found to be in violation of a regulation promulgated as

aforesaid or to be dangerous to the safety of persons or property.

A true copy of every order of the state fire marshal as provided for in this section shall be filed in the county where the premises are totally or partially located, with the county clerk who shall index and record the order in the general lien book. Upon filing, the order constitutes notice of such proceedings to all persons or parties thereafter having dealings involving said property." (Emphasis supplied.)

According to the undisputed testimony, gasoline fumes or vapors were present in the claimant's service station and in the adjacent motel on January 23, 1978. The service station had been closed for a few weeks as of that date. Mr. Ubeda, who inspected both establishments on that date, testified, without contradiction, that gasoline was seeping through a wall beside the station and that there were pools of gasoline standing on the floor of the basement underneath its office. He also testified unequivocally that he did not order the station closed. James D. Evans, the claimant's general manager, was present during that inspection. Other persons also were present. Mr. Evans did not testify that Mr. Ubeda ordered the closure of the station, but testified:

"Well, I felt like the impressions I got from everyone that we ought to keep the station closed until the situation was corrected or until we found the source of the problem."

Although the motel was evacuated on January 23, 1978, Mr. Evans testified that he was aware on January 24, 1978, that it resumed normal operation on that date. Following that date, there was considerable correspondence between Mr. Morhous, writing on behalf of the claimant, and the respondent. In a letter dated March 1, 1978, and in a letter dated March 16, 1978, Mr. Morhous alluded to "verbal closure" of the station by Mr. Ubeda, an allusion which was not rejected in responsive correspondence. But, even if the failure to reject that assertion at that time is viewed as some species of acquiescence, there is no way that it can be elevated to constitute com-

pliance with the quoted satute. In addition, after acknowledging that the claimed oral order did not comply with the statute, Mr. Morhous, in his letter of March 16, 1978, a copy of which was mailed to the claimant, stated:

> "Accordingly, we are advising our client by copy of this letter that unless it is in receipt of your written order closing the above establishment as provided in the above referenced West Virginia Code provisions within ten (10) days of your receipt of this letter, they should proceed with reopening this establishment for normal business."

That was excellent legal advice and the claimant would have been wise to follow it. In fact, Mr. Evans explained that the reason the station was not opened from March until July was because of difficulty in finding an operator. While there may have been some misunderstanding or misapprehension about the matter, the Court cannot conclude from the evidence that the respondent ordered the closure of the station or negligently refused to permit it to reopen, and, for that reason, this claim must be denied.

Claim disallowed.

Opinion issued February 17, 1982

JOHN J. WEST

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-122)

John S. Hrko, Attorney at Law, for the claimant.

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

WALLACE, JUDGE:

On March 23, 1981, the claimant's wife, Mary S. West, was driving a 1975 Pontiac owned by the claimant north on Route 19 in Wyoming County when she struck a pothole and damaged

the right rear tire and rim of the automobile. The claimant seeks to recover $209.20 for that damage.

The State neither insures nor guarantees the safety of motorists travelling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be found liable for road defects of this type, the claimant must prove that the respondent had actual or constructive knowledge of the defect. *Davis v. Department of Highways,* 11 Ct.Cl. 150 (1976). The claimant did not meet that burden of proof; therefore, this claim must be denied.

Claim disallowed.

Opinion issued February 22, 1982

CHARLES E. McCARTY

vs.

OFFICE OF THE SUPREME COURT ADMINISTRATOR

(CC-81-400)

No appearance by claimant.

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

PER CURIAM:

Claimant herein, an attorney at law, seeks to recover the sum of $55.00, the amount of an order entered by the Circuit Court of Roane County, for services rendered by the claimant in a mental hygiene proceeding as provided by West Virginia Code, Chapter 27, Article 5.

As the respondent's Answer admits the validity and amount of the claim, and sufficient funds remained in respondent's appropriation for the fiscal year in question from which the obligation could have been paid, the Court makes an award to the claimant in the amount of $55.00.

Award of $55.00.

Opinion issued April 1, 1982

LILLIAN WEST COLLINS AND
JOHN COLLINS

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-292)

Thomas L. Butcher, Attorney at Law, for claimants.

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

WALLACE, JUDGE:

Claimants filed this claim against the respondent in the amount of $4,261.85 for damage to their automobile and injuries sustained by claimant Lillian West Collins in an accident which occurred at approximately 8:00 a.m. on December 4, 1979, on West Virginia Route 97 south of Prenter, West Virginia.

On the morning of the accident, the claimant, Lillian West Collins, had taken her son to school in their 1975 Cadillac automobile and was proceeding to the post office. She was driving at about 25-30 miles per hour when, at a point in the highway known locally as Beverly Curve, the automobile skidded on ice on the highway and struck an embankment. Mrs. Collins suffered broken ribs and a fractured arm. The automobile was totalled. She testified that the respondent had done quite a bit of work on the road in September and October, and that the ditch line had been filled with large gravel, causing water to flow across the highway. Mrs. Collins further testified that she travelled the road two to three times a week, that she had not encountered ice before, and that she had no reason to complain to the respondent about the highway's condition.

Witnesses for the claimants stated that numerous accidents had occurred on the highway before and after the Collins accident. There was no testimony that there were ice formations on the highway prior to the accident. The respondent's witness, Bill Wilcox, testified that the berm of the road had been repaired in September and October; that large-size rock was placed on the berm and the ditch line was pulled; that coal

trucks usually run onto the berm and damage the ditch line; that, because of heavy traffic on the road, maintenance is a continuous problem, and that, at the time of the accident, there was no reason to expect ice or snow on the highway.

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 ice and had sufficient time to remedy the problem. *Lavender v. Dept. of Highways,* 12 Ct.Cl. 54 (1977). 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 (1969). The case of *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2nd 81 (1947), held in part:

> ". . .every user of the highways travels thereon at his own risk. 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 claimants have 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 this claim.

Claim disallowed.

Opinion issued April 1, 1982

CYNTHIA CATHERINE McGRATH

vs.

DEPARTMENT OF MOTOR VEHICLES

(CC-81-421)

Claimant appeared in person.

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

WALLACE, JUDGE:

On May 27, 1981, claimant was involved in an accident on MacCorkle Avenue in South Charleston, West Virginia, in which claimant's 1975 model Ford Mustang struck a flatbed

truck owned by The IV Seasons Builders and driven by LaRue Causey.

According to the testimony, the accident was investigated by a South Charleston police officer who estimated the damage to the truck to be $400.00. Actual damages to the vehicle amounted to $100.00, as indicated by a statement from Mr. Causey releasing the claimant from further liability.

As a result of the police officer's report and the fact that claimant's car was uninsured, the West Virginia Department of Motor Vehicles suspended claimant's license and registration pursuant to W.Va. Code §17D-3-3. Claimant's license and registration were restored by the respondent after the release was obtained from Mr. Causey.

Claimant filed this claim against the respondent in the amount of $47.00 for reimbursement of reinstatement fees. At the hearing, it developed that the actual amount paid was $35.00.

The fees collected by the respondent in cases of this nature are a part of the administrative process of operating the department. From the record, no improper action by the respondent was proven, and there is no basis for the Court to make an award to the claimant for a refund of her costs.

Claim disallowed.

Opinion issued April 1, 1982

NELVA MUNSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-355)

Roger F. Redmond, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

The claimant sustained injuries and her automobile was a total loss as the result of a single-vehicle accident which

occurred on November 13, 1979. She filed this claim against the respondent in the amount of $20,000.00 for her damages.

At approximately 1:00 p.m. on the day of the accident, the claimant, accompanied by her sister and her sister's infant daughter, was returning to Marietta, Ohio, from the mall at Vienna, West Virginia. She was proceeding northerly in her 1976 Dodge Aspen automobile on West Virginia Route 14 toward the bridge over the Ohio River. The weather was clear and the visibility was good. The road was twenty feet wide, rough, and bumpy. Claimant traveled it once or twice a month, and had traveled it on the way to the mall on the day of the accident. At a point opposite the 84 Lumber Yard, she reduced her speed to 35 miles per hour when she observed an oncoming vehicle proceeding close to the center line. She testified:

> "At no time did I see him come across the line. He was very close to the line. He was to the extreme left of his lane, but he was still in his lane."

In her concern with the oncoming vehicle, the claimant struck a pothole in the berm of the road which extended slightly into the road surface. As the right front wheel struck the hole, the claimant lost control of the vehicle, and the right rear fender struck a utility pole. The vehicle went up an embankment and rolled over.

Her automobile, which she valued at $2,000.00, was totalled. After her $100.00 deductible, claimant was paid $1,835.00 by her insurance carrier, and received $200.00 for the salvage. She was hospitalized for four days for observation and treatment, incurring costs at Marietta Memorial Hospital of $895.37, and a bill from Dr. Plummer in the amount of $75.00. Ambulance charges were $45.00, and claimant was absent from work for twelve days.

Witnesses for the claimant testified that the hole had been there for a period ranging from six months to a year, but no one had notified the respondent of the condition. The assistant superintendent of maintenance for Wood County, West Virginia, George Davis, testified that he had no knowledge of any complaints, and that if the respondent knew "of something we

assumed was a hazard, we get to it when seen or get a call." Ray Casto, as claims investigator for the respondent, checked respondent's records for October and November of 1979 and found no evidence of any complaints of road conditions at the point of the accident.

In order to make awards in claims such as this, the Court must be convinced that the respondent knew or should have known of the existence of the pothole in question, and that the respondent had sufficient time to repair it. The record is not sufficient in this regard. *William T. Blackwell, et al. v. Department of Highways,* 13 Ct.Cl. 121 (1980). This Court consistently has held that the State is not a guarantor of the safety of travelers on its highways and that its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all circumstances. *Parsons v. State Road Commission,* 8 Ct.Cl. 35 (1969); *Lowe v. Department of Highways,* 8 Ct.Cl. 210 (1971). Accordingly, this claim is disallowed.

Claim disallowed.

Opinion issued April 26, 1982

FRANK BONACCI

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-25)

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 $531.30 were caused when the vehicle was buried by snow and debris while crossing under Interstate 70 at a time when respondent's employees were clearing snow from the structure; that this occurred on

Route 40 at a point below Interstate 70, a highway owned and maintained by the respondent; and to the effect that respondent's negligent snow removal operation was the proximate cause of the damages suffered by the claimant, the Court finds the respondent liable, and hereby makes an award to the claimant of $531.30.

Award of $531.30.

Opinion issued April 26, 1982

ROBERT R. BROCK

vs.

WORKMEN'S COMPENSATION FUND

(CC-81-457)

Claimant appeared in person.

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

PER CURIAM:

Claimant Robert Brock alleges that he did not receive a check for Workmen's Compensation benefits to which he was entitled. According to Mr. Brock's petition, he did attend a hearing before the Workmen's Compensation Review Board. By letter dated April 16, 1981, Mr. Brock was advised that his claim could be reopened within five years of the last day he received benefits. The claimant has chosen to pursue the matter before the Court of Claims.

The respondent has filed a Motion to Dismiss the claim for two primary reasons: first, the claimant did not exhaust his administrative remedies under Chapter 23 of the West Virginia Code, and second, the claim does not come within the jurisdiction of the Court of Claims. With both these contentions the Court agrees.

It has been the policy of this Court in similar cases to rule that a claimant who does not exhaust his administrative remedies cannot avail himself of the jurisdiction of the Court of

Claims. *Nichols Engineering and Research Corporation v. State Tax Commissioner*, 9 Ct.Cl. 4 (1971). It is apparent, from respondent's letter of April 16, 1981, that Mr. Brock's claim could be reopened within a five-year period; thus, he could still pursue the matter through administrative channels.

With respect to the issue of jurisdiction, the law is quite clear regarding claims which cannot be brought before this Court. West Virginia Code §14-2-14 provides:

> "The jurisdiction of the court shall not extend to any claim. . .2. For a disability or death benefit under chapter twenty-three. . .of this Code."

For the reasons hereinabove stated, respondent's Motion to Dismiss is hereby granted, and the claim is disallowed.

Claim disallowed.

Opinion issued April 26, 1982

JUNE DORTON

vs.

WORKMEN'S COMPENSATION FUND

(CC-81-103)

Claimant appeared in person.

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

PER CURIAM:

Claimant June Dorton alleges that she was injured as the result of heavy lifting she performed while in the employ of Hoggsett Insulation Service in Huntington, West Virginia, on October 4, 1977. At that time, Mrs. Dorton's employer was a subscriber in good standing of the Workmen's Compensation Fund, and she subsequently filed a claim for Compensation benefits. Her claim was rejected by the Commissioner's Order of July 24, 1979, on the grounds that the disability complained

of was not due to an injury received in the course of and resulting from the claimant's employment. By letter of July 27, 1979, claimant protested the Commissioner's ruling, and, pursuant to that protest, a hearing was held on November 8, 1979. Following that hearing, Mrs. Dorton's attorney requested that the claim be continued in order that medical evidence from her physician could be obtained. The request for a continuance was granted, and another hearing was held on February 21, 1980. The claim was then submitted for decision, and, by order of June 27, 1980, the Workmen's Compensation Commissioner affirmed the order of July 24, 1979, rejecting Mrs. Dorton's claim for benefits. No appeal from that final order was made by the claimant, and she now seeks redress in this Court.

The procedure to be followed in Workmen's Compensation claims is set forth in the West Virginia Code, Chapter 23, Article 5. A review of the claimant's actions in accordance with the Code is necessary.

The Commissioner's initial rejection of Mrs. Dorton's claim "shall be final unless the employer, employee, claimant or dependent shall, within thirty days after the receipt of such notice, object, in writing, to such finding" (§23-5-1). Mrs. Dorton's objection was filed within three days of the receipt of the notice, and was therefore a valid objection.

Upon receipt of the objection, the commissioner "shall . . . set a time and place for the hearing of evidence" (§23-5-1). Mrs. Dorton had two such hearings on her claim.

The law further provides:

> "After final hearing the commissioner shall . . . render his decision . . . which shall be final: Provided, that the claimant or the employer may apply to the appeal board . . . within thirty days of receipt of notice of the commissioner's final action, or in any event within sixty days of the date of such final action, regardless of notice" (§23-5-1).

Mrs. Dorton did not apply to the appeal board regarding the final action of the Commissioner. Had she done so, a hearing would have been held before the appeal board, and, if

she wished to protest the board's decision, a further appeal would have been possible under §23-5-4:

> "From any final decision of the board, including any order of remand, an application for review may be prosecuted by either party, or by the commissioner, to the supreme court of appeals within thirty days from the date thereof . . . ."

It is clear from the record of this claim that ample administrative remedies were available to the claimant, the exhaustion of which would have led to a review by the West Virginia Supreme Court of Appeals. It has been this Court's position in a number of previous cases that a claimant who has not exhausted his administrative and judicial remedies cannot avail himself of the jurisdiction of this Court. *Nichols Engineering and Research Corporation v. State Tax Commissioner*, 9 Ct.Cl. 4 (1971). We have also ruled that the remedies provided by Workmen's Compensation are exclusive and final. *Hodges v Dept. of Mental Health*, 9 Ct.Cl. 76 (1972).

In addition, §14-2-13 of the West Virginia Code extends the jurisdiction of this Court to 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, except for those claims excluded by §14-2-14, which provides:

> "The jurisdiction of the court shall not extend to any claim . . . 2. For a disability or death benefit under chapter twenty-three [§23-1-1 et seq.] of this Code."

Therefore, as claimant herein has failed to exhaust her administrative remedies, and, as this Court's jurisdiction does not extend to Workmen's Compensation cases, the claim must be denied.

Claim disallowed.

Opinion issued April 26, 1982

NOVO CORPORATION

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-175)

Vincent V. Chaney and *Michael T. Chaney,* Attorneys at Law, for the claimant.

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

WALLACE, JUDGE:

The claimant, Novo Corporation, in conjunction with the Danbourne Corporation, entered into a contract with the respondent in July of 1973 for the construction of Cheat Lake Bridge near Morgantown, West Virginia. The project, AC-APD 481(31), was a joint venture of the two corporations. In addition to the construction of the bridge, the contract provided for the construction of land pier #6 and abutment #2 on the east end of the bridge, and land pier #1 and abutment #1 on the west end. Novo Corporation was responsible for the fabrication and delivery of all structural steel. The Danbourne Corporation was responsible for the erection of the steel and all the field work involved in completing the bridge.

Piers 2, 3, 4, and 5 in Cheat Lake were to be constructed by Allied Structural Steel Company.

The Mashuda Corporation had the contract with the respondent to do the site preparation work in the areas of the land piers and abutments.

Both contracts were awarded at about the same time as was the contract to Novo, that is, in July 1973.

The above corporations will be referred to herein as "Novo," "Danbourne," "Allied," and "Mashuda."

Respondent issued its notice to proceed to Novo on August 2, 1973. Land piers 1 and 6 and abutments 1 and 2 were to be completed late in 1974; however, the Mashuda Corporation

did not have the site preparation work complete until June 25, 1975. Allied was to have piers 2, 3, 4, and 5 available for bridge construction on November 30, 1974, but they were not completed and accepted by the respondent until April 23, 1975.

After the site preparation was completed by Mashuda and the lake piers were completed by Allied, Novo and Danbourne were able to proceed under the terms of Novo's contract with the respondent. The erection of the structural steel then proceeded very close to the original estimated required time after the piers were available, but the workers were forced to work in the winter of 1975-76.

These delays were brought to the attention of the respondent by letter from the claimant dated January 27, 1975. In that letter, claimant requested a time extension of 287 calendar days and a change order covering cost escalation caused by the delays. A meeting was held in respondent's Charleston office on March 10, 1975, with representatives of the respondent, Allied, Mashuda, and claimant, Novo, concerning the availability of the piers in the lake and the site preparations. Later, the claimant, by its letter of January 13, 1977, submitted a claim for additional compensation in the amount of 409,033.00. A meeting was held at respondent's office a year later on January 8, 1978, concerning the validity of the claim. The respondent's March 28, 1978, letter to the claimant refused the claim but granted an extension of 155 calendar days, revised the completion date to October 4, 1976, and waived liquidated damages. The respondent had originally assessed 188 days of liquidated damages.

Subsequent to the completion of the project, the claimant filed its claim against the respondent in the amount of $424,234.39. At the hearing, the claim was amended by reducing the amount to $373,982.00. The claim consisted of increased costs allegedly incurred by reason of the delays. These included additional labor costs, material and subcontract costs, finance costs, field overhead, and home office costs.

The record establishes that the availability of the piers being constructed by Allied was delayed 4.75 months before the erection of the structural steel could commence. This resulted in

additional delays in the work to be performed subsequent to the completion of the structural steel work. After the erection of the structural steel, the bolting-up process commences. Then comes the placing of the deck known as "stay in place" deck, or "SIP." This is eventually followed by the placing of the reinforcing steel and pouring of the deck, parapet, and walls. The bolting-up process was delayed .75 month and the installation of the SIP deck was delayed 1.75 months. The bolting-up and the SIP work are labor-intensive items, that is, they are performed by labor. The delays caused the work to be performed in the winter months, which had a tremendous impact on productivity. The total delayed time was 7.25 months.

The delays in the completion of the work to be performed by Allied and Mashuda delayed the commencement by the claimant of the work under its contract with the respondent. However, the claimant was able to complete its work in the same amount of time required under its time schedule as approved by the respondent. The extension of the completion time and the waiver of liquidated damages by the respondent are evidence that the respondent recognized that the delays were not the fault of the claimant. The contract was bid with the expectation that it would be completed within the estimated time frame. When the project did not commence as scheduled, the claimant incurred additional expenses for labor and materials. The increases in labor costs between the original estimated completion date and the actual date were $14,735.00 for iron workers, $4,775.00 for carpenters, $4,670.00 for laborers, $1,906.00 for cement finishers, and $546.00 for operating engineers. The increase in material costs during this period were concrete, $60,797.00, resteel, $8,117.00, and paint, $112,500.00 including $37,000.00 paid to the original paint subcontractor for work performed.

The claimant also contends that it incurred additional costs of $67,500.00 for field operating expenses and $82,963.00 for home office expenses. It further claims 1% per month on monies retained by the respondent, in the amount of $15,473.00.

The Court is of the opinion that the claimant is entitled to

recover the established fixed labor increases for the iron workers, carpenters, laborers, cement finishers and operating engineers in the total amount of $26,632.00, and the fixed increases in material costs for concrete, and paint, less the $37,000.00 previously paid in the amount of $136,297.00.

The cost of the reinforced steel is denied as included in the contract price of the caissons. The percentages estimated for field overhead and home office costs are considered speculative and are denied. The one per cent retainage is, in effect, an attempt to collect interest which the Court, by statute, cannot award.

Accordingly, the Court makes an award to the claimant of $162,929.00.

Award of $162,929.00.

Opinion issued April 26, 1982

BESSIE M. STONE, BY

CHARLES H. STONE, HER ATTORNEY IN FACT

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-35)

Stephen C. Littlepage, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

Bessie M. Stone filed this claim against the respondent by her son, Charles H. Stone, as her attorney in fact, asking for removal of a ferry approach road over the claimant's property in Henderson, West Virginia.

After the Silver Bridge collapse at Point Pleasant, West Virginia, on December 15, 1967, it was necessary to establish ferry service between West Virginia and Ohio. In early 1968, a ferry approach and access road were built by the respondent in Henderson, West Virginia. The access road was constructed

from Locust Street to the ferry approach on the Kanawha River over a parcel of land owned by the claimant. This road was used for traffic until a new bridge was built and opened in December of 1969.

The road was used again for ferry service when the new bridge was closed for repairs from July to October 1977. The claimant and respondent are presently litigating the amount of compensation for this temporary use in a condemnation suit brought by the respondent.

The claimant contends that by virtue of a letter dated February 23, 1968, from the respondent to John G. Anderson, the attorney for the Town of Henderson, that the respondent was required to remove the access road from claimant's property after the ferry service was terminated; that the letter was a contract between the respondent and the Town of Henderson; and that the claimant was a third-party beneficiary of the contract. The pertinent part of the letter relied upon by the claimant states:

> "The access from Locust Street to the river edge will also be maintained by the Commission, and, upon termination of the ferry service, the access road will be removed and that section of sidewalks removed will be replaced."

Claimant did not know of the existence of this letter until a copy was furnished her counsel in the fall of 1978.

In its Answer, the respondent contends that the claim was not in the proper form; that the claim was a proper matter for a condemnation proceeding; and that the claimant was barred by the doctrine of laches. Respondent also filed a motion to dismiss on the grounds that the claim is barred by the statute of limitations.

By a post-hearing stipulation, the cliamant and the respondent submitted to the Court two leases and a sublease to be considered as part of the record in this claim. All of the instruments are of record in the Office of the Clerk of the County Commission of Mason County, West Virginia, where the leased premises are situate. One of the leases, dated January 31, 1968, and recorded March 18, 1968, in Deed Book 208 at page

531, which was executed by the claimant and her late husband, leases to Ohio Valley Towing, Inc., two parcels of land "for use as roadways and approaches to ferry landing. . .for the incidental use in the ferry service." One of the parcels is in the City of Point Pleasant, being the river frontage between "Lot 125 and the Kanawha River at the foot of Main Street," the other being Lot 5 in the Town of Henderson over which the road in question runs. The lease provided for an annual rental of $730.00, representing $365.00 for each parcel for a term of five years, and for "such further number of years as may be desired by Ohio Valley until a bridge across the Ohio River near Point Pleasant shall have been built and opened. . . ." The lease further provided:

> "Improvements made to said parcels by Ohio Valley or anyone for it, or on its behalf, including the State Road Commission shall remain on said parcels after the termination of this lease, including but not limited to any and all roadways, streets, permanent ramps. . . ."

The other lease, recorded in Deed Book 200 at page 174, is an agreement dated February 1, 1966, and recorded February 24, 1966, between the claimant and her late husband to R. E. & E. Towing, Inc., a corporation. According to that document, claimant's river front property on the Kanawha River was leased for a period of fifty years at a rental of $350.00 per year. R. E. & E. Towing, Inc., subleased to Ohio Valley Towing, Inc., by instrument of record in Deed Book 208 at page 529, dated January 31, 1968, and recorded March 18, 1968, the parcel that extended along the Kanawha River bank in front of Lot 5 above Ferry Street to the mouth of the Kanawha River. This sublease contained the same clause herein above quoted, which was not contained in the original lease, that improvements made to the property, including roadways, were to remain on the parcels leased.

The sublease provided for a rental of $365.00 per year, and the same term of "five years and for such further years until a bridge across the Ohio River near Point Pleasant shall have been built and opened."

There is no provision in the statute creating this Court wherein it can order or direct an agency to accomplish certain

acts or perform certain work. This Court has no authority or jurisdiction to order the respondent to remove the road. Its authority extends only to an award of damages. If the Court finds for the claimant, any such finding must sound in damages.

The claimant relies upon the letter of February 23, 1968, as a contract between the respondent and the Town of Henderson, and believes the claimant to be a third-party beneficiary of the contract. The lease agreements entered into by the claimant and the towing company provide that any roadway constructed shall not be removed. The leases provided that compensation be paid to the claimant. The leasing of the premises in question by the claimant eliminates the aspect of a taking by the respondent. If the respondent had taken the premises without just compensation, the claimant would have the remedy of mandamus to compel the respondent to condemn the premises.

From the record in this claim, the Court is of the opinion that the leasing of the premises by the claimant, and the provision in the lease against removal of the road, bars recovery by the claimant for damages to her property. Accordingly, the claim is disallowed.

Claim disallowed.

Opinion issued April 26, 1982

AUDREY P. TITTLE, ADMINISTRATOR
OF THE ESTATE OF STEVEN B. PARCELL

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-48)

Andrew J. Goodwin and *Edward C. Goldberg,* Attorneys at Law, for the claimant.

Henry C. Bias, Jr., Deputy Attorney General, and *Nancy J. Aliff,* Attorney at Law, for the respondent.

WALLACE, JUDGE:

Audrey P. Tittle, Administrator of the Estate of Steven B. Parcell, filed this claim against the respondent for $250,000.00

as the result of an accident in which Steven B. Parcell lost his life.

On the morning of February 22, 1978, Steven B. Parcell was driving his 1976 Mercury automobile westerly on an elevated portion of Interstate 64 in Charleston, West Virginia. The weather was cold and snowy. At a point near the Court Street ramp, the Parcell vehicle crossed the westbound lane, struck the median barrier or parapet on the left-hand side, went over the side, and crashed to the ground below. Mr. Parcell was killed. The decedent was a young man of twenty-six years, unmarried, who lived alone. Formerly, he had made his home with his mother, who had been separated from her husband for eight or nine years. Mr. Parcell had been an employee of the post office at Belle, West Virginia.

The claimant alleges that the respondent was negligent in its failure to remove the accumulation of snow next to the parapet, which formed a ramp over which the decedent's vehicle left the highway.

A witness for the claimant, Robert Goddard, testified that he was proceeding in the eastbound lane of the interstate at the time of the accident, that he saw the decedent's vehicle in the westbound lane about two blocks before it left the highway, and that it was at an angle pointed toward the eastbound lane. He stated:

> "That's what called it to my attention first because of him being in an angle in the highway and he, evidently, was traveling on the right lane headed west and, like I say, when noticed him, he was at an angle, with his nose pointed towards the—it would be towards his left and seemed to be—there was a white vehicle. I don't know whether it was white or cream colored or what. It was a light vehicle—was going—was stopped. I mean it was completely still. His bumper was towards the retaining wall at the break of the Court Street entrance. It was pointed out into the middle of the highway and, evidently, I mean it looked like it may have aimed to miss this vehicle setting in this peculiar situation, see, and his vehicle never recovered. . . .

He traveled across the left lane striking the retaining wall at the angle, I'd say, his left front—left front part of his vehicle where he hit the retaining wall first, you know, rode up this snow that was piled against the retaining wall or something and then it got up on top of the retaining wall and it sort of nosed down slightly, rolled up on its side and then that was the last I seen of it."

Mr. Goodard further testified that the vehicle struck the wall at an angle of about 45 degrees, that he couldn't estimate its speed, and that he did not know the condition of the road in the westbound lane.

Sergeant David Mickel of the Accident Investigation Bureau of the Charleston Police arrived at the accident scene at about 8:30 a.m. He took photographs of the automobile tracks, made measurements of the markings made by the vehicle on the parapet, and went below the interstate and measured the distances the vehicle travelled after it fell from the wall. Sergeant Mickel testified that, according to his estimate, the automobile struck the parapet at an angle of 65-75 degrees; that it rode along the top of the parapet 69 feet, 5 inches; and that it struck the face of the outside wall of the eastbound lane and then fell between the east and westbound elevated sections of the roadway. The vehicle continued its forward motion for 30 feet as it fell 29 feet to the ground, where it skidded 32 feet, 4 inches on its top. The sergeant further testified that two westbound travel lanes were being used, snow and ice were built up on the sides, and traffic was moderate. He stated:

"The highway was in a hazardous condition to the point that you could not maintain 50 miles per hour which is the speed limit."

He further stated that he did not believe that the road could have been negotiated safely at a speed in excess of 40 miles per hour under those conditions.

Garland Steele, Chief Engineer of Operations for the respondent, testified that it was the practice of the State, during the early stages of interstate-highway snow removal, to clear the travel lanes first and to store snow on adjacent shoulders prior to its removal.

The record establishes that the parapet was 32 inches high and 1½ feet wide at the top. Photographs introduced into evidence show the accumulation of snow beside the parapet over which the decedent's vehicle travelled. Although no measurements were given at the hearing, the height of the snow against the parapet appears, from the photographs, to be 15 to 20 inches below the top of the parapet, and does not seem to be a solid mass.

Dr. Carl Rotter, Professor of Physics from West Virginia University, having been given all of the photographic exhibits and the factual situation of the accident, was asked to use principles of physics in giving his opinion of the speed of the decedent's automobile when it struck the median barrier. Dr. Rotter testified that, using the factual situation as outlined to him, and assuming that the vehicle struck the barrier at an angle of 45 degrees, the velocity of the automobile toward the parapet would have been 73 feet per second, which translates to a speed of 50 miles per hour. He further testified:

> ". . .if you change the angle to 75 degrees, (as testified to by Sgt. Mickel), the speed would have been 140 miles per hour and I think that is extravagant. So I don't think 75 degrees is in any way correct in analysis of the motion of the car." (Parenthetical statement supplied.)

As sympathetic as the Court may be regarding the loss of life resulting from the accident, the Court finds, from the record, that the claimant has failed to establish actionable negligence on the part of the respondent that caused the accident. On the contrary, the physical facts of this claim create an inescapable inference that the decedent was travelling at an excessive rate of speed, taking into consideration the condition of the highway. To operate a motor vehicle in disregard of the visible condition of the roadway constituted assumption of a known risk. See *Swartzmiller v. Department of Highways,* 10 Ct.Cl. 29 (1973). A person operating a vehicle on a public highway must consider all existing conditions with regard to his own safety and the safety of others. West Virginia Code, Chapter 17C, Article 6, Section 1(a), provides:

"No person shall drive a vehicle on a highway at a speed

greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards, then existing. . . .

(3) (c) The driver of every vehicle shall, consistent with the requirements of subsection (a), drive at an appropriate reduced speed. . .when special hazard exists. . .by reason of weather or highway conditions."

This Court has many times held that the State is not a guarantor of the safety of travelers on its highways, and that the user of the highways travels at his own risk. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2nd 81 (1947); *Parsons v. State Road Commission,* 8 Ct.Cl. 35 (1969). For the reasons herein set out, the Court disallows this claim.

Claim disallowed.

Advisory Opinion issued May 20, 1982

WELDING, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-76)

No appearance by claimant.

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

PER CURIAM:

Claimant Welding, Inc. seeks payment of the sum of $22,-950.00 for furnishing and installing a hot water boiler system at the West Virginia State Prison for Women.

According to claimant's petition, on or about December 13, 1981, the prison warden telephoned Welding, Inc., informed the company that it was the low bidder on the project, and advised the claimant to begin work as soon as possible. As the old boiler had suffered a major explosion and was condemned by an Insurance Commission inspector, the situation was deemed an emergency by the respondent Department of Corrections under West Virginia Code §5A-3-17, "Emergency purchases in open market." There was an urgent need for hot

water at the Women's Prison for inmate showers, dishwashing, and laundry. An emergency requisition form was prepared at Pence Springs and received in Charleston on December 23, 1981. No one was available in the Central Office to process the requisition until December 29, at which time it was forwarded to the Purchasing Division.

Mr. Cummings, of the Purchasing Division, disapproved the emergency request. At that time, the boiler from Welding, Inc. was already on the grounds of the prison, and workmen had dismantled the old boiler and were working on fittings for the new one. There was no evidence of any intentional wrongdoing in the handling of the situation; rather, it merely was a case of administrative error.

The respondent has filed an Answer admitting the allegations of the Notice of Claim and the fact that the claim arose under an existing appropriation. The respondent further states that the matter is one to be considered under the provisions of West Virginia Code §14-2-19, "Claims under existing appropriations," which states:

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

The Code section further provides:

> "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."

In view of the foregoing, the Court hereby finds the respondent liable, and grants an award to the claimant in the amount of $22,950.00. The Clerk of the Court is hereby directed to forward copies of this Opinion to the Commissioner of the

Department of Corrections, the State Auditor, and the Governor, as provided by law.

Opinion issued May 21, 1982

GORDON A. BOBBITT

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-62)

Claimant appeared in person.

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

PER CURIAM:

Claimant herein seeks payment of the sum of $265.25 for the installation of new carpet at respondent's Anthony Center. Respondent admits the validity and amount of the claim, but also states that there were not sufficient funds on hand at the close of the fiscal year in question from which the claim could have been paid.

While we feel that this claim should, in equity and good conscience, be paid, we cannot make an award, based upon the principles established in the case of *Airkem Sales and Service, et al. v. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued May 21, 1982

DEPARTMENT OF HIGHWAYS

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-57)

Nancy J. Aliff, Attorney at Law, for the claimant.

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

PER CURIAM:

In this claim, submitted upon the pleadings, claimant seeks

payment of the sum of $194.63 for repairs performed on a Plymouth vehicle at the request of the respondent. Invoices for the material and labor, sent to the Department of Corrections' Work Release Program, remain unpaid.

Respondent, in its Answer, admits the validity and amount of the claim, but states also that sufficient funds were not on hand at the close of the fiscal year in question 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 also are of the 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 May 21, 1982

GRAFTON CITY HOSPITAL

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-36)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted upon the pleadings, claimant seeks payment of the sum of $108.00 in medical bills incurred by an inmate of respondent's Grafton Work Release Center. Respondent admits the allegations of the Notice of Claim, but further alleges that no funds remained in its appropriation for the fiscal year in question 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 also are of the 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 May 21, 1982

LARRY GREATHOUSE

vs.

DEPARTMENT OF HEALTH

(CC-82-64)

No appearance by claimant.

Curtis G. Power, III, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant seeks payment of the sum of $204.00 for clothing lost while he was a patient at Huntington State Hospital in February, 1982. The issue in this case is whether or not the respondent can be held liable for the loss of property entrusted to its care.

The situation created clearly was a bailment. While it has been held that a bailee is not liable to his bailor for loss of property caused by robbery, *Tancil v. Seaton,* 69 Va. 601 (1877), a bailee is liable where he fails to exercise ordinary care for the safety of property in his hands. 2B M.J., *Bailments,* §11. Claimant's clothing was delivered over to employees of the respondent when he checked into the hospital, and, when he checked out, a leather coat and a pair of blue jeans were missing.

Based on the foregoing facts, the respondent admitted liability in its Answer, and, accordingly, the Court makes an award to the claimant of $204.00, representing the value of the property at the time of loss.

Award of $204.00.

Opinion issued May 21, 1982

PAULINE G. MALCOMB

vs.

ALCOHOL BEVERAGE CONTROL COMMISSIONER

(CC-80-275)

Robert P. Martin, Attorney at Law, for claimant.

Gene Hal Williams, Deputy Attorney General, for respondent.

WALLACE, JUDGE:

The claimant seeks to recover $73,501.54 expended in remodeling her store and barn for use as a liquor store for the sale of alcoholic beverages as an agency of the respondent.

At a pre-trial conference held in this matter, it was determined that the claim be bifurcated and only the question of liability be heard and determined at this hearing.

The claimant had become acquainted with a person by the name of Jim Morgan who was connected with the Snowshoe Ski Resort in Pocahontas County, West Virginia. Mr. Morgan was interested in obtaining a permit for a liquor agency to serve the resort, but, for reasons unrelated to this hearing, was denied a permit. Claimant was advised by Morgan of the possibility of establishing an agency on her premises in the unincorporated community of Slatyfork, West Virginia, in Pocahontas County. In fact, he furnished her an application form and accompanied Gary Hamrick, of the Alcohol Beverage Control Commissioner, on his first visit to the claimant. Claimant was told that Slatyfork was a good location because of its proximity to the Snowshoe resort. The claimant operated a small restaurant and gas station in Slatyfork which she remodeled for the purpose of installing a liquor store. Respondent's representatives had indicated that there was not sufficient storage space, and claimant remodeled and converted an old barn on her premises to be used as the store. Although the store and storage area were supposed to be in the same premises, claimant was given permission to store liquor in her

garage until remodeling was complete. Claimant testified that no remodeling started until a permit was issued.

On June 12, 1979, claimant made application to the respondent to become a State alcohol beverage agency. An agency agreement dated July 25, 1979, was executed by the claimant and respondent after proper bond was furnished by claimant. The agency opened for business in Slatyfork on November 8, 1979. It was later determined that Pocahontas County was a dry county as the result of a local option election held on May 25, 1954. Claimant was notified to close the agency effective January 17, 1980, and the agency agreement was terminated February 16, 1980.

Mr. Hamrick, in his testimony, stated that the ABC Commissioner used a prepared list of all counties in West Virginia, and that Pocahontas County was listed as a wet county.

The claimant testified that she had no knowledge of the referendum in May of 1954 when the county voted dry. She was thirty years old in 1954 and a resident of the county. Because of the referendum, the respondent contends that the contract with the claimant was void and unenforceable, and there can be no liability on the part of the respondent. The claimant knew that the respondent had established liquor stores in the incorporated towns of Cass and Marlinton, both in Pocahontas County, and that it had been negotiating with Mr. Morgan, who wanted to establish an agency at the Snowshoe Ski Resort six miles from Slatyfork. The claimant was not an attorney nor was she represented by one at that time. She could not have been expected to be fully aware of the legal requirements necessary to make a perfectly formal contract with the State. Claimant was certainly justified in accepting the representations of the respondent. In the case of *Cook v. Dept. of Finance and Administration,* 11 Ct.Cl. 28 (1975), this Court held,

> "The Court cannot absolve the State of liability from a contract which its agent made without compliance with the letter of the law where a private citizen has been injured by the agents' actions in behalf of the State, especially when there has been no question, except technically, as to the agents' authority."

The Court is of the opinion that the respondent is liable to the claimant for damages sustained by the claimant, fully realizing that consideration must be given to any benefits realized by the claimant. This claim is therefore held open for further evidence with regard to the damages sustained by the claimant.

Opinion issued May 21, 1982

THE MICHIE COMPANY

vs.

DEPARTMENT OF HEALTH

(CC-82-35)

No appearance by claimant.

Curtis G. Power, III, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant seeks payment of the sum of $163.31 for update material to the West Virginia Code. An invoice for the material remains unpaid.

As the respondent admits the validity of the claim, and avers that sufficient funds were available in its appropriation for that particular fiscal year from which the obligation could have been paid, the Court makes an award to the claimant in the amount requested.

Award of $163.31.

Opinion issued May 21, 1982

ANGELA PRESTON

vs.

ATTORNEY GENERAL'S OFFICE

(CC-82-79)

No appearance by claimant.

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

PER CURIAM:

Claimant herein seeks payment of the sum of $110.00 for

court reporter services furnished to the Attorney General's Office. The respondent admits the validity and amount of the claim, and, as sufficient funds remained in its appropriation for the fiscal year in question from which the claim could have been paid, the Court hereby makes an award to the claimant in the amount requested.

Award of $110.00.

Opinion issued June 30, 1982

ACE ADJUSTMENT SERVICE, INC.,
AGENT FOR UNITED HOSPITAL CENTER, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-78)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $325.00 in hospital expenses for an inmate of respondent's Huttonsville Correctional Center. The prisoner, while a patient at Memorial General Hospital in Elkins, West Virginia, underwent a Computerized Axial Tomography, or CAT-scan, by the United Hospital Center, Inc., through its "CAT-scan van." United Hospital sent the bill to Huttonsville. After receiving no response, they turned the bill over to Ace Adjustment Service, Inc.

While we feel that this claim should, in equity and good conscience, be paid, we must decline to make an award, 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 June 30, 1982

APPALACHIAN ENGINEERS, INC.

vs.

DEPARTMENT OF FINANCE & ADMINISTRATION

(CC-82-90)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $1,076.16 for engineering services performed for the respondent on its main unit air conditioning. The invoice for such services was not presented for payment in the fiscal year in which the work was done, but sufficient funds remained in the respondent's appropriation for that fiscal year from which the obligation could have been paid.

Accordingly, the Court makes an award of $1,076.16 to the claimant.

Award of $1,076.16.

Opinion issued June 30, 1982

CAROL JO BROWN

vs.

DEPARTMENT OF HEALTH

(CC-82-81)

Claimant appeared in her own behalf.

Curtis G. Power, III, Assistant Attorney General, and *Henry C. Bias, Jr.*, Deputy Attorney General, for the respondent.

PER CURIAM:

Claimant herein seeks payment of the sum of $546.13 for 8½ days of accumulated annual leave in accordance with the Civil Service Rules and Regulations which went into effect December 1, 1981. A new provision in those Rules allows cer-

tain employees with over ten years of regular employment to carry forward more than 30 days from one calendar year to another. The State Auditor refused payment to the claimant beyond the 30-day period.

The authority to establish rules and regulations is granted to the Civil Service Commission by West Virginia Code §29-6-10, which states, "The commission shall have the authority to promulgate, amend or repeal rules, in accordance with chapter twenty-nine-A [§29A-1-1 et seq.] of this Code, to implement the provisions of this article." Chapter 29A, referred to above, sets forth State administrative procedures, including rule making.

There was no evidence in this claim that proper rulemaking procedures were not followed by the Civil Service Commission in establishing the provision allowing certain employees to carry forward over 30 days from one year to the next. Furthermore, the respondent, in its Answer, admits the validity and amount of the claim, and states that sufficient funds remained in its appropriation for the fiscal year in question from which the obligation could have been paid. Accordingly, the Court makes an award of $546.13 to the claimant.

Award of $546.13.

Opinion issued June 30, 1982

ARLENE BURGESS and
CHARLES E. BURGESS

vs.

DEPARMENT OF HIGHWAYS

(C-82-84)

Claimants appeared in person.

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

PER CURIAM:

On February 28, 1982, an automobile owned by the claimants and driven by Arlene Burgess struck potholes in Route 119 near Marmet, West Virginia, damaging two tires and their

rims. The claimants assert that the accident was caused by respondent's negligence, and seek damages in the sum of $169.22.

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, a claimant must prove that the 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 potholes were located on the right-hand edge of the pavement, and they were filled with water. There is no evidence that the respondent had either actual or constructive notice of those potholes. 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 June 30, 1982

CHARLESTON BUSINESS MACHINES

vs.

STATE TAX DEPARTMENT

(CC-82-54)

Jerry Lewis appeared for the claimant.

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

PER CURIAM:

Claimant seeks payment of the sum of $139.95 for a missing Victor 100 calculator which had been loaned to the Procurement Office of the State Tax Department.

At the hearing, Mr. Jerry Lewis, owner of Charleston Business Machines, stated that the cost of the machine to his com-

pany was "probably about $95.00 to $98.00." Counsel for the respondent offered no evidence to refute the claim.

It is obvious that a bailment situation existed between claimant and respondent. While a bailee is not liable for loss of property caused by robbery, *Tancil v. Seaton,* 69 Va. 601 (1877), a bailee is liable where he fails to exercise ordinary care for the safety of property in his hands. 2B M.J., *Bailments,* §11.

The Court finds that the respondent did not meet that standard of ordinary care in regard to the calculator which was on loan from the claimant, and, based on the foregoing facts, the Court makes an award to the claimant in the amount of $95.00.

Award of $95.00.

Opinion issued June 30, 1982

CHERYL M. FIDLER

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-50)

Claimant appeared in person.

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

PER CURIAM:

On February 15, 1982, an automobile owned and driven by the claimant struck a pothole on Oakwood Road in Charleston, West Virginia, necessitating a realignment of the vehicle. The claimant asserts that the accident was caused by the respondent's negligence, and seeks damages in the sum of $24.25.

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). A claimant must prove that the respondent failed to conform to a standard of "reasonable care and diligence. . . under all the circumstances." *Parsons v. State Road Commis-*

sion, 8 Ct.Cl. 35 (1969). In the instant case, the pothole was located on the claimant's right-hand side of the pavement, and was filled with water. There is no evidence that the 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 June 30, 1982

ATHOLL W. HALSTEAD

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-40)

Claimant appeared in person.

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

PER CURIAM:

Claimant filed this action to recover damages in the amount of $84.50 as the result of an accident in which claimant's 1977 Mercury Cougar struck a pothole on West Virginia State Route 3 near Comfort, West Virginia.

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 (1969). 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 the respondent had notice of the defect in the road is necessary. *Lowe v. Dept. 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 June 30, 1982

SANDRA W. PHILLIPS LARESE

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-70)

Claimant appeared in person.

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

PER CURIAM:

On December 25, 1981, Donald C. Phillips was operating claimant's automobile on U.S. Route 52 near Elkhorn, West Virginia. The automobile struck a pothole on the right-hand side of the road damaging the rim and the valve, and resulting in the loss of two wheel covers. The claimant asserts that the accident was caused by the respondent's negligence and seeks damages in the sum of $258.80.

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 (1969). 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 June 30, 1982

EUGENE P. MULLINS

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-8)

Claimant appeared in person.

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

PER CURIAM:

The claimant herein alleges damages to his 1974 Chevrolet

Impala which resulted when the vehicle struck a pothole on West Virginia Route 41 on January 2, 1982, while the claimant was proceeding from Beckley, West Virginia, to his home at Terry, West Virginia.

The pothole struck by claimant's vehicle was located on the right-hand side of the road, partly in the berm and partly in the paved portion of the highway. Claimant's vehicle sustained damages in the amount of $155.78 as a result.

No evidence was introduced to prove knowledge, either actual or constructive, of the existence of the pothole on the part of the respondent. The law is well established in West Virginia 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). Before the respondent can be held liable, there must be some showing that the respondent knew or should have known of the defect in the highway. Accordingly, the Court disallows the claim.

Claim disallowed.

Opinion issued June 30, 1982

ELDEAN RUSSELL

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-60)

Claimant appeared in person.

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

PER CURIAM:

On February 17, 1982, claimant Eldean Russell was operating her 1976 Ford Torino automobile on State Route 3 in Comfort, West Virginia, when the right front and right rear tires struck a pothole causing damage to the right rear tire. The claimant testified that the damage was in the amount of $98.00.

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 (1969). 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 the respondent had notice of the defect in the road is necessary. *Lowe v. Department of Highways,* 8 Ct.Cl. 210 (1971).

As the claimant lived near the area where the pothole was located and was familiar with the pothole, the claimant herself was guilty of negligence which equalled or surpassed that of the respondent.

Accordingly, the Court must disallow this claim.

Claim disallowed.

Opinion issued June 30, 1982

RENNA J. WILCOX

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-63)

Claimant appeared in person.

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

PER CURIAM:

On February 16, 1982, an automobile owned and operated by the claimant struck a pothole on North Kanawha, a street located in Beckley, West Virginia, and maintained by the respondent. As a result of striking the pothole, the automobile sustained damage to the right front tire and was knocked out of alignment. The claimant asserts that the accident was caused by the respondent's negligence, and seeks damages in the sum of $116.28.

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). A claimant must prove that the respondent failed to conform to a standard of "reasonable care and diligence in the maintenance of a highway under all the circumstances." *Parsons v. State Road Commission,* 8 Ct.Cl. 35 (1969). In the instant case, the pothole was located on the claimant's right-hand side of the pavement and was filled with water. There is no evidence that the 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 July 1, 1982

JACK E. BROWN

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-6)

Paula G. Brown appeared for the claimant.

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

PER CURIAM:

On November 11, 1981, Paula G. Brown was operating claimant's 1976 Ford Pinto wagon on W.Va. Route 60, a four-lane highway in Belle, West Virginia. She was proceeding east towards Montgomery, West Virginia, when she approached a bridge. While upon the bridge, she slowed down and attempted to avoid a small pothole in the right-hand portion of the right lane of travel, but then hit a larger pothole in the center of the two eastbound lanes. As a result of striking the pothole, the claimant incurred a towing charge in the amount of $15.00, replacement costs for the tire and rim in the amount of $105.06, and costs for the repair of wiring in the vehicle in the amount of $32.03, for a total of $152.09 in damages. At the hearing it

was determined that the vehicle was titled in the name of Jack E. Brown, the husband of Paula G. Brown. The Court thereupon amended the style of the claim to reflect the name of the owner of the vehicle.

Photographs of the pothole struck by claimant's vehicle revealed the pothole to be of sufficient depth that the steel reinforcing rods on the bridge were exposed. U.S. Route 60 is one of the most heavily travelled highways in the State. The nature and extent of the pothole demonstrate that it must have been in existence for some appreciable time before the accident happened.

While the respondent is not an insurer of those using its highways, it does owe a duty of exercising reasonable care and diligence in the maintenance of the highways. If the respondent knows or should know of such a defect in the highway, as in this case, it must take the necessary steps within a reasonable period of time to repair the defect. *Lohan v. Dept. of Highways,* 11 Ct.Cl. 39 (1975).

From the record, and for the reasons herein set out, the Court makes an award of $152.09 to the claimant.

Award of $152.09.

Opinion issued July 1, 1982

CHICAGO EMBROIDERY COMPANY

vs.

OFFICE OF THE SECRETARY OF STATE

(CC-82-91)

Kevin Blackwell, Attorney at Law, for claimant.

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

PER CURIAM:

Claimant herein seeks payment of the sum of $3,468.07 for cloth emblems of the State seal purchased by the respondent. The claim is submitted for decision upon the pleadings, which reveal that the claim is valid and that sufficient funds remained

in respondent's appropriation for the fiscal year in question from which the obligation could have been paid.

Based on the foregoing, the Court hereby makes an award to the claimant in the amount requested.

Award of $3,468.07.

Opinion issued July 1, 1982

PATRICIA ANN HALL and LACY HALL

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-442)

Claimant *Patricia Ann Hall* appeared in person.

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

PER CURIAM:

On September 10, 1981, Patricia Ann Hall was driving her 1975 Mercury Bobcat automobile on W.Va. Route 49 between Matewan and Delorme, West Virginia. The claimant was proceeding toward Matewan at approximately 1:00 to 1:30 p.m. It was a clear day and the road surface was dry. As the claimant topped a small knoll, she came upon a rock fall in the road which covered the entire lane of claimant's lane of travel and some of the opposite lane. The claimant was then forced to "cut over to miss it and almost went over the guardrail on the other side. . . ." The claimant's vehicle sustained damages in the amount of $1,846.78.

The testimony in this claim established that the rock slide had occurred sometime the previous day and that the Department of Highways had been notified of the slide, but no signs were placed to warn the traveling public of the hazard, nor was the slide removed in a timely manner. As the slide covered the major part of the road, it was forseeable that vehicles using the road might have an accident. The respondent's failure to remove the slide or erect warning devices constituted negli-

gence and was the proximate cause of the accident. *Farley v. Dept. of Highways,* 13 Ct.Cl. 63 (1979).

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). However, the State can be found liable if the maintenance of its roads falls short of a standard of "reasonable care and diligence. . .under all the circumstances." *Parsons v. State Road Comm'n.,* 8 Ct.Cl. 35 (1969). Accordingly, the Court makes an award to the claimant in the amount of $1,846.78.

The record indicated that the title to the vehicle was in the names of Patricia Ann Hall and Lacy Hall. Accordingly, the Court amended the style of the claim to include both parties as claimants.

Award of $1,846.78.

Opinion issued July 1, 1982

THE HERTZ CORPORATION

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-82-137)

No appearance by claimant.

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

PER CURIAM:

Damages in the amount of $600.00 were caused to a Hertz vehicle while being driven by an employee of the Department of Public Safety on November 11, 1981, in Clearwater, Florida.

As the respondent admits the validity and amount of the claim, the Court makes an award to the claimant in the amount admitted.

Award of $600.00.

Opinion issued July 1, 1982

JOHNSON CONTROLS, INC.

vs.

DEPARTMENT OF FINANCE & ADMINISTRATION

(CC-82-87)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $2,856.20 for maintenance and service on mechanical equipment in the State Capitol Complex buildings, including work on chillers, air-handling units, pumps, and temperature controls. The respondent answers and says that there was a failure on the part of the claimant to bill the Department of Finance & Administration in the same fiscal year in which the work was performed. However, sufficient funds remained in the respondent's appropriation from which the obligation could have been paid.

In view of the foregoing, the Court hereby makes an award to the claimant in the amount admitted.

Award of $2,856.20.

Opinion issued July 1, 1982

LIBERTY MUTUAL INSURANCE COMPANY, SUBROGEE OF EDWARD E. and JENNIFER DILLING, and EDWARD E. and JENNIFER DILLING

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-93)

William E. Mohler, III, Attorney at Law, for claimant.

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

PER CURIAM:

Claimant Edward E. Dilling was involved in an accident on July 18, 1979, at approximately 9:30 or 10:00 p.m. on Route

39 near St. Marys, West Virginia. Claimants contend that the accident was the result of negligence on the part of respondent's employee in failing to properly park an endloader on the edge of Federal Ridge Road (State Route 39) such that the bucket of the endloader jutted into the travelled portion of the roadway. Claimants further allege that respondent's employees were negligent in failing to place warning devices or signs to inform the travelling public of the presence of the endloader. As a result of the accident, the claimant Edward Dilling suffered personal injuries, and his 1979 Chevrolet pickup truck sustained damages in the sum of $2,639.24.

At the time of the accident, the claimant was driving upgrade into a curve. He testified that the head lights of a vehicle approaching from the opposite direction blinded him and that the pickup truck then struck the bucket of the endloader.

Sherwood Wince, an equipment operator for the respondent, testified that he had been operating the endloader on a construction project to set piling. His usual procedure was to park the endloader between two stacks of piling, as far off the roadway as possible, with the bucket dipped down. He had parked the endloader in this manner on the evening of the accident described herein. No flashing lights or warning signs were placed in the vicinity of the parked endloader.

Thomas Aubrey, claims investigator for the respondent, testified that he visited the accident site and took measurements of the width of Federal Ridge Road approximately where the endloader was parked. The gravel portion of the road measured 27 feet in width and the berm measured 11 feet in width.

From the record, the Court is of the opinion that the failure of the respondent to place a warning light to indicate the presence of the endloader was negligence. However, the Court finds that the claimant, in failing to appreciably slow down his truck when blinded by the lights of the oncoming vehicle, was himself guilty of negligence which proximately contributed, to the extent of 25 per cent, to cause the accident and his resulting injuries and damages. *Adkins v. Department of Highways*, 13 Ct.Cl. 355 (1981).

The claimant sustained a concussion, bruises, and a lacera-

tion to his right leg for which he incurred medical expenses aggregating $691.90 as follows: Marietta Memorial Hospital, $513.66; Radiology Services, Inc., $110.40; Phillips Pharmacy, $12.84; and Larry B. Gale, M.D., $55.00. Liberty Mutual Insurance Company paid all of the medical expenses and all but the $100 deductible of the property damage. Claimant Edward Dilling's injuries were not permanent in nature. In view of all of the evidence, the Court determines the damages to be $3,231.14 to Liberty Mutual Insurance Company, and $100.00 to claimants Edward E. and Jennifer Dilling, which sums must necessarily be reduced by 25 per cent to reflect the contributory negligence of claimant Edward E. Dilling.

Award to Liberty Mutual Insurance Company of $2,423.35.

Award to Edward E. and Jennifer Dilling of $75.00.

Opinion issued July 1, 1982

MOORE BUSINESS FORMS, INC.

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-82-41)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted for decision based upon the Notice of Claim and an Amended Answer. Claimant seeks payment of the sum of $2,586.61 for forms printed for the Department of Public Safety.

As the respondent, in its Amended Answer, admits the amount and validity of the claim, and as sufficient funds remained in its appropriation for the fiscal year in question from which the claim could have been paid, the Court makes an award to the claimant in the amount admitted.

Award of $2,586.61.

Opinion issued July 2, 1982

DONALD E. ASHLEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-61)

Imogene Jean Ashley for the claimant.

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

PER CURIAM:

On February 9, 1982, Imogene Jean Ashley was operating a 1976 Oldsmobile on West Virginia Route 119 proceeding south toward Charleston, West Virginia. It was approximately 5:30 a.m. on a misty, dark morning. Mrs. Ashley had just picked up her rider, and the two of them were on their way to work when she came upon rocks in the road. She attempted to miss the rocks by straddling a large one, but, in so doing, damaged the underside of the automobile. This claim was filed by Imogene Jean Ashley but the Court amended the style of the claim to correspond with the name of the registered owner. Damages to the vehicle were in the amount of $227.43.

Mrs. Ashley testified that she had observed rock slides in this area of State Route 119 on prior occasions. She further testified that two employees of the respondent came upon the scene shortly after the accident. They informed her that they had just received a call that the rock fall had occurred.

Thomas Aubrey, a claims investigator for the respondent, testified that his investigation revealed that a call had been received in the office of the Kanawha County Sheriff at about 5:30 a.m. informing the respondent of the rock fall on State Route 119.

There is no evidence that the respondent knew or should have known of the existence of an unusually dangerous condition, and it is apparent from the evidence that the rocks had fallen just prior to the accident. From the record there is no showing of negligence on the part of the respondent, and accordingly, the Court disallows this claim. See *Bolyard v. Department of Highways*, 12 Ct.Cl. 344 (1979).

Claim disallowed.

Opinion issued July 2, 1982

DOROTHY M. GORE

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-161)

Tom Zerbe, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

Claimant filed this claim against the respondent for the value of her 1970 Chevrolet Nova automobile as the result of an accident which occurred on West Virginia Route 20 between Bluestone Dam and Bluestone Bridge on September 21, 1979. On the evening of the accident, the claimant had picked up her friend, Ken G. Milliner, and, because she was tired, allowed him to drive. The claimant and Milliner's cousin, Billy Jones, were passengers. They were proceeding northerly on West Virginia Route 20 to Hinton, West Virginia, at about 8:30-9:00 p.m. Bluestone Lake was on the right side and a cliff was located on the left side of the highway. It had been raining and was very foggy. The claimant, who was familiar with the road, had warned the driver to watch for falling rocks. The driver testified that he was travelling about 25-30 mph and that the headlights were on low beam. As they approached the area of the Bluestone Bridge, an oncoming vehicle flashed its lights, and, shortly thereafter, claimant's automobile struck a rock in the highway. The vehicle went over the embankment and landed upside-down fifty feet from the lake. The driver stated that because of the bright lights of the oncoming vehicle and the fog, he was unable to see the rock.

The claimant testified that her automobile was a total loss; that she had purchased it in June or July of 1979 for $550.00; that she had done considerable repairs on it, and that she could have sold it for $700.00 at the time of the accident. No other evidence of value was introduced, and no mention was made of the salvage value of the vehicle.

In addition to the claimant and the driver of the automobile, three witnesses testified on behalf of the claimant. Dean Lowry, Sr., and Albert L. Ward, former employees of the respondent, testified that they were familiar with the particular section of West Virginia Route 20 where the accident occurred. Both witnesses testified that the road was constructed in the late 1940's; that rock falls were frequent, especially in wet and freezing weather; that it was necessary to remove rocks on numerous occasions; and that nothing had been done by the respondent to correct the situation. Nancy Moles testified that she had been living four miles away in Hinton for 46 years; that she works at Bluestone State Park and travels the road to and from work; and that she was familiar with the road and with slides which occur in wet weather.

Bill Hanshaw, District 9 Engineer, testified for the respondent:

> "The route runs generally north and south from the Bluestone Dam to the Bluestone Bridge. It's generally rolling in nature. It's bounded on the east side by the Bluestone Lake and on the west side by varying heights of cut slopes from approximately 20 feet high to nearly 200 feet high. . . .
>
> The cut slopes are composed of layers of shale and earth and the erosion action from the weathering causes the cut slope to shear off at times with small to large rocks, particularly in the wet freezing season. This is common with many cuts throughout West Virginia. We have investigated these particular cut slopes with the idea of trying to correct that situation; however, this is a major undertaking. It's placed on a priority list with many other projects. We just haven't proceeded to find funding to move ahead on this project."

The respondent maintains "Falling Rock" signs in the area beside the highway.

Of necessity there are thousands of cuts and fills upon West Virginia highways. Many cuts are made through rock. If it were possible to prevent rocks from falling from the resulting

rock cliffs, there would be no need to warn the travelling public of that danger by "Falling Rock" signs. Having been warned, as in this case, it is the duty of the travelling public to heed such warning and it would be unreasonable to impose liability for damage resulting from fallen rocks unless it is proved that the respondent knew, or in the exercise of ordinary care, should have known of the particular slide involved. Since that was not proved in this case, the Court cannot conclude that the respondent was guilty of negligence which caused the claimant's damage.

Claim disallowed.

Opinion issued July 2, 1982

CHARLES L. KINNEY and
JOYCE I. KINNEY d/b/a
THE SOUTHWOOD CARRYOUT

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-696)

George J. Cosenza, Attorney at Law, for the claimants.

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

WALLACE, JUDGE:

Claimants seek damages of $240,000.00 from the respondent by reason of changes in the traffic pattern on West Virginia Route 14 in Parkersburg, West Virginia. Claimants operated a carry-out business known as The Southwood Carryout on Twenty-first Avenue in Parkersburg. The business consisted of the sale of beer, nonalcoholic beverages, and snack-type food items. Twenty-first Avenue intersects the west side of West Virginia Route 14.

In April of 1978, the respondent undertook a change in the traffic pattern of Route 14. A median strip separating the north and south lanes was constructed and traffic-control de-

vices were installed. The work was completed in June of 1979. The claimants contend that the changes made by the respondent limited the access to Twenty-first Avenue from Route 14, destroying their business.

The respondent filed its Motion to Dismiss the claim on the basis that the claimants failed to state a cause of action upon which relief could be granted, because the jurisdiction of this Court does not extend to any claim in which a proceeding may be maintained against the State in the regular courts of the State, namely, a condemnation suit. At the pretrial conference held in this matter, the parties were asked to submit memoranda to substantiate their respective positions.

The claimants' business was not located on West Virginia Route 14 where the construction took place, but on Twenty-first Avenue, and there is no basis for a proceeding in eminent domain. The Court is of the opinion, however, that the claim presented does not establish a cause of action against the respondent. Chapter 17, Article 2A, Section 12 of the West Virginia Code gives the West Virginia Commissioner of Highways the right and the duty, in the interest of safety and convenience and control of vehicular traffic, to establish regulations relating to and controlling the location, construction, and maintenance of traffic control factors. The Commissioner may not unduly interfere with any abutting property owner's entrance or access rights to a highway. In this claim, the claimants' business did not abut on West Virginia Route 14 on which the traffic pattern was changed. A non-abutting property owner is not entitled to damages for impairment of access if reasonable and adequate access is provided in another direction or by other means. *Heavner et al. v. State Road Commission,* 118 W.Va. 630, 191 S.E. 574 (1937); *State ex rel. Wiley v. State Road Commission,* 148 W.Va. 76, 133 S.E.2d 113 (1963).

Accordingly, respondent's Motion to Dismiss is hereby sustained.

Claim dismissed.

Opinion issued July 2, 1982

DOLORES MOORE

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-240)

A. Dana Kahle, Attorney at Law, for the claimant.

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

WALLACE, JUDGE:

This claim in the amount of $50,000.00 was filed by the claimant against the respondent for damages resulting from a fall on West Virginia Route 2. By agreement of the parties, this claim was submitted to the Court for decision on the pleadings, stipulation of damages, and the deposition of the claimant.

On June 12, 1978, the claimant had been driving southerly on Warwood Avenue in Wheeling, West Virginia. Warwood Avenue is also West Virginia Route 2 maintained by the respondent. She parked her automobile beside the west curb in order to go across the street to Beckett's Flower Shop. She purchased three small plants and returned across the street to her vehicle where she intended to place the plants in her automobile on the passenger side. As the claimant proceeded around her automobile, she fell down and severely injured her foot. It was later determined that there was a drop-off in the road surface of 1 to 1½ inches about 18 inches from the curb. In explaining what happened, the claimant stated in her deposition:

> "and when I came back — what I had purchased — I was going to go around the car and put them in. But when I got so far, something just, I just went down and it was this offset in the street."

In July of 1976, resurfacing of this particular section of Warwood Avenue, or West Virginia Route 2, was completed by Tri-State Asphalt Co. pursuant to respondent's specifications. The road at the point of the accident is 38 feet wide. To permit proper drainage, 18 inches of the existing pavement adjacent to the curb on each side of the street was not resurfaced. This

space of 18 inches was 1-1½ inches lower than the resurfaced pavement.

The law of West Virginia is well established that the State does not guarantee nor ensure the safety of travelers on its highways, and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947); *Lowe v. Department of Highways,* 8 Ct.Cl. 210 (1971). The roadway surface contained no defects and the respondent did not breach its duty of reasonable care and diligence in the resurfacing of the highway. For this Court to find for the claimant, actionable negligence on the part of the respondent must be established by the evidence. *White v. Department of Highways,* 11 Ct.Cl. 138 (1976). The lower elevation existed on both sides of the street. The claimant traversed the curb portion on both sides, once while crossing to the store, and again on her return to her automobile. Had the claimant exercised reasonable care under the circumstances and maintained a proper lookout, she would have avoided her fall and resultant injury. Her failure to do so was the proximate cause of her injury. *Welch v. Department of Highways*, 12 Ct.Cl. 136 (1978); *Hall v. Board of Regents,* 12 Ct.Cl. 232 (1978); *Winer v. Department of Highways*, 12 Ct.Cl. 353 (1979). Accordingly, the Court must disallow this claim.

Claim disallowed.

Opinion issued July 2, 1982

EARL G. MUCK

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-69)

Claimant appeared in person.

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

PER CURIAM:

Claimant Earl G. Muck lives on State Road 15/6 in Liberty, Jackson County, West Virginia. State Road 15/6 is a road

> "All claims, disputes and other matters in question between the Contractor and the Owner arising out of, or relating to, the Contract Documents or the breach thereof, * * * shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. * * * The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."

Subsequently, a dispute arose between the parties based upon a claim by Hughes-Bechtol that the respondent, on the one hand, had caused substantial delay in performance of the contract and, on the other hand, had refused to extend the time of performance. When amicable resolution of the dispute failed, Hughes-Bechtol filed a demand for arbitration at the Cincinnati Regional Office of the American Arbitration Association asserting a claim for damages in the sum of $932,-172.00. On December 12, 1980, it was served upon the respondent. An arbitrator was duly appointed and, at a hearing on February 10, 1982, it was determined that the dispute was arbitrable. A hearing upon the merits of the dispute began on March 18 and continued on March 19, April 9 and May 29, 1981. On June 9, 1981, an award was made to Hughes-Bechtol in the sum of $521,326.48 to which fees of $7,884.63 were added, making a total of $542,982.11. That item is included in the present claim of $1,275,570.70 which also includes other disputes between the parties.

The matter now is before this court upon the claimant's motion for partial summary judgment enforcing the arbitration award. The gist of the respondent's position in opposition to that motion is that the quoted arbitration provision of the contract is void and unenforceable because this court has exclusive jurisdiction of claims against state agencies such as the respondent and, for that reason, the respondent had no authority to agree to arbitration. The principal authority cited for that position is the case of *J. L. Simmons Company, Inc., v. Capital Development Board,* 424 N.E.2d 821 (Ill. 1981), a very similar case in which enforcement of an arbitration award was

edge of the existence of this defect, this Court is of the opinion that it did have constructive notice. Route 119 is one of the main arteries for motorists travelling north in Kanawha County. 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. See *Stone v. Department of Highways,* 12 Ct.Cl. 259 (1979). 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 claimants in the amount of $122.00.

Award of $122.00.

Opinion issued July 26, 1982

HUGHES-BECHTOL, INC.

vs.

BOARD OF REGENTS

(CC-81-450)

E. Glenn Robinson, Attorney at Law, and *David L. Wyant,* Attorney at Law, for claimant.

Victor A. Barone, Deputy Attorney General, and *Henry C. Bias, Jr.,* Deputy Attorney General, for respondent.

RULEY, JUDGE:

This claim grows out of a written contract upon a printed form designated AIA Document A101, Owner-Contractor Agreement, incorporating AIA Document A201, General Conditions of the Contract for Construction, dated March 14, 1979, and duly executed by the claimant and respondent, respectively. The contract provides for the construction of a Multi-Purpose Physical Education Facility at Marshall University, in Huntington, for a fixed sum of $3,162,173.00. The contract was approved by: the Director of the Purchasing Division; the Commissioner of the Department of Finance & Administration; and, finally, by the Attorney General on April 9, 1979. Paragraph 7.9.1 of the General Conditions, pertaining to Arbitration, provides:

While we believe that this claim should, in equity and good conscience, be paid, we further believe 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 July 13, 1982

HARRY R. SELLARDS and FRANCIS A. SELLARDS

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-83)

Claimants appeared in person.

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

PER CURIAM:

Claimants filed this claim in the amount of $432.00 for damage to their 1981 Oldsmobile which occurred when the vehicle struck a pothole on U.S. Route 119 in Hernshaw, Kanawha County, West Virginia.

Mr. Sellards, the driver of the vehicle, testified that he was proceeding north on Route 119 at approximately 9:00 p.m. on the evening of March 16, 1982. He estimated his speed to be 40-50 mph. It had been raining, and the road was wet. Suddenly, the car struck a pothole located on the right-hand side of the road. Mr. Sellards stated that the last time he had driven that road was three or four weeks prior to the date of the accident, at which time the hole did not exist.

Damage to the wheels of claimants' automobile totalled $432.10. Of that amount, claimants paid a $122.00 deductible; the rest was paid by their insurer. Therefore, the actual amount of their claim is $122.00.

While the 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 for their safety. While there was no direct evidence that the respondent had actual knowl-

curred on May 21-23, 1979, incident to testing by employees of the respondent was filed on July 29, 1981. The applicable period of limitation prescribed by West Virginia Code, §55-2-12, is two years. West Virginia Code, §14-2-21, relating to jurisdiction of the Court, provides, in part:

> "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.***"

Accordingly, this Court has no jurisdiction of this claim and cannot consider the same.

Claim disallowed.

Opinion issued July 13, 1982

MOUNTAINEER MOTOR SALES, INC.

vs.

FARM MANAGEMENT COMMISSION

(CC-82-106)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted upon the pleadings, claimant seeks payment of the sum of $86.87 for a tachometer purchased by the respondent.

The respondent, in its Answer, admits the validity and amount of the claim, but further states that there were insufficient funds remaining in its appropriation for the fiscal year in question from which the claim could have been paid.

Advisory opinion issued July 13, 1982

DEPARTMENT OF HIGHWAYS

vs.

FARM MANAGEMENT COMMISSION

(CC-82-58)

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

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $8,379.91 for aggregate and gas and lube purchases made by the Farm Management Commission.

Respondent answers and says that the claim is valid and the amount is correct, but that no funds remained in its appropriation for the fiscal year in question from which the obligation could have been paid.

While we feel that this claim should, in equity and good conscience, be paid, we further believe 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 July 13, 1982

JOYCE HUPP

vs.

OFFICE OF THE CHIEF MEDICAL EXAMINER

(CC-81-238)

Claimant appeared in person.

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

WALLACE, JUDGE:

This claim in the sum of $392.96 for property damage to an air conditioning unit in claimant's dwelling house which oc-

Q. And your car stalled?

A. Yes.

Q. Then I presume he struck you?

A. Yes, he backed on top of the hood of my car."

Ray Pack, a foreman for the respondent, testified that at the time of the accident the road grader was pulling shoulders. There were signs on both ends of the operation indicating "Shoulder Work" and "Flagmen Ahead." The flagman on one end would pass a ring to the last vehicle in the line of traffic to give to the flagman on the other end for the one-lane traffic pattern to proceed around the shoulder work. Mr. Pack testified as follows:

". . .as the traffic was going through, Mrs. Wheeler got in the right-hand lane behind the grader and our laborer that was between the flagman and the grader directed her to the left-hand lane. As soon as she passed the laborer then, she got back in the right-hand lane behind the grader and followed him to a stop."

Mr. Pack did not observe the accident as it occurred in the curve out of his view.

The road grader operator, Emery Plumley, testified that he was backing up in the usual manner on a ditching project; that he had observed traffic proceeding around him in the other lane; and that he looked back and then proceeded to back up, whereupon the grader struck claimant's vehicle. He did not observe the claimant's vehicle prior to striking it.

The Court is constrained to hold that, under the factual situation presented here, the claimant's failure to remain in the line of traffic directed to proceed around this ditching operation was negligence which was the proximate cause of the damage to her vehicle. Accordingly, the Court must disallow the claim.

Claim disallowed.

Opinion issued July 2, 1982

DREMA FAYE WHEELER

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-39)

Claimant appeared in person.

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

PER CURIAM:

Claimant Drema Faye Wheeler suffered damage to her 1974 Buick Impala in an accident with a road grader operated by an employee of the respondent.

On September 1, 1981, claimant was proceeding on State Route 19/21 Bypass when she approached a flagman with a "Slow" flag who was directing vehicles around a road grader. The road grader was in claimant's lane of travel. Claimant testified as follows:

A. "Well, I was driving and I saw a flagman with a 'Slow' flag. So all the traffic was going slow and there was a grader up ahead and as each vehicle got behind the grader, it would go around it. When I got behind him, it was in a curve and I couldn't see to go around him and I was going to follow him so around the curve until I could see, and he stopped and I stopped.

Q. This was the grader operator?

A. Yes, and he started backing up. When I seen that he wasn't going to even look back, then I started to put my reverse in to move the car and go back and it stalled on me.

Q. You started to back up?

A. Yes, sir.

way of the respondent, the Court is of the opinion to and does hereby disallow this claim.

Claim disallowed.

Opinion issued July 2, 1982

RANDALL E. ROWLEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-16)

Claimant appeared in person.

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

PER CURIAM:

On December 26, 1981, claimant Randall Rowley was operating his 1980 Buick Regal on I-77 southbound just north of the Kenna Exit when he approached a bridge on the interstate. He noticed several holes in the right-lane of the bridge, so he moved into the left-lane to avoid the holes; in so doing, the claimant's vehicle struck a hole at the end of the bridge in the left-lane. The left front tire of claimant's vehicle was damaged as well as the rim and wire wheel cover. The damages sustained by claimant's vehicle are in the amount of $201.62.

This Court has often held that the State is not an insurer of the safety of highway travelers. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). To be held liable, the respondent must have had either actual or constructive notice of the hazardous condition of the highway. As no such evidence of notice was presented in the instant case, the respondent cannot be found negligent. Accordingly, the Court hereby disallows the claim.

Claim disallowed.

to his driveway caused by water run-off in the drainage ditch which flows on both sides of the driveway. This ditch line located on Dairy Road is owned and maintained by the respondent.

During 1977, Dairy Road was resurfaced. At that time, Mr. Philpot experienced problems with water flowing over the driveway instead of through the culvert under the driveway.

Claimant's residence was constructed in 1976. During the construction, the contractor placed a culvert under the driveway and a steel grate at the end of the driveway over a concrete box culvert. Mr. Philpot experienced no water or erosion problems until Dairy Road was resurfaced and rock placed in the ditch lines in front of his residence. Claimant informed the respondent of these problems, and the respondent removed some of the rocks from the ditch line. Since that time, Mr. Philpot has experienced water and erosion problems with his driveway during heavy rains. No estimate for the cost of repairing the driveway or the steel grate over the box culvert were submitted by the claimant.

Kenneth W. Rumbaugh, a District One Maintenance Assistant for the respondent, testified that he had inspected the claimant's property in response to a complaint from him. Mr. Rumbaugh explained that the ditch of dump rock was placed by the respondent to prevent erosion and to slow down the flow of water in order to minimize any damage that the water itself might cause. He also testified that a permit from the respondent is necessary for any construction upon the right of way of the respondent. The permit requires "that whatever construction, whether it be a driveway or a drainage facility or anything else—whatever is being constructed is required to be constructed and maintained by the property owner."

From the record, the Court cannot conclude that the damage to claimant's driveway was due to any negligence on the part of the respondent. In fact, the respondent has maintained the ditch line in the usual and customary manner for hillside residential areas. As it is the responsibility of the property owner to maintain driveways constructed upon the rights of

owned and maintained by the respondent. The claimant filed for damages to his 1976 Plymouth station wagon when the vehicle became stuck in mud on State Road 15/6. The cost of repairing the vehicle was $670.95.

The claimant contends that this road has been poorly maintained by the respondent since 1978. Photographs of the road taken subsequent to claimant's accident depict a muddy, rut-filled road.

The respondent's County Superintendent, Everett Parrish, testified that the maintenance performed on Route 15/6 from 1978 through 1982 was in excess of what would normally be done to this particular class of road. He further testified that 15/6 "is a stabilized road with aggregate and a gravel cover on top of that" and that it is a class 4/5 priority road.

The record in this claim establishes that Route 15/6 is a road that has been maintained as well as could be expected given its classification as a class 4/5 priority road. For this Court to substitute its judgment as to the amount of maintenance to be afforded to roads of this type, for the judgment of the respondent, would be an arrogant misuse of power and might place an impossible economic burden upon the respondent. Accordingly, the Court cannot conclude that there was negligence on the part of the respondent.

Claim disallowed.

Opinion issued July 2, 1982

RICHARD T. PHILPOT

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-47)

Claimant appeared in person.

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

PER CURIAM:

Claimant Richard T. Philpot is a resident of Dairy Road in Poca, West Virginia. Mr. Philpot filed this claim for damages

denied because the Illinois Court of Claims has exclusive jurisdiction of the matter arbitrated. An examination of the Illinois Statute cited in that case, delineating the jurisdiction of its Court of Claims, Ill. Rev. Stat. 1979, Ch. 37, §439.8, and upon which the decision turned, however, discloses that it provides:

> "The court shall have exclusive jurisdiction to hear and determine the following matters:
>
> * * *
>
> (b) All claims against the State founded upon any contract entered into with the State of Illinois.
>
> * * *"

In view of that statute, that decision could not have been otherwise. West Virginia has no similar statute.

West Virginia does have substantial statutory and case law on the subject of arbitration and, if nothing else is clear, it is certain that the policy of the law of this state favors arbitration. In *Board of Education v. W. Harley Miller, Inc.*, ... W.Va. ..... , 236 S.E.2d 439 (1977), our Supreme Court of Appeals stated:

> "* * * Where parties to a contract agree to arbitrate either all disputes or particular limited disputes arising under the contract, and where the parties bargained for the arbitration provision, then, arbitration is mandatory, and any causes of action under the contract which by the contract terms are made arbitrable are merged, in the absence of fraud, with the arbitration award and the arbitration award is enforceable upon a complaint setting forth the contract, the arbitration provision, and the award of the arbitrators upon motion for summary judgment made at the proper time.
>
> [4] The important words in the new rule are that the agreement to arbitrate must have been 'bargained for.' * * *"

If the agreement to arbitrate in this case was not "bargained

for," in view of its various approvals, it would be difficult to conceive one that was.

In addition, West Virginia Code, §55-10-1, provides:

> "Persons desiring to end any controversy, whether there be a suit pending therefor or not, may submit the same to arbitration, and agree that such submissions may be entered of record in *any court*. Upon proof of such agreement out of court, * * * it shall be entered in the proceedings of such court; and thereupon a rule shall be made that the parties shall submit to the award which shall be made in pursuance of such agreement. * * *" (Emphasis supplied).

The emphasized language "*any court*" plainly is broad enough to include this court and it is equally plain that the legislature could have excluded this court from the operation of that statute had it wished to do so.

Finally, the general law appears to be to the effect that a state or its agencies may enter a valid contract with a private party providing for the arbitration of disputes that may arise under the contract. See 5 Am. Jur. 2d *"Arbitration and Award"* §67 and also 81A C. J. S. *"Arbitration"* §168c, page 636, where it is stated:

> "The parties to a contract for state improvements may agree to select an umpire or arbitrator to settle disputes as to the interpretation of the contract, and the rights of the parties thereunder, and his decision is binding in the absence of fraud or bad faith; * * *."

Since there is no assertion of fraud or bad faith in this case, this court is obligated to grant the pending motion and allow the award of $542,982.11. In addition, it appears proper to stay proceedings in this court as to the remaining matters in dispute pending their arbitration. See *Zando, Martin & Milstead, Inc. v. State Building Commission*, 13 Ct.Cl. 354 (1981).

Award of $542,982.11.

Opinion issued September 20, 1982

NORMAN E. BENSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-503)

Damon Morgan, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

Claimant Norman Benson was employed by Mason County, West Virginia, as a Deputy Sheriff. On January 4, 1979, he responded to a call concerning an accident on the Shadle Bridge located in Point Pleasant, West Virginia. Upon arriving at the scene of the accident, the claimant began directing traffic around a vehicle stalled on the bridge. As he was directing traffic, he stepped into a hole approximately two feet in length between the steel members of the bridge deck. As a result of falling into the hole on the bridge, the claimant sustained a broken wrist and contusions and ligament damage to his left knee. Claimant incurred medical expenses in the amount of $765.00 and loss of wages in the amount of $3,500.00. He still experiences pain and inconvenience from the knee injury.

The claimant alleges that failure of the respondent to maintain the Shadle Bridge in adequate condition was negligence, and such negligence was the proximate cause of the injuries and losses which he incurred.

The claimant testified that he had seen the particular hole into which he fell on the morning of the day on which he fell, and that he saw the hole again upon arriving at the accident scene prior to directing traffic. He stated that he forgot the existence of the hole in the course of directing the traffic. The hole was located approximately 20 feet from the stalled vehicle in the southbound lane of the two-lane bridge and close to the center line of the two lanes.

Frank C. Liss, the District I Crews Maintenance Engineer, testified on behalf of the respondent. He stated that the Shadle

Bridge has a steel grid deck with evidence of deterioration as one could hear the rattling of the steel when crossing the bridge. He further testified that when the first signs of deterioration began in 1975, crews of the respondent welded sections of the steel deck as they broke. The second type of repair performed by the respondent was the placement of quarter-inch, flat-welded steel over breakage areas on the bridge deck. Eventually, the respondent let a contract to repair the bridge deck in June, 1979. From 1975 to mid-1979, temporary repairs were effected by respondent's employees.

After careful consideration of the evidence and review of the photographs of the bridge deck, the Court finds that the respondent was negligent in its maintenance of the bridge deck [See *Davis v. Dept. of Highways,* 12 Ct.Cl. 31 (1977)], and further finds that the claimant was aware of the disrepair of the bridge and the particular hole into which he stepped, and in accordance with the doctrine of comparative negligence was negligent to the extent of 20% causing his own injuries. *Bradley v. Appalachian Power Co.,* ..... W.Va. ....., 256 S.E.2d 879 (1979). Accordingly, the Court makes an award of $7,500.00 reduced by 20% or $6,000.00.

Award of $6,000.00.

Opinion issued September 20, 1982

ELI BLANKENSHIP, JR.,
ADMINISTRATOR OF THE ESTATE
OF JOHNNY BLANKENSHIP, DECEASED

vs.

DEPARTMENT OF HIGHWAYS

(CC-76-113)

Warren R. McGraw, Attorney at Law, for the claimant.

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

GARDEN, JUDGE:

At approximately 4:00 p.m. on December 7, 1975, claimant's

decedent, Johnny Blankenship, was walking along Secondary Route 7 near Clear Fork, West Virginia, a highway owned and maintained by the respondent, when he was struck and killed by a pickup truck driven by Robert John Edwards. Mr. Edwards testified at the hearing that, as he was rounding a curve in Route 7, he saw a boy standing near the right side of the road, and swerved onto the berm to avoid striking him. When cutting back onto the surface of the highway, he lost control of his truck, which shot across the road and struck and killed the claimant's decedent on the opposite side.

Testimony at the hearing further revealed that the berm along Route 7 at the scene of the accident was lower than the paved portion of the highway; that the drop was three to six inches; that accidents had occurred in the area prior to the Blankenship accident; and that numerous complaints regarding the condition of the highway had been made to the Department of Highways.

The berm of a highway must be maintained in a reasonably safe condition for use when the occasion requires. 39 Am. Jur. 2d *"Highways, Streets, and Bridges"* §488, *Taylor v. Huntington*, 126 W.Va. 732, 30 S.E.2d 14 (1944). The record indicates that there was a drop of three to six inches from a highway to its berm, and that complaints had been made to the respondent of the condition. The driver testified that he went off the road onto the berm to avoid hitting a boy. In such a situation, a driver's use of the berm would be reasonably necessary. *Atkinson v. Dept. of Highways*, 13 Ct.Cl. 18 (1979).

The Court finds that the respondent was negligent in its failure to properly maintain the berm of the highway and awards the claimant $1,702.75 for hospital expenses, $2,511.11 for funeral and burial costs, and $10,000.00 for the wrongful death of Johnny Blankenship, for a total of $14,213.86.

Award of $14,213.86.

Opinion issued September 20, 1982

J. C. BOLAND and
MICHAEL J. BOLAND

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-15)

Michael F. Gibson, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

The claimant, Michael J. Boland, filed this claim for personal injuries to himself and property damages to a Datsun B-210 automobile owned by his father, J. C. Boland, as the result of an accident which occurred on April 7, 1977, on West Virginia Route 3 in Summers County, West Virginia, near Jumping Branch. During the hearing of the claim the style of the claim was amended to include J. C. Boland as a claimant reflecting the true owner of the vehicle involved in the accident which is the subject of this claim.

The claimant was proceeding to Hinton, West Virginia, when the vehicle which he was driving, a Datsun B-210, struck a hole in the berm approximately eight to ten feet in length, eight to ten inches in width and three to six inches in depth. Claimant was unable to avoid striking this hole as there was an oncoming vehicle in the left lane and several holes in the center of the road on claimant's left side. The claimant attempted to drive his vehicle between the holes in the center of the road and the hole in the berm, but his vehicle went into the hole in the berm which caused claimant's vehicle to turn over on its side and the claimant was thrown from the vehicle. As a result of the accident alleged to occur due to failure on the part of the respondent to properly maintain the road surface and berm of State Route 3, claimant sustained physical injuries and the

vehicle was rendered a total loss. Claimants filed this action in the amount of $50,000.00.

David Johnson, a witness for the claimant, testified that he had struck this same hole in the berm of Route 3 and had called the State road garage in Summers County around April 1, 1977, to report the condition of the berm to the respondent.

Testimony from witnesses of respondent revealed that the only maintenance performed on Route 3 in the vicinity of the accident site was performed by patching with cold mix, a form of temporary repair on holes in the highways of the State.

This Court has followed the principle that the berm or shoulder of a highway must be maintained in a reasonably safe condition for use when the occasion requires, and liability may ensue when a motorist is forced onto the berm in an emergency or otherwise necessarily uses the berm of the highway. 39 Am. Jur. 2d *"Highways, Streets, and Bridges"* §488, *Taylor v. Huntington,* 126 W.Va. 732, 30 S.E.2d 14 (1944).

There were potholes in the center of the roadway which claimant was attempting to avoid and an oncoming vehicle in the opposite lane. The respondent was aware of the condition of both the berm and the road surface of Route 3. It is the opinion of this Court that the negligence of the respondent in failing to adequately maintain the berm was the proximate cause of claimant's accident and resulting injuries.

A stipulation regarding hospital and physician charges to the claimant in the amount of $1,614.17 was filed by the parties. It was also stipulated that the Datsun B-210 had a value of $2,775.00 at the time of the accident.

The Court, therefore, makes an award to claimant, Michael J. Boland, in the amount of $3,500.00 and to claimant J. C. Boland in the amount of $2,775.00.

Award of $3,500.00 to Michael J. Boland.

Award of $2,775.00 to J. C. Boland.

Opinion issued September 20, 1982

CARL M. GEUPEL CONSTRUCTION CO., INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-172)

Wayne A. Sinclair, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

Carl M. Geupel Construction Co., Inc., entered into a contract with the respondent on July 23, 1973, for the construction of Project I-IG-77-3(113) 95, C-2, in Kanawha County, West Virginia. A subcontractor for Geupel, Hi-Way Paving, Inc., was to supply sand and gravel for the project. Geupel has filed this claim requesting payment for increases in transportation charges for sand and gravel in bulk under Section 110.1 of the *Standard Specifications for Roads and Bridges* (1972).

When the claimant and the respondent entered into this contract, the rates for transportation of sand and gravel in bulk were regulated by the Interstate Commerce Commission. Five months after the contract was entered into, the applicable section of the Interstate Commerce Act was amended. This amendment, in effect, deregulated the transportation of sand and gravel in bulk. As a result of this deregulation, the rates charged increased on February 15, 1974, by $.30 per ton to a total of $1.45 per ton; on February 15, 1975, another $.30 per ton to a total of $1.75 per ton; and on April 1, 1976, an increase of $.09 per ton to a total of $1.84 per ton. The contractor requested payment for these increases which totalled $42,758.79, but the respondent has refused payment.

The only question to be decided by this Court is whether the additional costs arising out of the change in the ICC rate should be borne by the contractor or by the respondent.

The *Standard Specifications* under which this particular contract was controlled provides as follows:

§110.1 Common Carrier Rates:

"The common carrier rates and taxes thereon which are current on the date of opening the bids shall be considered as applicable to all items subject to transportation charges thereunder.

If such rates or taxes are thereafter increased by public authority on any materials entering into and forming a part of the contract, an amount equal to the sum of all such increases, when evidenced by receipted common carrier bills, will be paid to the Contractor by the Department. All claims for such payment shall be made within 60 days after final acceptance of the work.

If such rates or taxes are thereafter reduced by public authority on any materials entering into and forming a part of the contract, an amount equal to the sum of all such decreases, when evidenced by receipted common carrier bills, will be deducted by the Department from the monies due the Contractor on the work performed under the contract.

When deliveries of materials are performed by means other than common carriers, an increase or decrease in price will not be allowed or charged for changes in rates or methods of delivery."

The respondent contends that the increases requested by the contractor were not increased by a public authority as required by Section 110.1, but by the water carrier to its customer as the result of deregulation by the authority.

The Court finds from the record that the deregulation of transportation rates occurred as the direct result of an act of a public authority and that an award be made to the claimant for these increased charges. The Court directs that the parties determine from their respective records the amount of the increased charges and report their finding for the Court for determination of the award.

Filed with Court of Claims on March 5, 1981

IN THE COURT OF CLAIMS OF
THE STATE OF WEST VIRGINIA

CARL M. GEUPEL CONSTRUCTION
CO., INC.,
Claimant,

v. Claim No. CC-79-172

DEPARTMENT OF HIGHWAYS,
STATE OF WEST VIRGINIA,
Respondent.

ORDER AND RECOMMENDATION

This day came the claimant, Carl M. Geupel Construction Co., Inc., by counsel, Wayne A. Sinclair, and the respondent, Department of Highways, State of West Virginia, by counsel, Stuart Reed Waters, Jr., and jointly represented to the Court that as directed by the Court in its opinion issued in the above styled claim, the parties have agreed to an amount of recovery for approval by the Court.

It is hereby jointly recommended by Carl M. Geupel Construction Co., Inc., claimant, and Department of Highways, State of West Virginia, respondent, that the claimant is entitled to recover from the respondent, the following sums of money on the following items:

I. COMMON CARRIER RATE INCREASE PRIOR TO FEBRUARY 15, 1976 SEE "EXHIBIT A" ATTACHED	$16,846.54
II. COMMON CARRIER RATE INCREASE AFTER FEBRUARY 15, 1976 SEE "EXHIBIT B" ATTACHED	$21,125.09
III. TAXES AND BOND	
A. 2.2% STATE BUSINESS AND OCCUPATION	$ 835.38
B. 1.5% CITY BUSINESS AND OCCUPATION	$ 569.57

C. .5% BOND	$ 189.86
TOTAL RECOMMENDED AWARD	$39,566.44

It is further agreed by and between the claimant and the respondent hereto that any additional amounts claimed not agreed to be paid in this recommendation, 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 respondent's representations, the Opinion of the Court heretofore filed in deciding the subject claim and the recommendations 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 in the amount of Thirty-Nine Thousand Five Hundred Sixty-Six Dollars and Forty-Four Cents ($39,566.44).

It is hereby further ordered that any additional amounts claimed and alleged in claimant's Notice of Claim not allowed in the above award, are hereby disallowed.

Entered this 5th day of March, 1981.

JOHN B. GARDEN/s
Judge

Approved by:

Carl M. Geupel Construction
Co., Inc., a corporation

By WAYNE A. SINCLAIR
Its Counsel

Department of Highways,
State of West Virginia

By STUART REED WATERS, JR.
Its Counsel

"EXHIBIT A"

Computations of the aggregate quantities set forth below were based upon item quantities paid through February 15, 1976, Project Materials Records and/or the Job Mix Formula for the payment items as submitted by the Contractor.

1. Item 501-1(8") Portland Cement Concrete Pavement, Non-Reinforced

Estimate ending February 15, 1976	2,141 SY
Estimate ending September 30, 1975	0
	2,141 SY

SF		CF		
2,141 SY	× 9 SY × .67 Ft.	+ 27 CY	= 478.16 CY	
#57 Gravel	478.16 CY × 1.01 Ton/CY	= 482.94 Tons	× 0.60	= $289.76
Sand	478.16 CY × .585 Ton/CY	= 279.72 Tons	× 0.60	= $167.83

2. Item 501-6(8") Continuously Reinforced Portland Cement Concrete Pavement

Estimate ending February 15, 1976	49,890 SY
Estimate ending September 30, 1975	18,244 SY
	31,646 SY

SF		CF		
31,646 SY	× 9 SY × .67 Ft.	÷ 27 CY	= 7,067.61 CY	
#57 Gravel	7,067.61 CY × 1.01 Ton/CY	= 7,138.29 Tons	× 0.60	= $4,282.97
Sand	7,067.61 CY × .585 Ton/CY	= 4,134.55 Tons	× 0.60	= $2,480.73

3. Item 501-1(10") Portland Cement Concrete Pavement, Reinforced

Estimate ending February 15, 1976	16,969 SY
Estimate ending September 30, 1975	9,073 SY
	7,896 SY

SF		CF		
7,896 SY	× 9 SY × .83 Ft.	÷ 27 CY	= 2,184.56 CY	
#57 Gravel	2,184.56 CY × 1.01 Ton/CY	= 2,206.40 Tons	× 0.60	= $1,323.84
Sand	2,184.56 CY × .585 Ton/CY	= 1,277.97 Tons	× 0.60	= $776.78

4. Item 501-1(10") Portland Cement Concrete Pavement, Non-Reinforced

Estimate ending February 15, 1976	7,470 SY
Estimate ending September 30, 1975	1,686 SY
	5,784 SY

SF CF

5,784 SY × 9 SY × .83 Ft. ÷ 27 CY = 1,600.24 CY

#57 Gravel 1,600.24 CY × 1.01 Ton/CY = 1,616.24 Tons × 0.60 = $969.74

Sand 1,600.24 CY × .585 Ton/CY = 936.14 Tons × 0.60 = $561.68

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5. Item 502-(12") Portland Cement Concrete Approach Slab

Estimate ending February 15, 1976	329 CY
Estimate ending September 30, 1975	164 SY
	165 SY

SF CF

165 SY × 9 SY × 1 Ft. ÷ 27 CY = 55 CY

#57 Gravel 55 CY × 1.01 Ton/CY = 55.55 Tons × 0.60 = $33.33

Sand 55 CY × .585 Ton/CY = 32.18 Tons × 0.60 = $19.31

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6. Item 501-7 Anchor Joints

Estimate ending February 15, 1976	8 each
Estimate ending September 30, 1975	0
	8 each

#57 Gravel 76.76 Tons × 0.60 = $46.06

Sand 44.46 Tons × 0.60 = $26.68

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7. Item 610-3(2) Combination Concrete Curb and Gutter

Estimate ending February 15, 1976	3,376 LF
Estimate ending September 30, 1975	1,241 LF
	2,135 LF

#57 Gravel 28.02 Tons × 0.60 = $16.81

Sand 16.22 Tons × 0.60 = $ 9.73

8. Item 501-1(9") Portland Cement Concrete Pavement

Estimate ending February 15, 1976	6,878 SY
Estimate ending September 30, 1975	6,835 SY
	43 SY

	SF		CF		
43 SY	× 9 SY	× .75 Ft.	÷ 27 CY	= 10.75 CY	
#57 Gravel	10.75 CY	× 1.01 Ton/CY	= 10.86 Tons	× 0.60	= $6.52
Sand	10.75 CY	× .585 Ton/CY	= 6.29 Tons	× 0.60	= $3.77

9. #57 Gravel Stockpile	5,768 Tons	× 0.60 =	$ 3,460.80
Sand Stockpile	3,967 Tons	× 0.60 =	$ 2,380.20
TOTAL			$16,846.54

"EXHIBIT B"

Computations of the aggregate quantities set forth below are based on final quantities of the various items less amounts used and stockpiled prior to February 15, 1976.

1. Item 501-1(8") Portland Cement Concrete Pavement, Non-Reinforced

	SF		CF		
36,291.3 SY —	2,141 SY	× 9 SY	× .67 Ft.	÷ 27 CY	= 7,626.9 CY
#57 Gravel	7,626.9	× 1.01 Ton/CY	= 7,703.17 Tons	× 0.69	= $5,315.19
Sand	7,626.9	× .585 Ton/CY	= 4,461.74 Tons	× 0.60	= $3,078.60

2. Item 501-6(8") Continuous Reinforced Portland Cement Concrete Pavement

	SF		CF		
70,620.7 SY —	49,890 SY	× 9 SY	× .67 Ft.	÷ 27 CY	= 4,629.86 CY
#57 Gravel	4,629.86	× 1.01 Ton/CY	= 4,676.16 Tons	× 0.69	= $3,226.55
Sand	4,629.86	× .585 Ton/CY	= 2,708.47 Tons	× 0.69	= $1,868.84

3. Item 501-1(10") Portland Cement Concrete Pavement, Reinforced

	SF	CF
39,239.1 SY —	16,969 SY × 9 SY × .83 Ft. ÷ 27 CY =	7,161.39 CY
#57 Gravel	6,161.39 × 1.01 Ton/CY = 6,223.00 Tons × 0.69 =	$4,293.87
Sand	6,161.39 × .585 Ton/CY = 3,604.41 Tons × 0.69 =	$2,487.04

4. Item 501-1(10") Portland Cement Concrete Pavement, Non-Reinforced

	SF	CF
22,327.5 SY —	7,470.0 SY × 9 SY × .83 Ft. ÷ 27 CY =	4,110.58 CY
#57 Gravel	4,110.58 × 1.01 Ton/CY = 4,151.69 Tons × 0.69 =	$2,864.67
Sand	4,110.58 × .585 Ton/CY = 2,404.69 Tons × 0.69 =	$1,659.24

5. Item 502-1(12") Portland Cement Concrete Approach Slab

	SF	CF
2,146.8 SY —	329.9 SY × 9 SY × 1 Ft. ÷ 27 CY =	605.93 CY
#57 Gravel	605.93 × 1.01 Ton/CY = 611.99 Tons × 0.69 =	$422.27
Sand	605.93 × .585 Ton/CY = 354.47 Tons × 0.69 =	$244.58

6. Item 501-7 Anchor Joints

18 each — 8 each at 9.5 CY/ea = 95 CY

#57 Gravel	95 × 1.01 Ton/CY = 95.95 Tons × 0.69 =	$66.21
Sand	95 × .585 Ton/CY = 55.58 Tons × 0.69 =	$38.35

7. Item 610-3(2) Combination Concrete Curb and Gutter

29,069.3 LF — 3,376 LF × .013 CY/LF = 334.91 CY

#57 Gravel	334.01 × 1.01 Ton/CY = 337.35 Tons × 0.69 =	$232.77
Sand	334.01 × .585 Ton/CY = 195.40 Tons × 0.69 =	$134.83

8. Item 501-1(9") Portland Cement Concrete Pavement, Reinforce and Non-Reinforced

	SF		CF	
13,817.2 SY − 6,878 SY × 9 SY × .75 Ft. ÷ 27 CY = 1,734.8 CY				
#57 Gravel	1,734.8 × 1.01 Ton/CY = 1,752.15 Tons × 0.69 =			$1,208.98
Sand	1,734.8 × .585 Ton/CY = 1,014.86 Tons × 0.69 =			$ 700.25

9. Less # 57 Gravel Stockpile	(5,768) Tons × 0.69 =	($ 3,979.92)	
Sand Stockpile	(3,967) Tons × 0.69 =	($ 2,737.23)	
TOTAL			$21,125.09

Opinion issued September 20, 1982

COCHRAN ELECTRIC COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(CC-76-117)

Frank A. O'Brien, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

Claimant Cochran Electric Company, hereinafter referred to as the contractor, entered into a contract on April 3, 1972, with the respondent for the installation of vehicular and pedestrian traffic lights in the downtown section of Wheeling, West Virginia. There were approximately twelve intersections involved in the contract which required the installation of new poles to support overhead traffic signals. For the pedestrian lights, the contractor was to use the existing concrete bases for the support poles. These poles had anchor bolts

over which the poles were to fit. The contractor ordered all of the materials for completion of the contract except for anchor bolts which generally may be purchased as off-the-shelf items. However, the anchor bolts were not delivered until October 1972, which delayed the contractor in beginning construction by 26 days. The traffic poles were delivered to the job site in December 1972. The contractor contends that the anchor bolts were a necessary item before it could begin the excavation and construction of the concrete bases for the traffic poles. Construction began when the anchor bolts were received in October. The project was not completed until November 15, 1973. The respondent calculated the project time from June 19, 1972, and, after granting time for proper delays, established a completion date of July 12, 1973. The respondent then assessed the contractor 104 days in liquidated damage at $100.00 per day in the amount of $10,400.00 for failing to complete the project until November 15, 1973. The contractor alleges that the assessment of liquidated damages was unjustified and requests an award in that amount. The contractor also alleges that the delay caused extra costs to be incurred in the amount of $2,100.00.

The respondent contends that in accordance with the specifications of the contract, the contractor is responsible for all materials on the project, and, if the contractor is delayed by reason of its failure to receive the materials necessary for the project, the respondent is entitled to liquidated damages under the contract for the delay. The respondent also contends that the extra labor or materials claimed are included in the contract, and are the responsibility of the contractor, with which the Court agrees.

The contractor contemplated the delivery of the materials in July and so informed the respondent at a pre-construction conference on May 18, 1972. Construction was to commence in June 1972 for site preparation. The first delay occurred when the anchor bolts for the traffic poles were not delivered until October 4, 1972. The poles for the traffic signals were

not delivered by the supplier until December 1972. The contractor claims that the respondent contributed to the delay in delivery as the items were not approved and green-tagged by the respondent at the site of the supplier in a timely manner.

The question to be considered herein is the propriety of the assessment of 104 days of liquidated damages. The contract provided for a completion date of May 31, 1973. The respondent extended this date to July 12, 1973. The contractor completed the contract on November 15, 1973, and was assessed liquidated damages for the time from July 12 through November 15.

The Court has determined that an assessment of 26 days or $2,600.00 is a fair and reasonable assessment by the respondent for the delay attributed to the late start by the contractor. However, the imposition of the additional 78 days is unreasonable. The general rule for assessment of liquidated damages is found 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."

The delay by the respondent in approving the materials through the "green tag" process contributed to the delay, and the record fails to establish that the respondent sustained any damage by reason of the delay. See *Whitmyer Bros., Inc. v. Dept. of Highways*, 12 Ct.Cl. 9 (1977) and *Vecellio & Grogan, Inc. v. Dept. of Highways*, 12 Ct.Cl. 294 (1979).

The Court therefore makes an award to the contractor in the amount of $7,800.00.

Award of $7,800.00.

Opinion issued September 20, 1982

THELMA E. McINTYRE, ADMINISTRATRIX
OF THE ESTATE OF WILMA S. McINTYRE, DECEASED

vs.

DEPARTMENT OF HEALTH

(CC-76-70)

Frederick P. Grill, Attorney at Law, and *J. T. Michael,* Attorney at Law, for the claimant.

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

GARDEN, JUDGE:

Claimant Thelma E. McIntyre brought this claim as the administratrix of the estate of Wilma S. McIntyre.

Claimant's decedent, Wilma S. McIntyre, was admitted to Weston State Hospital on July 10, 1974. She was taken to Weston State Hospital by Harrison County deputy sheriffs in response to a request from the Veterans Hospital in Clarksburg, West Virginia. The decedent exhibited symptoms of mental illness which she had suffered in the past prior to previous commitments to institutions for mental health treatment.

The first night at Weston, the decedent was placed in Ward 8, an area with barred windows and locked doors. The next day, July 11, 1974, the claimant spoke with the decedent's psychiatrist at Weston, Dr. Castillo, advising him to keep the decedent in a restricted area. Later that same day, the claimant, her husband, and her niece (the daughter of the decedent) went to visit the decedent. She had been transferred to a crisis intervention unit (CIU), where there were no bars on the windows and no locks on the doors. The window in the decedent's room had a screen on it which latched with one hook and eye. The decedent recognized the claimant, claimant's husband, and her daughter. The claimant was contacted at approximately 1:45 a.m. on July 12, 1974,

by Dr. Castillo, who advised the claimant that the decedent had fallen through the window in her room and was being taken by ambulance to West Virginia University Hospital in Morgantown, West Virginia.

The decedent was paralyzed from the neck down as a result of sustaining a broken neck in the fall through the window at Weston and died from these injuries on August 14, 1974.

Claimant alleged that the respondent was negligent in its failure to place the decedent in an appropriate ward, considering her mental condition.

The evidence reveals that the decedent had suffered from mental illness for many years, requiring commitment to mental health institutions at various times for various periods. The claimant had, in fact, been a patient at Weston State Hospital in 1943 for approximately 14 months. Her case history revealed the mental problems from which she suffered. Before being taken to Weston on July 10, 1974, the decedent had been examined by Dr. Jaime E. Lazaro, who had stated on the "Certificate of Physician" form the following: "Wanders off home. Travels country. Very disorganized, delusional, irrational. Talks about the dead and wants reunion with the dead. Incompetent, dangerous to self - psychotic." According to a report compiled by Dennis Bridgeman, Administrative Assistant II, and Peggy Allman, Psychologist II, employees of Weston, the decedent was interviewed by social worker Roger Belknay on July 11, 1974. Mr. Belknay determined that she met the criteria for admission to the Crisis Intervention Unit, and she was transferred to the CIU at that time. Both teams of Unit II (Ward 8) and CIU approved of this transfer. The report also contained the written statement of Kathleen Cottrill, Aide II on CIU, who had been on duty the night of the decedent's fall. Her statement indicated that the decedent did not seem disturbed or upset; that she requested that she not be given her H.S. Medication (a sleeping inducement medication); and that she appeared to be sleeping well. She last checked the decedent at 11:15 p.m. The statement continues as follows:

"I was getting ready to leave the ward when I heard a noise, the aide (on midnight) and I rushed to Wilma, she was lying on her back on the ground, I asked her what happened, and she said she thought she was at a door, instead it was a window and she fell. In my honest opinion, I do not think the woman jumped from the window. I believe she mistook the window for a door, and was leaning out to see where she was, and lost her balance."

Whether the decedent fell from the window or jumped from the window is a matter of speculation. The fact that the decedent was a patient in the care of the respondent created a burden upon the respondent to take reasonable precautions to prevent the decedent from doing harm to herself. Under the circumstances of the case, that should have included placing the patient in wards with more adequate safeguards. In the instant case, the decedent was placed in a ward without adequate consideration being given to her past mental history. The respondent failed to adequately protect the decedent when she was placed in a ward where there were no bars on the windows.

The Court concludes that the respondent failed to fulfill its moral and legal obligation to protect the claimant's decedent; that the respondent's acts constituted negligence; and, that such negligence was the proximate cause of the death of claimant's decedent. *House v. Dept. of Mental Health*, 10 Ct.Cl. 58 (1974).

The decendent's estate was responsible for the hospital bill of $3,538.56 incurred while decedent was a patient at the West Virginia University Medical Center; the funeral bill of $1,786.23; and the cost of a grave marker of $302.51, for a total of $5,627.30.

The Court is of the opinion to and does hereby award to the claimant, Thelma E. McIntyre as administratrix of the estate of Wilma S. McIntyre, decedent, the sum of $10,000.00, with the additional sum of $5,627.30 for expenses incurred by the estate, a total of $15,627.30.

Award of $15,627.30.

Opinion issued September 20, 1982

ALVA KATHERINE WHITE

vs.

DEPARTMENT OF HIGHWAYS

(D-748a)

and

PAUL WHITE and WANDA WHITE

vs.

DEPARTMENT OF HIGHWAYS

(D-748b)

John Boettner, Jr., and *Michael R. Crane*, Attorneys at Law, for claimants.

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

GARDEN, JUDGE:

These two claims were consolidated for hearing purposes and ultimate decision because the same alleged acts of negligence on the part of the respondent allegedly caused the damage to four homes located in proximity to each other in the Cabin Creek Hill area of Kanawha County, West Virginia. Two of the homes were owned by the claimant Alva Katherine White, and the other two were owned by the claimants Paul White and Wanda White. The two homes owned by Alva Katherine White were built on Lots 6 and 7 as shown on J. D. Kittinger's Map of Lots of Cabin Creek Junction, Kanawha County, West Virginia, and the two homes of claimants Paul White and Wanda White were built on Lot 21 of the same subdivision. To describe the terrain in the area of these homes as hilly would certainly be an understatement. At the foot of the hill is situated State Route 61, which runs generally in an east-west direction between Cabin Creek Bridge and the towns of Coalburg and East Bank. To the south of State Route 61 and also running in an east-west direction are railroad tracks of the C & O. Fronting on the C & O right of way are Lots 6 and 7 upon which Alva Katherine White's homes are constructed.

Behind Lots 6 and 7 is State Route 61/9 above which is located Lot 21. There is a set of concrete steps situate on the hillside of Lot 21 and a private road above the lot. During the years 1964 and 1965, the respondent installed three drainage pipes. One of the drainpipes was located on the private road directly above the concrete steps and Lot 21. Two drainpipes were installed on State Route 61/9 above Lots 6 and 7. It is the contention of the claimants that the installation of these drains resulted in excess water being cast upon the properties of the claimants, causing extensive damage thereto. The respondent contends that the water from both roads is following its natural drainage path and would flow across the lots belonging to the claimants regardless of the presence of the three drains.

The claimants testified that, prior to the installation of these drains and the grading of the roads, they had not experienced the water problems which have occurred since 1964-65.

H. Douglass Preble, a consulting geologist, testified on behalf of the respondent. His investigation involved observations of the topography, drains, running water, and subsurface water on the properties and the two roadways. He testified that the water from both roads was following the natural drainage of the hillside and would flow across claimants' lots in the same manner without the presence of the drains installed by the respondent. However, on cross-examination, the witness testified that the presence of the drainpipes may have propelled and accelerated the flow of water.

It is well established law that land at lower levels is subject to the servitude of receiving waters that flow naturally upon it from adjoining higher land levels, and, unless a landowner collects surface water and precipitates it with greatly increased or unnatural quantities upon his neighbor's land, causing damage, the law affords no redress. If no more water is collected on the property than would naturally have flowed upon it in a diffused manner, the dominant tenement cannot be held liable for damage to land subject to the servitude of flowing waters. The evidence in these claims reveals that the

installation of the three drains did, in fact, result in excess water being cast upon the properties of the claimants.

The common law rule that surface water is considered a common enemy, and that each landowner may fight it off as best he can prevails in Virginia and West Virginia, with the modification that an owner of higher ground may not inflict injury on the owner of lower ground beyond what is necessary. *Norfolk & W. R. Co. v. Carter,* 91 Va. 587, 22 S.E. 517, *Jordan v. Benwood,* 42 W.Va. 312, 26 S.E. 266, and *Lindamood v. Board of Education,* 92 W.Va. 387, 114 S.E. 800.

The Court concludes that the facts of the claims herein reveal that the actions of the respondent in placing the drains caused the damages inflicted upon the properties of the claimants.

The property appraisal report submitted to the Court indicates a difference in before-and-after market value of $1,000.00 for the properties of the claimant Alva Katherine White, and a difference in before-and-after market value of $4,000.00 for the properties of Paul White and Wanda White. Accordingly, the Court makes an award to the claimant Alva Katherine White in the amount of $1,000.00, and an award to claimants Paul and Wanda White in the amount of $4,000.00.

Award of $1,000.00 to Alva Katherine White.

Award of $4,000.00 to Paul and Wanda White.

Opinion issued September 23, 1982

JIMMIE G. ADAMS

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-139)

Claimant appeared in person.

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

PER CURIAM:

At approximately 7:00 a.m. on May 16, 1982, claimant was driving along Route 11/11 in Upshur County, West Virginia,

a road owned and maintained by the respondent, when his right front tire struck an object in the road and went flat. Claimant got out to investigate and discovered a small cut in the side of the tire. He then walked back to examine the road and recognized it as having been recently graded. A photograph introduced into evidence shows a jagged metal protrusion in the road, which the claimant described as a part of a culvert yanked up during ditching operations.

Testifying on behalf of the respondent was Veril C. Powers, the Upshur County Superintendent for the Department of Highways. Mr. Powers stated that, prior to the date of the claimant's accident, he had received no phone calls or complaints that a culvert was damaged at that location on Route 11/11.

The law of West Virginia is well settled that the State is not a guarantor of the safety of motorists upon its highways; its duty is one of reasonable care and diligence in the maintenance of a highway under all circumstance. *Parsons v. State Road Comm'n.*, 8 Ct.Cl. 35 (1969); *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947).

In the instant case, claimant's testimony concerning the grading of Route 11/11 was unrefuted. While there was no evidence that the respondent had actual notice of the fact that there was a defect in the road, the Court believes that the respondent failed in its duty to use reasonable care in the maintenance thereof. This failure was the proximate cause of the damages suffered by the claimant.

Claimant's Notice of Claim indicates the sum of $120.00 in damages. Submitted into evidence was an invoice from Alker Tire & Supply of Buckhannon in the amount of $402.91 for the purchase of four new tires, balancing, and the cost of two valves. As the actual damage to claimant's vehicle resulting from the incident in question was to one tire only, the Court hereby awards the claimant $89.54 for one new tire, $2.89 in excise tax, $3.00 for balancing, and $1.00 for the valve, for a total award of $96.43.

Award of $96.43.

Opinion issued September 23, 1982

LARRY L. BENNETT

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-434)

Claimant appeared in person.

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

PER CURIAM:

At approximately 3:00 p.m. on Friday, November 13, 1981, claimant was operating his 1980 Buick Skylark northerly on West Virginia Route 2 near Wellsburg, West Virginia, where employees of the respondent were patching the road with tar and cinders. As claimant passed through the area, he heard something hit his vehicle. After about five minutes, claimant stopped his car to inspect it and discovered a crack in the windshield. Introduced into evidence was an invoice in the amount of $192.42 for replacement of the windshield. No evidence was produced by the respondent to refute the claim.

Accordingly, the Court finds the respondent negligent in its road repair operations, which negligence proximately caused the damage to the claimant's vehicle, and hereby makes an award to the claimant in the amount of $192.42.

Award of $192.42.

Opinion issued September 23, 1982

JOHN R. COFFMAN

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-51)

No appearance by claimant.

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

PER CURIAM:

Upon written stipulation to the effect that damages to the muffler system of claimant's vehicle in the amount of $131.24

were caused when the vehicle, while crossing the Maple Lake Bridge in Bridgeport, West Virginia, struck a portion of the deck which had settled; that said bridge is owned and maintained by the respondent; that the accident occurred because of the negligence of the respondent, and that this negligence was the proximate cause of the claimant's damages, the Court finds the respondent liable, and makes an award to the claimant in the amount stipulated.

Award of $131.24.

Opinion issued September 23, 1982

DREAMA DAWN COOK

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-21)

Claimant appeared in person.

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

PER CURIAM:

At approximately 11:30 a.m. on December 3, 1981, claimant was operating her 1978 Dodge Colt automobile on Route 60 west of Belle in Kanawha County, West Virginia. Route 60 is a highway owned and maintained by the respondent.

According to the claimant's testimony, she was travelling at a speed of 50 mph when the right front tire struck a pothole measuring 2½ feet by 1½ feet, resulting in damage to the vehicle in the amount of $133.45.

It is well-established law in West Virginia that the State cannot and does not guarantee the safety of motorists upon its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). To be found liable, the respondent must have had either actual or constructive notice of the particular hazard which caused the damage. *Davis v. Dept. of Highways,* 11 Ct.Cl. 150 (1976). No evidence of notice was presented in this case; therefore, no negligence on the part of the respondent can be established. Accordingly, the claim must be denied.

Claim disallowed.

Opinion issued September 23, 1982

EXXON CO., U.S.A.

vs.

FARM MANAGEMENT COMMISSION

(CC-82-136)

and

SCOTT SAW SALES & SERVICE

vs.

FARM MANAGEMENT COMMISSION

(CC-82-165)

No appearance by claimants.

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

PER CURIAM:

These claims against the Farm Management Commission were submitted for decision upon the pleadings. The claimants seek payment for various goods and services furnished to the respondent as follows:

Exxon Co., U.S.A.	$219.71
Scott Saw Sales & Service	$ 42.44

The respondent admits the validity and amounts of these claims, but further alleges that sufficient funds were not available at the close of the fiscal years in question from which the obligations could have been paid.

While we feel that these claims should, in equity and good conscience, be paid, we further believe that awards cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claims disallowed.

Opinion issued September 23, 1982

DAE ANNE FLETCHER and
PAUL NORMAN FLETCHER

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-52)

Claimants appeared in person.

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

PER CURIAM:

At 9:30 a.m. on Sunday, February 14, 1982, claimants were operating their 1980 Plymouth Horizon in a southerly direction on Route 19 in Harrison County, West Virginia. Route 19 is owned and maintained by the respondent.

Claimant Dae Anne Fletcher testified that she and her husband and son were on their way to church that morning and the roads were clear. However, upon turning left onto Clarksburg Country Club Road, they encountered ice. Mrs. Fletcher stated that Clarksburg Country Club Road had a little rise to it, and after coming up over the rise, they saw an automobile stopped in front of them. Mr. Fletcher turned to the left to go around the car and glanced the rear bumper of that vehicle. The Fletcher vehicle then skidded into a tree, went back into the road, made a complete circle, and hit a tree on the other side. Claimants suffered personal injuries and were treated and released by a Clarksburg hospital. Damage to claimants' automobile was paid by their insurer, Erie Insurance, with the exception of a $100.00 deductible.

The law of West Virginia is well established that the State cannot and does not guarantee the safety of motorists travelling upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). To be held liable, the respondent must have had either actual or constructive notice of the hazardous condition of the highway. Since no such evidence of notice was brought forth in this case, the respondent cannot be found negligent. Therefore, the Court hereby disallows the claim.

Claim disallowed.

Opinion issued September 23, 1982

FORREST C. HATFIELD

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-227)

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

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

WALLACE, JUDGE:

Claimant seeks to recover $25,000.00 from the respondent for personal injuries and damages to his 1977 Ford F-100 pickup truck sustained in a single-vehicle accident on November 29, 1977.

At the time of the accident, the claimant resided in Staats Mill, West Virginia, in Jackson County. To go to and from his residence he travelled West Virginia Route 34/5 also known as Southall Ridge Road which is a secondary blacktop road maintained by the respondent. The claimant had moved to Staats Mill sometime in 1976. In his testimony he stated that there was a small slip in the road near his house at the time and at the time of the accident two automobiles could pass "if one gets off on the berm".

The claimant travelled the road daily. On the day of the accident he drove his wife to work at the K-Mart in Charleston and then returned home. He returned to Charleston in the evening to pick her up, returning home about 6 p.m. It had rained the day before and on the day of the accident. Between 6:45 and 7:45 p.m. he left his house to drive to a neighbor's home. It was dark, rainy, and foggy. He stated, "you couldn't see ten feet ahead of you." The claimant testified, ". . .I just started out from the house maybe a couple or three hundred yards and the road had dropped more when I hit that chuck hole or slip or whatever you call it." ". . .that one particular piece of road there had dropped in after we had come back from Charleston." The claimant further stated that his vehicle's right wheel went over the hill; that he lost control and jumped out of his truck, the door struck him and knocked him under the back wheel crushing his left foot. He crawled up to the road surface where he was picked up by a neighbor and subsequently taken to the hospital.

The parties stipulated that the truck sustained damage of $77.20; that medical expenses for doctors and hospital were $4,396.95; and that the claimant had a 30% permanent partial disability resulting from his injuries.

The claimant and John Cobb, a witness in his behalf, both testified that they had complained to respondent's Ripley and Charleston offices prior to the accident and that there were no signs posted to warn of the slip condition, a fact which is immaterial as far as this claimant is concerned because he knew of the road condition. However, the respondent could not have been aware of the slip which the claimant testified occurred from the time he returned from Charleston and the time of the accident.

Although the record establishes that the respondent had notice of the condition of the road prior to the day of the accident, it also establishes that the claimant was very familiar with it and its condition. Under the doctrine of comparative negligence, the negligence of the claimant in traveling a road, at night in rain and fog, known to him to be in disrepair was equal to or greater than the negligence of the respondent in its failure to repair the road. *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (1979). A traveller on the highway travels at his own risk. The State is not a guarantor of his safety. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947); *Parsons v. State Road Commission*, 8 Ct.Cl. 35 (1969). The claim of the claimant is disallowed.

Claim disallowed.

Opinion issued September 23, 1982

CHESTER JONES

vs.

DEPARTMENT OF HIGHWAYS

(CC-76-51)

E. Joseph Buffa, Jr., Attorney at Law, for claimant.

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

GARDEN, JUDGE:

Chester Jones, also known as Chester Mynes, filed this

claim to recover damages alleged to have occurred when the respondent allegedly breached a contract with the claimant for quarrying stone on claimant's property.

Claimant is the owner of a 10-acre tract of land located on Green Creek Road in Roane County, West Virginia. On April 3, 1971, the claimant and the respondent entered into a written lease agreement, the purpose of which was to permit the respondent to proceed onto claimant's property "to purchase and acquire certain rock and stone for the purpose of using same upon said highways;" (Claimant's Exhibit No. 10). The agreement further provides for payment of the stone quarried as follows:

> "The agreed price to be paid by party of the second part to party of the first part shall be $0.05 per ton for all stone removed and certified. It is mutually agreed that volume shall be determined by truck load records. The back wall of the quarry shall be left as a perpendicular wall and the quarry site left in a tidy condition. This agreement shall be for a period of four (4) years from date."

During the term of the contract, the claimant received one payment from the respondent for the stone quarried. This payment, which was in the amount of $1,989.40, was transmitted to the claimant by a letter stating that payment was in full. Claimant, at that time, questioned the amount of the payment, but accepted it with the understanding that further payments would be forthcoming. The claimant then received nothing further.

To perform the stone quarrying operation, it was necessary for the respondent to clear a portion of claimant's property of trees and move dirt to obtain the rock. Then, blasting was undertaken to obtain the rock for the stone crushing operation. Respondent also constructed a haul road on the property for removal of the stone from the quarry. This road was actually part of an old road already existing on the property and partially new road. The quarrying operation on claimant's property ceased at some point in 1973. The lease agreement expired on April 3, 1975.

The claimant subsequently filed this claim in May 1976 alleging a breach of the lease agreement. Claimant contends that he was not paid for all of the stone quarried on his property; that his house sustained damages as the result of the blasting activities; that rocks were left strewn over the property; that a garage was destroyed; that fruit trees were destroyed; and that the road ramp which cuts across the meadow has not been removed. Claimant alleges that his property has not been left in a "tidy condition" in accordance with the provisions of the lease agreement.

Respondent, however, contends that claimant had been paid in full for the stone quarried. According to records of the respondent, 39,788 tons of stone were quarried and the claimant was paid at a rate of $.05 per ton, the rate agreed to in the lease agreement. Respondent also contends that the claimant has released the State from any and all claims for damages and compensation to the residue.

Previously, the Court made an award to the claimant in the amount of $3,760.60 for stone quarried by the respondent in accordance with the terms of the lease agreement. The award was paid by an appropriation by the 1980 Legislature.

Subsequent to the award, the claimant filed a petition for rehearing and thereafter the claimant and the respondent filed briefs on the question of damages to the real property and buildings of the claimant. The Court, having considered these briefs, reviewed the law of West Virginia with respect to damages to real property.

The general rule has been that damages to real property were classified as temporary or permanent. The measure of damages then depended upon the classification. A temporary injury to property occurred when the cause of the injury and its effects could be remedied, removed or abated. The measure of damages was the cost of remedy, removal or abatement. Injury to real property was permanent when the injury affected the property's value permanently. The measure of damages was then the difference in the market value of the property immediately before and immediately after the injury. The West Virginia Supreme Court reviewed these two methods

of measuring damages to real property in the case of *Jarrett v. Harper & Son, Inc.*, ... W.Va. ....., 235 S.E.2d 362 (1977), and determined that:

> ". . .a more manageable and meaningful meshing of the measures is possible simply by eliminating the temporary and permanent classifications. The result would be similar to the rule about damage to personal property. When realty is injured the owner may recover the cost of repairing it plus his expenses stemming from the injury including loss of use during the repair period. If the injury cannot be repaired or the cost of repair would exceed the property's market value, then the owner may recover the money equivalent of its lost value plus his expenses resulting from the injury including loss of use during the time he has been deprived of his property."

The Court further stated that:

> ". . .cases that differentiate between measures of damages for injury to real property on the 'temporary' or 'permanent' bases are overruled on that point."

In this claim, the claimant's property sustained damages to the residence and other outbuildings and damages to the terrain. During the hearing of this claim, testimony from the claimant and exhibits introduced with respect to damages, indicated the following: the cost of cleaning up the real property—$14,480.00; repairs to the residence—$623.00: clean-up of the quarry site—$14,700.00; rebuilding of the garage—$1,200.00; and replacement of fruit trees—$1,335.00, for a total amount of damages of $32,338.00.

Also submitted for the Court's consideration were appraisals. The appraisal report submitted by the claimant demonstrated a difference in before and after market values of $24,000.00, while the difference in before and after market values in the appraisal report submitted by the respondent was $1,700.00.

The Court has carefully considered all of the damage evidence submitted in this claim and hereby makes an award of $12,760.60, less the award of $3,760.60 heretofore received.

Award of $9,000.00.

Opinion issued September 23, 1982

RAYMOND L. MAYNARD

vs.

BOARD OF REGENTS

(CC-81-206)

Claimant appeared in person.

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

PER CURIAM:

Claimant Raymond L. Maynard is seeking damages in the amount of $15,000.00 resulting from a loss of his veteran's benefits allegedly due to counseling errors at Southern West Virginia Community College.

The claimant obtained a two-year associate degree in Mining Technology from Southern West Virginia Community College in May of 1980. In August of 1980, he enrolled for the College's fall semester in Drafting and Design. His difficulties with the Veteran's Administration arose in regard to two courses, Mining 122 and Data Processing 101, which he had taken for his mining degree. It was the position of the Veteran's Administration that those elective courses should have been transferred as credit toward his drafting degree. The VA decided to stop payment of all benefits to the claimant until the VA was reimbursed $1,061.74 it considered overpayment for the two courses in question. This resulted in a loss of $370.00 per month for April and May 1981. The claimant testified, "Once the VA is reimbursed the $1,061.74, I'm assuming the VA will forward my two checks for the last two months of the semester." A letter to the claimant dated April 28, 1981, from the Veteran's Administration's Huntington office, states, "We will withhold any future benefits due you until the debt ($1,061.74) is recovered." (Parenthetical figure supplied.)

The evidence further reveals that claimant's advisor at Southern West Virginia Community College treated him as a "new student" in his advisement because the "transfer of credit evaluation form" had not been completed.

The claimant relied upon his advisor in selecting the course work necessary for the drafting degree, and this advice resulted in the loss of benefits. The school received the benefit of the overpayment to the detriment of the claimant. The Court makes an award to the claimant in the amount of $1,061.74.

Award of $1,061.74.

Opinion issued September 23, 1982

THE MELBOURNE BROTHERS CONSTRUCTION COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(CC-77-150)

Michael T. Chaney, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

The Melbourne Brothers Construction Company, hereinafter referred to as the contractor, entered into a contract with the respondent for project BRF-0312 (019) which included the removal of an existing bridge and construction of the Third Avenue Bridge in Huntington, West Virginia. The first part of this claim involves a dispute in the painting of the steel on the Third Avenue Bridge, and the second part of the claim involves a dispute as to which party to the contract is responsible for the bond required to be posted by the U.S. Coast Guard to insure the safe and adequate removal of an existing structure.

The contractor contends that it was required to place a wash coat not called for in the contract which resulted in an additional expense to the contractor of $5,296.00. The specifications provide for a wash coat if a zinc rich system of paint is used and if the wash coat is, in fact, recommended by the manufacturer. The contractor herein was to apply an inorganic zinc shop primer with a vinyl top coat. The wash coat is placed upon the primer if the primer is incompatible with the vinyl top coat used by the contractor. Section 711.20.3 of the *Stan-*

tion filed by the parties, claimants seek payment of the sum of $144.00 for damages to their 1980 Eagle station wagon resulting when the vehicle passed through tar which had been applied to the highway by the respondent's employees. This occurred on Fish Creek Road in Marshall County, West Virginia, a highway owned and maintained by the respondent. At that time and place, no warning signs had been posted, and the respondent's negligence in failing to warn motorists of the substance on the highway was the proximate cause of the damages suffered by the claimants.

Accordingly, the Court makes an award to the claimants in the amount stipulated.

Award of $144.00.

Opinion issued September 23, 1982

RAINBOW DEVELOPMENT CORPORATION

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-350)

Ernest Pennington appeared for the claimant.

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

PER CURIAM:

Claimant herein seeks reimbursement in the amount of $26,000.00 for certain work done on Russet Drive, a West Virginia secondary highway located in Cross Lanes, Union District, Kanawha County.

The claimant, Rainbow Development Corporation, was engaged in land development, the creation of subdivisions, and housing construction. The Kanawha County Planning and Zoning Commission required it to widen and improve a section of Russet Drive before the commission would grant it permission to sell lots in the area.

Claimant thereupon drafted a set of plans and specifications and submitted them to the respondent Department of High-

dard Specifications of Roads and Bridges requires a wash coat if recommended by the manufacturer, and the contractor must necessarily apply the wash coat. The cost of the wash coat is the responsibility of the contractor.

The provisions of the contract dictate that the cost of the bond required by the U.S. Coast Guard in the amount of $500.00 is the responsibility of the contractor. Therefore, the contractor must bear this expense.

The Court hereby disallows the claim in its entirety.

Claim disallowed.

Opinion issued September 23, 1982

MONONGAHELA POWER COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-116)

David L. Williams, Attorney at Law, for claimant.

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

PER CURIAM:

Upon written stipulation to the effect that damages to claimant's secondary power line in the amount of $38.38 were caused when employees of the respondent negligently tore down the line, located in the vicinity of Route 19 near Gore, Harrison County, West Virginia, the Court finds the respondent liable, and hereby makes an award of $38.38 to the claimant.

Award of $38.38.

Opinion issued September 23, 1982

SIDNEY POZELL and LILLIAN POZELL

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-163)

No appearance by claimants.

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

PER CURIAM:

In this claim, submitted for decision upon a written stipula-

ways. The Department of Highways informed Rainbow that it would not be necessary for the corporation to bear the expense of upgrading Russet Drive, and that if Rainbow proceeded with the subdivision of the lots and got several families to live there, the Department of Highways would improve the road. Rainbow then took this information back to the Kanawha County Planning and Zoning Commission, which found the proposal unacceptable. The Commission ruled that the work would have to be completed before any families could be moved into the subdivision. Ernest Pennington, claimants' president, testified, the Rainbow Development Corporation "went back to the Department of Highways and agreed in writing (via a permit) to widen and improve the road *at our expense.*" There was a cost estimate of approximately $8,400.00 for the work.

The set of specifications for the project had originally called for asphalt pavement, but approximately one month after the Department of Highways issued the work permit, District Engineer L. S. Smith issued to Rainbow a verbal directive to change the pavement from asphalt to concrete. Testimony at the hearing indicated that there was never a *written* agreement concerning reimbursement:

"Q. Did you ever enter into any kind of contract with the Department of Highways, other than the permit which has been admitted into evidence. . . ?

A. No, there was never a contract on this job, no.

Q. Now, that permit does not make any mention of payment to you by the Department of Highways; isn't that correct?

A. It does not.

Q. Did you ever receive anything in writing, any agreement, from the Department of Highways that they would pay for any portion of this, in writing?

A. The only thing we've ever received was a verbal commitment from the district engineer, Mr. Smith."

From the evidence, it is clear to this Court that no contract

was ever entered into by the parties. It follows that there can be no breach of contract on the part of the respondent, and no basis for liability. Hence, the claim is hereby disallowed.

Claim disallowed.

Opinion issued September 23, 1982

DORIS RANDOLPH, FRANK RANDOLPH, her husband, and YVONETTE (SUZIE) RANDOLPH, infant

vs.

DEPARTMENT OF HIGHWAYS

(CC-76-12)

Samuel D. Lopinsky, Attorney at Law, for claimants.

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

GARDEN, JUDGE:

The accident, which is the subject of this claim, occurred at approximately 8:30 p.m. on June 22, 1975, on W.Va. Route 35 near Pliny, West Virginia. The claimants Doris Randolph and Yvonette Randolph were proceeding in a southerly direction on this road en route from Pomeroy, Ohio, to their home in Cross Lanes, West Virginia. W.Va. Route 35 at the accident scene is a two-lane roadway, one lane for northbound travel and one lane for southbound travel. The claimant Doris Randolph was operating a 1974 Chevrolet Corvette owned by her husband, Frank Randolph. According to claimant Doris Randolph, she was attempting to pass a vehicle in front of her by entering the northbound lane. As she began to pass the vehicle, her vehicle struck a depressed area of the roadway causing her to lose control of her vehicle, whereupon the vehicle turned sideways and slid into a tree adjacent to the berm of the southbound lane. Upon impact with the tree, the vehicle exploded.

As a result of the accident, the claimant Doris Randolph sustained fractured ribs, a fractured right ankle, a broken left wrist, and internal injuries which required surgery. In addition to personal injuries, the claimant also sustained a loss of wages of approximately 13 months. Claimant Yvonette Ran-

dolph sustained a fractured clavicle. The vehicle was rendered a total loss.

The testimony established that there was a depressed area in the northbound lane of Route 35. There were supposed to be signs posted which read "Dip Ahead", but the record was unclear as to whether these signs were in place on the date of this accident. Two of the eyewitnesses to this accident testified that the vehicle being driven by the claimant appeared to be proceeding at a high rate of speed when it was in the northbound lane.

The claimant had, earlier that same day, driven over this same stretch of Route 35. She testified that she had had no difficulty proceeding over Route 35 and, in fact, did not remember having any difficulty in negotiating this part of the highway earlier in the day.

This Court consistently has held that the State is not a guarantor of the safety of travelers on its highways and that its duty to travelers is one of reasonable care and diligence in the maintenance of a highway under all the circumstances. *Parsons v. Dept. of Highways,* 8 Ct.Cl. 35 (1969). The oft-cited case of *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81, holds that the user of the highways travels at his own risk and that the State does not and cannot assure him a safe journey.

While we are most sympathetic to the claimants who suffered painful injuries, we do not feel that the record in this claim is sufficient to make this claim an exception to the general rule as hereinabove set forth, and we, therefore, disallow this claim.

Claim disallowed.

Opinion issued September 23, 1982

FRANK E. REDD

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-169)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon a written stipula-

tion filed by the parties, claimant seeks payment of the sum of $51.00 for damages to his Chevrolet Blazer resulting when the vehicle passed through tar which had been applied to the highway by the respondent's employees. This occurred on Fish Creek Road in Marshall County, West Virginia, a highway owned and maintained by the respondent. At that time and place, no warning signs had been posted, and the respondent's negligence in failing to warn motorists of the substance on the highway was the proximate cause of the claimant's damages.

Accordingly, the Court makes an award to the claimant in the amount stipulated.

Award of $51.00.

Opinion issued September 23, 1982

STANLEY T. RUCKMAN

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-166)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon a written stipulation filed by the parties, claimant seeks payment of the sum of $78.75 for damages to his 1977 Chrysler Cordoba resulting when the vehicle passed through tar which had been applied to the highway by the respondent's employees. This occurred on Fish Creek Road in Marshall County, West Virginia, a highway owned and maintained by the respondent. At that time and place, no warning signs had been posted, and the respondent's negligence in failing to warn motorists of the substance on the highway was the proximate cause of the claimant's damages.

Accordingly, the Court makes an award to the claimant in the amount stipulated.

Award of $78.75.

Opinion issued September 23, 1982

SHANE MEAT COMPANY

vs.

BOARD OF REGENTS

(CC-82-86)

H. Ronald Shane appeared in behalf of claimant.

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

PER CURIAM:

Claimant Shane Meat Company entered into a contract with West Virginia University, a school under the supervision of the Board of Regents. The terms of the contract provided that the claimant was to supply unbreaded veal in chopped form with TVP added. The contract also provided that the price was based upon price "per piece." It is that provision in the contract which resulted in this claim.

It is the claimant's contention that it should be paid in accordance with the terms of the contract for each piece of unbreaded veal steak ordered by and shipped to the University. The respondent, on the other hand, contends that during the bidding process, a mechanical error occurred which resulted in the "per piece" language rather than "per pound" in the bid. The error was discovered after the contract had been entered into by the parties. The University paid the claimant for the veal ordered and shipped to the University based upon a per pound rate rater than the "per piece" price quoted in the contract. The difference in the calculation based upon per pound rather than per piece is $1,450.44, which is the amount claimed herein. The claimant delivered more pieces of the veal than that ordered by West Virginia University.

The claimant entered into the contract based upon the language in the contract which stated clearly that the unbreaded veal was to be priced "per piece." The claimant based its invoice to the University upon the terms of the contract. Where a contract is free from ambiguity or doubt, it is the duty of the court to construe the contract according to its terms, and

to give full force and effect to the language used. 4B M.J., *Contracts*, §40.

The Court, in accordance with the testimony adduced at the hearing, grants an award to the claimant for the difference in the "per pound" amount paid to the claimant and the "per piece" rate in the contract for the unbreaded veal steaks originally ordered by West Virginia University, which award is in the sum of $1,412.52.

Award of $1,412.52.

Opinion issued September 23, 1982

JAMES D. TERRY

vs.

OFFICE OF THE STATE AUDITOR

(CC-82-44)

No appearance by claimant.

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

PER CURIAM:

The claimant is an attorney who served as counsel for criminal indigents in juvenile, misdemeanor, or felony proceedings pursuant to the provisions of West Virginia Code Chapter 51, Article 11. This statute provides for the payment of attorney fees out of the "needy persons fund" by the State Auditor. Claimant's fee of $345.00 was denied by the respondent as the fund was exhausted.

The factual situation in this claim is identical to that in *Richard K. Swartling, et al. v. Office of the State Auditor*, issued on November 5, 1979. Accordingly, an award is hereby made to the claimant in the amount indicated below.

Award of $345.00.

Opinion issued September 23, 1982

WILLIAM M. TRUMAN

vs.

OFFICE OF EMERGENCY SERVICES

(CC-81-376)

Robert B. Stone, Attorney at Law, for claimant.

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

PER CURIAM:

During the month of September 1979, claimant William M. Truman applied for the position of lead engineer of an emergency communications system which was, at that time, being organized by the Office of Emergency Services, an agency of the State of West Virginia. During the preliminary steps of the hiring process, the claimant alleges that he was led to believe that he would be employed by the respondent State agency. In reliance thereon, he resigned from the employment he had at the time and entered into a purchase contract for a house near Charleston, West Virginia. As a result of these actions, Mr. Truman sustained losses in the amount of $5,620.00, for which he filed this claim.

On September 3, 1979, claimant was contacted via telephone by John Anderson, the Director of the Office of Emergency Services, concerning the position of engineer of the emergency communications system and was interviewed by Mr. Anderson on September 8. It was necessary for the claimant to receive a rating from Civil Service to determine the salary to be offered to him; and the position had to be approved by the Commissioner of the Department of Finance and Administration.

On September 26, 1979, the salary level which was approved through Civil Service was communicated to the claimant, whereupon the claimant and Mr. Anderson discussed the starting date for claimant's employment, and designated it to be November 1, 1979. The claimant then notified his employer of his intention to assume a new position. He also visited

Charleston, West Virginia, to locate a house, and did, in fact, enter into a purchase contract, and approached a lending institution for financing.

Thereafter, Mr. Anderson informed the claimant that approval of the claimant for the position of communications engineer was not forthcoming from the Commissioner of the Department of Finance and Administration. Subsequently, the claimant sought and accepted a position elsewhere.

Mr. Anderson testified that from October 11, 1979, until the end of November 1979, the approval for the hiring of the claimant was in question as the Commissioner of the Department of Finance and Administration would not approve the salary level agreed upon by the claimant and Mr. Anderson. This approval was necessary before the claimant could be employed by the Office of Emergency Services.

From the facts referenced above, the Court is constrained to conclude that the claimant prematurely assumed that he would be employed by the Office of Emergency Services. The record establishes that an agreement by the parties concerning claimant's employment was not effected. Any losses sustained by the claimant in anticipation of employment by the respondent must be borne by the claimant himself. Therefore, the Court must disallow this claim.

Claim disallowed.

Opinion issued September 23, 1982

DAVID E. UTT

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-115)

Claimant appeared in person.

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

PER CURIAM:

On the evening of April 4, 1982, claimant was operating his 1982 Oldsmobile Toronado easterly on State Route 22 (also

known as Cove Road) in Weirton, West Virginia, a road owned and maintained by the respondent. As the claimant was turning onto Harmon Creek Road, a two-lane secondary road, the right front wheel of his automobile struck a pothole, damaging the hubcap and rim in the amount of $142.00.

According to the claimant's testimony, he had been travelling at a speed of 25 mph and was familiar with the road in question. On prior occasions, he had observed the pothole, but made no complaints to the Department of Highways.

It is well established law in West Virginia that the State cannot and does not guarantee the safety of motorists upon its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). To be held liable, the respondent must have had either actual or constructive notice of the hazardous condition of the highway. No such evidence of notice was presented in this case; therefore, the respondent cannot be held negligent, and the Court must disallow the claim.

Claim disallowed.

Opinion issued October 12, 1982

DAVID LEE CLOSSON

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-82-176)

No appearance by claimant.

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

PER CURIAM:

A civil judgment against the claimant in Marion County Magistrate Court resulted in the revocation of his driver's license. The judgment was later set aside, but, due to a clerical error, no notification was given to the Department of Motor Vehicles. Claimant expended $30.00 in towing fees and $20.00 in long distance phone calls to get his license reinstated, for a total claim of $50.00.

The respondent's Answer admits the amount and validity of the claim, and states that sufficient funds remained in its appropriation for the fiscal year in question from which the claim could have been paid. The Court therefore makes an award to the claimant in the amount requested.

Award of $50.00.

Opinion issued October 12, 1982

RICHARD D. GRAHAM, JR.

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-82-190)

HOWARD R. NORDECK

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-82-209)

No appearance on behalf of the claimants.

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

WALLACE, JUDGE:

Each of the claimants hereinabove is a magistrate who has petitioned the Court for the payment of wages not paid in accordance with the results of the 1980 decennial census. In the case of *Ruth A. Donaldson, Magistrate, etc., et al. v. Gainer, Jr., Auditor et al.* (June 30, 1982), the West Virginia Supreme Court of Appeals held that the 1980 decennial census became effective July 1, 1981. There were insufficient funds available to pay magistrates whose salaries were based upon the 1980 decennial census for the 1981-82 fiscal year.

The Supreme Court Administrator's Office has reviewed these claims and has admitted that the amounts claimed are valid and correct.

This Court has previously determined that payment for back wages arises at the time the wages are found to be due. *Petts and Preston v. Div. of Voc. Rehab.*, 12 Ct.Cl. 222 (1978).

Therefore, the Court makes awards for the wages which were not paid to the claimants during the 1981-82 fiscal year.

Award of $4,500.00 to Richard D. Graham, Jr.

Award of $4,500.00 to Howard R. Nordeck.

Opinion issued October 12, 1982

GREEN TAB PUBLISHING

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-194)

No appearance by claimant.

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

PER CURIAM:

Claimant herein seeks payment of the sum of $3,856.47 for typesetting the West Virginia Tax Book for the respondent.

Respondent's Answer admits the allegations of the Notice of Claim, and states that payment was not made because statutory purchasing procedures were not followed.

From the evidence, the Court believes that a misunderstanding regarding purchasing procedures existed between the parties; that, nevertheless, the work was performed satisfactorily; and that sufficient funds remained in the respondent's account for the proper fiscal year from which the obligation could have been paid.

Accordingly, an award is hereby made to the claimant in the amount requested.

Award of $3,856.47.

Opinion issued October 12, 1982

ROBERT A. ISNER

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-82-229)

No appearance on behalf of the claimant.

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

WALLACE, JUDGE:

The claimant hereinabove is a magistrate who has petitioned

the Court for the payment of wages not paid in accordance with the results of the 1980 decennial census. In the case of *Ruth A. Donaldson, Magistrate, etc., et al. v. Gainer, Jr., Auditor et al.* (June 30, 1982), the West Virginia Supreme Court of Appeals held that the 1980 decennial census became effective July 1, 1981. There were insufficient funds available to pay magistrates whose salaries were based upon the 1980 decennial census for the 1981-82 fiscal year.

The Supreme Court Administrator's Office has reviewed this claim and has admitted that the amount of $4,500.00 is the correct amount to be paid to the claimant.

The claimant has added interest to the amount claimed which this Court must deny in accordance with West Virginia Code Chapter 14, Article 2, Section 12.

This Court has previously determined that payment for back wages arises at the time the wages are found to be due. *Petts and Preston v. Div. of Vov. Rehab.*, 12 Ct.Cl. 222 (1978). Therefore, the Court makes an award to the claimant for the wages which were not paid to the claimant during the 1981-82 fiscal year.

Award of $4,500.00.

Opinion issued October 12, 1982

McANALLEN BROTHERS, INC.

vs.

BOARD OF REGENTS

(D-1031)

Edgar F. Heiskell, III, Attorney at Law, and *Robert L. Shuman*, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

McAnallen Brothers, Inc., had a contract with the respondent, Board of Regents, for construction of a natatorium at West Virginia University. A part of that contract provided for the construction of a sanitary sewer. This claim is for the cost incurred by the contractor for extra work performed in

the construction of this sanitary line as the direct result of rock encountered on the project site. The contractor contends that the test borings provided prior to bidding on the job provided no indication of the type of rock on the project site as was encountered in the area of the sanitary sewer. The respondent, on the other hand, contends that the contractor should have performed its own test borings on the project to determine the sub-surface conditions and, therefore, the respondent is not responsible for the costs incurred by the contractor.

The record in this claim establishes that the contractor began construction on the sanitary line and within a week's time encountered sub-surface hard rock similar to granite. The contractor attempted to use mechanical means to break the rock but soon resorted to the use of dynamite with the permission of the respondent's field inspector. This method proved to be too time consuming to the contractor so the architect was requested to assist the contractor by redesigning the sanitary line. The architect complied with the contractor's request by redesigning the line so as to raise the elevation and alter the direction and ultimate length of the line. The contractor then constructed the sanitary line according to the redesign.

The architect for the respondent, William Hartlep, testified that the rock encountered by this contractor "is blue limestone which is nearly as hard as granite and very, very rare." He further testified that the borings did not disclose this sub-surface condition "because it's a very isolated small area and I can't explain it because it's a freak occurrence of stone in that area. It's one in a hundred shot that it would be there."

The record in this claim establishes that an unanticipated sub-surface condition existed on the project and this condition caused the contractor to incur extra expense in the amount of $20,228.00 for which the contractor is entitled to be compensated. *C. J. Langenfelder & Sons, Inc. v. State Road Commission*, 8 Ct.Cl. 193 (1971). The Court, therefore, makes an award to the claimant in the amount of $20,228.00.

Award of $20,228.00.

Opinion issued October 12, 1982

PAUL J. and BETTY O. UNDERWOOD

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-86)

Claimants appeared in person.

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

GARDEN, JUDGE:

Claimants are the owners of property located on State Route 12 at Ada in Mercer County, West Virginia, which they purchased in 1974.

Across State Route 12, on the north side, is situated a drainpipe whose ends became clogged with dirt during the summer of 1978. As a result, claimants' property suffered damage from water which flowed across the highway during heavy rains. On September 10, 1978, hard rain washed into the drainage ditch on State Route 12, across the roadway, and onto the Underwood property. Claimants' basement became flooded, cracking the basement wall and bowing the cinder block foundation. The total amount of damages as indicated by the evidence was $3,777.09.

Testifying on behalf of the respondent was Mr. Elwood Simons, Mercer County Superintendent of the Department of Highways. According to Mr. Simons, the ditch line along Route 12 was cleaned some time during the summer of 1978, but he could not recall the exact date.

A registered professional engineer, Mr. Bruce Leedy, also offered testimony on behalf of the respondent. Mr. Leedy stated that the cracks in the basement wall of claimants' structure were due to foundation failure caused when the weight imposed on the foundation on the footer became too much for the bearing capacity of the soil beneath. However, he further stated that the damage may have occurred as the result of excess water or a saturated condition in the soil, which would have aggravated the footer condition to the point where cracking occurred.

From the evidence, the Court finds that the drain was located in the ditch along the State highway and it was the responsibility of the respondent to maintain. Respondent's failure to maintain the drain caused water to flow across the road and onto claimants' property, damaging it extensively. See *Stevens v. Dept. of Highways*, 12 Ct.Cl. 180 (1978), and *Taylor v. Dept. of Highways*, 12 Ct.Cl. 261 (1979). Therefore, the Court makes an award to the claimants in the amount of $3,777.09.

Award of $3,777.09.

Opinion issued October 12, 1982

CLYDE WOOD

vs.

DEPARTMENT OF HIGHWAYS

(CC-77-103)

Arthur A King, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

Claimant is the owner of a tract of land on Surveyor's Branch Road in Summers County, West Virginia. The claimant purchased the property in September 1975, at which time he had a small summer home built on the property. In 1976, a slip occurred, and by the spring of 1977, the slip had progressed up to the house. The claimant was forced to purchase a second piece of property and move the house and an outbuilding from the original tract of land. The claimant contends that the slip which occurred was the result of action taken by employees of the respondent when they stopped up a ditch line on Surveyor's Branch Road causing water to flow over the road and onto his property.

Bill Hanshew, Jr., Regional Construction Engineer for the Department of Highways, testified that he was the District Engineer for District 9, which includes Summers County, from 1975 to 1977, and was familiar with the property damage in this claim. He explained that the claimant's property was affected by the movement of the ground, which was aggravated

by underground water seeping beneath Surveyor's Branch Road and existing on the claimant's property. There was also a small dirt road below claimant's property which removed some of the lateral support for the property. Mr. Hanshew recommended that the respondent drill the ditch line and install a perforated pipe to help stabilize Surveyor's Branch Road and claimant's property. This work was performed, but claimant's property continued to slip to the point that claimant was no longer able to reside upon the land.

The Court has determined from the preponderance of the evidence that the respondent was not negligent in the maintenance of its road, and, in fact, had attempted to correct the slip on claimant's property while remedying the slip problem occurring on Surveyor's Branch Road. Therefore, the Court is of the opinion to, and hereby does, disallow the claim.

Claim disallowed.

Opinion issued October 26, 1982

AMERICAN HOSPITAL SUPPLY

vs.

DEPARTMENT OF HEALTH

(CC-82-197)

No appearance by claimant.

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

PER CURIAM:

Claimant seeks payment of the sum of $1,140.00 for two airfloat lapidus units for patient care which, while being rented by Huntington State Hospital, were damaged and rendered inoperable.

Respondent's Answer admits the validity and amount of the claim, and states that sufficient funds were available in its appropriation for the fiscal year in question from which the obligation could have been paid.

Accordingly, the Court makes an award to the claimant in the amount requested.

Award of $1,140.00.

Opinion issued October 26, 1982

NARENDRA BORA

vs.

DEPARTMENT OF HEALTH

(CC-82-97)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted upon the pleadings, claimant seeks payment of the sum of $157.00 for damage to personal property at Huntington State Hospital. Respondent acknowledges the validity and amount of the claim, and avers that sufficient funds were available in its appropriation for the pertinent fiscal year from which the claim could have been paid. Accordingly, the Court makes an award of $157.00 to the claimant.

Award of $157.00.

Opinion issued October 26, 1982

NELSON EDDIE FURNER, AN INCOMPETENT, SUES BY AND THROUGH AVA ELIZABETH FURNER YOUNG, HIS NEXT FRIEND, AND AVA ELIZABETH FURNER YOUNG, INDIVIDUALLY

vs.

DEPARTMENT OF MENTAL HEALTH

(D-1010)

James R. Watson, Attorney at Law, for the claimant.

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

GARDEN, JUDGE:

Ava Elizabeth Furner Young filed this action individually and on behalf of her son, Nelson Eddie Furner, an incompetent. Mr. Furner was injured when he jumped from the roof of Ward O at respondent's Weston State Hospital where he was a patient. The claimant contends that the respondent was negligent in failing to prevent him from gaining access to the roof of the building.

Nelson Eddie Furner, 24 years of age, was a patient at Weston State Hospital for treatment of an epileptic condition and for mental retardation. The ward on which he was located, Ward O, Unit 3, was a "closed ward," that is all doors leading to the outside of the ward were kept locked at all times. The patients were not locked in their rooms but were free to roam in the hallways or rooms of the ward as they desired. On the evening of October 13, 1973, Mr. Furner was given his usual medication at approximately 9:00 p.m. Normally, the patients receive medication and then return to their rooms for the night, but are permitted to stay up if they desire. Bernard Davis, a Psychiatric Aide II employed by Weston State Hospital, was on duty the night of October 13, 1973. After having provided the usual medication to Mr. Furner and the other ward patients at approximately 9:00 p.m., Mr. Davis was sweeping the TV room when he heard a "fall sound" and thought that a wheelchair patient may have fallen. The telephone then rang and the supervisor told him that Nelson Furner was "laying out back." Mr. Davis proceeded outside where he found him lying on the ground. He did not know why he was outside the building, nor did he know how he had gotten there.

Nelson Eddie Furner testified that he entered the mop room on his floor through an unlocked door, and then went up a ladder in the mop room, into the attic. Then, he used a smaller ladder to go up onto the roof of the building. Another patient, Gary George, was with him. When the two reached the roof, Nelson Eddie Furner jumped off one end of the building and Gary George jumped off the other end. Both patients were injured. Mr. Furner was taken to WVU Hospital for treatment of abrasions to his body and a broken left leg. He remained in the hospital until his release on December 24, 1973, when the claimant took him to Ohio where he now resides. Since that time, it has been necessary for him to have surgery on his right leg.

When the psychiatric aide, Bernard Davis, returned to Unit 3, he determined that the mop room door was unlocked and that a ladder had been placed against the trap door in the ceiling, which door was opened to the attic. Mr. Davis then

locked the mop room door and "got away from it." According to Davis, the mop room door was kept locked at all times except during the evenings from 8:45 to 9:30 p.m. when the floors were being mopped. It was necessary at that time to obtain water from the mop room for use in washing the floors. Apparently it was at this time that the two patients, Furner and Young, gained entrance to the mop room. One ladder was in the mop room because men were making repairs to the roof during the day and were using the ladder to get to the attic and then onto the roof.

For the respondent to be found liable for the injuries to Nelson Eddie Furner, negligence on the part of the respondent must be established. Foreseeability of injury to one to whom a duty is owed, is of the very essence of negligence. 13 M. J. *Negligence* §22. This Court is of the opinion that the sequence of events leading to the injury of the claimant was not forseeable.

Although the Court is sympathic to Nelson Eddie Furner, the Court is constrained to hold that, for the foregoing reasons, the claim must be denied.

Claim disallowed.

Opinion issued October 26, 1982

DAVID R. GOLD and
LOUIS H. KHOUREY d/b/a
GOLD & KHOUREY

vs.

OFFICE OF THE STATE AUDITOR

(CC-82-192a)

No appearance by claimants.

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

PER CURIAM:

The claimants are attorneys who served as counsel for criminal indigents in juvenile, misdemeanor, or felony proceed-

ings pursuant to the provisions of West Virginia Code, Chapter 51, Article 11. Claimants' fees were denied by the respondent because the fund was exhausted.

The claimants also served as counsel for indigents in Mental Hygiene hearings by appointment of the Circuit Court of Marshall County, West Virginia, pursuant to the provisions of West Virginia Code, Chapter 27, Article 5. This statute provides for the payment of mental hygiene commissioner fees and attorney fees out of the "mental hygiene fund" by the State Auditor. West Virginia Code §27-5-4(i). Claimants' fees were denied by the respondent as the fund was exhausted.

The factual situations in this claim are identical to that in *Richard K. Swartling, et al. v. Office of the State Auditor,* 13 Ct.Cl. 57 (1979). Accordingly, awards are made in the amounts indicated below to the claimants.

Needy Persons Fund — award of $1,140.50.

Mental Hygiene Fund — award of $42.50.

Opinion issued October 26, 1982

DAVID R. GOLD and
LOUIS H. KHOUREY d/b/a
GOLD & KHOUREY

vs.

PUBLIC LEGAL SERVICES

(CC-82-192b)

No appearance by claimants.

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

PER CURIAM:

The claimants are attorneys who served as counsel for criminal indigents in juvenile, misdemeanor, or felony proceedings pursuant to the provisions of West Virginia Code, Chapter 51, Article 11. Claimants' fees were denied by the respondent because the fund was exhausted.

The claimants also served as counsel for indigents in Mental

Hygiene hearings by appointment of the Circuit Court of Marshall County, West Virginia, pursuant to the provisions of West Virginia Code, Chapter 27, Article 5. This statute provides for the payment of mental hygiene commissioner fees and attorney fees out of the "mental hygiene fund" by the State Auditor. West Virginia Code §27-5-4(i). Claimants' fees were denied by the respondent as the fund was exhausted.

The factual situations in this claim are identical to that in *Richard K. Swartling, et al. v. Office of the State Auditor,* 13 Ct.Cl. 57 (1979). Accordingly, awards are made in the amounts indicated below to the claimants.

Needy Persons Fund — award of $422.50.

Mental Hygiene Fund — award of $65.00.

Opinion issued October 26, 1982

GENEVA HILL

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-241)

Claimant appeared in person.

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

GARDEN, JUDGE:

This claim seeks recovery of damages to personal property located in the basement of claimant's residence at 82A Rural Lane near Chester, West Virginia. At some time during the period between May 30, 1978, and June 14, 1978, water flooded the claimant's basement. The claimant alleges that the water was surface water cast onto her property from State Route 16/4 which entered the basement through a window well.

The claimant testified that a low spot on the road created a large puddle which splashed water onto claimant's property when vehicles passed through the puddle. There is also a culvert from the road which empties onto claimant's property from which she has attempted to maintain a ditch through

her property for drainage. The claimant had made many complaints to employees of the respondent about the water problems which she experienced.

Donald M. Robinson, the Maintenance Superintendent for Hancock County, testified that he had visited the claimant's property after a complaint from the claimant. He explained that water flowed onto claimant's property because it is the natural drainage course. The respondent maintains a ditchline on the side of the road opposite from claimant's property. There is no easement for a drain through claimant's property; therefore, it is the responsibility of the claimant to maintain the ditch for the water draining naturally onto her property. The Court finds that the preponderance of the evidence supports those assertions of the respondent and, accordingly, is constrained to deny this claim.

Claim disallowed.

Opinion issued October 26, 1982

WAITMAN D. JETT and
MARILYN JETT

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-17)

Joseph C. Hash, Jr., Attorney at Law, for claimants.

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

GARDEN, JUDGE:

Claimants are the owners of real estate and a residence located on West Virginia Secondary Route 8 in Jackson County, West Virginia, adjacent to Interstate 77. On or about July 11, 1976, a heavy rainfall occurred and water from Little Sandy Creek flooded claimants' property and residence. A second flood occurred in July 1977. The claimants and the respondent stipulated that damage to claimants' property amounted to $935.00 as a result of the first flood.

The claimants allege that negligent maintenance of a channel

and the construction of an inadequate culvert under I-77 were the proximate causes of the flooding.

The respondent contends that the culvert under I-77, a 96-inch pipe, was adequate; that the drain or channel flowing into this pipe was on private property; and that the rainfall was of an extraordinary nature.

Two witnesses for the claimants, Mrs. Roland Haught and Mr. Kenneth G. Gough, testified to their familiarity with the property which is the subject of this claim. Mr. Gough owned the property at one time. He testified that no floods had occurred prior to the construction of I-77. Mrs. Haught testified that she taught school in a building on the site of claimants' home for many years and she had never observed any floods on the property.

The evidence establishes that large rocks and other debris were blocking the channel of the creek to the 96-inch culvert under I-77. After the rocks and debris were removed by the respondent and the claimants, the claimants did not experience any further flooding on their property.

The Court is of the opinion that the respondent was negligent in its maintenance of the creek bed at the mouth of the 96-inch culvert under I-77, and this negligence was the proximate cause of the flood on claimants' property. See *Haught v. Dept. of Highways,* 13 Ct.Cl. 237 (1980). Therefore, the Court makes an award to the claimants in the amount of $935.00.

Award of $935.00.

Opinion issued October 26, 1982

MONSANTO COMPANY

vs.

BOARD OF REGENTS

(CC-78-282)

Gary C. Markham, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

The respondent Board of Regents on behalf of Marshall Uni-

versity, one of the institutions under its supervision and control, arranged for bids to be let for the replacement of the Astro-Turf on Marshall's football field on April 26, 1978. The claimant, Monsanto Company, hereinafter referred to as Monsanto, submitted a bid in the amount of $390,000.00 to remove the old turf and to put down new Astro-Turf. A bid from Super-Turf was also submitted in the amount of $386,920.78. Thereafter, Monsanto received from the respondent a letter of intent dated May 10, 1978, which specifically stated: "This letter of intent does not authorize you to commence work on the referenced project. Any work performed or any materials purchased or contracted for prior to receipt of a written 'Notice to Proceed' and/or a purchase order shall be at the contractor's risk." The letter requested certain documentation from Monsanto required to be executed before the contract could be awarded to Monsanto. Included with this letter was the standard Form of Agreement which Monsanto signed and returned to the respondent.

Monsanto requested permission to remove the old turf prior to the time the contract was approved by the respondent, and was informed by Larry Barnhill, an employee of the respondent, that the contract had not been signed, and that if Monsanto performed any work it would be at Monsanto's own risk. On May 31, 1978, Monsanto sent employees to remove the old turf, which work was completed on June 6, 1978.

The Department of Finance and Administration awarded the bid to the low bidder, Super-Turf, and the respondent refused to pay claimant's invoice in the amount of $13,010.00 for the removal work. The claimant filed this claim to recover the amount of the invoice.

The respondent admits the work was performed by Monsanto but takes the position that the claimant proceeded at its own risk without a contract. Cost of removing the old turf was included in the bid of the low bidder.

To support its position, the claimant contends its claim is similar to one awarded by this Court in *Russell Transfer v.*

Alcohol Beverage Control Commissioner, 10 Ct.Cl. 40 (1973). The instant case is distinguishable from that claim as the claimant therein had an executed contract. The Department of Finance and Administration refused to issue a purchase order to permit performance of the contract. The Court held that the issuance of a purchase order "is a ministerial act, and the destruction of it . . . in no manner nullified a written and legally enforceable contract between the parties."

In this claim the evidence is undisputed and, accordingly, it must be denied.

Claim disallowed.

Opinion issued October 26, 1982

IRLANT E. MOORE and
ROBERT L. MOORE

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-179)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a stipulation to the effect that on or about June 8, 1982, while claimant Irlant E. Moore was operating a 1973 Chervolet Caprice titled in the name of Robert L. Moore across a bridge on West Virginia Route 52 in McDowell County, a highway owned and maintained by the respondent, one of the tires struck a piece of steel, protruding from the surface of the bridge, resulting in damage in the amount of $43.15.

Following the precedent of *Halliburton Services vs. Dept. of Highways,* 12 Ct.Cl. 281 (1979), an award in that sum should be made.

Award of $43.15.

Opinion issued October 26, 1982

JOHN ORNDOFF

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-111)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a stipulation to the effect that on or about February 5, 1982, while claimant was operating his 1972 Chevrolet station wagon across a bridge on West Virginia County Route 15, a highway owned and maintained by the respondent, the vehicle struck loose timber decking protruding from the bridge which damaged the car's exhaust system in the amount of $104.16.

Following the precedent of *Halliburton Services vs. Dept. of Highways*, 12 Ct.Cl. 281 (1979), an award in the above amount is made.

Award of $104.16.

Opinion issued October 26, 1982

B. PAYMAN, M.D., ET AL.

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-205)

No appearance by claimants.

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

PER CURIAM:

These claims were submitted for decision upon the pleadings. The claimants seek reimbursement for medical and dental services rendered to persons incarcerated at the West Virginia

State Prison for Women at Pence Springs, West Virginia, as follows:

Claim No.	Claimant	Amount
CC-82-205	B. Payman, M.D.	$1,199.00
CC-82-206	Professional Laboratory & X-Ray	$ 32.00
CC-82-208	Jett S. Andrick, D.D.S.	$ 843.00
CC-82-210	Harold E. Harvey, M.D., Inc.	$ 75.00
CC-82-211	C. K. Agarwal, M.D.	$1,235.00
CC-82-214	Beckley Medical Arts, Inc.	$ 60.00

The respondent admits the validity and amounts of these claims, but further alleges that sufficient funds were not available at the close of the fiscal years in question from which the obligations could have been paid.

While we feel that these claims should in equity and good conscience be paid, we further believe that awards cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claims disallowed.

Opinion issued October 26, 1982

PETERS FUEL CORPORATION, ET AL.

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-185)

No appearance by claimants.

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

PER CURIAM:

These claims were submitted for decision upon the pleadings. The claimants seek payment for various goods and services furnished to the respondent as follows:

Claim No.	Claims Against Huttonsville Correctional Center	Amount
CC-82-185	Peters Fuel Corporation	$30,097.20
CC-82-220	Monongahela Power Company	$66,033.70

Claim No.	Claims Against West Virginia Prison for Women	Amount
CC-82-202	Summers County Hospital	$13,456.65
CC-82-232	Summers Community Clinic Pharmacy	$ 29.90

The respondent admits the validity and amounts of these claims, but further alleges that sufficient funds were not available at the close of the fiscal years in question from which the obligations could have been paid.

While we feel that these claims should in equity and good conscience be paid, we further believe that awards cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claims disallowed.

Opinion issued October 26, 1982

THE PIONEER COMPANY and
MOUNTAIN STATE CONSTRUCTION COMPANY, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-76-148)

Charles W. Yeager, Attorney at Law, for claimants.

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

GARDEN, JUDGE:

The Pioneer Company and Mountain State Construction Company, Inc., had a contract with the respondent for the construction of a storm sewer from the Kanawha River crossing beneath Kanawha Boulevard and Greenbrier Street in Charleston, West Virginia. At the point where Kanawha Boulevard and Greenbrier Street intersect, the contractors encountered a sanitary sewer which the contractors allege

caused considerable extra work and additional time on the project, for which they seek compensation from this Court.

The claimants used a tunnel method of installing the storm sewer, starting from a manhole at the edge of the Kanawha River. As the mechanical hydraulic shield progressed beneath the Kanawha Boulevard, it struck an object and became lodged underground. In order to dislodge the shield, it was necessary for employees of the claimants to hand excavate from a manhole 20 feet from the shield. The respondent redesigned the location of the storm sewer after it was determined that a 15" sanitary sewer encased in concrete was the object struck by the shield of the machine excavator. The contractors were paid for the work performed in accordance with the redesign of the storm sewer and sanitary sewer which crossed beneath the storm sewer. A portion of the Kanawha Boulevard caved in, breaking other utility lines, and the contractors were paid for the work and materials incident to this. A broken water main also caused problems in the correction work, keeping the soil in a more liquid state. The contractors allege that the extra labor, equipment, and materials for dislodging the shield amounted to $41,498.99.

The original plans for this project showed the storm sewer passing over the sanitary sewer with 1.6 foot clearance. The plans also provided that the contractor was to use extreme care in the area of existing utilities and should hand excavate.

The respondent contends that the claimants failed to comply with a specific note in the construction plans which provided as follows: "Location and depth of existing utility lines shall be verified by the contractor in advance of storm sewer construction. Extreme care shall be exercised in excavating existing utilities and hand excavation only will be permitted in the vicinity of existing pipes and/or conduits." The respondent also contends that when the contractors encountered the obstruction, they failed to ascertain that it was a utility or to use the proper construction methods that would have prevented the problem which occurred. The respondent further contends that the claimants have been paid for all of the construction costs incident to the project in accordance with the contract provisions.

From the evidence, it appears to the Court that the contractors were paid for all costs incident to the redesign of the storm sewer over the sanitary sewer which was actually adjacent to the planned flow line of the storm sewer. The use of the mechanical hydraulic machine in the proximity of the sanitary sewer, rather than hand excavation, resulted in the extra costs incurred by the contractors in dislodging the shield from the sanitary sewer.

The Court is of the opinion to and does disallow this claim.

Claim disallowed.

Opinion issued October 26, 1982

TRI-CITY WELDING SUPPLY COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-173a)

A. J. Massinople for claimant.

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

WALLACE, JUDGE:

This claim was submitted for determination upon a written stipulation filed by the parties indicating that the claimant supplied the respondent's Equipment Division with oxygen and acetylene in cylinders; that it is common custom and practice in the welding industry that cylinders are loaned to customers; that three cylinders of the claimant were damaged by fire while in the possession and control of the respondent, and that the sum of $437.00 is a fair and reasonable amount for the damaged cylinders.

Accordingly, the Court makes an award to the claimant in the amount stipulated.

Award of $437.00.

Opinion issued October 26, 1982

TRI-CITY WELDING SUPPLY COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-173b)

A. J. Massinople for claimant.

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

WALLACE, JUDGE:

This claim was submitted for determination upon a stipulation indicating that the claimant supplied the respondent's Equipment Division with oxygen and acetylene in cylinders; that it is common custom and practice in the welding industry that cylinders are loaned to customers; that eight cylinders belonging to the claimant were lost due to the negligence of the respondent; that this negligence was the proximate cause of the damages suffered by the claimant, and that the sum of $1,394.00 is a fair and reasonable amount for the lost cylinders.

Accordingly, the Court makes an award to the claimant in the amount stipulated.

Award of $1,394.00.

Opinion issued October 26, 1982

WAYNE CONCRETE CO.

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-109)

D. W. Daniel, Jr., for claimant.

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

WALLACE, JUDGE:

This claim was submitted for determination upon a stipulation filed by the parties which revealed the following facts:

Claimant supplied 34 cubic yards of concrete grout to the respondent for use in certain highway projects. The purchase order for the grout was dated after the delivery date of the material, and could not be processed by the respondent. The respondent acknowledges that the concrete grout was received and utilized in its work, and that the sum of $2,642.84 is a fair and reasonable amount for the material supplied.

Based on the foregoing facts, the Court makes an award to the claimant in the amount stipulated.

Award of $2,642.84.

Advisory opinion issued October 26, 1982

WEST VIRGINIA UNIVERSITY OUTPATIENT PHARMACY

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-145)

No appearance by claimant.

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

PER CURIAM:

This claim arose between two State agencies, and the Court will render an advisory decision pursuant to West Virginia Code §14-2-18.

Claimant seeks payment of the sum of $117.50 for prescriptions filled for an inmate of the West Virginia Penitentiary at Moundsville. Respondent admits the validity and amount of the claim, but states in its Answer that no funds remained in its appropriation for the fiscal year in question from which the obligation could have been paid.

No award can be made by the Court in this case since it is an advisory determination. Even if an award were possible, we believe that the case is governed by this Court's decision in *Airkem Sales and Service, et al. v. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971), and the claim would be denied.

The Clerk of the Court is hereby directed to forward copies of this opinion to the respective heads of the State agencies involved in this claim.

Opinion issued December 1, 1982

B. & S. AIR TAXI SERVICE

vs.

OFFICE OF THE SECRETARY OF STATE

(CC-82-259)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted for decision upon the pleadings. The claimant seeks payment for services furnished to the respondent in the amount of $304.50.

The respondent admits the validity and amount of the claim, but further alleges that sufficient funds were not available at the close of the fiscal year in question from which the obligation could have been paid.

The Court finds that an award cannot be made, based on the decision in *Airkem Sales and Service, et al. v. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued December 1, 1982

BOWLINGS, INC., ET AL.

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-150)

No appearance by claimants.

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

PER CURIAM:

These claims were submitted for decision upon the pleadings.

The claimants seek payment for various goods and services furnished to the respondent as follows:

Claim No.	Claim Against Anthony Center	Amount
CC-82-150	Bowlings, Inc.	$ 407.74

Claim No.	Claims Against West Virginia Prison for Women	Amount
CC-82-226	Butler's Pharmacy	$2,466.18
CC-82-222	FMRS Mental Health Council, Inc.	$ 96.00
CC-82-218	William D. McLean, M.D.	$ 64.00
CC-82-217	D. L. Rasmussen, M.D.	$ 665.00

The respondent admits the validity and amounts of these claims, but further alleges that sufficient funds were not available at the close of the fiscal years in question from which the obligations could have been paid.

The Court finds that these claims should, in equity and good conscience, be paid, but awards cannot be made, based on the decision in *Airkem Sales and Service, et al. v. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claims disallowed.

Opinion issued December 1, 1982

SUSAN L. CALE

vs.

BOARD OF REGENTS

(CC-82-160)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted upon the pleadings, claimant seeks payment of the sum of $530.00 representing a miscalculation in her rate of pay by West Virginia University. While in the employ of the Department of Ophthalmology, claimant changed position from Secretary II to full-time Secretary II,

and finally, to Secretary III. Two incorrect computations of her salary resulted in a $530.00 underpayment to her.

The respondent admits the amount and validity of the claim and that sufficient funds remained in its appropriation for the fiscal year in question from which the obligation could have been paid. The Court makes an award to the claimant in the amount of $530.00.

Award of $530.00.

Opinion issued December 1, 1982

ROBERT CONLEY, GENEVA CONLEY
and MICHAEL CONLEY, by
his mother, GENEVA CONLEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-145)

Charles T. Bailey and *Tom Parks,* Attorneys at Law, for claimants.

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

GARDEN, JUDGE:

On June 8, 1976, claimant Geneva Conley was operating a 1973 Ford Bronco belonging to her husband, claimant Robert Conley, on W.Va. Route 3 in Logan County, West Virginia. Claimant Michael Conley, son of claimants Geneva Conley and Robert Conley, was a passenger in the vehicle. As claimant proceeded on State Route 3 towards her home in Shively, West Virginia, she had a single vehicle accident in which she and her son received personal injuries, and the vehicle was totalled. Claimants have alleged that failure of the respondent to maintain the berm of State Route 3 caused the accident and resultant injuries and losses sustained by the claimants.

W.Va. State Route 3, in the area of the accident, was described as a narrow two-lane, blacktopped road with a slight curve. A hillside is on one side and a narrow berm is on the other side. As claimant came into the curve, a truck was approaching in the opposite lane of travel. When the two vehicles were approximately five to ten feet apart, the claim-

ant drove onto the berm of the road. The vehicle thereupon struck a large rock located about six inches from the pavement causing claimant to lose control, and the vehicle crossed the road, hit the hillside and rolled over. Claimant testified that she was unable to see the rock "until I was right on it," because weeds had grown up around it.

Walter Hager, a foreman for respondent during the period before claimant's accident, testified that he was aware of the rock on the berm. He was not aware of how the rock came to be on the berm. He stated that the rock had not been moved off of the bern because "I didn't have the equipment to move it with, didn't have a good end loader to pick it up." He further testified that ". . .If you met somebody coming around that curve pretty fast, you would have to move off." He also stated that he had received complaints about the rock on the berm prior to claimant's accident.

"The berm or shoulder of a highway must be maintained in a reasonably safe condition for use when the occasion requires, and liability may ensue when a motorist is forced onto the berm in an emergency, or *otherwise necessarily uses the berm of the highway.*" (Emphasis supplied.) 39 Am.Jur. 2d *Highways, Streets & Bridges* §488, *Taylor v. Huntington,* 126 W.Va. 732, 30 S.E.2d 14 (1944). Failure to remove a large rock from the berm and permitting weeds to obscure the rock from the view of a motorist in a section of highway where use of the berm by motorists is common, created an unsafe condition.

The record in this claim established that the respondent had knowledge of the presence of the rock on the berm of the road. The failure of respondent to remove this rock created a hazardous condition which constituted negligence. This negligence was the proximate cause of the injuries and loss sustained by the claimants.

Claimant Michael Conley suffered an injury to his back and two broken ribs. He was required to stay in the hospital in traction for five days. He has now fully recovered from his injuries. Claimant Geneva Conley suffered a compression-type fracture of the second and third lumbar vertebrae with deformity. She remained in the hospital for three weeks following the accident. It was necessary for her to wear a

back brace following her release from the hospital. She has suffered low back pain since the injury occurred, requiring her to avoid lifting heavy objects and to sleep on a hard surface. As a result of the injury to her back, claimant has a gibbous deformity or humpback, which is permanent. The percentage of her disability is approximately 35 percent. Inasmuch as the accident occurred in June, 1976, after school was out for the summer and claimant was able to return to her position as a teacher's aide in Logan County in September 1976, she did not sustain any loss of wages.

The medical bills incurred by claimant Michael Conley were in the amount of $516.00, and those incurred by claimant Geneva Conley were in the amount of $1,863.05. The ambulance bills totalled $195.71.

The 1973 Bronco had a fair market value at the time of the accident of $3,700.00, but the purchase price had been $2,995.00.

In view of the evidence, the Court makes awards as follows: $2,995.00 to claimant Robert Conley; $1,500.00 to claimant Michael Conley; and $10,000.00 to Geneva Conley.

Award of $2,995.00 to Robert Conley.

Award of $1,500.00 to Michael Conley.

Award of $10,000.00 to Geneva Conley.

Opinion issued December 1, 1982

G. M. McCROSSIN, INC.

vs.

BOARD OF REGENTS

(CC-79-682)

Patrick Thompson and *Ronald G. Robey*, Attorneys at Law, for claimant.

Ann V. Dornblazer, Assistant Attorney General, and *Henry C. Bias, Jr.*, Deputy Attorney General, for respondent.

GARDEN, JUDGE:

In April 1979, the Board of Regents issued an Advertisement for Bids for the construction of an athletic shell facility for

West Virginia University in Morgantown, West Virginia. The bid documents requested a base bid and alternates numbered one through eight. Claimant G. M. McCrossin, Inc. (McCrossin) submitted a bid for this project in accordance with the bid documents on July 26, 1979. At the bid opening, McCrossin was the apparent low bidder. When employees of McCrossin compared its bid with the bids submitted by the other bidders, they determined that an error had been made in alternates 2 and 5 on the bid documents. On the day following the bid opening, McCrossin notified the respondent, by letter dated July 27, 1979, of the errors in alternates 2 and 5. After a review of the bid documents and supporting data from McGrossin, the Division of Purchasing in the Department of Finance and Administration notified McCrossin that there was insufficient justification for rejection of the bid. McCrossin then proceeded with construction of the shell facility in accordance with the contract, but filed this claim to recover the loss alleged as a result of the errors in alternates 2 and 5.

McCrossin contends that an adjustment should have been permitted by the respondent or that it should have been released from performance of the contract.

The respondent contends that McCrossin failed to meet the mandatory requirements of Purchasing Regulation 2.02(6), which details the conditions under which a bid may be rejected after a bid opening. Section 2.02(6) provides as follows:

> "The Director, *at his discretion,* may reject an erroneous bid after the bid opening *if all of the following conditions exist*: 1) a clerical error was made; 2) the error materially affected the bid; 3) rejection of the bid would not cause a hardship on the State agency involved other than losing an opportunity to receive goods and/or services at a reduced cost; 4) enforcement of the part of the bid in error would be unconscionable." (Emphasis supplied.)

In explaining the decision made by the Purchasing Division, Glenn R. Cummings, Director of the Purchasing Division, testified that the data submitted by McCrossin to explain the errors in alternates 2 and 5 on the bid did not establish that a

clerical error had occurred; that he determined that a judgemental error had occurred; that the portion of the error was a small percentage of the whole contract; that rejection of the bid would have caused a hardship upon the respondent in having to rebid the alternates or the whole bid; and that enforcement of the part of the bid in error was not unconscionable as it was only a three or four percent differential.

McCrossin introduced an abundance of evidence illustrating in detail the manner in which the errors in the alternates occurred. The errors occurred during the hour prior to the submission of the bid when McCrossin's employees were finalizing the figures to be relayed by telephone to an employee waiting in Charleston. Needless to say, there was much confusion in putting the figures in the proper places, computing the final figures, and then reporting the same to the person in Charleston who submitted the final bid at the bid opening. ". . .Construing the words literally, a 'clerical error' means an error committed by a clerk or some subordinate agent in the performance of clerical work. It usually denotes negligence or carelessness which is not attributable to the exercise of judicial consideration or discretion." 21A M.J., Words & Phrases, Page 350. In the opinion of the Court, McCrossin did satisfactorily prove that the errors were clerical.

However, Regulation 2.02(6) of the Division of Purchasing, which applies to the rejection of a bid, requires that three other conditions also be met before the bid may be rejected.

The clerical error must also materially affect the bid. As the errors in alternates 2 and 5 constituted approximately three to four percent, the Court is reluctant to find that the bid was materially affected by the errors.

Rejection of the bid in this instance may have caused a hardship upon the respondent Board of Regents inasmuch as this bid letting was the second one for the construction of the Athletic Shell Facility. The delay involved in re-bidding the contract probably would have resulted in increased cost of the project to the detriment of the respondent.

In addition, it does not appear from the evidence that en-

forcement of the bid in error by the Division of Purchasing would be unconscionable.

In the opinion of the Court, the Director of the Purchasing Division did not abuse the discretion granted to him under Section 2.02 (6) of the Purchasing Regulations.

For the foregoing reasons, the Court is of the opinion to, and does, disallow the claim.

Claim disallowed.

Opinion issued December 1, 1982

GENERAL MOTORS
ACCEPTANCE CORPORATION

vs.

DEPARTMENT OF MOTOR VEHICLES

(CC-82-46)

Sarah G. Sullivan, Attorney at Law, for claimant.

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

PER CURIAM:

Claimant seeks to recover the sum of $4,259.64 for damages it has suffered due to respondent's failure to record claimant's lien on a West Virginia Certificate of Title.

On April 19, 1978, Lillian Vaught entered an installment sales contract payable to Gary Fronrath Chevrolet, Inc. of Fort Lauderdale, Florida, for the purchase of a 1978 Chevrolet Monte Carlo. The contract was transferred and assigned to General Motors Acceptance Corporation ("GMAC"). A Florida Certificate of Title was issued to Ms. Vaught on which GMAC was designated as first lien holder.

In January of 1980, Ms. Vaught applied for a W.Va. Certificate of Title. A title was issued, omitting GMAC's lien, which had been recorded on the Florida title. Ms. Vaught defaulted on her sales contract, at which time GMAC discovered that Ms. Vaught was holding clear title to the vehicle. GMAC also discovered that Ms. Vaught had sold the automobile.

On June 29, 1981, GMAC obtained a default judgment in the Circuit Court of Kanawha County in the amount of $4,235.98 with interest, and costs in the sum of $10.00. A Writ of Execution was issued and returned no property found; claimant now seeks recovery from the Department of Motor Vehicles.

The Court finds that the respondent was negligent in failing to record claimant's lien on the W.Va. Certificate of Title and makes an award to the claimant in the amount of $4,245.98, an award of interest being precluded by Code, §14-2-12. See *Wood County Bank v. Dept. of Motor Vehicles,* 12 Ct.Cl. 276 (1979).

Award of $4,245.98.

Opinion issued December 1, 1982

GLENN E. HILLER

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-183)

No appearance by claimant.

Matthew H. Fair, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that respondent is liable for damages in the amount of $155.76, based upon the following facts.

On or about July 1, 1982, claimant was driving his automobile off the Patrick Street Bridge in Kanawha County, West Virginia. The automobile ran over a drain hole on the right side of the exit and was damaged because the metal cover over the grill of the drain was broken and sharply edged. Respondent's failure to repair the metal grill cover was the proximate cause of the damages suffered by the claimant. The Court makes an award to the claimant for the sum of $155.76, which is a fair and equitable estimate of the damages sustained.

Award of $155.76.

Opinion issued December 1, 1982

HENRY A. KAY and
CHARLES E. KAY

vs.

DEPARTMENT OF NATURAL RESOURCES

(CC-80-146)

Robert H. C. Kay, Attorney at Law, for claimants.

Robert D. Pollitt, Assistant Attorney General, for respondent.

GARDEN, JUDGE:

Claimants filed this claim to recover damages occasioned by actions of employees of the respondent when they released certain Canada geese near claimants' farm located in Mason County, West Virginia. The geese came upon claimants' property and ate sorghum and corn plants resulting in damage of $3,800.00.

The respondent obtained the Canada geese from the State of New York and released them in an attempt to re-establish a native wildlife population of Canada geese in West Virginia. The Canada geese were released at two points on the Kanawha River on June 24, 1979. In early June, 1979, the claimants had planted corn and sorghum on 19 acres of their farm in the area next to the Kanawha River where it joins Pond Branch Creek. In early July, 1979, when the plants were about knee high, claimants noticed numerous geese in the field, at which time claimants contacted their uncle, who in turn notified the respondent of the problem. Employees of the respondent attempted to scare the geese off claimants' property by shooting over the heads of the geese, but to no avail.

The geese continued to be a problem to the claimants until fall 1979 when the crops were harvested.

Respondent's witness, Thomas Lee Dotson, a District Wildlife Biologist for the respondent, testified that 91 Canada geese were released at one point on the Kanawha River, and 104 more were released at another point to go "wherever they wanted to go."

The Court finds that the respondent released the Canada geese without regard to the propensity of geese to feed upon sorghum. It was foreseeable that the Canada geese would seek the nearest food supply, which happened to be available in claimants' field. It is the opinion of the Court that the respondent was negligent in releasing the Canada geese in proximity to claimants' property, and the Court makes an award to the claimants in the amount of $3,800.00.

Award of $3,800.00.

Opinion issued December 1, 1982

WILLIAM B. McGINLEY

vs.

BOARD OF REGENTS

(CC-81-20)

James Casey, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

Claimant seeks damages and attorney fees from the respondent for breach of contract.

The claimant, after graduation from the College of Law at West Virginia University in May 1980, was interviewed for the position of Attorney for Students at the University. Of those interviewed, he was ranked second. The first choice accepted the position. The claimant then accepted a position with the Legal Services Plan in Beckley, West Virginia. In September 1980, the position of Attorney for Students became vacant, and Edmund Podeszwa of the Office of Personnel at West Virginia University wrote the claimant advising him of the vacancy and asked if he wanted to apply for the position. The claimant advised that he was interested and was interviewed in Morgantown on September 25, 1980. After all interviews were completed, the claimant, on October

1, 1980, was offered the job at an annual salary of $16,776.00, which was accepted by claimant, and by agreement, he was to start work on October 20, 1980. After accepting the employment, the claimant resigned from his position with Legal Services Plan, cancelled his lease on his apartment in Beckley, and made preparations to move to Morgantown.

On October 7, 1980, the claimant was notified by Mr. Podeszwa that the employment offer was withdrawn because the University had made a mistake concerning the affirmative action policy in their hiring policy.

The claimant was unable to return to his job with Legal Services, and since he had no employment, he and his wife returned to Morgantown where he entered the private practice of law.

The position as Attorney for Students was not filled, and the University again sought applicants. The claimant was again offered the job on February 18, 1981, but declined the employment because he had accepted the position as Assistant Prosecuting Attorney of Mason County, West Virginia at a salary of $14,300.00.

The claimant contends in his complaint that he had a valid contract with the University which was breached; that the salary agreed upon was annual and, therefore, he was employed at least for a year. He seeks, as a part of his damages, attorney fees and travel expenses. Mr. Podeszwa testified that travel expenses to Morgantown were not to be paid by the University, which was confirmed in claimant's testimony. Mr. Podeszwa also testified that the first six months are considered as a probationary period of employment.

There is no dispute of the facts in this claim. While it appears that the respondent did breach the contract which it made with the claimant, there is no evidence that the claimant sustained damage for reason of the breach inasmuch as his employment could have been terminated at any time during his probationary period. Accordingly, the Court is disposed to make an award in the sum of $500.00.

Award of $500.00.

Opinion issued December 1, 1982

REYNOLDS MEMORIAL HOSPITAL, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-28)

John T. Madden, Attorney at Law, for claimant.

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

PER CURIAM:

This claim was filed by Reynolds Memorial Hospital to recover costs expended in rendering medical services to Vester McCoy, an inmate of the West Virginia State Penitentiary at Moundsville, West Virginia. Mr. McCoy was admitted to Reynolds Memorial on February 19, 1981, where he remained until his death on June 21, 1981. Total hospital charges for this period were $58,950.70. The respondent has paid $5,628.75, which is the amount of expenses incurred between February 19 and March 10, 1981, leaving a balance of $53,321.95. The respondent denies liability for expenses incurred after March 10, 1981. On that date, the Governor of the State of West Virginia, in accordance with W.Va. Code §5-1-16, granted a Medical Respite to Vester McCoy. The State would not bear any responsibility for Mr. McCoy's medical bills.

The Medical Respite was an agreement entered into between the Governor of West Virginia and the inmate, and its purpose was to allow the inmate to die with dignity. Mary McCoy, wife of Vester McCoy, initiated the request for the Respite. At the time the Respite was issued, Vester McCoy was in a coma, and the agreement was signed by Mrs. McCoy for her husband.

In accordance with W.Va. Code §2-2-10(m), persons "under disability" is defined to include convicts while confined in the penitentiary. W.Va. Code §28-5-33 provides for the appointment of a committee for a convict confined to a penitentiary for one year or more. Mr. McCoy's sentence was for a term of life with mercy. W.Va. Code §28-5-36 provides that the committee main-

tain all actions for the convict. "No action or suit shall be instituted by or against such convict after he is incarcerated, and all actions or suits to which he is a party at the time of his incarceration shall abate, and continue so until revived by or against the committee, whose duty it shall be to prosecute or defend, as the case may be." The record does not establish that Mrs. McCoy was committee for her husband. Therefore, no contract was entered into which would obligate the McCoy family to bear Vester McCoy's medical expenses. A contractual relationship had been established between the hospital and respondent in which respondent agreed to pay Vester McCoy's medical bills. This contract continued throughout his hospitalization. It is the opinion of the Court that the claimant is entitled to recover the medical expenses incurred by Vester McCoy; therefore, the Court makes an award to the claimant in the amount of $53,321.95.

Award of $53,321.95.

Opinion issued December 1, 1982

SAVAGE CONSTRUCTION COMPANY, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-14)

T. Carroll McCarthy, Jr., Attorney at Law, for claimant.

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

WALLACE, JUDGE:

The claimant seeks to recover $6,788.75 from the respondent, $4,488.75 representing the cost of the installation of hot laid bituminous concrete as directed by respondent, the balance of $2,300.00 representing liquidated damages charged to the claimant.

By contract dated September 6, 1978, the claimant contracted with the respondent to build a bridge known as the Folsom Bridge in Wetzel County, West Virginia. All work was to be

completed in 90 working days. Notice to proceed was given the claimant on October 5, 1978.

During the course of the contract, there were numerous delays for which the respondent did not charge the claimant for working days. Work on the contract actually commenced on November 6, 1978, after being delayed by the power company's failure to remove its pole and lines. The stream over which the bridge was to be constructed was very narrow. The claimant installed pipes and pumps to control the water during construction. However, the project was washed out twelve times because of heavy rains requiring the claimant to clean up and start over. A steel hauler's strike held up the delivery of reinforcing steel required in the footers. The steel was delivered January 23, 1979. Time was not charged for these delays.

In June or July, 1979, claimant reported to respondent serious errors in the plans and specifications. The bridge was to have been built with one wing wall excluded, which was to be constructed after the bridge was completed, open for traffic, and the existing bridge removed. There was an 8½ foot error in the plans, making it necessary to shorten the width of the bridge, then to open it for traffic, remove the old structure, and complete the new bridge. No time was charged for completing an abutment and building the wing wall due to the error in the plans. Originally, it was planned to use slag or traffic maintenance aggregate to maintain traffic on the bridge, but because of the time of the year, respondent directed the claimant to cover the aggregate with hot laid bituminous base. Claimant was paid for the base, but the cost was deducted from its final payment, because the bridge was not completed on time. The bridge opened for traffic on November 26, 1979, after 96 working days. Guardrail installation and finishing work was not completed until spring. A total of 23 days were charged as liquidated damage.

The contract required the traffic be maintained over the existing bridge during construction, then reroute the traffic over the new bridge with a minimum of interruption. Work was to have been completed in 90 working days. The bridge

opened for traffic in 96 days on November 26, 1979, and additional time was required to complete guardrails and finishing work for a total of 113 working days. The Court finds the charge for liquidated damages to be proper.

However, the error in the plans and specifications caused delays which, in addition to extensions granted claimant, extended the completion date into the winter months. For these reasons, the Court awards the claimant the $4,488.75 charged against its proceeds for hot laid bituminous concrete and its installation.

Award of $4,488.75.

Opinion issued December 1, 1982

CHARLES H. SIMMONS d/b/a
SIMMONS' HAULING, ET AL.

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-130)

No appearance by claimants.

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

PER CURIAM:

These claims were submitted for decision upon the pleadings. The claimants seek payment for various goods and services furnished to the respondent as follows:

Claim No.	**Claims Against Anthony Center**	**Amount**
CC-82-130	Charles H. Simmons d/b/a Simmons' Hauling	$1,926.80
CC-82-250	Greenbrier Physicians, Inc.	$ 550.00
CC-82-253	Alfredo C. Velasquez, M.D.	$1,430.00
Claim No.	**Claims Against West Virginia Prison for Women**	**Amount**
CC-82-241	Steven Richman, DO, Inc.	$ 495.00
CC-82-244	F. M. Mingo, D.D.S.	$ 99.00
CC-82-255	Matthew Bender & Company, Inc.	$ 95.00

The respondent admits the validity and amounts of these claims, but further alleges that sufficient funds were not available at the close of the fiscal years in question from which the obligations could have been paid.

The Court finds that these claims should, in equity and good conscience, be paid, but awards cannot be made, based on the decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct.Cl. 180 (1971).

Opinion issued December 1, 1982

STARK ELECTRIC, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-193)

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

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

GARDEN, JUDGE:

Claimant filed this claim to recover liquidated damages assessed against it by the respondent for failure to complete the installation of a lighting system on I-64 under the terms of its contract for that work.

The claimant and the respondent entered into the contract on March 10, 1977. Claimant was notified to proceed with the work on or about April 6, 1977. Actual work on the project did not begin until October 26, 1977. The contract completion date was March 15, 1978, but the actual completion date was July 26, 1978. The respondent contends that claimant would have completed this project in the time allotted under the terms of the contract, but for the fact that claimant failed to keep in contact with its suppliers and failed to perform timely the preparation work necessary for the project, thereby running into the winter season.

The claimant contends that the delay in the project was occasioned by the respondent in "green tagging" or approving lids for the conduit boxes at the site of the supplier and then later rejecting these lids on the project site, thereby making

it necessary to reorder the lids, which then were unavailable to the claimant until February, 1978.

The evidence showed that claimant's supplier for the junction boxes, frames and lids submitted drawings to the respondent for approval in May, 1977. These drawings were approved by respondent's inspector, Robert W. Kendall, on May 26, 1977. The claimant then submitted a purchase order to the supplier for the materials on June 1, 1977. A partial delivery of the junction boxes was made in August 1977, at which time respondent informed the claimant that the lids for the junction boxes did not meet the specifications, and the "green tags" were removed. The claimant contends that the junction boxes could not be installed without the lids as this would have posed a danger to vehicular traffic. The claimant then reordered the lids specified by the respondent. The new lids were not approved and delivered until February 1978, at which time claimant was able to install the junction boxes and complete the project. The claimant requested a 90-day time extension, but this request was denied. The respondent assessed liquidated damages in the amount of $10,800.00.

From the record in this claim, it was established that the problem of the lids was based upon the tensile strength. The plans provided for 18 x 18 inch junction boxes with lid strength of 60,000 psi. The claimant requested a change to 22 x 22 inch junction boxes which the respondent permitted. However, when the boxes were manufactured, the lids had a tensile strength of 30,000 psi. These were the lids which were green tagged by respondent's inspector. That approval was an inadvertent error which was not discovered until August 18, 1977, at which time the junction boxes had been shipped to the project site. The error was discovered by the respondent's consultant for the inspection of the materials. The whole problem originated with the failure of the respondent to indicate the tensile strength required on the shop drawings, so the inspector was not aware of the requirement.

From the record in this claim, the Court concludes that respondent's inadvertent error of green tagging the junction boxes, at least, contributed to cause the delay experienced by claimant in completing the project. In addition, it does not ap-

pear from the evidence that the respondent suffered any damages as a result of this delay. For those reasons, it was inappropriate for the respondent to assess liquidated damages. See *Whitmyer Brothers, Inc. v. Dept. of Highways,* 12 Ct.Cl. 9 (1977).

Award of $10,800.00.

Opinion issued December 6, 1982

SHIRLEY R. ADAMS
and BILLIE ADAMS

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-146)

Claimants appeared in person.

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

PER CURIAM:

This claim was originally filed in the name of Shirley R. Adams. The testimony disclosed that the damaged automobile, a 1979 Impala stationwagon, was titled in the joint names of the claimant and her husband, Billie Adams, and the Court on its own motion joined Billie Adams as an additional claimant.

Mrs. Adams testified that she was driving their stationwagon on Route 39 near Marlinton, West Virginia, on May 1, 1982, when she observed a "Rough Road" sign. She slowed down and then struck a drainage ditch which had been dug by respondent across the road. The ditch was estimated to be 18 inches wide and 8 to 10 inches deep. Both front tires had to be replaced at a cost of $91.68.

The evidence indicates that the ditch line was dug on April 29 and that the gravel covering the ditch settled over the next two days. The Court finds that the respondent was negligent in failing to properly maintain the construction area. *Hale and Wingate vs. Dept. of Highways,* 11 Ct.Cl. 93 (1976). An award of $91.68 is accordingly made to claimant.

Award of $91.68.

Opinion issued December 6, 1982

ALLSTATE INSURANCE CO.,
as subrogee of MICHAEL HALL

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-149)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that the respondent is liable for damages in the sum of $246.76, based upon the following facts.

On or about the week of February 4, 1981, a 1980 Dodge Omni, owned by claimant's insured, Michael L. Hall, was parked in his driveway in Fairview, Marion County, West Virginia. Respondent, then engaged in snow removal and cindering operations, caused cinders to be blown onto the vehicle, damaging the painted finish.

The Court finds that respondent's negligence was the proximate cause of the damages suffered by the claimant's insured and makes an award to the claimant in the amount of $246.76.

Award of $246.76.

Opinion issued December 6, 1982

MICHAEL CROUCH

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-236)

Paul R. Goode, Jr., Attorney at Law, for claimant.

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

GARDEN, JUDGE:

The claimant seeks to recover $2,500.00 for damage sustained to his home and 1977 Ford automobile caused by dust from

a section of W.Va. Route 7 in Wyoming County, near Oceana, West Virginia. Claimant's house is located 35-40 feet off the highway. Heavy traffic and winter weather caused a section of the highway of approximately 65-70 yards in front of claimant's home to deteriorate. In the early spring and summer of 1978, the respondent dug out the existing blacktop pavement and replaced it with heavy rock and crusher run rock. This was covered by a mixture of gravel and tar. After this process was completed, the entire section was blacktopped. The application of crusher run rock to the road surface created the heavy dust condition which caused damage to the claimant's house and automobile.

Although numerous complaints were made to the respondent, no action was taken to alleviate the dust problem during construction.

The claimant's frame house had to be repainted, and the paint finish was damaged on his automobile, which he sold at a reduced price because of the damage. Based upon estimates of the damage, the Court makes an award to the claimant in the amount of $1,350.00.

Award of $1,350.00.

Opinion issued December 6, 1982

SILBERN D. and
METTA GODDARD

vs.

DEPARTMENT OF CORRECTIONS

(CC-81-301)

Claimants appeared in person.

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

PER CURIAM:

Claimants are the owners of property located on McConnell Drive in Moundsville, West Virginia, behind the West Virginia State Penitentiary. They seek damages in the amount of

$2,723.00 allegedly caused by the negligence of the respondent when the penitentiary installed a new sewer system. The old sewer and two catch basins were removed. Since the catch basins were taken out, surface water has flowed through the field behind the penitentiary and down onto claimants' property. On June 25, 1981, the water ran below the foundation of claimants' house and through the basement, cracking the rear wall. Also damaged were the water heater, furnace, and dryer. There had been no problems with surface water before the installation of the new sewer. After the June 1981 flooding, penitentiary personnel used a backhoe to dig a ditch to drain the water from claimants' property.

The preponderance of the evidence presented herein shows that the sewer system constructed by the respondent caused a substantial increase in the volume of surface water flowing onto the claimants' land. It is a general rule of law that one who, by means of artificial channels, collects surface water in a body or mass and discharges it upon adjacent land is liable for any resulting damage. *Willston Apartment, Section F, Inc. v. Berger,* 229 Fed. Supp. 338 (E.D. Va. 1964). Accordingly, the Court makes an award of $2,723.00 to the claimants.

Award of $2,723.00.

Opinion issued December 6, 1982

PAUL GYKE and JOE ANN GYKE

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-162)

Claimants appeared in person.

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

PER CURIAM:

On June 11, 1982, claimant Joe Ann Gyke was driving her husband's 1982 Cavalier on Interstate 64 across the Nitro Bridge from Nitro into Hurricane, West Virginia. She was following a pickup truck that struck a pothole from which a

piece of concrete or a rock was thrown. The concrete or rock hit and cracked the Cavalier's windshield. Mrs. Gyke's startled reaction resulted in pulled back muscles which necessitated a doctor's visit and medication. The car was repaired at a cost of $419.00, of which all but $50.00 was paid by insurance. Mrs. Gyke's medical bills totalled $33.97.

Mrs. Gyke testified that she had called respondent approximately three weeks before this incident to complain about the condition of the road.

The record reflects, by a preponderance of the evidence, that respondent had notice of the condition of the road and its failure to remedy the defect constitutes negligence. The Court makes an award to the claimant, for expenses not covered by insurance, of $83.97.

Award of $83.97.

Opinion issued December 6, 1982

MR. and MRS. STEPHEN KENT HILL

vs.

BOARD OF REGENTS

(CC-80-183)

David Hill, Attorney at Law, for claimant.

Ann Dornblazer, Attorney at Law, for respondent.

GARDEN, JUDGE:

In May 1978, claimants entered a lease with West Virginia University to rent an apartment in the College Park Apartment complex. Coin-operated washers and dryers were provided in the complex. On May 9, 1979, claimant was washing some clothes which belonged to his wife. After washing and drying the clothes, claimant found that they had oil stains on them. Claimant testified that he was unable to determine whether the washer alone, or in combination with the dryer caused the spots, but that there were "greasy handprints" on the washer. Dry-cleaning failed to remove the stains. The

clothes, 2 blouses, a dress and a skirt, were valued at $93.35, including dry-cleaning costs. The Court has determined that the personal property involved in the claim is jointly owned by Stephen Kent Hill and his wife. The Court therefore amends the style of the claim to include Mrs. Stephen Kent Hill.

The relationship between the claimant and respondent was that of landlord and tenant. See *Delassio v. Board of Regents*, 12 Ct.Cl. 242 (1979). A landlord may be found liable when negligence is shown in the maintenance of its appliances provided for the use of tenants, even in the absence of a contractual or statutory duty. *Allen v. Board of Regents*, 13 Ct.Cl. 321 (1980). 49 Am. Jur. 2d *Landlord & Tenant*, §881 (1970).

From the evidence presented in this case the Court is of the opinion that respondent's failure to properly inspect and maintain the equipment in the College Park Apartment laundramat constituted negligence and that such negligence proximately caused the damage to claimants' personal property.

Award of $93.35.

Opinion issued December 6, 1982

MARK A. HISSAM and
JULIA A. HISSAM

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-375)

Claimants appeared in person.

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

GARDEN, JUDGE:

Claimants are residents of the Oakbrook Drive subdivision in Mineral Wells, West Virginia. Prior to July of 1980, Oakbrook Drive was an unpaved road which was not a part of the State road system. The homeowners on Oakbrook Drive petitioned respondent to bring the road into the State system.

This was done in early 1980. Shortly after, the homeowners requested that respondent pave the road, but were told there were insufficient funds to do this work. By an informal agreement, however, the homeowners agreed to pay for the paving, and respondent agreed to provide the necessary engineering and a drainage system. The road was paved by a third party in July and August of 1980, but the drainage system was not installed. August 18, 1980 brought the first significant rainstorm since the road was completed. Claimants' family room and basement were flooded. They seek $3,395.37 for damages sustained by respondent's failure to provide adequate drainage.

Claimant Mark Hissam testified that the agreement provided that the drainage system would be installed before the road. Respondent failed to put in the drainage system before the road was completed. The only change made to the existing system was to put a 15-inch pipe under the road. This pipe, however, fed into an existing 8-inch drain line. When the August 18 rainstorm occurred, water backed up in several homeowners' yards and flowed down claimants' driveway into their house. Mr. Hissam stated that he had expressed fears that flooding would occur to respondent's employees. There had never been a flooding problem before respondent's work, and there has been no flooding since respondent completed a new drainage system.

Respondent's witness, Kenneth Webb, an engineer in respondent's employ, testified that respondent acquired right-of-ways for a drainage system, but did not install drainage at the time of paving because it was felt the existing system was sufficient. A gap was left between the 15-inch and 8-inch pipes to allow any overflow of water to drain over the land as it had previously. Mr. Webb stated that construction work then being done on Mr. Hissam's driveway was the cause of the flooding.

The Court finds that respondent failed to design and provide adequate drainage for the road improvement and that this negligence was the proximate cause of claimants' damages.

This Court has previously held that when respondent fails

to design and provide adequate drainage, and a reasonably prudent person would have foreseen that damage would occur without proper drainage, an award for damages will be made. *Osborne v. Dept. of Highways*, 10 Ct.Cl. 83 (1974). Claimants' evidence indicated that their damage amounted to $3,395.37.

Award of $3,395.37.

Opinion issued December 6, 1982

RICKY S. HOWERTON

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-329)

W. Merton Prunty, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

On the morning of August 21, 1980, a record flood hit the area of Goldtown, Jackson County, West Virginia. Numerous homes in the area were damaged or destroyed. The house owned by the claimant, Ricky Howerton, was lifted from its foundation by the flood waters and was carried approximately 7/10 of a mile downstream. It struck a bridge and came to rest sideways across W.Va. Route 21 completely blocking the road. Claimant alleges that negligence on the part of respondent's employees in attempting to remove the house from the road resulted in the destruction of the house. The claimant had built the house between May and November of 1978. His records indicate that he had spent approximately $28,000.00 for materials and expended 750 hours or more in constructing the house. Claimant seeks to recover $40,000.00.

Claimant was able to reach his house before noon on August 21. Respondent's work crew was already present at the site. Claimant was removing his possessions from his house when he was informed that the crew was going to try to turn the house to clear one lane for traffic. The work crew removed two windows on one end of the house and ran a chain through

them. When the chain was pulled, it ripped through the house. Mr. Howerton testified that no precautions were taken to prevent damage to the house. "If they had put a steel plate . . . it was suggested to them . . . in front of that house where . . . or anything so that chain would have held onto it and got more of an area to push, the house could have been turned right around enough to have opened up that road there on the side."

Claimant testified that his home then was destroyed by respondent. "Well, after that, the next thing I remember was somebody hollering, 'get out of the house.' I got out the front and looked up in the air and there come that Grade-All bucket over the top and just smashed it. After he got it down on the ground, the endloader come up. Them guys was just grinning. They just loaded her up in the pickups and buried it on another man's property." Claimant also testified that he had suggested getting a house mover. Claimant said, "On the house movers, having them move it which I checked into, it would have been at the tops four hours. That's their travel time and all." Claimant's witness, Dickie E. Fisher, who was present when the house was destroyed corroborated claimant's testimony.

Respondent's witness, Corporal Harold Facemyer of the State Police, testified that the house had to be removed in order to allow for passage of emergency vehicles. While conceding that there were alternate routes to the houses along Route 21, Corporal Facemyer stated that the detours were too lengthy for emergency vehicles had there been any life-threatening situations. Under cross-examination, he said no such emergency arose. Corporal Facemyer also stated his belief that the house was unsalvageable.

Claimant's witness, William F. Boggess, a residential home-builder testified to the value of the house. He estimated the fair market value before the flood was $68,000.00. He estimated that it would cost $19,450.00 to restore the house to its original condition after it was damaged by the flood and that the fair market value of the house immediately after the flood but before its destruction was $48,550.00. These estimates were based on a study of photographs of the house and on viewing a comparable house with similar damage.

While the respondent had both a right and a duty to remove the house from the highway and was obliged to perform it expeditiously, it had a concomitant obligation to perform that duty in a reasonable manner. The plain preponderance of the evidence impels the conclusion that it did not do so and accordingly, the claimant is entitled to an award of the damages which he sustained as a result of the respondent's actions.

On the issue of damages, the weight attributable to the testimony of the witness Boggess must be reduced considerably by reason of the fact that it was based upon photographs of the house. Aside from that evidence, however, there is only the testimony of the claimant and the witness Facemyer which is in irreconcilable conflict. In view of that conflict, the Court is disposed to award damages in the sum of $20,000.00.

Award of $20,000.00.

Opinion issued December 6, 1982

INDUSTRIAL GAS & SUPPLY COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-182)

J. Peter Richardson, Attorney at Law, for claimant.

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

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that the respondent is liable for damages in the amount of $2,389.42, based upon the following facts.

Between January 31, 1979 and February 28, 1982, respondent agreed to purchase goods from claimant under written contract R-77-94. Respondent owes claimant the sum of $2,389.42 for costs of oxygen and acetylene cylinders, the cost of lost cylinders, and for service charges for goods sold. The Court makes an award of $2,389.42, which is a fair and equitable estimate of damages sustained by claimant.

Award of $2,389.42.

Opinion issued December 6, 1982

LESTER A. KUBSKI, M.D.

vs.

DEPARTMENT OF HEALTH

(CC-82-167)

Claimant appeared in person.

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

PER CURIAM:

Claimant is a psychiatrist employed by Huntington State Hospital. Dr. Kubski was subpoenaed to testify at a criminal court hearing in Charles Town, West Virginia. Claimant's travel expenses for food, lodging, and gasoline amounted to $126.05.

Respondent has admitted it is indebted to claimant in the amount of $88.07. West Virginia State Travel Regulations allow $15.00 per day for food allowance. The $37.98 balance is in excess of the $15.00 per day allowance. The Court makes an award in the amount admitted.

Award of $88.07.

Opinion issued December 6, 1982

ROBERT HOWARD LATTA

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-147)

Claimant appeared in person.

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

PER CURIAM:

On or about May 29, 1982, claimant was driving his 1973 Cadillac across the 35th Street Bridge from Charleston into Kanawha City, West Virginia. A bolt broke off from the bridge

and fell, cracking claimant's windshield. The damage was repaired at a cost of $150.00.

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 reasonably safe condition. This includes bridges which are part of the State highway system. The Court is of the opinion that the record establishes negligence on the part of the respondent, and makes an award in favor of the claimant.

Award of $150.00.

Opinion issued December 6, 1982

JOHN T. MAY

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-165)

Claimant appeared in person.

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

WALLACE, JUDGE:

On May 18, 1981, at about 6:30 in the evening, claimant was injured in a fall from a bridge into a creek on Route 44 in Stirrat, West Virginia. The bridge involved had been taken into the State highway system in the spring of 1981. Department of Highways personnel inspected the bridge and found it defective. It was barricaded and closed to vehicular traffic.

Claimant testified that by closing the bridge, access to his residence from the highway was prevented. No walkway across the creek was built, so claimant was forced to walk along a steel "I" beam that had been left when the bridge was torn down. He stated he had travelled this way for about 2 1/2 months and was aware that the bridge was closed.

As a result of the accident, claimant injured his back, received facial abrasions, and broke his glasses. Medical bills

for emergency room treatment and replacement of eyeglasses totalled $379.25.

Respondent was negligent in failing to provide an adequate walkway after closing the bridge, but the Court believes that the claimant, with his prior knowledge of the condition of the bridge, was also negligent. Under the doctrine of comparative negligence, the Court allocates negligence as follows: Claimant 20%, respondent 80%. Reducing the claimed damages by 20%, the Court makes an award in favor of claimant in the amount of $303.40.

Award of $303.40.

Opinion issued December 6, 1982

MEMORIAL GENERAL HOSPITAL ASSOCIATION, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-256)

Richard H. Talbot, Jr., 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 seeks payment for services furnished to respondent's Huttonsville Correctional Center in the amount of $165,695.32.

The respondent admits the validity and amount of the claim, but further alleges that sufficient funds were not available at the close of the fiscal year in question from which the obligation could have been paid.

The Court finds that this claim should, in equity and good conscience, be paid, but an award cannot be made, based on the decision in *Airkem Sales and Service, et al. v. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued December 6, 1982

ETHEA M. SCOTT

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-102)

Claimant appeared in person.

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

PER CURIAM:

Claimant is a psychiatric aide at Huntington State Hospital. On March 25, 1982, she was helping to transport patients from Huntington, using a State-owned car. The car developed mechanical problems and was taken to the Department of Highways garage at Crawley, West Virginia. The car was serviced and the parties continued on their travel. When claimant left the car, the back of her nurse's uniform was covered with oil and grease. She testified that this had not been present prior to stopping at the garage, and that two mechanics had test-driven the car after making the repairs. Claimant's witness, Kermit L. Sargent testified that both mechanics were "filthy dirty." The cost of the uniform was approximately $38.00. The Court believes that the negligence of respondent's employees in failing to adequately protect the car seats proximately caused the claimant's damage.

Award of $38.00.

Opinion issued December 6, 1982

CHARLES W. W. STULTZ and

MARY N. STULTZ

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-12)

Howard Krauskopf, Attorney at Law, for claimant.

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

PER CURIAM:

At approximately 1:00 a.m. on January 1, 1981, claimants were traveling on Secondary Route 5 in Hampshire County,

West Virginia, on their way home from a New Year's Eve party. It was snowing and the roads were slick. While traveling at a speed of 30-35 miles per hour in their 1977 Blazer about a mile from their home, claimants came upon a little rise or knoll in the road followed by a 14-15 foot dip. Claimant Charles Stultz testified that, parked in the middle of the roadway, in the dip, was a truck belonging to the respondent with bright lights blazing. Mr. Stultz stated that he was one hundred feet from the truck when he first observed it, and when he tried to stop his car, it began to slide, and hit trees on the opposite side of the road.

As a result of the accident, the Blazer was totaled, and claimants seek $4,200 in damages for the vehicle. In addition, claimant Mary N. Stultz suffered personal injuries, and both claimants' glasses were broken. The amount of those bills was $926.91, for a total claim of $5,126.91.

Testifying on behalf of the respondent was the driver of the truck, Ersel A. Hott. Mr. Hott indicated that he was cindering Route 5 when a piece of wood became lodged in the fan. He then stopped the truck in his lane of travel and got out to investigate. Mr. Hott stated that the four-way flashers and the revolving light were on.

Liability in this claim is governed by West Virginia Code §17C-13-1:

> "(a) Upon any highway outside of a business or residence district no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled part of the highway when it is practicable to stop, park, or so leave such vehicle off such part of said highway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicles shall be available from a distance of two hundred feet in each direction upon such highway.
>
> (b) This section shall not apply to the driver of any vehicle which is disabled while on the paved or main-

traveled portion of a highway in such manner to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position."

Respondent's driver violated that statute and respondent thereby was guilty of negligence which proximately caused the damages suffered by the claimants. See also *The Board of Education of the County of Kanawha vs. Department of Highways,* 13 Ct.Cl. 60 (1979).

Accordingly, an award of $5,126.91 is made to the claimants.

Award of $5,126.91.

Opinion issued December 6, 1982

JANET T. SURFACE

vs.

WORKMEN'S COMPENSATION FUND

(CC-82-280)

William H. Hazlett, 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 in the Notice of Claim and the respondent's Answer.

Claimant seeks payment in the amount of $6,828.33, for reporting services for Workmen's Compensation hearings under a contract with the Department of Finance and Administration for fiscal year 1980-1981. Respondent in its Answer admits the validity of the claim and that the amount is fair and reasonable for the services rendered.

In view of the foregoing, the Court makes an award to the claimant in the amount of $6,828.33.

Award of $6,828.33.

Opinion issued December 6, 1982

TERRA AQUA CONSERVATION

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-283)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that the respondent is liable for damages in the amount of $854.78, based on the following facts.

On September 3, 1981, claimant received from respondent a purchase order for wire gabions, which contained a "ship to" and a "delivery" address. Claimant shipped the goods via Allegheny Freight Lines, Inc. to the Clarksburg, West Virginia "ship to" address. Respondent indicated to Allegheny that the goods actually belonged in Fairmont, West Virginia, but would accept shipment in Clarksburg and redeliver to Fairmont themselves. Respondent failed to provide for redelivery until October 28, 1981, when claimant was requested to authorize a reconsignment. Claimant incurred storage and redelivery costs of $854.78 as the result of respondent's failure to provide for the reconsignment and redelivery, which sum the Court finds is a fair and reasonable amount of the damages sustained.

Based on the foregoing facts, an award of $854.78 is made to the claimant.

Award of $854.78.

Opinion issued December 6, 1982

THOMAS R. TREADWAY

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-227)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that respondent is liable for damages in the amount of $140.28, based upon the following facts.

On or about August 23, 1982, claimant Thomas Treadway was driving his 1976 Chevrolet on W.Va. Route 73 in the vicinity of Campbell's Creek Drive, Kanawha County, West Virginia. While crossing the Campbell's Creek Bridge, claimant's vehicle struck a piece of metal protruding from the bridge, damaging a tire. The Court finds that respondent's negligence was the proximate cause of the damages suffered by claimant in the amount of $140.28, which is a fair and equitable estimate of the damages.

Based on the foregoing facts, an award of $140.28 is made to claimant.

Award of $140.28.

Opinion issued December 6, 1982

WESLAKIN CORPORATION

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-156)

No appearance by claimant.

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

PER CURIAM:

Claimant seeks payment of the sum of $95.67 for steel pipe sold to Anthony Correctional Center.

Respondent's Answer admits the validity and amount of the claim, and states that sufficient funds were available in its appropriation for the fiscal year in question from which the obligation could have been paid.

Accordingly, the Court makes an award to the claimant in the amount requested.

Award of $95.67.

Opinion issued December 6, 1982

WESTINGHOUSE ELECTRIC SUPPLY COMPANY

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-221)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted for decision upon the pleadings. The claimant seeks payment for services furnished to the respondent in the amount of $732.76.

The respondent admits the validity and amount of the claim, but further alleges that sufficient funds were not available at the close of the fiscal year in question from which the obligation could have been paid.

The Court finds that an award cannot be made, based on the decision in *Airkem Sales and Service, et al. v. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued December 6, 1982

HAROLD E. WILEY

vs.

DEPARTMENT OF MOTOR VEHICLES

(CC-80-331)

Claimant appeared in person.

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

GARDEN, JUDGE:

In 1977, claimant licensed his 1977 GMC Truck with respondent. Respondent erroneously titled the vehicle as a station wagon. Claimant annually paid a license fee which was $6.00 higher than it would have been had the truck been titled correctly. The error persisted for three years, and claimant spent $2.00 to have the vehicle properly titled. He sues respondent for $20.00.

The Court finds that respondent was negligent in erroneously titling claimant's vehicle. However, the statute of limitations has run on the first year of Mr. Wiley's claim. W.Va. Code §14-2-21 provides that "the court shall not take jurisdiction of any claim . . . 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 W.Va. . . . and such period of limitation may not be waived or extended." The Court makes an award in the amount of $14.00.

Award of $14.00.

Opinion issued December 6, 1982

WILSON WELDING SUPPLY COMPANY

vs.

RAILROAD MAINTENANCE AUTHORITY

(CC-82-258)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted for decision upon the pleadings. The claimant seeks payment in the amount of $340.00 for one

oxygen cylinder and one acetylene cylinder which were lost by the respondent.

The respondent admits the validity and amount of the claim, but further alleges that sufficient funds were not available at the close of the fiscal year in question from which the obligation could have been paid.

While this claim should, in equity and good conscience, be paid, an award cannot be made, based on the decision in *Airkem Sales and Service, et al. v. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued December 7, 1982

ALBERT G. CAPINPIN

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-158)

Claimant appeared in person.

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

PER CURIAM:

Claimant sues for $205.54 for damages to his 1980 Chevrolet when it struck a low lying branch on Lucado Street in Charleston, West Virginia. The retractable antenna was broken and had to be replaced. Respondent's witness, Albert L. Fleshman, Jr., an employee of the Department of Highways, testified that Lucado Street has been owned and maintained by the City of Charleston since 1959.

The Court cannot conclude from the evidence that the accident was caused by negligence on the part of the respondent and therefore, denies the claim.

Claim disallowed.

Opinion issued December 7, 1982

ROGER K. CLAY

vs.

BOARD OF REGENTS

(CC-82-123)

Claimant appeared in person.

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

WALLACE, JUDGE:

On Monday, April 23, 1982, claimant returned to his dormitory room at Marshall University after a weekend in Tennessee. He discovered that his cassette deck was missing. The loss was reported to campus security. Upon investigation, no evidence of breaking and entering could be found. Claimant seeks $329.00, the purchase price of the cassette deck.

Under cross-examination, claimant testified that whoever entered his room did so with a pass key. He also said that "there was nothing they [the State] could have done" to prevent his loss. There is no evidence of negligence on the part of the University officials in maintaining proper security for the dormitory.

Claim disallowed.

Opinion issued December 7, 1982

DAIRYLAND INSURANCE COMPANY,
SUBROGEE OF JESSE W. COBERN, JR.

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-10)

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

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

WALLACE, JUDGE:

On September 11, 1981, Jesse W. Cobern, Jr. was driving his 1975 Chevrolet on Campbell's Creek Drive in Charleston, Kanawha County. He encountered an area of construction, and because there was gravel on the road, he switched from the right-hand to the left-hand lane where the road was clear.

When Mr. Cobern saw traffic approaching, he returned to his lane. Shortly afterward, he struck a manhole which was in the middle of his lane. The car stopped on impact. The front frame, fly wheel cover, oil pan, and windshield had to be replaced at a cost of $1,035.09, the amount of this claim. The amount includes $250.00 deductible, paid by Mr. Cobern.

Mr. Cobern testified that there were no flagmen or signs warning of construction or of the manhole. He also testified that he had travelled the road without incident previously, although in a different vehicle. He was aware of the construction, but not the manhole.

Respondent's witness, Albert L. Fleshman, Jr., an employee of Department of Highways, stated that the construction involved the installation of sanitary, sewer, and force mains. This work was being performed by the Malden Public Service District, under contract with Department of Highways. According to the contract, responsibility for all work done, and any necessary repairs to the roadway rested with the Public Service District. There is no evidence in the record to establish that the respondent had notice of the condition. Even if there was notice, the Court is of the opinion that claimant's negligence was equal to or greater than respondent's, because of his knowledge of the construction area. For those reasons, the Court must deny the claim.

Claim disallowed.

Opinion issued December 7, 1982

CHARLES DENNIS

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-80-336)

Claimant appeared in person.

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

GARDEN, JUDGE:

In 1978, claimant converted a Volkswagon automobile into a dune buggie. Concerned about inspection requirements,

claimant first contacted the Department of Public Safety to find out what would be required to make the vehicle "street legal." These requirements were met and in August 1978, the dune buggie passed State inspection. In 1979, respondent adopted new safety regulations for dune buggies. Claimant's vehicle failed to meet these new regulations and was not issued another inspection sticker. Claimant contends that the old regulations should continue to apply to his vehicle. He sues for $3,000.00. the amount he spent converting the car into a dune buggie.

The Commissioner of Motor Vehicles is charged with making rules and regulations concerning the administration and enforcement of motor vehicle inspections. West Virginia Code §17C-16-4. There was no evidence to the effect that he abused his discretion in changing those regulations and, accordingly, this claim must be denied.

Claim disallowed.

Opinion issued December 7, 1982

CHARLES N. DURBIN

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-181)

Claimant appeared in person.

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

PER CURIAM:

Claimant seeks payment for damage to his barn wall allegedly caused by the improper construction of a highway berm which allowed water to flow onto his land. Bills totalling $420.15 were submitted as proof of the damage.

Claimant's property, consisting of 27 acres, is located on both sides of Route 891 in Cameron, Marshall County, West Virginia.

Mr. Durbin's barn, a two-story structure, is situate 15-20 feet from the edge of the road. The top floor is almost level with the roadway, and the basement is below the elevation of the roadway.

On about the first day of June, 1981, rainwater flowed from the surface of the roadway down to claimant's barn and pushed out the cement block wall. Claimant testified that the respondent, over his objections, kept lowering the berm of the road, prior to the date of the incident in question, in an effort to divert water from claimant's property.

James P. Reid, Marshall County Maintenance Superintendent, testified that they had indeed made "various attempts to divert the water from the area of the barn." Cold mix asphalt was applied to the berm in the area of the barn in May of 1981, one month before the incident complained of by claimant.

When questioned about the work, the claimant stated:
". . .They went ahead and they put the blacktop in there along the edge and the water goes right on down and spread out all over the place . . . That solved the problem, and, of course, here the other night it come a hard rain and sort of broke over and I had to build it up a little bit again."

The law of West Virginia is well settled that surface water is a common enemy which each landowner must fight off as best he can, provided that an owner of higher ground may not inflict injury to the owner of lower ground beyond what is reasonably necessary. *Holdren v. Dept. of Highways*, 11 Ct.Cl. 75 (1975). In the instant case, the evidence indicates that the respondent conducted its highway repairs to the satisfaction of the claimant prior to the flooding and damage complained of; that the flooding occurred as the result of a single, heavy rainstorm; and that the respondent did nothing to increase the flow of water onto the claimant's land. Accordingly, the claim is disallowed.

Claim disallowed.

Opinion issued December 7, 1982

HENRY W. GOULD

vs.

BOARD OF REGENTS

(CC-79-357)

Claimant appeared in person.

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

PER CURIAM:

Claimant, a West Virginia University professor, resides on College Avenue in Morgantown. During a snow storm on January 16, 1978, a large tree on University High School property fell, cutting the power lines to claimant's residence. Electric service was not restored for 24 hours. Claimant's tropical fish, valued at $317.50, froze because the heaters in the fish tanks could not operate.

Claimant testified that the tree, estimated to be 150 feet high, was living and that high winds accompanied approximately 18" of snow. Claimant's wife stated that she had, on a number of occasions, complained to University officials about the trees facing their property. She explained that the size and angle of the trees made her feel that they were unsafe. Grounds crews responded to the complaints by inspecting the trees and declaring them safe.

It is not demonstrated by a preponderance of the evidence that the accident was caused by negligence on the part of the respondent. For that reason, the claim must be denied.

Claim disallowed.

Opinion issued December 7, 1982

EARL F. GUTHRIE

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-125)

Claimant appeared in person.

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

PER CURIAM:

Claimant seeks compensation in the amount of $631.00 for

damage to a 1981 Plymouth sustained when the car struck a pothole. The pothole was located on Route 60 in Belle, West Virginia. Claimant testified that the pothole was located just past a bridge ramp, and because of a dip in the road the pothole was not visible. The hole was located about half way across the right-hand lane and measured about two feet long by nine inches wide. When claimant called respondent after the accident, he was told that there had been another call concerning the pothole.

In order to make an award, it must be established that respondent knew or should have known of the existence of the pothole and respondent must have had sufficient time in which to repair the pothole. The Court, accordingly, disallows this claim.

Claim disallowed.

Opinion issued December 7, 1982

WILLIAM PAUL HALL, SR.,
ADMINISTRATOR OF THE ESTATE OF
WILLIAM PAUL HALL, JR.

vs.

DEPARTMENT OF HEALTH,
DIVISION OF MENTAL HEALTH

(CC-76-134)

William C. Garrett and *Thomas N. Whittier*, Attorneys at Law, for claimant.

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

GARDEN, JUDGE:

This is a claim for damages for the alleged wrongful death of William Paul "Sonny" Hall, Jr., a 25-year-old patient at Weston State Hospital. In 1968, at the age of 19, Sonny was committed to Weston by his parents on the advice of a psychiatrist. On August 20, 1975, while a patient in Ward 14, Unit 5 of the hospital, Sonny Hall was burned by another patient, Arnold Lee Shinaberry. The incident occurred at ap-

proximately 8:00 p.m. in a locked, enclosed sun porch. Sonny Hall was clad in a long tee shirt, and Arnold Shinaberry, who had received matches from another patient earlier in the day, set fire to Sonny's shirt. One of the two aides on duty that night, Mickey Scarff, heard shouting on the sun porch and ran to unlock the door. Scarff called the other aide and they escorted Sonny Hall to his room. A registered nurse was summoned and emergency treatment was administered to the victim by the nurse and the only physician on duty at that time, Dr. Zabat. The doctor ordered Sonny Hall's transfer to the West Virginia University Medical Center in Morgantown. He was transported there by ambulance, where he was examined and immediately sent to the burn center at West Penn Hospital in Pittsburgh, Pennsylvania. Two days later, he died as the result of his injuries.

Claimant alleges that the respondent was negligent in failing to properly supervise the patients in the ward and in failing to have proper treatment available to the victim. Claimant seeks damages under West Virginia Code §55-7-6 in the amount of $10,000 for bereavement suffered by the parents and the sum of $1,783.19 for funeral expenses.

Testimony at the hearing revealed that Sonny Hall was a severely retarded individual who was unable to speak well or feed and clothe himself. He was small of stature, hirsute, and needed constant care. Sonny was placed in Ward 14, which housed approximately 59 patients.

On the day of the incident in question, the two aides on duty locked Sonny Hall and three other patients in a sun porch next to the ward. The three other patients were described as "troublemakers," and Sonny Hall required "a lot of care," so the four of them were isolated while the two aides shaved the other patients. There was no supervision of Sonny and his companions during their 4½-hour seclusion on the sun porch.

It is a fundamental principle of law that negligence cannot create a cause of action unless it is the proximate cause of the injury complained of. 13 M.J., *Negligence*, §21. The injury must have been the natural and probable consequence of the

negligence, and it ought to have been foreseen in the light of the attending circumstances. 13 M.J., *Negligence*, §22. In the case, the evidence indicates a high degree of foreseeability, especially the testimony regarding Arnold Shinaberry, the perpetrator of the crime. A hospital aide described Shinaberry as oftentimes causing disturbances. When such a person is left locked up with others for a long period of time with absolutely no supervision, it is reasonably foreseeable that some harm could occur to a patient such as Sonny Hall, who was unable to take care of himself.

The Court finds from the record that the respondent failed to exercise reasonable care for the safety of the decedent, and that its failure proximately caused his injury and subsequent death.

Accordingly, the Court makes an award in the sum of $10,000.00 plus $1,783.19 for funeral expenses, for a total award of $11,783.19.

Award of $11,783.19.

Opinion issued December 7, 1982

HENRY ELDEN & ASSOCIATES

vs.

DEPARTMENT OF HEALTH and
DEPARTMENT OF FINANCE AND ADMINISTRATION

(CC-79-367)

Michael T. Chaney, Attorney at Law, Kay, Casto & Chaney, for claimant.

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

WALLACE, JUDGE:

The claimant seeks $63,000.00 from the respondent for architectural work performed for the Fairmont Emergency Hospital in Fairmont, West Virginia.

By contract with the Department of Public Institutions, dated October 16, 1972, the claimant was to furnish archi-

tectural services for the construction and renovation of the Fairmont Emergency Hospital. A decision was made later not to renovate the existing facilities, but to build a new facility. The first and second appropriations of funds by the Legislature were not sufficient, and the building was completed as far as possible in April 1976. The claimant was paid all compensation due him under his contract and the subsequent change orders.

In January 1977, the Legislature appropriated $1,500,000.00 to complete the work on the hospital. These funds became available on July 1, 1977. Also on July 1, 1977, the State Department of Health came into being, consolidating certain other departments, including the Department of Public Institutions. A search committee was formed to find and recommend someone to be the director of the new department. Dr. Charles Andrews of the Medical School of West Virginia University was named Acting Director.

The record indicates that the claimant actively pursued his employment to complete the project. He testified that he was in constant contact with Blake Boggess, the administrator of the hospital; that he had met with Dr. Andrews and told him what was necessary to complete the building; and that Blake Boggess had contacted his organization and told them "to proceed to complete the drawings for the finalization of the building." The claimant further stated that he then submitted plans and specifications to Blake Boggess.

Claimant stated that he received an agreement from Blake Boggess covering the work to be done, which he signed and returned. However, claimant never received an approved and executed copy.

Blake Boggess testified that he met with Dr. Andrews in late July of 1977; that Jane Stout, Acting Director of the Division of Hospitals, and Keith Swarny, assistant to Mr. Boggess, were present; and that the reason for the meeting was to make Dr. Andrews aware of the status of the hospital. Mr. Boggess stated that Dr. Andrews instructed him "to proceed to draw up the initiating documents to get the project under way." He talked with the claimant and his son and

instructed them to proceed with the project. Mr. Swarny, using an old purchase order as a guide, prepared the purchase order signed by the claimant. After being initialed by Boggess, it was forwarded to Charleston. Mr. Boggess stated that his authority ended when he sent the requisition to the central office, that "the final authority would have been with the Director of the Health Department," and that "we wanted to be ready to go with the project when the final approval came through."

Jane Stout testified that she met often with Dr. Andrews, and that she had attended the meeting with Blake Boggess and had the impression that Dr. Andrews gave Blake Boggess permission "to give Henry Elden the go-ahead to write the plans." In the course of her testimony, she was asked:

Q "I take it from that that you mean you had the general impression that Dr. Andrews may have authorized Blake Boggess to go ahead?"

A "Well, mainly, because Henry Elden did go ahead after that meeting and we had the plans that he wrote."

Dr. Andrews testified that he had met with the claimant on three occasions; that he was aware that the hospital was not completed; and that claimant had been the architect. He testified that he probably met with Blake Boggess, but doubted that he told him to proceed. He stated, ". . .I may have discussed it but I don't think I would have told anybody to proceed on the building without contracts and procedures and things you go through to do it." He did not authorize the claimant to proceed, but decided it could wait for the director to determine what he was going to do with the building.

Dr. George Pickett was appointed Director of the State Health Department and commenced his duties in September 1977. Upon assuming his duties, he visited all of the State institutions. Dr. Pickett testified that, during the interim prior to his appointment, Dr. Andrews made the decisions that had to be made; decisions involving policy, or the issues were postponed. When Dr. Pickett visited Fairmont Emergency

Hospital, he found that the building was in place but not finished. There was no heat and no floor coverings. One elevator was working, and not all rooms had toilet facilities. Doors were not hung. It was not a functional building. He stated, ". . .There were no visible programs that indicated that there was any kind of planning that I could find anywhere in the files that told me what the facility was to be." A determination was made to establish a primary general hospital. Proposals were solicited from architects for making necessary corrections, design changes, and construction changes to bring it into compliance with this purpose. The claimant was among those invited to submit proposals.

Dr. Pickett further stated that, as a result of his investigation, he was not able to find any type of directive that could be construed as a direction from Dr. Andrews or the Health Department to proceed with any kind of obligation with the claimant.

W.Y.K. Associates of Clarksburg received the contract for the exterior work, and L. D. Schmidt and Son of Fairmont completed the interior plans.

The claimant contends that there was no substantial difference between his plans and the plans used by the architects selected in the completion of the hospital, and that he is entitled to be compensated for his plans. The respondent contends that there were substantial changes made which were necessary to complete the building for its designated use.

Daniel R. Smithson, Staff Engineer for the Department of Health, stated, "The things we did may not significantly change a building to someone that's not familiar with construction . . . basically, the building looked the same . . . the building was designed . . . for a program that did not fit our need . . . we reviewed these drawings and reviewed the . . . specifications . . . set forth by Medicare and Medicaid and we attempted to bring the building as close as possible in conformity with these codes."

Certain areas were eliminated, walls were changed, room sizes varied, and omitted fireproofing was completed. The

respondent relied on the parties as designated to complete the building, and, if the successful architects did, in fact, use the work of the claimant, it would be a matter between the architects.

The record establishes that the claimant had performed services for many of the various State departments as well as federal agencies. Claimant was familiar with the contract procedures necessary before employment is insured. He knew that it was necessary for the spending agency to initiate the contract which then had to be approved by the Department of Finance and Administration, followed by approval of the Attorney General as to its form. This was not done.

Miles Dean, who at the time was Director of Finance and Administration, testified that no contract was submitted to his Department employing the claimant to complete the hospital work. Daniel R. Smithson, the Staff Engineer for the Department of Health, testified that he had no instructions from Dr. Andrews or Dr. Pickett to work with the claimant on the project.

Since the claimant had no contract with the respondent, the Court denies the claim.

Claim disallowed.

Opinion issued December 7, 1982

TOMMY KINDER

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-110)

Claimant appeared in person.

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

PER CURIAM:

This claim was originally filed in the name of Eva Kinder, but when the testimony revealed that the automobile, a 1981 Chevrolet Chevette, was titled in the name of claimant's hus-

band, Tommy Kinder, the Court on its own motion amended the claim to reflect the proper party.

On April 2, 1982, Mrs. Kinder was driving her husband's automobile on a secondary road off Route 119 in Boone County, West Virginia. At about 7:30 that evening, the car struck a pothole. The estimate for repairs to the car was $217.92. Mrs. Kinder testified that she had previously observed potholes in this road. She said that there were so many potholes "it's like driving on an obstacle course." She had not made any complaints to respondent concerning the condition of the road. Claimant testified that he had on several occasions mentioned the road condition to people in the Department of Highways garage at Madison, West Virginia, but no action was taken.

The State is neither an insurer nor guarantor of the safety of persons travelling on its roadways. *Adkins v. Sims,* 130 W.Va. 645 (1947). For negligence of the respondent to be shown, proof of notice of the defect is required. *Davis Auto Parts v. Dept. of Highways,* 12 Ct.Cl. 31 (1977). In this case, claimant testified that he had reported the road condition. The Court believes, however, that the prior knowledge of claimant and his wife concerning the road condition, makes them likewise negligent. Under the doctrine of comparative negligence, the Court is of the opinion that the claimant's negligence was equal to or greater than the respondent's and disallows the claim.

Claim disallowed.

Opinion issued December 7, 1982

OHIO VALLEY MEDICAL CENTER, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-276)

John L. Bremer, 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 seeks payment for services furnished to respondent's West Virginia Penitentiary in the amount of $22,614.68.

The respondent admits the validity and amount of the claim, but further alleges that sufficient funds were not available at the close of the fiscal year in question from which the obligation could have been paid.

The Court finds that this claim should, in equity and good conscience, be paid, but an award cannot be made, based on the decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued December 7, 1982

CATHERINE PASCERI

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-186)

Christine Hedges, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

During the year 1976, the respondent engaged Lang Brothers Construction Company to construct the South Clarksburg By-Pass, W. Va. Route 97. Incident to that project, the contractor conducted blasting operations. Claimant alleges that the blasting performed by the respondent's contractor caused the brick walls adjacent to her driveway to collapse and the front steps to separate from her house necessitating repairs in the amount of $1,882.60.

Claimant's witness Delores Terango testified that she observed damage claimed after the blasting.

Ronald Smith, Jr., District Maintenance Engineer for respondent, testified that blasting operations were performed at approximately 500 feet from claimant's property at the closest point. Blasting operations also were performed at distances of approximately 1500 feet from claimant's property.

Glenn R. Sherman, a geologist with respondent's Materials Control, Soils and Testing Division, testified that he had examined the blasting data and seismic records maintained by Vibra-tec, a consulting firm hired by contractors to analyze and recommend blasting limits. From his observations of claimant's property, he concluded that the damage to claimant's property was the result of movement in the soil rather than a result of the blasting operations. He contended that the drainage of water behind the walls adjacent to the driveway was the cause of the movement of the soil which occurred.

From the record in this claim it is undisputed that an independent contractor performed the blasting alleged to be the proximate cause of the damages to claimant's property. The general rule is that an employer of an independent contractor is not liable for torts committed by an independent contractor. However, an exception to the general rule of non-liability is generally recognized in the case of inherently or intrinsically dangerous work. *Moore v. Department of Highways,* 13 Ct.Cl. 148 (1980). It is held that blasting operations are not so intrinscally dangerous as to render an employer liable for the negligent acts of an independent contractor *where the blasting is done in a barren, rural section, or in a mountainous area far removed from human habitation.* (Emphasis supplied.) See 31 Am. Jur. 2d *Explosions and Explosives* §43. Whether the work which produces the vibrations sufficient to cause damage or injury is or is not so intrinsically dangerous as to render an employer liable for the tort of an independent contractor depends upon the circumstances. The Court is of the opinion that the exception to the general rule of non-liability is not applicable to the facts of this claim. Accordingly, the Court hereby disallows the claim.

Claim disallowed.

Opinion issued December 7, 1982

RICHARD L. SARGENT

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-98)

Claimant appeared in person.

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

PER CURIAM:

Claimant seeks compensation in the amount of $43.45 for damage to a 1978 Datsun automobile sustained when the car struck a pothole on the northbound lane of U.S. Route 119 in Kanawha County, West Virginia, on March 11, 1982. There was rain at the time of the incident, and claimant testified he did not see the pothole because it was filled with water. He also stated that he travelled the road about twice a week, and did not remember seeing the pothole.

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. Since there was no proof in this case that the State had notice of the defect, the claim must be denied.

Claim disallowed.

Opinion issued December 7, 1982

ROBERT C. SCHUMACHER

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-55)

Claimant appeared in person.

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

WALLACE, JUDGE:

This claim is for damage to claimant's automobile in the amount of $221.02. Claimant's son was driving the car on January 5, 1982. He was making a right-hand turn from Hickory Road onto State Route 214 in Charleston, when the

vehicle struck a pothole. The right front and rear tires were ruined, both rims bent, one beyond repair, and the front end went out of alignment.

Claimant's son testified that he travelled this route about once a week, but had not noticed the hole before. There was no oncoming traffic as he made the turn. The hole was located on the berm next to the road. It was not visible looking over the hood of the car, and, according to claimant's son, he thought he was on the road.

The berm or shoulder of a highway must be maintained in a reasonably safe condition for use when the occasion requires, and liability may ensue when a motorist is forced onto the berm in an emergency or otherwise necessarily uses the berm of the highway. 39 Am. Jur. 2d *Highways, Streets, and Bridges* §488. A pothole approximately eight inches deep existed along the berm. The Court cannot conclude however, that claimant's son was forced onto the berm or necessarily used it. It appears that claimant's son was guilty of negligence which equalled or exceeded any negligence of which respondent may be guilty. The claim must be denied. *Sweda v. Dept. of Highways,* 13 Ct.Cl. 249 (1980).

Claim disallowed.

Opinion issued December 7, 1982

BERTIE GIBBS THOMAS
and CAROLYN THOMAS

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-163)

Claimant appeared in person.

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

PER CURIAM:

Claimants seek compensation in the amount of $300.38 for damages to a 1981 Ford. Bertie Gibbs Thomas testified that she was driving on Route 60 in Belle, West Virginia, on June

16, 1982, at about 11:20 p.m., when she apparently struck a pothole and an exposed piece of metal reinforcement. The right front and rear wheels were bent and the tires were ruined. She also stated that she had driven the road at least twice a day for a number of years and was aware of the bumpy condition of the road. She had never made a complaint about the road's condition prior to the accident.

The State is neither an insurer nor grantor of the safety of persons travelling on its highways. *Adkins v. Sims,* 130 W.Va. 645 (1947). For the negligence of the respondent to be shown, proof of notice of the defect is required. *Davis Auto Parts v. Dept. of Highways,* 12 Ct.Cl. 31 (1977). The Court believes that claimant, with her prior knowledge of the road's condition, was negligent and that this negligence was equal to or greater than that of respondent. Under the doctrine of comparative negligence, the Court disallows the claim.

Claim disallowed.

Opinion issued December 7, 1982

BOB E. WILLIS
and RAGENE WILLIS

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-100)

Claimants appeared in person.

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

PER CURIAM:

This claim was originally filed in the name of Bob E. Willis. When testimony revealed that the damaged automobile, a 1981 Ford was titled in the joint names of the claimant and his wife, Ragene Willis, the Court on its own motion joined Ragene Willis as an additional claimant.

On March 21, 1982, at approximately 10:30 p.m., claimants'

automobile struck a pothole on Route 119 at Hernshaw, West Virginia. Damage to the automobile amounted to $119.38. Mr. Willis testified that he travelled the road about once a month and had never seen the pothole.

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). In order for the State to be liable, it must first have had either actual or constructive notice of the defect in the roadway. Since there was no proof in this case that the State had notice of the defect, the claim must be denied.

Claim disallowed.

Opinion issued December 16, 1982

MARGARET GRAFF

vs.

BOARD OF REGENTS

(CC-82-216)

Russell M. Clawges, Jr., Attorney at Law, for claimant.

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

PER CURIAM:

This case was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer and Amended Answer.

Claimant received a promotion to the position of Senior Staff Nurse at West Virginia University Hospital in November of 1980. The promotion entitled her to a pay increase. Due to clerical error, she did not receive that increase from November 1981 through May 1982. In its Amended Answer, the respondent admits the validity of the claim and that respondent is liable to the claimant for the sum of $1,096.50.

The Court makes an award to the claimant in the amount of $1,096.50.

Award of $1,096.50.

Opinion issued December 16, 1982

TEDDY KEIFFER

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-168)

Steven L. Miller, Attorney at Law, for claimant.

Nancy J. Aliff and *Matthew H. Fair*, Attorneys at Law, for respondent.

PER CURIAM:

On or about September 10, 1980, claimant was riding his 1977 Honda motorcycle on West Virginia Route 16 between Dixie and Smithers, West Virginia. Claimant alleges that respondent's negligent maintenance of the road caused claimant to lose control of his motorcycle. He claims $3,072.67 in damages to the motorcycle, medical bills, lost wages and consequential damages of $802.50.

Claimant testified that he crested a hill, then entered an S-shaped turn. He was going into a left-hand turn when he encountered gravel on the road. Claimant stated that he reported his accident to the supervisor of respondent's road crew which was working in the area. He was told that the road crew lacked the proper machine to remove the gravel from the road. The gravel had been used to build up the berm alongside the road. Claimant stated that there were no signs warning of the condition.

From the record in this case, the Court is of the opinion that a hazardous condition existed on the roadway and that the failure of the respondent to place any devices warning the travelling public was negligence. The Court has previously held that a failure to warn the public of a hazardous condition constitutes negligence. See *Pullen v. Dept. of Highways*, 13 Ct.Cl. 278 (1980); *Porterfield v. Dept. of Highways*, 13 Ct.Cl. 297 (1980). The Court finds that such negligence was the proximate cause of the claimant's injuries and damages and, accordingly, makes an award to the claimant in the amount

of $3,557.14. This award is based on $3,113.14 in repair bills, $103.00 in medical bills, and personal property damage and lost wages in the amount of $341.00.

Award of $3,557.14.

Opinion issued December 16, 1982

LOIS McELWEE MEMORIAL CLINIC, ET AL.

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-299)

No appearance by claimants.

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

PER CURIAM:

These claims were submitted for decision upon the pleadings. The claimants seek payment for various goods and services furnished by the respondent as follows:

Claim No.	Claims Against Anthony Center	Amount
CC-82-299	Lois McElwee Memorial Clinic	$ 140.00
CC-82-284	Physicians Fee Office	$2,773.00
Claim No.	**Claims Against West Virginia Prison for Women**	**Amount**
CC-82-297	Chandra P. Sharma, M.D., Inc.	$ 250.00
CC-82-286	Mario C. Ramas, M.D.	$ 110.00

The respondent admits the validity and amounts of these claims, but further alleges that sufficient funds were not available at the close of the fiscal years in question from which the obligations could have been paid.

The Court finds that these claims should, in equity and good conscience, be paid, but awards cannot be made, based on the decision in *Airkem Sales and Service, et al. v. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claims disallowed.

Opinion issued December 16, 1982

REYNOLDS MEMORIAL HOSPITAL, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-212a)

REYNOLDS MEMORIAL HOSPITAL, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-212b)

John T. Madden and *B. Michael Whorton*, Attorneys at Law, for claimant.

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

PER CURIAM:

The above claims against the Department of Corrections, submitted upon the pleadings by agreement of the parties, have been consolidated by the Court for determination.

Claimant provided services to ill inmates of the West Virginia State Penitentiary for a period of one fiscal year divided into quarters for payment purposes. These claims arose because of an agreement made by the hospital and Warden Bordenkircher regarding a discount to the State of 10 per cent, to be applied to the last three quarters of the fiscal year. This agreement was made without following mandatory purchasing procedures, but was entered into in good faith.

A letter from J. Matthew Foreman, Assistant Commissioner of the Department of Corrections, reveals that during the first quarter covered by the agreement, the respondent paid for all invoiced services rendered by Reynolds, a total of $31,564.81 (reflecting a $3,507.27 discount). During the second quarter, the respondent paid all invoices for medical services in the sum of $32,247.13 (reflecting a $3,583.17 discount). In the third and final quarter of the agreement, the respondent

lacked funds to pay for any services provided by claimant, and was not, therefore, entitled to a discount. The total of services provided during this period was $63,873.86.

In addition to the medical services, the claimant provided 4,256 meals at a cost of $24,216.64. The respondent made no payment for the meals.

The respondent accepts as a valid obligation to the claimant the amount of $88,090.50, which represents the unpaid medical services ($63,873.86) and the unpaid meal services ($24,216.64). Because no payment was made during the final quarter, no discount is involved. The respondent contends, however, that because the agreement was followed for the first two quarters, the respondent does not owe the $7,090.44 discounted during that period.

The total amount claimed by claimant in these two cases is $95,180.94. The respondent accepts as valid all but the $7,090.44 discount. By individual claim, the respondent admits as true and valid all of Claim CC-82-212a ($79,281.45) and part of Claim CC-82-212b ($8,809.05), for a total of $88,090.50, stating also that sufficient funds were not available in its appropriation for that fiscal year from which the obligation could have been paid.

From the evidence, the Court determines that the agreement is not a valid contract inasmuch as the respondent's representative signed the document without authority to do so. Therefore, the claimant is entitled to the full reasonable value of its services, *viz.*, the sum of $95,180.94, and the respondent is not entitled to the benefit of the discount which it would have received had it made timely payment of the obligations.

While these claims are ones which in equity and good conscience should be paid, awards cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claims disallowed.

Opinion issued December 16, 1982

VELMA SUTTON

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-249)

Harold S. Yost, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

The claimant seeks an award in the sum of $2,969.36 for damages to personal property stored in a garage on property located near the Meadowbrook Exit of I-79 in Harrison County, West Virginia. Claimant alleges that flooding, which occurred from May 31 through June 1, 1980, resulted from water backed up from a culvert which was constructed for Barnetts Run to flow beneath I-79 into Simpson Creek.

Claimant alleges respondent constructed an inadequate culvert beneath the interstate resulting in the flooding of the garage and damage to her personal property. Respondent contends that the flooding occurred as the result of a heavy rainfall and that construction on the hillside above the property where vegetation was removed contributed to the flooding. Respondent also contends that the culvert under I-79 was adequate.

Claimant's son, John T. Sutton, testified that he observed the flooding on the night of May 31, 1980, at approximately 10:00 p.m. By 12:30 a.m. of June 1, 1980, the garage had six to seven feet of water inside. He also testified that Barnetts Run was overflowing and the water was above the top of the culvert.

The claimant testified that she had not experienced any water problems from the time of the construction of I-79 until this flood.

Randolph Epperly, Jr., a design engineer for the respondent, testified that he made a study of the drainage area affecting Barnetts Run. His calculations for the culvert under the interstate and the Simpson Creek channel indicated that the 96-inch culvert was sufficient to carry the water in the area.

The computations were based upon a ten-year flood frequency, a 25-year flood frequency, a 50-year flood frequency and a 200-year flood frequency. The culvert was designed to carry a 25-year storm without any problems. In answer to a question from Judge Ruley as to the effect of the culvert acting as a dam, Mr. Epperly testified that "the fact that the highway field was there would not have decreased or lowered the amount or depth of flooding back in the highway fill. It would just slow down the amount of time it would take for the water to flow out of the 96-inch pipe. . . . It's my opinion there was a very large amount of rainfall in the area, plus the fact that the mall had disturbed some of the area which would have naturally increased the amount of flow and that these conditions combined and caused an enormous amount of water to flow into this area."

From the record in this claim the Court finds that an unusually heavy storm occurred; that Barnett's Run overflowed its banks; that the 96-inch culvert constructed beneath I-79 did, in fact, prevent the flow of water from Barnetts Run into Simpson Creek; and that the area flooded as a result of a combination of these circumstances. The evidence established that the value of personal property lost was $2,969.36 and the Court makes an award to the claimant in the amount of $2,969.36.

Award of $2,969.36.

Opinion issued December 16, 1982

UTAH VALLEY HOSPITAL

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-300)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted for decision upon the pleadings. The claimant seeks payment for medical services provided to George R. Keller who was being extradicted to West Virginia.

A bill for medical services in the amount of $1,825.16 was included with the extradition papers.

The respondent admits the validity and amount of the claim, but further alleges that sufficient funds were not available at the close of the fiscal year in question from which the obligation could have been paid.

The Court finds that this claim should, in equity and good conscience, be paid, but an award cannot be made, based on the decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued December 20, 1982

AZILE DEAN, INDIVIDUALLY,
AND AS EXECUTRIX OF THE ESTATE OF
VIRGIL DEAN, DECEASED

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-632)

Hazel A. Straub, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

On January 31, 1979, at approximately 1:30 p.m., Virgil Dean was driving on Route 119, between Danville and Rock Creek, in Boone County, West Virginia. A portion of shale rock broke off of the side of the mountain and struck Mr. Dean's 1971 Chevrolet truck. Mr. Dean sustained a cerebral concussion, neck strain and multiple contusions of the chest. He was hospitalized until February 6, 1979. Mr. Dean died on September 5, 1979, during heart surgery. Azile Dean, widow of Virgil Dean, maintains this action on her behalf and as executrix of her husband's estate. She seeks an award of $50,000.00, based on respondent's allegedly negligent maintenance of Route 119.

Claimant testified that her husband had observed loose rock at the accident site, and told her if it fell, it would kill someone. This occurred four to six weeks before the accident. Claimant further stated that her husband left the house one day to notify the respondent of this danger, but could not say whether, or to whom, he talked. She said that Mr. Dean told their nephew, Ricky Daniel Dean, about the loose rock. Ricky Dean was then employed by the respondent.

Ricky Dean testified that he informed James Anderson and Gary Keys, both employees of the respondent, about the condition of the rock. These reports were made as part of Mr. Dean's daily inspector's report, which was required by his job. This was approximately five weeks before the accident, and according to Mr. Dean, no action was taken as a result of his report.

James Anderson stated that he did not remember Ricky Dean reporting a hazardous rock condition to him. Gary Keys said that he checked the daily inspector's reports for November and December of 1978 and found no information about the rock area in question. Frank Ball, who was the Boone County Road Maintenance Supervisor in 1979, testified for respondent. He stated that the portion of Route 119 where the accident occurred had not been subject to rockfalls, just shale debris falling into the ditch line. Mr. Ball said that it was "very unusual" for a large piece of shale rock to break off, and that this had never happened in this area. He also said that he travelled that portion of Route 119 every day that he worked and had never seen anything unusual with the hillside at the accident site.

A careful review of the facts as established by the record indicates to the Court that the respondent was not negligent in its maintenance of Route 119. This particular section of the road was not known to be one where falling rocks, of the size which was encountered by Virgil Dean, usually fell. *Manning v. Dept. of Highways,* 13 Ct.Cl. 275 (1980). The Court is of the opinion that the claimant has failed to establish by a preponderance of the evidence that the respondent knew or should have known that a dangerous condition existed on Route 119.

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 evidence does not establish negligence on the part of the respondent, the claim must be denied.

Claim disallowed.

Opinion issued December 20, 1982

BARBARA HAYNES

vs.

BOARD OF REGENTS

(CC-78-13)

Thomas D. Ireland, Attorney at Law, for claimant.

Frank Ellison, Deputy Attorney General, for respondent.

GARDEN, JUDGE:

Claimant seeks $25,000.00, alleging that the negligence of respondent's employee resulted in claimant sustaining a broken finger, which has impaired her work as a pianist and writer. Claimant was a patient at the West Virginia Medical Center in Morgantown on February 4, 1976, when the injury occurred. She was being transported in a wheelchair to the shower by a staff nurse. Her gown became disarrayed, and in an effort to cover herself, claimant's left middle finger was caught in the spokes of the wheel chair, causing the fracture. Claimant alleges that she had a permanent loss of flexion in the finger, due to the fracture.

Claimant testified that she was feeling dizzy and was being pushed at a "high rate of speed." There was conflicting testimony as to whether claimant wore a hospital gown or her own clothing. When she reached to cover herself, her finger was caught in the wheelchair. As a result of the injury, claimant lost the ability to play the piano well, and was also unable to speed type, which slowed her progress on a novel she was writing.

Nurse Pixler testified that she was pushing the wheelchair

at a normal rate of speed, when she noticed Mrs. Haynes' robe slipping. She had begun to stop the wheelchair when claimant's finger became entangled in the spokes.

The Court, in order to allow a recovery in this claim, must be satisfied by a preponderance of the evidence that respondent's negligence proximately caused claimant's injury. The evidence does not indicate negligence. There is no evidence, other than claimant's testimony, that she was being pushed at an unreasonably high rate of speed. Claimant stated, "I was dizzy. I felt heavy, I didn't feel like myself, . . . and she pushed me very fast . . . ."

From the record, the Court finds that the claimant has failed to prove by a preponderance of the evidence that the negligence of the respondent caused her injury and disallows her claim.

Claim disallowed.

Ruley, J., did not participate in the hearing or decision of this claim.

Opinion issued December 20, 1982

JOHN MULLENAX, ADMINISTRATOR
OF THE ESTATE OF EDITH MULLENAX

vs.

DEPARTMENT OF AGRICULTURE

(CC-78-157)

George I. Sponaugle, II, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

On July 29, 1976, the claimant and his wife, Edith Mullenax, attended the 34th Annual West Virginia Poultry Convention and Festival in Moorefield, Hardy County, West Virginia. At the conclusion of the festivities, Mrs. Mullanax decided to find the ladies room. Mrs. Mullenax proceeded approximately 75 feet down a dimly lit corridor of the school building where the festival was held. She opened a door, thinking it the entrance to the ladies room, but it was actually the stairway to the base-

ment. Mrs. Mullenax fell 12 to 15 feet down the stairs to the floor below, sustaining severe injuries, including two broken ankles, broken ribs, and a broken wrist and a fractured cheekbone. There is nothing in the record to indicate that these injuries were the cause of her death. The claimant contends that the respondent is liable for damages arising out of Mrs. Mullenax's fall under an agency theory, because the respondent contributes funds to the West Virginia Poultry Association, which sponsored the event. Claimant seeks $100,000.00.

The testimony established that the respondent contributed $400.00 to the West Virginia Poultry Association. According to Robert E. Ludwig, President of the Hardy County Poultry Association in 1976, the money was "just a grant to assist us in our general program of furthering the poultry industry in Hardy County, West Virginia." He further stated that the West Virginia Poultry Association is "in no way whatever" under respondent's supervision. Claimant's witness, Ralph Hitt, an employee of respondent, stated that respondent neither controls nor supervises the Poultry Association. Earl K. Kelley, also an employee of respondent, stated that the respondent has given funds to the Poultry Association in varying amounts since 1970, but that there is no requirement that the money be expended in any particular manner. The sums have ranged from $50.00 to $1,000.00.

The Court is of the opinion that these limited financial contributions are insufficient to establish an agency relationship between the respondent and the Poultry Association. Claimant in his brief argues that all that is necessary to establish an agency relationship is the right or potential right of the principal to control the agent. Claimant alleges that respondent's financial contributions coupled with respondent's sponsorship of the Poultry Convention is sufficient to establish a potential right to control. The Court cannot agree with this contention. We do not find any evidence that the respondent held itself out as being a sponsor of the Poultry Convention. The contributions made by the respondent were simply that — contributions. There was no actual or potential control involved. Cross-examination of Mr. Ludwig elicited the following exchange:

"Q. Mr. Ludwig, did the West Virginia Department of Agriculture ever give you instructions as to how the activities of the Poultry Association were to be carried out?

A. No way whatever. Even if they would have, we wouldn't have considered them in any way because it was not their function."

The Court must therefore disallow the claim.

Claim disallowed.

Opinion issued December 20, 1982

FRANK A. PAYNE

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-719)

John L. Boettner, Jr., Attorney at Law, for claimant.

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

GARDEN, JUDGE:

Claimant was driving his 1975 Chevrolet van on Route 119, at Elkview, Kanawha County, West Virginia, on October 7, 1979. At approximately 1:00 a.m., claimant lost control of the vehicle and slid into a ditch line. The van, valued at $3,475.00, was a complete loss. Claimant alleges that respondent, in cleaning the ditch line earlier that day, had negligently left mud on the road, which caused claimant's vehicle to skid, resulting in the accident.

Respondent's witness, Trooper M. J. Smith, an employee of the West Virginia Department of Public Safety, testified that he investigated the accident. He stated that he did not see mud on the road, and that the claimant had been drinking. Billy D. Ray, the foreman of the workcrew which had worked on the ditch line on October 6, 1979, stated that to his knowledge there was not a great deal of dirt left in the road. Mr. Ray stated that the road was cleaned after pulling the ditch line

and then fly ash was put on the road to minimize danger to motorists.

Without a positive showing of negligence on the part of the respondent, this case is governed by the well settled principle of *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947), cited in *Parsons v. State Road Comm'n.*, 8 Ct.Cl. 35 (1969), that the State is not a guarantor of the safety of travelers and 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. The evidence in this case fails to establish a lack of reasonable care and diligence. See *McCarthy v. Dept. of Highways*, 12 Ct.Cl. 139 (1978). Accordingly, the Court denies the claim.

Claim disallowed.

Opinion issued January 21, 1983

MARY LYNN COOK

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-82-157)

Claimant appeared in person.

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

PER CURIAM:

At a pre-trial conference and a hearing on respondent's motion to dismiss, the claimant outlined the basis of her claim. Claimant resided in apartment 2 on the first floor of 1522 East Lee Street, Charleston, West Virginia, and was employed by the West Virginia State Welfare Department at a salary of $525.00 per month. Prior to October 1977, claimant contends certain activities commenced such as loud noises, music playing late at night and people "stomping in and out of the house at all hours of the night up and down the stairs." Her loss of sleep caused her to quit her job. She complained to her landlady, Mrs. Angie Ehle, and later sued her for damages. She didn't pursue the suit because she stated the respondent should have stopped the "activities." Claimant also contends that people in the neighboring property at 1520 East Lee Street caused disturbances and spied on her which in addition to the

activities where she resided finally caused her to move in March of 1980. Claimant alleges that she complained to "all police departments" including respondent.

Damages claimed include $25,074.40 as salary lost after she quit work, $5,000.00 claimed for things done to her personal belongings, some of which she was forced to sell, and $3,000.00 for a foot and leg injury received from a fall while residing at 1307½ Quarrier Street. She was injured when she caught her foot in a hole in the back lawn and fell on the gravelled street. This fall was apparently prior to the activities at 1522 East Lee Street. An additional $20,000.00 is claimed for the death of her husband who died on June 13, 1979, as a result of a fall from a window at the Union Mission.

The Court has carefully considered the statements made by the claimant and has examined the numerous papers filed with the claim and finds that the damages claimed by the claimant were not caused by any breach of duty by the respondent which could be the basis of an award by the Court. Additionally, the Court notes that the activities complained of occurred more than two years prior to the filing of this claim and are barred by the statute of limitations. West Virginia Code §55-2-12. By statute, West Virginia Code §14-2-21, this Court is prohibited from hearing matters which are barred by law. Accordingly, the respondent's motion to dismiss is sustained and the claim is dismissed.

Claim dismissed.

Opinion issued January 24, 1983

THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY

vs.

DEPARTMENT OF NATURAL RESOURCES

(CC-81-302)

David Ogborn, Attorney at Law, for claimant.

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

PER CURIAM:

The claimant seeks payment of $7,591.93 in back charges for

phone service at the Pipestem State Park. These charges were incurred between August 2, 1975 and June 7, 1979. An inventory of the phone system at Pipestem resulted in billing errors being discovered, and this claim resulted from the adjusted bill which was presented to the respondent for the period in question.

During the construction of the Pipestem facility, the respondent entered into negotiation with the claimant for installation of a telephone system. Eventually, a dial 701 B PBX system was agreed upon. This equipment contains P-33 selectors, which are a part of the dialing chain within the system, and 44-M power and common equipment, which drives the system. The telephone equipment became operational in 1970.

On May 2 and 3, 1979, the claimant performed an inventory of the telephone equipment at Pipestem. This was part of a periodic routine verification of customer accounts, made to insure accurate billing. The inventory, which consisted of physically identifying the equipment which was listed on an account information record, resulted in the discovery of 23 billing errors. Of these errors, three were billed or credited to the respondent's account. Two items were billed, the P-33 selectors and the 44-M common equipment, at a total cost of $7,591.93. A credit of $221.95 was given for equipment which had been billed, but was not present at Pipestem.

The Court is of the opinion that the evidence establishes that a contract for telephone service existed between the claimant and respondent. The equipment for which the claimant seeks compensation is an integral part of the 701 B PBX system. James Humphreys, the engineer of the Pipestem telephone system, testified that the system would not operate without the P-33 selectors and the 44-M common equipment. The respondent has received the use of this equipment; to deny the claimant relief would unjustly enrich the State. The Court, therefore, makes an award of $7,591.93.

Award of $7,591.93.

Opinion issued January 24, 1983

RONALD E. CYRUS

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-196)

Claimant appeared in person.

Matthew H. Fair, Attorney at Law, for respondent.

PER CURIAM:

The claimant's vehicle, a 1975 Chevrolet Van, was damaged in an accident on Route 3, Boone County, West Virginia, on October 17, 1980. The vehicle was a total loss. The accident occurred when the vehicle went through water on the road. The water extended across the pavement and was three or four inches deep. James Smith, who was driving at the time, lost control of the vehicle and hit an overhanging rock cliff. Claimant seeks an award of $4,500.00, $3,000.00 for the van, $500.00 for injuries received, and $1,000.00 for lost wages.

The claimant testified that he had driven that road on many occasions and knew that the road had flooded before, although never as much as on the night of the accident. He indicated that the water came from a stopped up culvert alongside the road.

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 negligence of the respondent to be shown, proof of notice of the defect in the road is required. *Davis Auto Parts v. Dept. of Highways,* 12 Ct.Cl. 31 (1977). In this case, there was no evidence that respondent knew or should have known of the condition of the road. The Court must therefore disallow the claim.

Claim disallowed.

Opinion issued January 24, 1983

JAMES DAVID HUTCHINSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-291)

James C. Lyons, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

Claimant lives on Route 97 between Pineville and Maysville in Wyoming County, West Virginia. On May 1 and July 10, 1980, there were heavy rainstorms. On both occasions claimant's property received flood damage. Claimant contends that respondent was negligent in maintaining Route 97; that respondent, in trying to widen and stabilize the road, filled in the ditch line and blocked the culvert which drains the rain from the area of claimant's property. Claimant seeks an award of $2,475.00, the cost of restoring his property. Respondent contends that severe weather conditions were, in part, responsible for claimant's damages. The other contributing factor was the existence of two private roads across from claimant's property from which dirt and rock washed down onto claimant's property.

Claimant's father, Lonnie Hutchinson, testified that prior to May 1, 1980, respondent's employees had worked on Route 97. This work consisted of widening the road so that it would be safer for truck usage. Mr. Hutchinson said that red dog was used to widen the road and that in widening the road, the ditch line was stopped. Mr. Hutchinson stated that he asked respondent to open a new ditch, but this request was not complied with until after July 10, 1980.

Respondent's witness, Bill Wilcox, who was the Wyoming County Road Supervisor in respondent's employ, testified that he visited claimant's property on July 11, 1980. He stated that there was "quite a bit of stone washed over on Mr. Hutchinson's property." This stone was a crusher type stone which respon-

dent had not used in its work on Route 97. Mr. Wilcox stated that the heavy rains that had occurred the previous day swept the stone off two private roads located above claimant's property. Mr. Wilcox also testified that his records showed that red dog was not hauled to Route 97 until September 1980.

In order for the Court to make an award in this case, it must be satisfied that the actions taken by respondent resulted in the damages alleged. The evidence is in conflict as to the cause of the claimant's damages. The Court cannot base an award on speculation, and to make an award on the evidence presented would be to speculate. There is no doubt that the claimant's property was damaged, but it cannot be said that this damage resulted from negligence on the part of the respondent. The Court must therefore deny the claim.

Claim disallowed.

Opinion issued January 24, 1983

L. R. LEWIS & B. L. LEWIS

vs.

DEPARTMENT OF FINANCE & ADMINISTRATION AND DEPARTMENT OF WELFARE

(CC-82-235)

Louis H. Khourey, Attorney at Law, for claimants.

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

WALLACE, JUDGE:

The claimants, who are husband and wife, own two real estate lots on Diamond Street, Moundsville, West Virginia. By a June 24, 1975 letter, the claimants were informed that the Department of Finance and Administration intended to lease a building to be constructed on these lots from the claimants. The letter stated that the lease would be for a term of "approximately ten years." At $600.00 per month, the claimants obtained a loan for $42,000.00, with interest at 9% per annum payable for ten years, to construct the building. The Department of Welfare occupied the building from February 1,

1976 to February 28, 1982. The Department of Welfare, by letter dated January 27, 1982, exercised its option to cancel the lease on 30 days' notice. The claimants allege that the doctrine of equitable estoppel should be applied to prevent the respondents from cancelling the lease. Claimants allege that they have sustained damages of $28,200.00 because of the cancellation.

Mr. Lewis testified that he had been told by some State employee not to be concerned about the cancellation provision, because " 'the State of West Virginia has never cancelled a lease.' " This statement and the statement in the June 24, 1975 letter were taken in good faith by Mr. Lewis to mean that the lease would not be cancelled before the end of the ten-year period. He was, however, aware of the terms of the cancellation provision contained in the lease agreement.

The evidence indicates that a contract to lease a building was entered into between the claimant and the respondent Department of Finance and Administration. The lease contained a cancellation provision which was clear on its face. The parties to the agreement were aware of the terms of this provision. The respondent Department of Finance and Administration cancelled the lease with the required 30 days' notice. The Court must therefore find that the terms of the contract were controlling and deny the claim.

Claim disallowed.

Opinion issued January 24, 1983

JAMES PACK & ELLA MAE PACK

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-125)

Abishi C. Cunningham, Attorney at Law, for claimants.

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

GARDEN, JUDGE:

Claimants are co-owners of a tract of land which fronts county route 83/2 at Atwell Hollow, Bartley, McDowell County,

West Virginia. The land was purchased in July 1974, and claimants moved onto the property in 1975. Claimants allege that the house and real estate have suffered water damage which resulted from respondent's negligent maintenance of the roadway and drainage system. Claimants seek damages in the amount of $12,467.52.

County route 83/2, also called the Atwell Branch Road, is a gravel-based dirt road, designated as a local service road, which is situated about 50 feet above claimants' property. The claimants testified that when there was heavy rain, the ditch line drainage system which runs alongside the road, became blocked by rocks and other debris. The water then overflowed onto their property and damaged their house. Mr. Pack testified that he had made numerous complaints to respondent concerning this condition. He stated that respondent brought gravel to lay on the road, but that the slope of the road caused the gravel to wash down onto his property. Photos admitted into evidence show gullies, rock slides and other evidence of erosion.

Mr. Pack testified that on at least nine occasions he has hired a bulldozer to try to correct the damage to his driveway and yard. The driveway was not in existence when claimants moved onto the property. Mr. Pack testified that he had the driveway bulldozed to connect to county route 83/2. He stated that the driveway crosses over a small portion of an adjoining landowner's property before exiting into county route 83/2.

Jesse H. Gravely, a District Engineer for Construction, employed by respondent, testified that he had examined the Pack property. On the basis of his examination, he believed the problem resulted from the construction of the driveway. He stated:

> "Well, if the bulldozer took out too much material at the foot of the slope between the driveway and the State road, then that would tend to weaken the support of the State road and, of course, it would slide down into the driveway. That apparently is what has happened. The slope here is very, very steep. The material is of a talus or rocky

nature and when it gets, if you undercut it, it will slide away and in at least two places this has brought slides from the road down into the driveway where the driveway was too close to the road itself."

Mr. Gravely stated that a permit is required to connect a driveway to a State road. The permit will be issued after the property owner submits a plan showing that the driveway will be properly constructed, meeting drainage standards. No such permit was issued to the claimants. Mr. Gravely disputed Mr. Pack's testimony that the driveway crossed over another landowner's property.

From the record, the Court is of the opinion that the drainage problem was caused in part by the respondent's failure to keep the ditch line clear. However, the Court feels that the claimant was also negligent in the construction of the driveway and that this was the significant contributing factor to the drainage problems. Applying the doctrine of comparative negligence, the Court is of the opinion that the negligence of the claimant was equal to or greater than that of the respondent and denies the claim.

Claim disallowed.

Opinion issued January 24, 1983

CLARENCE SHIFLET & FLORENCE SHIFLET

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-131)

Claimants appeared in person.

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

PER CURIAM:

The claimants seek an award of $697.36 to repair damage to their 1980 Plymouth Volare automobile. The damage allegedly occurred driving on Gluck Run in Gilmer County, West Vir-

ginia, which is where the claimants reside. They testified that respondent left large rocks in the road, which is a dirt road, after a scraping operation. The damage occurred sometime in March or April, 1982, and there was no specific incident which caused it.

Ralph Marks, Gilmer County maintenance supervisor, testified that three-inch and one and one-half-inch stone was used to fill holes in the road. He also said that he viewed Gluck Run after receiving a call from claimants and saw no rocks which were large enought to damage a car.

Without a positive showing of negligence on the part of the respondent, this case is governed by the well settled principle of *Adkins v. Sims*, 130 W.Va. 645 (1947) that the State is not a guarantor of the safety of travelers, and the user of the highway travels at his own risk. The existence of a defect in the roadway does not establish negligence per se. The claimants lived on Gluck Run and were aware of its condition.

The evidence in the record is not sufficient to establish such negligence on the part of the respondent as to create liability for the claimants' damage. Accordingly, the Court is of the opinion to and does disallow the claim.

Claim disallowed.

Opinion issued January 25, 1983

BLACK ROCK CONTRACTING, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-222)

Frederick L. Thomas, Jr., Attorney at Law, for claimant.

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

GARDEN, JUDGE:

During 1971 Marble Cliff Quarries Company (Marble Cliff) contracted with the respondent for construction of Project I-

470-1 (8) (0), Ohio County, West Virginia. The work on the project commenced on January 17, 1972. In the course of construction, Black Rock Contracting, Inc., (Black Rock) acquired all of the assets of Marble Cliff and agreed to perform the subject contract.

On or about May 11, 1974, a major slide occurred on the project through no fault of Black Rock. As a result of the slide, the respondent shut down the earthwork operation. During a meeting on June 13, 1974, respondent's representatives indicated to representatives of Black Rock that the contract would be rescinded as the respondent did not have access to the funds needed to correct the slide and complete the project. The respondent then notified Black Rock by letter dated June 25, 1974, that the contract was "mutually rescinded."

As a direct and proximate result of the cancellation of the contract, Black Rock incurred substantial costs and damages including loss of income on six subcontracts in the amount of $294,354.04. Black Rock also incurred costs in the settlement of litigation and payment of attorneys' fees in the amount of $18,387.42 in a related legal action brought against Black Rock by the Village of Bethlehem.

The first issue to be considered is whether or not Black Rock is entitled to recover the loss of income on the six subcontracts. To determine this issue the facts in the claim must be examined to first clarify whether the contract was "mutually rescinded" or was unilaterally cancelled by the respondent. At the first meeting which was held on June 13, 1974, Black Rock provided an estimate for the slide correction in the amount of $10 million. Representatives of the respondent indicated that funds were not available and that a study of the method of slide correction would be necessary on the part of the respondent; therefore, the respondent requested Black Rock to prepare to "clean up" the construction site and remove all of its equipment. Leo A. Vecellio, Sr., President of Vecellio and Grogan, Inc., of which Black Rock is a wholly owned subsidiary, testified that at this meeting he understood the contract was cancelled and that Black Rock would be compensated by supplemental agreements for preparing the job site for

studies by the respondent and for moving out all of its equipment.

Supplemental agreements were thereafter entered into by Black Rock and the respondent for such items as idle equipment, site preparations necessary for a delay of the project, moving and storing materials already at the site, and various and sundry other items. Some of those agreements refer to the "mutual rescission" of the project or the "termination" of the project. Black Rock was well aware at the time the agreements were made that the project was stopped. These agreements were the only method whereby Black Rock could be paid for work it performed on the project site. The respondent contends that the signing of these agreements by Black Rock was a waiver of Black Rock's right to recover for losses sustained as a result of the termination of the contract.

Joseph S. Jones, the State Highway Engineer for the respondent during the period in which this claim arose, testified that the project was stopped due to the costs involved in correcting the slide and the delay necessary for the respondent to perform design work to correct the slide. As to his comments made at the June 13, 1974, meeting he stated, "Then we . . . the last part of it, I said, 'Then we'll get together.' We did not terminate the contract, but stopped it right then. We said, 'there are things we'd like to meet in the field with you to go over to get this in a shape so that it will be in as good a condition as we can to leave it until such time as a new contract was let.' " It was after this meeting that the respondent sent the letter using the phrase "mutually rescinded" with reference to the contract. Black Rock contends that the contract was unilaterally cancelled while the respondent contends the contract was mutually rescinded.

It is clear under the evidence in this case that the project was stopped and Black Rock's contract was terminated or rescinded but the Court cannot conclude that the recission was "mutual." Mutual connotes a meeting of the minds and it does not appear that there was a meeting of the minds between the parties respecting the termination of this contract. Al-

though, as a practical matter the respondent may have had no choice in the premises, it unilaterally terminated the contract without fault on the part of Black Rock and Black Rock was damaged as a result of the termination. The argument that Black Rock waived its rights incident to the termination by executing supplemental agreements related to closing the project is regarded as unmeritorious.

It is well established that a party to a contract who is prevented from performing it through no fault of his own may recover as damages that profit which he would have made upon full performance. 12 Am. Jur. *Contracts* §386. The parties have entered into a written stipulation to the effect that that sum in this instance was $294,354.04.

The second item of damage claimed presents a more unusual question. It relates to another Marble Cliff contract which was assigned to Black Rock. Under the terms of the contract, Black Rock was to dispose of waste material from the project in an area which the Town of Bethlehem intended to develop into a municipal park. The fill material was not available to Black Rock when the project was stopped. As a result, Black Rock was obliged to cancel its contract with the Town of Bethlehem and later negotiated a settlement of its claim at a cost of $18,387.42. The general rule is that attorneys' fees and expenses incurred in litigation are not recoverable as an item of damages in an action *ex contractu* but an exception to the rule exists where a breach of contract has forced a party to maintain or defend a suit with a third person. Among the losses recoverable in that instance may be the expenses of counsel fees, court costs and the amount of a judgment. 5B M.J. *Damages* §44. The agreement by and between Black Rock and the Town of Bethlehem resulted in litigation as a direct result of the rescission of Black Rock's contract with the respondent. The Court, therefore, makes an award to Black Rock in the amount of $18,387.42 for this portion of the claim.

Award of $312,741.46.

Opinion issued January 25, 1983

CITY OF OAK HILL

vs.

MUNICIPAL BOND COMMISSION

(CC-82-268)

Pat R. Hamilton, Attorney at Law, for respondent.

Michael G. Clagett, Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted upon a written stipulation acknowledging liability on the part of the respondent in the amount of $531.49 based on the following facts.

The respondent acted as the agent of the claimant in the matter of issuing call notices for the period covered by the claim. The respondent failed to issue call notices for the years 1977, 1978, 1979, and 1980 and is therefore liable to the claimant for the losses suffered as a result of the failure. The claimant was required to pay $1,071.94 in additional interest to holders of bonds that should have been retired, but saved $540.45 in total expenses by not calling the bonds. The Court finds that the respondent is liable, and makes an award to the claimant in the amount of $531.49.

Award of $531.49.

Opinion issued January 25, 1983

WILLIAM E. COY

vs.

DEPARTMENT OF HEALTH

(CC-82-204)

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 $90.14 for repairs to the armature shaft of his wheelchair which was broken by a rapidly closing elevator door in Pinecrest Hospital, Beckley, West Virginia.

In its Answer, the respondent admits the validity and amount of the claim. The Court therefore makes an award to the claimant of $90.14.

Award of $90.14.

Opinion issued January 25, 1983

J. P. CURRENCE

vs.

OFFICE OF THE SECRETARY OF STATE

(CC-82-186)

Claimant appeared in person.

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

PER CURIAM:

This claim was submitted for decision upon the pleadings. The claimant seeks payment for investigating services furnished to respondent in the amount of $143.00.

The respondent admits the validity and amount of the claim, but further alleges that sufficient funds were not available at the close of the fiscal year in question from which the obligation could have been paid.

The Court finds that this claim should, in equity and good conscience, be paid, but 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 25, 1983

EVANS LUMBER COMPANY

vs.

DIVISION OF VOCATIONAL REHABILITATION

(CC-82-249)

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 $458.97 for an unpaid bill for lumber supplies.

In its Answer, the respondent admits the validity and amount of the claim. The Court therefore makes an award to the claimant in the amount of $458.97.

Award of $458.97.

Opinion issued January 25, 1983

VICTOR FRISCO and
JANET FRISCO

vs.

DEPARTMENT OF NATURAL RESOURCES

(CC-80-121)

Claimant appeared in person.

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

PER CURIAM:

The Court in its opinion issued on November 10, 1980, denied this claim on the grounds it was barred by the Statute of Limitations. The claim is now before the Court for rehearing on the issue of whether the claim is time barred.

On or about May 20, 1977, hydacid uranine (flourscein) dye was placed in a water well located upon property in Mineral County, West Virginia. The dye was put in the well by respondent, in an effort to trace underground water to a surface mine site. The dye damaged the well. Respondent drilled a new well, but the dye migrated to and contaminated the new well.

The claimants purchased the property in the fall of 1977, with the assurance that the dye was temporary and not detrimental. On February 25, 1980, the claimants filed this claim for $1,956.00 for the cost of installing a third well. The respondent on June 11, 1980, filed its Answer admitting the damage to claimants' well. On June 23, 1980, respondent filed its Amended Answer, with the defense that the claim was barred by the applicable two-year period of limitations.

At the rehearing, it was established that the claimants were advised for the first time not to use the well for domestic purposes on March 3, 1978, in a letter from the West Virginia Department of Health. The claimants' right of action accrued on March 3, 1978, and this claim is not barred by the statute of limitations. However, the testimony at the rehearing established that the claimants started to receive city drinking water "a couple of months" prior to the July 21, 1982, rehearing date. It was also established that the third well, for which the claimants seek $1,956.00 to drill was never drilled. Accordingly, there can be no award for special damages but, the claimants certainly have been inconvenienced by action of the respondent before obtaining a public water supply and, accordingly, the Court makes an award to the claimants in the amount of $500.00.

Award of $500.00.

Opinion issued January 25, 1983

DONALD A. HARMAN

vs.

DEPARTMENT OF CORRECTIONS

(CC-81-381)

Claimant appeared in person.

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

WALLACE, JUDGE:

Claimant seeks recovery of $994.90 for sundry articles of personal property which he owned and which were removed from his possession by officers or employees of the respondent at the West Virginia Penitentiary, in Moundsville, while the claimant was imprisoned there. The property was taken during a "shake down" on November 29, 1979. Subsequently, it supposedly was shipped to claimant's home and was received by his wife. The claimant testified that some of the articles were destroyed in his presence, some never reached his home and others were damaged beyond repair when they reached his home. That evidence was not disputed. It would appear that,

when the respondent took possession of the property, it became a bailee. In *Chesapeake & Ohio Railway Co. v. S.R.C.*, 8 Ct.Cl. 140 (1970), the Court stated:

> "A bailee must return to the bailor the bailment property in the condition it was in at the time of the bailment, usual wear and tear excepted."

Following that general rule, liability of the respondent is clearly established.

As to the amount of damage, however, it appears that the evidence was of replacement cost rather than fair market value at the time of the loss. For that reason, the Court is inclined to allow only half of the sum claimed on the theory that this approach will be at least roughly consistent with experience.

Award of $497.45.

Opinion issued January 25, 1983

RUTH A. KRIPPENE

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-230)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that the respondent is liable for damages in the sum of $3,152.65 based upon the following facts: On June 9, 1982, and on August 16, 1982 claimant's property flooded due to water from the adjacent roadway. The flood damage was the result of respondent's negligent maintenance of the drainage system in the vicinity of claimant's property. The claimant missed three days of work as a result of the flooding. Damages for lost work amount to $213.00. Claimant's property was damaged in the amount of $2,939.65.

The Court finds that the respondent's negligence was the proximate cause of the claimant's damages, and hereby makes an award in the amount stipulated.

Award of $3,152.65.

Opinion issued January 25, 1983

DORIS LESLIE

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-285)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that the respondent is liable for damages in the sum of $146.47. On or about July 14, 1982, the claimant was operating a 1980 Ford Mustang on Route 52, in the vicinity of Coaldale, Mercer County, West Virginia. In the course of this travel, the vehicle crossed a section of roadway which had been ditched across the roadway by respondent and filled with gravel. While crossing the ditch, claimant's vehicle sustained damage to its tire, wheel and alignment. This occurred because of the negligence of the respondent and this negligence was the proximate cause of the claimant's damages.

In view of the foregoing facts, the Court finds the respondent liable, and makes an award to the claimant in the amount stipulated.

Award of $146.47.

Opinion issued January 25, 1983

WEST VIRGINIA SCHOOL OF OSTEOPATHIC MEDICINE CLINIC, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-306)

Paul S. Detch, 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 seeks payment for medical services furnished to respondent's Anthony Center in the amount of $14,709.50.

The respondent admits the validity and amount of the claim, but further alleges that sufficient funds were not available at the close of the fiscal year in question from which the obligation could have been paid.

The Court finds that this claim should, in equity and good conscience, be paid, but an award cannot be made, based on the decision in *Airkem Sales and Service, et al. v. Department of Mental Health,* 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued January 26, 1983

WILSON R. COLE

vs.

DEPARTMENT OF HIGHWAYS

(CC-77-3a)

MARY LOU COLE

vs.

DEPARTMENT OF HIGHWAYS

(CC-77-3b)

WILSON R. COLE, ADMINISTRATOR
OF THE ESTATE OF TIMOTHY RAY COLE

vs.

DEPARTMENT OF HIGHWAYS

(CC-77-3c)

WILSON R. COLE, ADMINISTRATOR
OF THE ESTATE OF MARY JACQUELINE COLE

vs.

DEPARTMENT OF HIGHWAYS

(CC-77-3d)

Randy D. Hoover, Attorney at Law, for claimants.

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

GARDEN, JUDGE:

On January 7, 1975, claimant Mary Lou Cole, wife of claim-

ant Wilson R. Cole, was operating a 1973 Plymouth Road Runner owned by him on West Virginia Route 21 near Beckley, Raleigh County, West Virginia. A single vehicle accident occurred in which she suffered severe injuries, two children of the claimants were killed, and the vehicle was destroyed. The claimants contend that the respondent was negligent in permitting a layer of ice to accumulate on the highway at the place of the accident. When Mrs. Cole drove onto the ice, she lost control of the vehicle, crossed the center line into the opposite lane of travel, ran up and then down an embankment and then crossed both lanes of travel and proceeded over a hill into a pond where the vehicle turned over in the water.

Trooper Bradford Vaughan investigated the accident. He testified that the surface of this particular section of State Route 21 is shaded by a high embankment on the west side of the highway adjacent to the southbound lane for a distance of "at least a hundred feet" and, if there is any ice on that portion of the highway, it does not thaw until mid-afternoon.

Trooper A. W. Maddy testified that he had passed the accident scene twice on the day of the accident. On his way to his office he had noticed that all of the road were covered with a thin layer of frost or ice and this spot was no different from the surface of the roads elsewhere. However, on his way through the accident scene later at about 11:00 a.m., he noticed that the ice was still present there, whereas the surface of the other roads was clear of the ice. He pulled off the highway immediately after he struck the ice and radioed the Beckley dispatcher to call the Department of Highways to send a cinder truck to that spot. He testified that he had not called earlier in the morning because

> "As I previously testified, when there is a hazard in a general area, people have to live with it and they — everyone knows to be careful when it's cold and when they know that the road is slick and everyone is careful. But I was especially concerned about it at 11 o'clock, because at that time the road was dry everywhere else. People were just zooming along there at the posted speed limit * * * and

possibly beyond, but I knew that an accident was going to happen. One had already happened and I was highly suspicious that another one was going to happen because the roadway was dry from Beckley all the way to there and it was dry from the other end of the icy spot south. That was the only slick spot and it was just over the crest of the hill as you're going north and I was concerned that there was going to be an accident because no one suspected it at that time of day with the sun out shining."

Mrs. Cole testified that she was driving at approximately 35 miles per hour. She did not see the ice. She could not remember doing anything mechanically to the automobile. She stated that she had driven through this area on previous occasions and had noticed slick spots there.

Other witnesses for the claimants and for the respondent corroborated the fact that ice existed on the surface of the road where the accident occurred.

Corporal A. C. Bartlect, a member of the Department of Public Safety, testified about the scene where this accident occurred as follows:

Q "Was that a known bad spot along the highway in Raleigh County?

A Yes, it was.

Q And had you ever notified the Department of Highways yourself, personally, about that bad spot?

A No. I had been there for years and the spot had always been there.

Q Are you saying it was common knowledge?

A Yes.

Q And what was common knowledge about it?

A Well, whenever the weather — when it got cold, it usual-

ly froze there, and it was always even in a little dry weather, there was still some water or something coming out through there, through the blacktop.

Q You don't know — do you know where the water was coming from?

A No, I don't. There's a pond on one side and, of course, the hill on the other side, and I don't have any idea."

Following the decision in the case of *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947), this Court has repeatedly held that the State is not a guarantor of the safety of the travelers on its roads. "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 circumstances." *Parsons v. State Road Comm'n.,* 8 Ct.Cl. 35 (1969). The State can neither be required nor expected to keep its highways absolutely free of ice and snow at all times, and the presence of an isolated ice patch on a highway during winter months is generally insufficient to charge the State with negligence. See 39 Am. Jur.2d *Highways, Streets, and Bridges* §506. See also *Woofter v. State Road Comm'n.,* 2 Ct.Cl. 393 (1944); *Christo v. Dotson,* 151 W.Va. 696, 155 S.E.2d 571 (1967).

The facts of this claim reveal a common occurrence which exists throughout the mountainous terrain of West Virginia. Roads accumulate frost during cold winter nights. The frost remains on the surface of roads until it thaws. In areas shaded from the sun the surface of the roads naturally remain slick longer than unshaded areas. This condition is common on many of this State's highways. Accordingly, the Court is of the opinion that the respondent was not negligent in the maintenance of Route 21. Although the Court is very sympathetic to the claimants, the Court is constrained to hold that, as there was lack of negligence on the part of the respondent in the maintenance of the highway, the claims must be denied.

Claims disallowed.

Opinion issued January 26, 1983

JERRY M. EDWARDS and EDGAR E. EDWARDS

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-198)

Claimant appeared in person.

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

PER CURIAM:

This claim was originally filed in the name of Jerry M. Edwards, but when the testimony disclosed that the damaged vehicle, a 1982 98 Oldsmobile, was titled in the joint names of the claimant and her husband, Edgar E. Ewards, the Court on its own motion joined Edgar E. Edwards as an additional claimant.

On May 28, 1982, at 2:30 p.m., Mrs. Edwards struck a pothole near milepost 48 in the westbound lane of I-64 near Cross Lanes, West Virginia. Mrs. Edwards testified that she was aware of holes in the road because she travels that route twice a day. She added that she could avoid the holes by driving near the edge of the road, but a truck, belonging to respondent, was on the berm and she could not move over far enough to avoid the hole. Damage to the car amounted to $96.92. Mrs. Edwards made no complaints to respondent prior to the accident.

The State neither insures nor guarantees the safety of motorists traveling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damages caused by the pothole, proof of notice of the defect is required. *Davis Auto Parts v. Dept. of Highways*, 12 Ct.Cl. 31 (1977). In this case, the claimant testified that respondent's employees were working near the site of her accident. However, the Court believes that the claimant, with her prior knowledge of the road's condition, was likewise negligent. Under the doctrine of comparative negligence, the Court is of the opinion that the claimant's negligence was equal to or greater than the respondent's and disallows the claim. *Hull v. Dept. of Highways*, 13 Ct.Cl. 408 (1981).

Claim disallowed.

Opinion issued January 26, 1983

NELSON GREGORY

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-307)

William C. Garrett, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

On May 19, 1979, claimant was walking on State Route 22, in Webster County, West Virginia, near Big Grassy Creek. At approximately 10:00 p.m., the claimant reached the bridge over Big Grassy Creek. The guardrails were missing, and claimant fell off the bridge, sustaining multiple personal injuries. Claimant alleged that the failure of the respondent to replace the guardrails constituted negligence and seeks $50,000.00.

Claimant's testimony indicated that he was familiar with the condition of the bridge. A coal company was working in the area, and its trucks, which travelled across the bridge, were responsible for knocking off the guardrails on a previous occasion. Respondent had replaced the rail at that time. According to the claimant, the guardrail "had been off a good while, maybe three weeks or a month" this second time, before his accident. Respondent's employee, Maxine K. Alsop, was the Head Clerk of the Webster County Maintenance Detail at the time of claimant's accident. She testified that part of her job included taking complaints and that there had been no complaints, prior to Mr. Gregory's accident, that the guardrails were down again.

The State is neither an insurer nor a guarantor of the safety of persons travelling on its roadways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For negligence of the respondent to be shown, proof of notice of the defect is required. *Davis Auto Parts v. Department of Highways*, 12 Ct.Cl. 31 (1977). Even if the Court should find that the respondent was negligent under the facts of this case it appears from the

evidence that the negligence of the claimant himself, having knowledge of the bridge's condition, would equal or exceed it. See *Davis v. Dept. of Highways,* 9 Ct.Cl. 49 (1972).

Claim disallowed.

Opinion issued January 26, 1983

BOBBIE E. HOLMES and

NEVA I. HOLMES

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-191)

Claimants appeared in person.

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

PER CURIAM:

Claimants are the owners of residential property located on Route 73, known as Ridge Road, in Monongalia County, West Virginia. The land slopes downhill from the road to the claimants' property. In 1979 and 1980, surface water flowed down into their garden and destroyed it. Claimants seek recovery in the amount of $2,495.21 for the damages caused by the flooding.

At the hearing, Mr. Holmes testified that the water which flooded his land came from two of his neighbors' driveways:

"Q. It it your testimony that it's flowing down the driveways and then down into the lower area where your property is?

A. Uh-huh; comes right out their driveway, right down through their yard and right on down through into the other driveway and then right down on me.

Q. Now, your property where your garden is located, is it an area that is at a lower elevation than the roadway; is that correct?

A. Well, yes, it's sloped, it's graded."

Mr. Holmes further testified that for the previous two years he had dug a small ditch across his neighbors' driveways along the respondent's right-of-way in an attempt to correct the situation. Claimants had been living at that location for twelve years.

Claimant Mrs. Holmes stated that a round, four-inch culvert existed in the area, but that it had been installed by a neighbor, and not by the Department of Highways.

Testifying on behalf of the respondent was Edward E. Goodwin, claims investigator, who explained the procedure for the installation of driveway culverts. According to Mr. Goodwin, a property owner must get a permit from the district office to connect to the State road. Then, at least a 15-inch culvert must be purchased by the property owner. The Department of Highways will then come by with a grader to dig a ditch for the culvert, drop it in, and cover it.

No evidence was presented in this case to the effect that the respondent had notice of a drainage problem along Route 73 in the area of claimants' property. Edgar Malone, an employee of the respondent, testified that the road was ditched in 1981, but it was unclear just how far the ditching was performed.

From the record in this case, the Court cannot conclude that any action, or lack thereof, on the part of the respondent was the sole cause of the flooding of claimants' property. Water simply followed its natural course downhill to the lower-lying area of claimant's garden. To hold that a diversion of the water from a clogged ditch line was the sole, direct cause of the damage to the garden, is not warranted from the evidence.

Accordingly, the Court is of the opinion that the claimants have not shown by a preponderance of the evidence that their damages were the result of negligence on the part of the Department of Highways, and hereby disallows the claim.

Claim disallowed.

Opinion issued January 26, 1983

BERNARD C. LYONS and
HELEN V. LYONS

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-578)

Claimants appeared in person.

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

GARDEN, JUDGE:

The claimants allege that respondent negligently failed to maintain drainage lines along Route 39 in Richwood, Nicholas County, West Virginia, and that such negligence resulted in damages to their home in the amount of $45,000.00. The house, a two-story structure, which is concrete block on the lower level, and wood on the top, has developed numerous cracks in the concrete floor and has settled, cracking a number of windows. Claimants allege that respondent promised to correct the drainage problems before resurfacing Route 39 in 1977 but failed to do so. As a result, the drain became clogged and water damage occurred.

Respondent's witness, Eugene Tuckwiller, an engineer, testified that the hillside behind the claimants' property contains subsurface water which flows continuously which has caused the ground to become unstable around the claimants' home, and caused movement of the land. This movement is unrelated to any action respondent has taken, and respondent has no responsibility for water until it reaches its right-of-way.

The Court is of the opinion that the claimants have failed to establish by a preponderance of the evidence that the acts or omissions of the respondent resulted in the damage to their home. The evidence indicates that the saturation of the hillside beyond claimants property was the direct cause of the movement of the land. *Caldwell, et al. v. Dept. of Highways*, D-690 et al. (1975). The Court must disallow the claim.

Claim disallowed.

Opinion issued January 26, 1983

ANDREW S. YOUNG

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-75)

Claimant appeared in person.

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

PER CURIAM:

On February 11, 1981, claimant was driving his 1972 Datsun 240-Z on U.S. Route 52 about three-tenths of a mile south of the junction of U.S. Route 52 and West Virginia Route 44 in Logan County, West Virginia. Claimant was traveling north at about dawn, and entered the southbound lane in order to pass a truck. His automobile struck a rock in the road, sustaining damages of $3,995.55.

The claimant testified that when he first saw the object, he was about 100 to 150 yards away and that he was parallel to the truck when he hit the rock. There was nowhere for him to go to avoid the rock. Claude Blake, a claims investigator, stated that at the scene of the accident the berms are exceptionally wide, from 10 to 17 feet, and that the area is not prone to rock falls. The claimant stated that he had travelled that road the day before the accident and the rock was not present.

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. Since there was no proof in this case that the State had notice of the defect, the claim must be denied.

Claim disallowed.

Opinion issued January 27, 1983

JESSE C. ANDERSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-110)

Claimant appeared in person.

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

PER CURIAM:

On August 18, 1980, the basement wall of the claimant's home, which is located on State Route 14 at Butcher Hill, Wood County, West Virginia, collapsed. Claimant alleges that the damage was caused by land slippage from State property. The wall was repaired at a cost of $1,132.95.

The claimant's son, Harry Anderson, testified that his father's house sits below the road on the north side of Route 14 and that there is a hill on the south side. The house was built in 1938, but there had been no damage to it until 1980. Since 1938, there has been "natural movement of the hillside" and respondent has relocated Route 14 "numerous" times and made a pile driving correction in order to try to stablize the hillside. At the time of the damage, there was no ditch line along Route 14 because of the slippage. There had been rain for a day or two before August 18, and the water ran over the road onto claimant's property, resulting in the collapse of the basement wall according to claimant's son.

Ralph Adams, a geologist, testified that a subsurface investigation was performed in 1979 by Atec Associates in cooperation with respondent, and this investigation showed that a large slide area existed above and below Route 14. The claimant's property is in the middle of the slide. The soils in the area are unstable and the ground water level is high. The investigation indicated that there was "a record of moving approximately 50 years with more recent movement." The work that respondent has done on Route 14 served to slow down the land movement by cutting down the slope and

removing weight from the hillside. A slide correction has been proposed for the area, which would involve moving the roadway into the hillside and removing the slide material from the cut slope area.

The evidence indicates that the claimant's home is situated in a slide prone area. The respondent has made some effort to slow down the slippage. In making its corrections, however, the respondent is under a legal duty to use reasonable care to maintain the ditch line in such condition that it will carry off surface water and not discharge it onto the property of others. *Stevens v. Dept. of Highways,* 12 Ct.Cl. 180 (1978). The Court finds that there is sufficient evidence to show that water was discharged onto the claimant's property, and that the respondent's failure to maintain the ditch line caused the discharge and resultant damage sustained by the claimant. The Court therefore makes an award in the amount of $1,132.95.

Award of $1,132.95.

Opinion issued January 27, 1983

GENE BRADY BEEGLE

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-248)

AND

ST. PAUL'S PROTESTANT EPISCOPAL CHURCH

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-271)

Robert E. Wright, Attorney at Law, for claimants.

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

WALLACE, JUDGE:

The claimants, Gene Brady Beegle and St. Paul's Protestant Episcopal Church, own adjacent properties on W.Va. Route 2, commonly called Cemetary Hill Road, in Sistersville, Tyler

County, West Virginia. These cases were consolidated because the damages alleged arose out of the same incident. In July 1981, during a heavy rainstorm, a portion of the curb on Cemetary Hill Road broke. Water ran down the hillside and into the Beegle home and the church. Claimant Beegle sustained damages of $1,778.00 for replacement of carpeting and a furnace. The church sustained damages of $122.00. Claimants allege that respondent was negligent in failing to maintain the curb.

Mr. Beegle testified that sometime in February 1981, a school bus slid into the curb. This caused the curb to crack. He said that he notified both the City of Sistersville and the respondent prior to July 1981 to fix the curb, but no action was taken until after the damage occurred.

Ray H. Maxwell, a county maintenance superintendent employed by respondent, testified that Cemetary Hill Road was taken into the State system in May of 1972. By agreement between the respondent and the council of the City of Sistersville, responsibility for the maintenance of the paved vehicular roadway rested with respondent. All other portions of the roadway were to be maintained by the city.

The evidence indicates that the normal run-off of rain down Cemetary Hill Road was disrupted by the break in the curb. The respondent had actual notice of the damage to the curb. It was foreseeable that the surface water run-off would be diverted by the broken curb. West Virginia adheres to the common law rule that a landowner may fight surface water in whatever manner he chooses, but the rule is modified by the principle that one must use his property so as not to injure the rights of another. 20 M.J., *Waters and Watercourses*, §5, p. 27. See also *Miller v. Dept. of Highways*, 13 Ct.Cl. 414 (1981). The Court finds that the respondent was negligent in failing to maintain the curb, and the surface water run-off from respondent's roadway was the proximate cause of claimants' damages.

Award of $1,778.00 to Gene Brady Beegle.

Award of $122.00 to St. Paul's Protestant Episcopal Church.

Opinion issued January 27, 1983

PIUS B. CHUMBOW

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-62)

William D. Highland, Attorney at Law, for claimant.

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

RULEY, JUDGE:

On November 5, 1980, at approximately 4:30 p.m., claimant was driving his 1971 Mercury west on 7th Avenue, W.Va. Route 25, in Charleston, Kanawha County, at a speed of 30-35 mph. Seventh Avenue is a four-lane highway with a concrete median, and on that date, both inside lanes, eastbound and westbound, were blocked off with Type 2 barricades because sewer modification work was being carried out along that route. As claimant approached the intersection of 7th Avenue and 29th Street, a 1966 Oldsmobile driven by Marian Helms made a left turn from the eastbound lane of 7th Avenue and pulled across the westbound lane into the path of claimant. Claimant struck the Helms car which then struck two other vehicles. As a result of that accident, claimant lost $3,012.05 in automobile repairs, wages, towing fees and transportation expenses. He alleged that the accident occurred because the Type 2 barricades in the inside lanes obstructed the vision of both drivers.

Testimony failed to establish negligence on the part of the respondent. An independent contractor was responsible for placing the barricades, and the barricades themselves were placed in accordance with Department of Highways regulations. According to Dennis King, traffic engineer for the respondent, the barricades were 36 inches tall, well below the 45 inches considered standard eye level in traffic engineering design. Mr. King further testified that the contractor was required to prohibit left turns onto and off of 29th Street only during working hours, which ended at 4:00 p.m. The exact placement of the barricades on November 5, 1980 could not be determined.

It thus appears that any negligence in this accident would have to be attributed to the drivers of the vehicles involved. Since the claimant failed to establish negligence on the part of the respondent, the claim must be disallowed.

Claim disallowed.

Opinion issued January 27, 1983

RUBY E. SHRADER

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-168)

AND

JAMES C. MARTIN, JR. AND
SHIRLEY B. MARTIN

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-231)

Fred O. Blue and *James C. Cain,* Attorneys at Law, for claimants.

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

WALLACE, JUDGE:

These claims were consolidated for hearing and decision. Claimant Ruby E. Shrader was the owner of a house and not designated as 3511 Cumberland Road, located at the intersection of Cumberland Road and Edgemont Drive in Bluefield, West Virginia, and also was the owner of a garage apartment located on Edgemont Drive to the rear of the house on Cumberland Road. Claimants James C. Martin, Jr. and Shirley B. Martin rented the Cumberland Road house from claimant Shrader. The claimants allege that due to improper design and construction of the drainage system of the Bluefield Bypass of U.S. Route 460, they sustained damage from

water flowing out of overflow pipes from under the highway across Cumberland Road.

The Bluefield Bypass at U.S. Route 460, a four-lane highway, was constructed as a portion of Appalachian Corridor Q. Cumberland Road is parallel to and on the north side of the U.S. Route 460 Bypass. The segment of the bypass relevant to this claim was designed by Gates Engineering Company and constructed by S. J. Groves & Sons, both under contract with respondent. The respondent accepted and approved the plans of Gates Engineering Company. The design of the highway provided for water drainage to be disposed of through underground limestone caves or caverns. Previous to the construction in the vicinity of the Shrader property, there had existed a depression or low area in which water from East River Mountain would collect and be dispersed through an underground limestone cave. It appeared as a small farm pond, 50 by 100 feet in size, and approximately five to six feet in depth. This pond or cave was utilized in the drainage system designed for the highway. One witness described the area as "essentially a huge sink hole." The actual cave opening was not located, and a manifold was designed to carry water run-off which the sink hole had formerly handled for East River Mountain and the general vicinity. The manifold was a large horizontal corrugated metal pipe into which water entered from 60-inch and 54-inch pipes running under the road from the south side of the highway. Five pipes extended from the bottom of the manifold from which water percolated into the caves below. If the manifold was unable to handle the water for any reason and it rose two feet or more, it would be able to flow through two overflow pipes; one, 54 inches and the other, 48 inches, located to the west and east of the manifold respectively. The outlet of the 54-inch pipe was located approximately in front of the Shrader property. The 48-inch pipe was located to the east. The south ends or inlets of the overflow pipe were almost at highway level, and the north end on the Cumberland Road side of the highway emerged out of the bottom of the toe of the fill. There were no baffles or weirs at the inlet ends of the pipes. There were energy dissipating type baffles at the outlet ends designed to slow the flow of water out of the pipes and

riprap was in place to slow any erosion that might occur. The Cumberland Road area on the north side of U.S. Route 460, where the pipes emerged, slopes downward from east to west. Mr. Robert L. Long, a civil engineer for the Gates Engineering Company, testified in his deposition that it was anticipated that there would be water coming through the overflow pipes at some periodic intervals over the life of the highway, and such water would be deposited on the north side. He further stated that Gates was not asked to provide any method to dispose of the water other than the baffles and the riprap.

Frank Hamrick, a civil engineer employed by the respondent, testified that if water came through the overflow pipes,

> "Hopefully, it would have stayed in the road (Cumberland Road) and gone down the road, which was close to where the lowest point is."

He further testified that,

> "There was no provision made beyond the right of way limits of that area because really there was not a natural drain there at the time."

He further stated that,

> "From an economic standpoint, it wasn't justified."

Continuous flowing occurred on October 6, 7, and 8, 1976, and again on June 17, 1977, caused by unusually heavy rainstorms. On these occasions, the manifold did not carry off the water and the excess water emptied through the overflow pipes. When the water exited the overflow pipes, it struck the baffles with such force as to shoot up into the air over them and proceed across Cumberland Road into portions of the first floor and basement garage of the Shrader house and into the basement of the garage apartment. The basement walls and floors were cracked, the walk into the house and driveways were damaged. The lawn and shrubs were washed out. Clothing and personal belongings of the Martins were damaged and destroyed. Mrs. Martin, during her high school days, nearly drowned in a swimming incident, memories of which caused her to become hysterical on each occasion at the sight of the water gushing

out of the pipe across the road from the house. Mr. Martin suffers from hemophilia and arthritis and is unable to go up and down stairs. After the floodings, the house remained damp, aggravating Mr. Martin's condition. His condition and Mrs. Martin's fear of a repetition of the rushing water entering the house were such as to necessitate the Martins to find another place to live. They had rented from Mrs. Shrader for $95.00 per month for many years and were unable to find comparable accommodations they could afford. Later, the Martins built a home on a lot given to them by Mrs. Martin's parents.

Mrs. Shrader seeks $20,000.00 for damages sustained to her property. The Martins seek recovery of $83,853.40 for the loss of their clothing and personal property, for inconvenience and anguish, and for interest on the loan obtained for the construction of their new home, which will amount to $60,932.40 over the twenty-two-year life of the loan.

On the occasions of the floodings, the respondent was notified by the claimants. Employees of the respondent went to the property and observed the damages sustained. One employee testified that he saw the water gushing 30 to 40 feet into the air. After the flooding of June 1977, the respondent created a ponding or storage area on the south side of the U.S. Route 460 Bypass and installed baffles or weirs on the inlets of the overflow pipes. On the north side of the highway, respondent dug a ditch line between the toe of the embankment and Cumberland Road to carry off any water coming through the pipes. Severe storms have occurred since these changes and there has been no subsequent flooding.

In addition to the claim filed before this Court, the claimants brought suit in the Circuit Court of Mercer County against Gates Engineering Company and S. J. Groves & Sons. Mrs. Shrader's suit was settled for $1,500.00, and the Martins accepted $5,000.00 to settle their litigation.

The Court finds that the respondent approved and accepted the plans and specifications for the drainage system designed for the section of the U.S. 460 Bypass in the vicinity of claimants' property without consideration being given to the inability of the overflow system to properly carry off water. If

the overflow pipes had been supplied with the necessary baffles, ponding areas and a method provided to dispose of water as it leaves the outlets, there would have been no damage.

The Court finds that claimant Shrader is entitled to recover the sum of $19,810.00, less the $1,500.00 settlement already received. No recovery will be allowed the Martins for labor or interest on their loan. Accordingly, the Court makes the following awards.

Award of $18,310.00 to Ruby E. Shrader.

Award of $6,846.00 to James C. Martin, Jr. and Shirley B. Martin.

Opinion issued January 27, 1983

CHARLES S. WARD,
guardian of CHARLES F. WARD

vs.

DEPARTMENT OF CORRECTIONS

(CC-78-113)

Robert V. Berthold, Jr., and *Eugene R. Hoyer*, Attorneys at Law, for claimants.

Henry C. Bias, Jr., Deputy Attorney General, and *Gray Silver, III*, Assistant Attorney General, for respondent.

GARDEN, JUDGE:

Because of the age of the claimant, this claim was filed by Charles S. Ward as guardian of Charles F. Ward, seeking $125,000.00 for damages sustained while assigned to the Anthony Forestry Center in Neola, West Virginia. For the purposes of this opinion, the ward, Charles F. Ward, will be referred to as "claimant."

The claimant and two others, Ronald Deitz and John Preston, had been found guilty of breaking and entering in Kanawha County, West Virginia. His two companions thought

that the claimant had cooperated with the police, and, because of this, the presiding judge, in passing sentence, recommended that they be placed in separate facilities. Claimant and Preston were sent to the Leckie Center at Leckie, West Virginia, where claimant was harassed as a "snitch." Claimant, fearing for his safety, wrote his probation officer, which resulted in his transfer to the Anthony Center, where Ronald Deitz was confined. Ronald Deitz told other inmates that claimant was a "snitch." On February 16, 1977, claimant, Jeff Webb, and Darrell King were assigned to work in the cafeteria at the center. They left the cafeteria to empty the garbage. Claimant's companions pushed him about, threw him down, and called him a "snitch." His hand was severely cut when he fell. The boys are not supposed to leave the cafeteria without permission, and when they do leave, they are supposed to be watched by center personnel.

At the time of the accident, claimant, to avoid further harassment, told the cook at the cafeteria and others that he slipped on the ice and cut his hand.

The Court is not unmindful of the serious nature of claimant's injury. Dr. Jacques Charbonniez, an expert in plastic surgery and surgery of the hand, testified eloquently concerning the surgery claimant has already undergone, and will require in the future, as well as the extent of his disability. In order for the Court to make an award in this case, however, it must be shown by a preponderance of the evidence that the respondent was guilty of negligence which proximately caused claimant's injury. He testified that he had never informed any staff member at the Anthony Center of his concerns for his safety. It is well recognized that there can be no liability for injuries inflicted by one inmate upon another without knowledge of some unusual danger, or reason to anticipate such danger. 41 ALR 3d 1021. The evidence presented indicates that claimant was provided with the usual amount of security; Anthony Center officials had no reason to do otherwise. The Court must therefore deny the claim.

Claim disallowed.

Opinion issued January 28, 1983

CHAD CUNNINGHAM

vs.

DEPARTMENT OF HEALTH

(CC-82-323)

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.

The claimant seeks payment of the sum of $7.34 for damage to a shirt. The claimant was required to physically restrain a patient at Spencer State Hospital. The patient grabbed the shirt and tore it.

In its Answer, the respondent admits the validity of the claim. As there were sufficient funds on hand from which the claim could have been paid during the fiscal year, the Court hereby makes an award to the claimant in the amount requested.

Award of $7.34.

Opinion issued January 28, 1983

C. ELAINE FRIEND

vs.

SUPREME COURT OF APPEALS

(CC-82-314)

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.

The claimant seeks payment of the sum of $165.00 for services rendered as Jury Commissioner for Jefferson County, West Virginia.

In its Answer, the respondent admits the validity of the claim, and the Court hereby makes an award to the claimant in the amount requested.

Award of $165.00.

Opinion issued January 28, 1983

BENJAMIN C. HENRY

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-96)

David S. Skeen, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

On June 13, 1981, the claimant's home, which is located between Hillside Drive and Route 25 in Nitro, Kanawha County, West Virginia, sustained flood damage. The claimant alleges that this damage was the result of respondent's failure to maintain a culvert situated on Route 25. This clogged culvert caused water to back up and flood the claimant's property.

The claimant's house faces Hillside Drive and backs on Route 25. Both roads run east-west. A 15-inch drainpipe runs from Hillside Drive along the west side of the claimant's house. This drain empties into an 18-inch drain which is maintained by respondent and runs from the north to the south under Route 25. This drain empties into a 30-inch culvert, which runs parallel to Route 25 on its south side. The water runs east in the 30-inch drain.

The claimant testified that shortly after moving into his

house in 1977, he became aware of the drainage problem. Water would go through the 18-inch drain, but because the culvert was clogged the water would back up through the drain. The claimant's property is below the level of Route 25 and the water flowed from the drainpipe across his yard and into his basement. The claimant made numerous phone calls to respondent beginning in 1977. On three occasions before June 13, 1981, water entered the home. One of respondent's engineers visited the property in late 1977 and suggested that the level of the yard be raised. The claimant had about two feet of dirt put in his back yard to try to prevent further water damage, but this effort was unsuccessful. The claimant testified that not until after the June 1981 damage did he witness any of respondent's employees cleaning the ditches and drains. He stated:

> "Well, they had — I don't know what you call the shovel that's on a truck — to come in that would go over into the ditch line, the culverts and clean them out and they had at least two trucks. One was loading while the other one was taking away and there was 8, 10, maybe 12 truck loads of debris that was taken out of there."

Since the removal of the debris, the claimant has had water back up into his yard, about 2/3 of the way from the 18-inch pipe to his back door. On June 13, 1981, the water was approximately five feet high in his house.

The Court is of the opinion that the flooding to claimant's property occurred as the direct result of the lack of maintenance of the 30-inch culvert located on the south side of W.Va. Route 25.

After careful consideration of all of the estimates of damages, the Court has determined that $4,500.00 is a just and equitable amount to compensate the claimant for his losses. Accordingly, the Court makes an award in the amount of $4,500.00.

Award of $4,500.00.

Opinion issued January 28, 1983

DONNA F. PORTERFIELD

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-91)

Claimant appeared in person.

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

RULEY, JUDGE:

On December 29, 1980, at approximately 7:00 p.m., claimant was driving her 1980 Pontiac south on U. S. Route 19 near Star City, in Monongalia County. Snow had been falling and the pavement was wet, but there was no snow on the road surface. At a point near the Star City Bridge, claimant encountered a large number of rocks in her traffic lane and collided with several of them causing damage to her automobile in the sum of $300.70, for which she filed this claim.

Testimony by James Tomay, the Department of Highways night watchman at the Saberton station on the night of the accident, and John Gillespie, Department of Highways equipment operator on duty that night, revealed that the respondent was first notified of the rockslide at about 7:00 p.m., on December 29, 1980 (most probably after the accident happened), and had cleared the roadway by 7:30 p.m. that evening.

The State neither insures nor guarantees the safety of motorists travelling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For an award to be made in cases such as this, it must be proven that the respondent had actual or constructive knowledge of the existence of the defect plus a reasonable amount of time to take corrective action. *Davis v. Department of Highways,* 11 Ct.Cl. 150 (1976). The respondent acted competently and quickly to correct the defect in question and thus cannot be held negligent. This claim must be disallowed.

Claim disallowed.

Opinion issued January 28, 1983

ALFRED W. SMITH

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-177)

William W. Pepper, Attorney at Law, for claimant.

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

PER CURIAM:

Sometime in July 1982, the claimant was driving his 1976 Toyota Corolla on Fisher Ridge in Putnam County, West Virginia, when he encountered a ditch in the road. The chassis of the car broke in two places, and subsequent welding of the frame proved unsuccessful. The car remains undrivable. Claimant seeks $1,500.00 as replacement value of the car.

The claimant testified that when he went to work between 7:30 and 8:00 that morning he saw four or five Department of Highways employees apparently cleaning the ditch along Fisher Ridge. When he returned at 5:00 p.m., the ditch was in the road, which claimant stated was the result of the installation of a 24-inch drainpipe across the road. A 12 to 14-inch drop existed between the road and the ditch. The claimant saw no signs warning of danger. He did not see any equipment capable of digging the ditch, nor could he say who dug the ditch.

From the evidence presented in this claim, the Court cannot find that respondent dug the ditch which caused the damage to claimant's automobile. 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. Since there was no proof in this case that the State had notice, the claim must be denied.

Claim disallowed.

Opinion issued January 28, 1983

JANET T. SURFACE

vs.

DEPARTMENT OF HEALTH

(CC-83-2)

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.

The claimant seeks payment of $132.00 for services rendered as a court reporter.

In its Answer the respondent admits the validity of the claim. As there were sufficient funds on hand from which the claim could have been paid during the fiscal year, the Court hereby makes an award to the claimant in the amount requested.

Award of $132.00.

Opinion issued February 9, 1983

A. H. ROBINS CO.

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-315)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $259.54, representing unpaid bills for merchandise purchased by respondent's Huttonsville Correctional Center.

Respondent's Answer, although admitting the validity of the claim, states that there were no funds remaining in respondent's appropriation for the fiscal year in question from which the obligation could have been paid.

While the Court feels that this is a claim which in equity and good conscience should be paid, it is of the opinion that an award cannot be made, based on the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health,* 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued February 9, 1983

THOMAS HAROLD ANDERSON, SR.

and

EDITH IOLENE ANDERSON

vs.

DEPARTMENT OF WELFARE

(CC-79-554)

Anthony J. Julian and *Charles E. Anderson,* Attorneys at Law, for claimants.

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

RULEY, JUDGE:

Claimants seek payment of the sum of $30,520.00 as reimbursement for expenses incurred while they served as foster parents for three children over an eight-year period, from March 26, 1964, to October 23, 1972.

The evidence disclosed that on or about June 1, 1961, three children were placed in the Andersons' home under the respondent's foster care program. In September of 1963, the children were moved from the claimants' home in the hope that they would be adopted and given a permanent home. The Andersons received monthly payments of $120.00 from the Department of Welfare during the time that the children were in their care (June 1, 1961, to September 18, 1963).

In February of 1964, the children were placed in yet another home. Finally, after these two unsuccessful attempts at securing adoption for the children, the Department of Welfare returned them to the custody of the claimants on March 26, 1964. At that time, it was the intention of Mr. and Mrs. Anderson to adopt the children, and they communicated that intention to the Department of Welfare. They also contacted a lawyer in an effort to institute adoption proceedings. Due to the Andersons' request to adopt the children, the Department of Welfare closed its file in August of 1964, and no further monthly payments were made to the claimants. Frances R. Vincent, a Social Services Worker for the respondent stated, "Payment wasn't made because the children were placed in trial adoption and we don't pay people when children are placed in trial adoption unless there are extenuating circumstances such as if the children are older and have physical problems . . ."

Eight years later, on October 23, 1972, Mrs. Anderson telephoned the Department of Welfare, asking for financial assistance for the care of the children. For some unknown reason, the adoption had never materialized. The Department of Welfare immediately began (effective October 23, 1972) making payments to the Andersons as foster parents and continued such payments until each child reached eighteen years of age. On October 11, 1979, this claim was filed seeking payments for the period from March 26, 1964, to October 23, 1972.

The claimants' assertion of liability is based on the theory that the Department of Welfare was negligent in not checking on the status or progress of the children. Even if that be viewed as correct, however, it is clear that, by the same token, the Andersons were equally negligent in failing to contact the respondent or their own attorney to determine the status of the adoption. And, irrespective of whether the claim be viewed as one based upon negligence or one based upon an oral contract (there having been no evidence whatever of any written contract), it would be barred by the applicable statute of limitations. Accordingly, this claim must be denied.

Claim disallowed.

Opinion issued February 9, 1983

BOSO AGRI-CENTER, INC.

vs.

FARM MANAGEMENT COMMISSION

(CC-82-318)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $2,288.94, representing unpaid bills for merchandise purchased by respondent.

Respondent's Answer, although admitting the validity of the claim, states that there were no funds remaining in respondent's appropriation for the fiscal year in question from which the obligation could have been paid.

While the Court feels that this is a claim which in equity and good conscience should be paid, it is of the opinion that an award cannot be made based on the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health,* 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued February 9, 1983

TERESA BRITT

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-267)

Claimant appeared in person.

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

PER CURIAM:

The claimant's 1973 Ford Mustang was damaged when the

vehicle struck a tree which had fallen across Pemberton Road in Raleigh County, West Virginia. The incident occurred on September 5, 1982, at about 10:30 p.m. Estimates of the damage to the vehicle ranged from $258.30 to $474.55. The claimant testified that the tree was live, and that the road had been clear at 10:15 p.m.

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 (1947). To be liable, the State must have had either actual or constructive notice of the particular hazard which caused the accident. *Davis v. Dept. of Highways,* 11 Ct.Cl. 150 (1976). There was no evidence of notice to the respondent or of the prolonged existence of the hazard. The claimant's testimony leads to the conclusion that the tree had fallen only a short time before the accident. Without notice of the hazard and a reasonable opportunity to remove it, the respondent cannot be held liable. The claim must therefore be denied.

Claim disallowed.

Opinion issued February 9, 1983

C. H. JAMES & CO.

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-326)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $2,332.18, representing unpaid bills for merchandise purchased by respondent's Beckley Work Release Center.

Respondent's Answer, although admitting the validity of the claim, states that there were no funds remaining in respondent's appropriation for the fiscal year in question from which the obligation could have been paid.

While the Court feels that this is a claim which in equity and good conscience should be paid, it is of the opinion that an award cannot be made, based on the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health,* 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued February 9, 1983

KENNETH N. ELLISON

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-274)

Claimant appeared in person.

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

PER CURIAM:

This claim arises out of damages to a 1978 Ford automobile which struck a pothole on West Virginia Route 119 near Hernshaw, West Virginia. The accident occurred in late March or early April, 1982. The vehicle's right front wheel rim was replaced at a cost of $214.05. The claimant testified that he did not see the pothole until after the vehicle struck it.

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. Since there was no proof that the State had notice of the defect, the claim must be denied.

Claim disallowed.

Opinion issued February 9, 1983

HOLLY, KENNEY, SCHOTT, INC.

vs.

DEPARTMENT OF HIGHWAYS

(D-893)

Thomas L. Linkous, Attorney at Law, for the claimant.

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

RULEY, JUDGE:

Claimant was employed by the town of Chapmanville, in Logan County, to design water and sewer facilities which were to be advertised for bids in December, 1968. In early November, 1968, claimant obtained a copy of the plans for Corridor G of the Appalachian Highway, from which it was readily apparent that it would be necessary to redesign the water and sewer facilities for Chapmanville. Rather than waiting for authorization of that work by the federal Bureau of Public Roads which finally, on January 24, 1969, was given, the claimant proceeded with the redesign work for which it seeks an award of $13,755.00. The defense is based upon Bureau of Public Roads Policy and Procedure Memorandum 30-4, par. 3d, which provides, in part:

* * *

"d. Where the advance installation of new utility facilities, crossing or otherwise occupying the proposed right-of-way of a future planned highway project, is either underway, or scheduled to be underway, prior to the time such right-of-way is purchased by or under control of the State, arrangements should be made for such facilities to be installed in a manner that will meet the requirements of the future planned highway project. Federal funds are eligible to participate in the additional costs incurred by the utility that are attributable to and in accomodation of the planned highway project, provided such costs are incurred *subsequent* to authorization of the work by the division engineer.***" (emphasis supplied)

In sum, the respondent asserts that, since the claimant performed the work prior rather than subsequent to authorization by the division engineer, it is not entitled to payment from the respondent. However, in a letter dated June 19, 1969, from W. S. Ritchie, Jr., then the State Road Commissioner, to the division engineer of the Bureau of Public Roads, Commissioner Ritchie stated:

> "Since authorization to proceed was finally received and the work was performed, completely documented and is satisfactory, the time limitation should be waived. A definite period of time was required to complete the redesign work regardless of a specific starting date and the cost is under the estimate provided."

The facts quoted from that letter bring into stark relief the technical nature of the defense. "Let Chapmanville pay" is suggested but why should Chapmanville pay for work which was occasioned solely by action of the respondent? It is undisputed that the claimant performed the work in good conscience and, if the standard of equity and good conscience delineated in West Virginia Code §14-2-13, is applied, the award which is sought in this claim must be granted.

Award of $13,755.00.

Opinion issued February 9, 1983

MOUNTAINEER OFFICE SUPPLY,
a division of F & M SUPPLY CO., INC.

vs.

SECRETARY OF STATE

(CC-82-337)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted for decision based upon the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of $1,860.00 for certificate covers ordered by the respondent. In its Answer, the respondent admits the allegations set forth in the Notice of Claim, but states that the claim was not paid because respondent inadvertently failed to comply with the technical regulations of the State purchasing procedures. There were sufficient funds in respondent's appropriation for the fiscal year in question from which the claim could have been paid. Based on the foregoing, the Court hereby makes an award to the claimant in the amount of $1,860.00.

Award of $1,860.00.

Opinion issued February 9, 1983

MARY E. PETERSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-246)

Claimant appeared in person.

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

PER CURIAM:

The claimant seeks the sum of $184.11 for damages to her 1980 Subaru which struck a pothole on West Virginia Route 3 in Beckley, Raleigh County, West Virginia. The incident occurred on March 16, 1982, at about noon. The pothole was covered with water, so the claimant did not see it before she struck it. The right front and rear tires and rims had to be replaced.

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. Since there was no proof in this case that the State had notice of the defect, the claim must be denied.

Claim disallowed.

Opinion issued February 9, 1983

ROY G. SHAWVER

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-189)

John E. Dorsey, Attorney at Law, for claimant.

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

PER CURIAM:

The claimant seeks compensation for damages sustained to his 1975 Ford truck on July 12, 1982, on W.Va. Route 7, also known as Kelly's Creek Road, in Kanawha County, West Virginia. Two estimates of the damage were obtained. One was for $833.49 and the other for $923.42. According to the claimant's testimony, he was coming out of a sharp curve and another vehicle was approaching. There was mud in the middle of the road which the claimant's vehicle struck, causing it to slide into a rock cliff adjacent to the roadway. The claimant testified that a grader, belonging to the respondent, was parked near the accident scene.

William J. Meade, testifying for the claimant, stated that the grader had broken down apparently while performing a ditch cleaning operation along Kelly's Creek Road. While he did not see the work being done, he surmised that the grader had broken down prior to the completion of the ditching, resulting in dirt being left in the road.

Lloyd Myers, Kanawha County Maintenance Supervisor, testified that work was done of Kelly's Creek Road at the end of June or beginning of July. The work consisted of patching potholes and perhaps some ditch cleaning. Mr. Myers said that he had received a complaint about Kelly's Creek Road, but did not remember from whom. As a result, he drove down Kelly's Creek Road sometime between July 10 and 12, and at that time, the roadway and ditch lines were clear of dirt and debris.

From the record, the Court is of the opinion that the failure of the respondent to clear Kelly's Creek Road of dirt following its ditch cleaning operation caused the damages sustained

by the claimant. The Court, therefore, makes an award to the claimant of $833.49.

Award of $833.49.

Opinion issued February 9, 1983

C. O. SMITH, JR.

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-311)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon a written stipulation based on the following facts. The claimant is the owner of real property located in Beckley, Raleigh County, West Virginia. On August 4, 1982, employees of respondent, who were in the process of surveying between I-64 and I-77, trespassed on claimant's property and destroyed two Norway Spruce trees, valued at $630.00. Based on the foregoing, the Court makes an award to the claimant in the amount of $630.00.

Award of $630.00.

Opinion issued February 9, 1983

SWAIN WINDOW CLEANING SERVICES

vs.

DEPARTMENT OF FINANCE AND ADMINISTRATION

(CC-82-301)

No appearance by claimant.

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

PER CURIAM:

The claimant maintained a contract with the respondent to provide window cleaning services at the State Capitol Complex in Charleston, West Virginia. There is no dispute that services were rendered, however a dispute did arise on the amount still due on warrants endorsed by the respondent. The Court has determined, based on the evidence presented, that $2,332.00 is owed to the claimant by the respondent. The

Court, therefore, makes an award to the claimant in that amount.

Award of $2,332.00.

Opinion issued February 9, 1983

JACK L. TAYLOR

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-243)

Claimant appeared in person.

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

PER CURIAM:

At approximately 7:30 p.m. on September 6, 1982, the claimant was driving his 1973 Buick Electra on West Virginia Route 60 towards South Charleston, West Virginia. He turned off West Virginia Route 60 onto Faulkner Street. Four or five feet from the corner of West Virginia Route 60 the claimant's car struck a manhole which was protruding above the level of Faulkner Street, which is a gravel road. The vehicle sustained damages in the amount of $832.15.

The testimony revealed that the manhole in question is not maintained by respondent, but is probably maintained by the Sanitary Board of St. Albans. It was not established whether the manhole was within respondent's right-of-way. As it was not established that the respondent was responsible for the maintenance of either the manhole or the roadway around the manhole, the Court is of the opinion, and does, deny the claim.

Claim disallowed.

Opinion issued February 9, 1983

WAYNE F. WIGGINS

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-207)

Claimant appeared in person.

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

PER CURIAM:

On June 4, 1982, at approximately 11:10 p.m., the claimant's

1978 MGB was damaged when it struck a pothole on West Virginia Route 68 near Sherman, West Virginia. The vehicle sustained damages of $449.82. The claimant testified that the pothole was approximately 12 to 14 inches wide, two feet long and 10 inches deep. He did not see the hole prior to the accident because it was raining and the pothole had filled with water. The claimant stated that he travelled the road about once a week and knew that there were a number of potholes in the road. He had never noticed this particular pothole before.

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. Since there was no proof in this case that the State had notice of the defect, the claim must be denied.

Claim disallowed.

Opinion issued February 14, 1983

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-260a — Administration)
(CC-82-260b — Anthony Center)
(CC-82-260c — Industrial School for Boys)
(CC-82-260d — Leckie Center)
(CC-82-260e — W.Va. Penitentiary)
(CC-82-329 — Anthony Center)
(CC-82-330 — Parole Services)
(CC-82-331 — Industrial School for Boys)
(CC-82-334 — W.Va. Prison for Women)

Jack O. Friedman, Attorney at Law, for claimants.

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

WALLACE, JUDGE:

In this consolidated claim, the claimant seeks to recover $181,052.93, of which sum $156,267.00 is the amount of unem-

ployment compensation tax owed by respondent and $24,785.93 is accumulated statutory interest of 1% per month. The following is a breakdown by tax and interest:

Institution	Tax	Interest
Administration	$11,588.42	$ 3,171.60
Anthony Center	17,074.63	3,129.87
Industrial School for Boys	12,559.57	3,496.07
Leckie Center	37,335.36	100.80
W.Va. Penitentiary	47,621.09	12,231.26
Anthony Center	1,420.00	52.54
Parole Services	10,642.46	348.01
Industrial School for Boys	3,998.55	147.95
W. Va. Prison for Women	14,026.92	2,107.83

The purpose of the Unemployment Compensation Law is to provide a reasonable and effective means of promoting social and economic security by reducing so far as practicable the hazards of unemployment. In compliance with the Congressional Mandate of Public Law 94-566, Unemployment Compensation Amendments of 1976, the West Virginia Legislature amended the W.Va. Unemployment Compensation Law, effective January 1, 1978. Under W.Va. Code §21A-1-3(7) and §21A-1-3(9) (a), services rendered by employees of the State are covered by the Unemployment Compensation Law.

The respondent in its Answers admits the validity of the claims, but states that the claims must be denied under the doctrine announced by the Court in *Airkem Sales and Service, et al. vs. Dept. of Mental Health,* 8 Ct.Cl. 180 (1971). The consolidated claims in *Airkem* represented various supplies, commodities and services furnished to the respondent for which an appropriation was made by the Legislature during the preceding fiscal year. The claims were disallowed, despite the respondent's opinion that the claims were moral obligations of the State, because the respondent lacked sufficient funds from its appropriation with which to pay the claims.

The Court, however, looks to its decision in *Swartling, et al. vs. Office of the State Auditor,* 13 Ct.Cl. 57 (1979). In *Swartling,* the Court made awards to the claimants for services rendered to the State pursuant to statutes promulgated by

the Legislature. Payment for these services was provided from funds designated for this purpose and subject to appropriation by the Legislature. The Court held in *Swartling* that for the Legislature to provide for the types of services performed by the claimants and then to fail to appropriate sufficient funds to pay them would be contrary to public policy.

In this claim, the Legislature has adopted statutes based on Congressional directives. The statutes provide for the collection and disbursement of funds to compensate the unemployed. The cost of providing this service cannot be predicted for any given fiscal year in advance. Only at the close of the fiscal year is this total known. For the Court to deny these claims would be contrary to public policy and the mandate of Congress.

W.Va. Code §21A-5-17 provides interest payments on past due monies at a rate of 1% per month until payment. The Court is restricted by W.Va. Code §14-2-12 from awarding interest unless the claim arises on a contract specifically providing for the payment of interest. Based on this section, the Court concludes that the respondent is not legally liable for the payment of accrued interest. The Court, therefore, makes an award in the above listed claims in the amount of $156,267.00.

Award of $156,267.00.

Opinion issued February 14, 1983

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

DEPARTMENT OF CULTURE AND HISTORY

(CC-82-262)

Jack O. Friedman, Attorney at Law, for claimant.

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

PER CURIAM:

The claimant seeks $2,822.00 for unemployment compensation tax owned by the respondent.

The factual situation in this claim is identical to that in *Dept. of Employment Security vs. Dept. of Corrections,* 14

Ct.Cl. 387 (1983), and, accordingly, the Court makes an award to the claimant in the amount of $2,822.00.

Award of $2,822.00.

Opinion issued February 14, 1983

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

DEPARTMENT OF HEALTH

(CC-82-263a)

Jack O. Friedman, Attorney at Law, for claimant.

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

PER CURIAM:

The claimant seeks $2,149.23 for unemployment compensation tax owed by the respondent.

The factual situation in this claim is identical to that in *Dept. of Employment Security vs. Dept. of Corrections,* 14 Ct.Cl. 387 (1983), and, accordingly, the Court makes an award to the claimant in the amount of $2,149.23.

Award of $2,149.23.

Opinion issued February 14, 1983

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

DEPARTMENT OF HEALTH

(CC-82-332)

Jack O. Friedman, Attorney at Law, for claimant.

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

PER CURIAM:

The claimant seeks $6,686.70 for unemployment compensation tax owed by the respondent.

The factual situation in this claim is identical to that in *Dept. of Employment Security vs. Dept. of Corrections,* 14 Ct.Cl. 387 (1983), and, accordingly, the Court makes an award to the claimant in the amount of $6,686.70.

Award of $6,686.70.

Opinion issued February 14, 1983

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-82-266)

Jack O. Friedman, Attorney at Law, for claimant.

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

PER CURIAM:

The claimant seeks $1,341.64 for unemployment compensation tax owed by the respondent.

The factual situation in this claim is identical to that in *Dept. of Employment Security vs. Dept. of Corrections,* 14 Ct.Cl. 387 (1983), and, accordingly, the Court makes an award to the claimant in the amount of $1,341.64.

Award of $1,341.64.

Opinion issued February 14, 1983

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

FARM MANAGEMENT COMMISSION

(CC-82-261)

Jack O. Friedman, Attorney at Law, for claimant.

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

PER CURIAM:

The claimant seeks $5,308.35 for unemployment compensation tax owed by the respondent.

The factual situation in this claim is identical to that in *Dept. of Employment Security vs. Dept. of Corrections,* 14 Ct.Cl. 387 (1983), and, accordingly, the Court makes an award to the claimant in the amount of $5,308.35.

Award of $5,308.35.

Opinion issued February 14, 1983

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

HUMAN RIGHTS COMMISSION

(CC-82-264)

Jack O. Friedman, Attorney at Law, for claimant.

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

PER CURIAM:

The claimant seeks $13,577.00 for unemployment compensation tax owed by the respondent.

The factual situation in this claim is identical to that in *Dept. of Employment Security vs. Dept. of Corrections,* 14 Ct.Cl. 387 (1983), and, accordingly, the Court makes an award to the claimant in the amount of $13,577.00.

Award of $13,577.00.

Opinion issued February 14, 1983

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

INSURANCE COMMISSION

(CC-82-265)

Jack O. Friedman, Attorney at Law, for claimant.

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

PER CURIAM:

The claimant seeks $5,511.92 for unemployment compensation tax owed by the respondent.

The factual situation in this claim is identical to that in *Dept. of Employment Security vs. Dept. of Corrections,* 14 Ct.Cl. 387 (1983), and, accordingly, the Court makes an award to the claimant in the amount of $5,511.92.

Award of $5,511.92.

Opinion issued February 14, 1983

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

SECRETARY OF STATE

(CC-82-333)

Jack O. Friedman, Attorney at Law, for claimant.

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

PER CURIAM:

The claimant seeks $2,279.12 for unemployment compensation tax owed by the respondent.

The factual situation in this claim is identical to that in *Dept. of Employment Security vs. Dept. of Corrections,* 14 Ct.Cl. 387 (1983), and, accordingly, the Court makes an award to the claimant in the amount of $2,279.12.

Award of $2,279.12.

Opinion issued February 14, 1983

FIBAIR, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-196)

Neil A. Reed, Attorney at Law, for claimant.

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

RULEY, JUDGE:

Claimant owns property located near Reedsville, in Preston County, upon which it manufactures fiberglass filter media. On the south or lower side of the property there is a roadway running generally east and west which provides access to an industrial park. All surface water accumulating on the north side of the road, where claimant's manufacturing plant is located, and at elevations above it naturally flows toward the

road and thence into Kanes Creek which lies about one hundred yards south of the road. Two twelve-inch storm sewers satisfactorily provided drainage from claimant's property to Kanes Creek until July, 1980.

In June and July, 1980, the respondent improved the access road and redesigned the storm drainage so as to replace that portion of one of the twelve-inch storm sewers which ran under the road and which connected catch basins on each side of the road, directly south of claimant's warehouse, with an eighteen-inch storm sewer. This eighteen-inch storm sewer connected with the twelve-inch line between the road and the creek. Respondent contends that it did not increase the volume of surface water at that point but that contention is rebutted persuasively by the undisputed evidence that, when rains subsequently occurred on July 5, 6 and 7, 1980, water backed up from the twelve-inch line through the eighteen-inch line and thence through a connecting line, into and through the floor drains in claimant's warehouse, causing it to be flooded. Thereafter the respondent extended the eighteen-inch line to Kanes Creek and that apparently solved the problem. Because of the flood, and principally as the result of damage to its products in the warehouse, claimant sustained damage in the sum of $29,482.48.

Although various imaginative defenses were asserted by the respondent, it appears that principal reliance is upon the release contained in a deed dated January 25, 1980, from the claimant to the respondent which reads:

> "And for the consideration hereinbefore set forth, the said party of the first part do (sic.) hereby release the party of the second part from any and all claims for damages that may be occasioned to the residue of the lands of the party of the first part by reason of the construction and maintenance of a state road over, upon and under the tracts or parcels of real estate herein conveyed."

In rejecting the defense based upon that release, the Court notes that by its own terms it is limited to "damages * * * to the residue of the lands", none of which are claimed. In

addition, it is clear that damages such as those which are claimed never were contemplated by either party when the release was executed. In sum, the damages claimed consisted of the fair market value of manufactured products which were rendered useless and costs related to cleaning, all of which were a result of the flood. Accordingly, the Court is disposed to make an award of $29,482.48.

Award of $29,482.48.

Opinion issued February 14, 1983

JOHN GREY

vs.

BOARD OF EXAMINERS FOR REGISTERED NURSES

(CC-81-151)

Claimant appeared in person.

Curtis Power, Assistant Attorney General, and *Henry C. Bias, Jr.*, Deputy Attorney General, for respondent.

RULEY, JUDGE:

Claimant, a registered nurse, seeks $26,100.00 for loss of wages and mental anguish allegedly resulting from the respondent's delay in granting him a license to practice registered professional nursing in West Virginia. Claimant testified that he was educated at Saddleback Community College, Mission Viejo, California, where he received a certificate of achievement when he graduated. Subsequently, he was licensed as a registered nurse in California and then, in September, 1980, shortly before moving from California to West Virginia, applied for a license in West Virginia. Claimant testified that, at some unspecified later time while his application in this State was pending, he received his A.A. degree. Between September, 1980, and February 2, 1981, the date on which his West Virginia license was issued, there were various letters and calls between the claimant, the respondent, Saddleback Community College and the California Board of Nursing. It does not appear that the claimant ever forwarded a copy of

his A.A. degree to the respondent but, finally, the respondent did obtain a copy of his college transcript on February 2, 1981, and it issued his license that same day.

West Virginia Code §30-7-6, provides in part:

> "§30-7-6. Qualifications and examinations of persons seeking licensure; applications; practitioners licensed in another state; present practitioners; fees; temporary permits.
>
> To obtain a license to practice registered professional nursing, an applicant for such license shall submit to the board written evidence, verified by oath, that he or she (a) is of good moral character; (b) has completed an approved four-year high school course of study or the equivalent thereof, as determined by the appropriate educational agency; and (c) has completed an accredited program of registered professional nursing education and holds a diploma of a school accredited by the board.
>
> * * *
>
> The board may, upon application, issue a license to practice registered professional nursing by endorsement to an applicant who has been duly licensed as a registered professional nurse under the laws of another state, territory or foreign country if in the opinion of the board the applicant meets the qualifications required of registered professional nurses at the time of graduation.
>
> * * *"

The respondent construes the statute to require documentary evidence of compliance with the qualifications listed in it. We believe that is reasonable. And, without summarizing the involved evidence as to who said or wrote what to whom when, we conclude that, while the claimant may have been distressed by the delay in his license, that delay was not the result of any unlawful conduct on the part of the respondent and a large part of it was attributable to his own inaction. Accordingly, this claim must be denied.

Claim disallowed.

Opinion issued February 14, 1983

KANAWHA COUNTY COMMISSION

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-447)

Raymond G. Dodson, Attorney at Law, for claimant.

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

PER CURIAM:

This claim was submitted for decision based on the allegations in the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of $2,362.08 for waste disposal at Kanawha County Landfill, a division of the Kanawha County Commission, as per a July 29, 1980 agreement. In April 1981, claimant was advised that because of the wording of the agreement the State Auditor's Office lacked the authority to pay certain invoices. The respondent admits that the charges are valid and reasonable.

Based on the foregoing, the Court hereby makes an award to the claimant in the amount of $2,362.08.

Award of $2,362.08.

Opinion issued February 14, 1983

LUCAS TIRE, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-14)

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

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

PER CURIAM:

This claim was submitted upon a written stipulation to the effect that the respondent is liable for damages in the sum

of $1,804.07, based upon the following facts. The claimant is the owner of real property located at 810 Neville Street, in Beckley, Raleigh County, West Virginia. On January 25, 1981, the road adjacent to claimant's property was widened after a portion of the property was condemned. In the process of excavation, the claimant's sewer line was crushed, damaging claimant's property and necessitating re-excavation and re-concreting of the pavement. The damage sustained by the claimant was the result of the negligence of the respondent, and the Court therefore makes an award to the claimant in the amount stipulated.

Award of $1,804.07.

Opinion issued February 14, 1983

MOORE BUSINESS FORMS, INC.

vs.

DEPARTMENT OF EDUCATION

(CC-82-298)

Claimant appeared in person.

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

PER CURIAM:

The claimant seeks payment of $201.11 for changes made to a classroom designation form which was ordered by the respondent. Of this amount, $60.97 is a freight charge, and the remainder, $140.14, is an alteration charge. The respondent, in its Answer, admits the amount and validity of the freight charge.

James Ruziska, the claimant's sales representative, testified that a proof correction form was sent to respondent and returned by the claimant with several minor corrections. These changes required that the claimant redo the form. The respondent, however, was not informed of the cost of the alteration prior to receiving the forms and was not made aware of the fact that a charge would be made for the alterations.

After reviewing the evidence, the Court cannot find that the respondent is liable for the alteration cost. Even if, as Mr. Ruziska testified, the charge could not be estimated with certainty prior to making the changes, it was still incumbent on the claimant to inform the respondent that a charge would be made. The Court therefore denies the claim for the alteration charge, and makes an award for the freight charge in the amount of $60.97.

Award of $60.97.

Opinion issued February 16, 1983

BROWNING-FERRIS INDUSTRIES,
CHEMICAL SERVICE, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-247)

Claimant appeared in person.

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

PER CURIAM:

The claimant alleges damages in the amount of $601.71 for repairs made to a high pressure water truck which struck a piece of concrete on Interstate 64 near Cross Lanes, Kanawha County, West Virginia. The incident occurred August 5, 1982, between 3:00 and 4:00 p.m. Mike Milam, an employee of the claimant, was driving the truck at the time of the accident. He testified that he was traveling between 45 and 50 mph, when the car in front of him swerved. Mr. Milam then saw a triangular piece of concrete pavement which had broken loose and was standing about a foot above the road's surface. A portion of the highway had broken loose which Mr. Milam was unable to avoid. The two left rear wheels struck the concrete and had to be replaced.

M. W. Hughart, also employed by claimant, testified that he had been aware of the broken piece of concrete for a week prior to the accident, although the concrete was lying flat in

the road when he saw it. He estimated its size to be 8 inches thick, 18 inches wide, and 20 inches long. Mr. Hughart had not contacted respondent about the broken concrete.

Herbert C. Boggs, interstate maintenance superintendent, testified that the area where the accident occurred is a slide prone area. "Bump" signs are in place along this section of I-64 to indicate that it is slide prone. He stated that he was unaware of this broken piece of concrete and said that there are work crews continually patching I-64, which is in need of repair.

The evidence in this case indicates that a dangerous condition existed on I-64 for a week prior to this accident. While this Court has repeatedly held that the State is neither an insurer nor a guarantor of the safety of travellers on its roads, the unusual circumstances of this case lead us to find that the respondent was negligent in failing to discover the broken concrete and repair it. The Court therefore makes an award to the claimant in the amount of $601.71.

Award of $601.71.

Opinion issued February 16, 1983

DONALD R. HOGSETT

vs.

DEPARTMENT OF HEALTH

(CC-83-16)

No appearance by claimant.

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

PER CURIAM:

This claim was submitted upon the allegations of the Notice of Claim and the respondent's Answer.

The claimant was admitted to Huntington State Hospital on December 19, 1982 at 3:00 a.m. He had in his possession a new jacket, which was on his bed when he went to sleep. When the claimant woke up, the jacket, valued at $60.00, was missing.

An investigation failed to locate the jacket. The respondent in its Answer admits the validity of the claim and requests the claim be honored. In view of the foregoing, the Court makes an award to the claimant in the amount of $60.00.

Award of $60.00.

Opinion issued February 16, 1983

THOMAS E. LAYTON, II

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-245)

Claimant appeared in person.

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

PER CURIAM:

On September 9, 1982, at approximately 8:00 p.m., the claimant was driving his 1975 Chevrolet Vega on West Virginia Route 2 near Pt. Pleasant, Mason County, West Virginia. The vehicle struck a bolt, which holds down a metal plate which is part of a flood gate system installed by the Corps of Engineers and maintained by the City of Pt. Pleasant. The bolt damaged the exhaust system and transmission oil pan. The vehicle was repaired at a cost of $235.36. The claimant testified that the bolt was about 2½ to 3 inches above the surface of the pavement, and that the concrete around the bolt had deteriorated, allowing his automobile to drop even further. He said that he was aware of the metal plate, but could not say how long the deterioration had been present.

James L. Metheney, assistant supervisor for Mason County, testified that prior to the accident, there had been no complaints about the bolts or the pavement around the bolts. He further stated that the respondent does not maintain the bolts or plates and presumed that the City of Pt. Pleasant or the Corps of Engineers would maintain the concrete around the bolt.

The Court is of the opinion that the accident resulted when the bolt worked itself loose from the deteriorating concrete. Under W.Va. Code §17-2A-8(i) the State Road Commission has the responsibility for the general supervision of the State road program and for the construction, repair and maintenance of State roads and highways. The deterioration of the concrete could not have occurred overnight, and the respondent should have been aware of and repaired this dangerous condition which existed on the surface of its road. The Court therefore makes an award to the claimant in the amount of $235.36.

Award of $235.36.

Opinion issued February 18, 1983

ARTHUR U. BROWNING

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-83-50)

HAROLD E. DARLINGTON

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-83-51)

E. W. DAY

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-83-52)

C. P. DINGLER

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-83-53)

RUTH A. DONALDSON

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-83-54)

PETER H. DOUGHERTY

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-83-55)

GLEN GREENE

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-83-56)

GARRY OSBURN

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-83-57)

SHARRELL STICKLER

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-83-58)

EUGENE C. SUDER

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-83-59)

D. M. VANDELINDE

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-83-60)

LESTER WARNER

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-83-61)

WETZEL K. WORKMAN

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-83-62)

NAT MARINO

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-83-108)

NORMA TARR

vs.

OFFICE OF THE SUPREME COURT OF APPEALS

(CC-83-109)

LaVerne Sweeney, Attorney at Law, for the claimants.

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

PER CURIAM:

Each of the claimants hereinabove is a magistrate who has petitioned the Court for the payment of wages not paid in accordance with the results of the 1980 decennial census. Based on our opinion in *Graham, et al. v. Office of the Supreme Court of Appeals*, 14 Ct.Cl. ..... (1983), the Court makes awards for wages which were not paid to the claimants during the 1981-82 fiscal year.

Award of $4,500.00 to Arthur U. Browning.

Award of $4,500.00 to Harold E. Darlington.

Award of $4,500.00 to E. W. Day.

Award of $4,500.00 to C. P. Dingler.

Award of $4,500.00 to Ruth A. Donaldson.

Award of $4,500.00 to Peter H. Dougherty.

Award of $4,500.00 to Glen Greene.

Award of $4,500.00 to Garry Osburn.

Award of $3,375.00 to Sharrell Stickler.

Award of $3,375.00 to Eugene C. Suder.

Award of $3,375.00 to D. M. VandeLinde.

Award of $3,375.00 to Lester Warner.

Award of $4,500.00 to Wetzel K. Workman.

Award of $4,500.00 to Nat Marino.

Award of $4,500.00 to Norma Tarr.

Opinion issued March 11, 1983

CONNIE LAWRENCE BAILEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-389)

Claimant appeared in person.

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

RULEY, JUDGE:

On September 9, 1981, at about 12:30 a.m., the claimant was driving his 1974 Datsun pickup truck on West Virginia Route 99 near Kopperston, Wyoming County, West Virginia. Falling rocks struck the truck, which sustained damage of $1,962.16, rendering it a total loss. West Virginia Route 99 is a blacktopped highway and is cut through a mountain side at the accident site. High rock cliffs stand on either side of the highway and "Falling Rock" signs are located on both sides of the road. William W. Wood, a maintenance assistant employed by respondent, testified that respondent had received no notice or forewarning of this particular rock fall.

This Court has consistently held that the State is neither an insurer nor a guarantor of the safety of persons travelling its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). The claimant testified that he travelled the road daily, and knew that the area was prone to falling rocks. Following *Lowe v. Dept. of Highways,* 8 Ct.Cl. 210 (1971), this claim must be denied.

Claim disallowed.

Opinion issued March 11, 1983

WILLIAM CONNER AND LOIS CONNER

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-154)

James Allan Colburn, Attorney at Law, for claimants.

Douglas Hamilton, Attorney at Law, for respondent.

RULEY, JUDGE:

The claimants own a parcel of property on Hubbard's Branch

Road in Huntington, West Virginia. Hubbard's Branch Creek runs through their property and access across it to their home was provided by a private road. On June 21, 1979, during a heavy rainstorm, the private road was washed out. The claimants allege that the cause of the washout was a clogged culvert on the Interstate 64 right-of-way, which caused the water to back up along Hubbard's Branch Creek. The culvert became clogged by refuse which a contractor or subcontractor, working under a contract with respondent, had dumped near the culvert. Claimants seek an award of $31,000.00 to rebuild their private road.

Mrs. Conner testified that on several occasions prior to June 21, 1979, she had seen men dump truckloads of dirt, tree stumps and other debris near the culvert. Mr. Conner stated that he had followed a truck from a nearby construction area in Spring Valley which dumped debris near the culvert. The truck was described as a black truck with an unpainted home-made bed on it. Mr. Conner said that this dumping occurred, not in the spring of 1979, but in May through July of 1978. He did not state that he had seen respondent's trucks dumping material near the culvert, although Mrs. Conner did. Carol Conner, daughter-in-law of the claimants, said the dumping occurred in the spring of 1979.

Respondent's witness, Kevin Reichard, who was superintendent of the Spring Valley job, testified that the work on the project was performed by a general contractor, Barboursville Bridge Co., and a subcontractor, Allen Stone Co. He stated that the dumping on Hubbard's Branch Creek was done by the contractor. Furthermore, the material that was dumped came from the contractor's property, which was outside the respondent's right-of-way. Mr. Reichard's function was to oversee performance of the contract, which did not include the dumping. From the foregoing evidence, it is clear that the misconduct, if any, causing claimants' injury, was committed by an independent contractor. Numerous decisions of the Court have held that the respondent may not be held liable for acts of an independent contractor. *Safeco Ins. Co. v. Dept. of Highways,* 9 Ct.Cl. 28 (1971). Therefore this claim is denied.

Claim disallowed.

Opinion issued March 11, 1983

NORMA DORNBOS, d/b/a
THE PARTY BEER STORE

vs.

DEPARTMENT OF WELFARE

(CC-81-92)

Claimant appeared in person.

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

RULEY, JUDGE:

On January 10, 1981, the front window of the Party Beer Store, which is located in St. Albans, West Virginia, was broken. According to the claimant's testimony, Dean Murphy, who is a foster child and a ward of the State, admitted breaking the window when he fell off his bicycle. Claimant seeks $260.66 to replace the window.

In order for the Court to make an award in this case, there must be a showing of negligence on the part of the respondent. The record is devoid of any evidence of such negligence. The Court therefore denies the claim.

Claim disallowed.

Opinion issued March 11, 1983

CLAUDE W. JARRELL

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-324)

Claimant appeared in person.

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

RULEY, JUDGE:

The claimant was employed by the respondent from 1962 until February 27, 1981. On January 2, 1979, he was injured in a fall while at work. He visited a doctor in April 1979, and discovered that he had suffered a broken back in the fall. The claimant continued to work but was forced to take sick

leave periodically until he was terminated during a general reduction in force. The claimant had 430 hours of sick leave remaining and claims he should have been allowed to exhaust those hours before being terminated. He seeks $3,125.00 in compensation for those hours.

Renee Seefried, respondent's personnel administrator, testified that there was no policy that pertained to terminating employees while on sick leave in a reduction in force situation. The fact that an employee was on sick leave did not influence the termination. Ms. Seefried stated that "it was necessary because of budgetary constraints to fairly quickly and substantially reduce the number of employees and as I say, with the hundreds of hours of sick leave that most of our employees have accumulated, this would be, you know, quite a detriment in removing people from State service quickly."

The evidence in the record indicates that there was no provision made to compensate employees for sick leave when terminated as part of a general reduction in force. There was no policy in existence which required that an employee, who was on sick leave at the time of the reduction in force, be allowed to exhaust the balance of his or her sick leave hours before being terminated. For those reasons, the Court is constrained to deny this claim.

Judge Wallace disqualified himself and did not participate in the consideration of this claim.

Claim disallowed.

Opinion issued March 11, 1983

LUCILLE LINVILLE

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-58)

Claimant appeared in person.

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

RULEY, JUDGE:

During 1978 and 1979, the claimant's property on Buffalo

Creek at Amherstdale in Logan County was flooded several times. These floods caused erosion of topsoil and damage to claimant's fence and concrete walkway. Claimant presented no written estimate of the cost of these damages, but estimated herself that repairs would cost $3,500.00. She alleges that the flooding of her property was in some way related to Highway Project ER 277, which involved altering the channel of Buffalo Creek and constructing a new bridge near her property. However, the claimant also testified that her home was in a low area where water often backed up after a heavy rain.

Dallas Cary, Project Supervisor for Project ER 277, testified that the project increased the flow capacity of Buffalo Creek in the area of the claimant's property, and that he believed claimant's flooding problems might be due to surface run-off from the area behind her property. He further testified that the water table was very high in that area.

Joe Scarbury, an inspector on Project ER 277, testified that he inspected the area several times in response to claimant's complaints of flooding, but found no water overflowing the creek banks. However, he did observe water percolating up through claimant's yard, which he said was the lowest spot in the area.

Testimony failed to establish negligence on the part of the respondent. In fact, it was never established that the floodwaters on claimant's property came from Buffalo Creek, and it seems likely that other factors, such as a high water table and a low elevation, were the cause of claimant's flooding problems. Therefore, the Court is of the opinion that the claimant has not shown 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 March 11, 1983

D. ALBERT MOORE

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-97a)

Claimant appeared in person.

Douglas Hamilton, Attorney at Law, for the respondent.

RULEY, JUDGE:

Claimant filed this claim in the amount of $700.00 for the cost of installing two blacktop aprons at the intersection of Sun Valley Drive and Big Tyler Road, a state-maintained road, in Cross Lanes. According to the claimant, the apron installed by the Department of Highways at that intersection was damaged during snow and ice removal operations, necessitating replacement on two separate occasions in 1980 at a total cost of $700.00. Claimant presented no receipts for this work, and could not recall the name of the paving company. In addition, claimant had no permit for this work. Finally, claimant presented no evidence that he, or any other party, had at any time contacted the Department of Highways about this problem.

In sum, the claimant seeks reimbursement for monies allegedly expended in repairing a public road. While it may be commendable for private citizens to assist the respondent in the discharge of its duty to maintain the public roads, it should be virtually needless to say that a private citizen, in the absence of a contract, is not entitled to be reimbursed for such expense.

Claim disallowed.

Opinion issued March 11, 1983

MARTHA C. SCRUGGS

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-428)

Claimant appeared in person.

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

RULEY, JUDGE:

On November 7, 1981, claimant was driving her 1976 Ford on I-64 near the St. Albans exit when it struck a "hunk of steel or iron," damaging the undercarriage of the car in the sum of $442.32 (of which all but $140.00 was paid by the claimant's insurance).

Claimant testified that she did not know how long the piece of metal, which she thought might have come off a tractor trailer or endloader, had been in the highway. There is nothing in the record to indicate to the Court that the respondent knew of the presence of this piece of metal. This Court has consistently held that the respondent is neither an insurer nor a guarantor of the safety of motorists using its highways and that, before an award can be made in a case such as this, proof, either actual or constructive, that the respondent was aware of the condition complained of must be presented. *Davis Auto Parts v. Dept. of Highways*, 12 Ct.Cl. 31 (1977). The Court therefore denies the claim.

Claim disallowed.

Opinion issued March 11, 1983

TERRY SKEEN

vs.

BOARD OF REGENTS

(CC-79-194)

Jennifer Bailey and Larry Ellis, Attorneys at Law, for claimant.

Ann V. Dornblazer, Assistant Attorney General, for respondent.

RULEY, JUDGE:

Claimant alleges damages in the amount of $25,000.00 due to changes in the requirements for obtaining a Master's Degree in Correctional Counseling from the West Virginia College of Graduate Studies at Institute, West Virginia. These changes allegedly delayed her receipt of the degree for two years and she claims that, as a result, she was prevented from entering the job market for two years and suffered anxiety which has required medical treatment.

Claimant was admitted into the master's degree program in the Summer Term of 1975. She received, following payment of tuition, a catalog of courses for 1974-75, which claimant used to familiarize herself with the master's degree requirements to plan her courses. After a year of study, claimant enrolled in a Practicum Course. This was one of two degree requirements then remaining. The Practicum was listed as a three-hour course which claimant began in the first Summer School Term in 1976. Towards the end of that term, the class was informed that the course would extend through the Second Summer Term. There was no written notification of that change and a three-hour course usually lasts for one term. Respondent introduced into evidence the syllabus for the Practicum which states the amount of counseling hours required to pass the course and says, "it is likely that two practicums would be needed to approximate this recommendation." Dr. Michael Burton and Dr. John Zarski, the instructors for the Practicum, both testified that due to the shortened

nature of the summer terms, the Practicum extended over both.

Claimant alleges that she was inadequately supervised during the Practicum. The testimony established that one of the original instructors for the course resigned during the summer and Dr. Burton took over. Considerable confusion seems to have resulted; neither professor seemed sure who had primary responsibility for evaluating claimant's work. They agreed, however, that her performance was not satisfactory at the end of the summer, and that she would need additional work.

Claimant also alleges difficulties in the administration of the Master's Comprehensive Examination (MCE). She took the examination in June 1976, while working on the Practicum course. This was contrary to the school's policy requiring completion of the MCE before taking the Practicum. Claimant was informed that she had failed one section of the MCE and would have to wait until the next examination date, October 9, 1976, to take that section again. She introduced other students who took the same examination, who testified that they were allowed to do additional research to successfully complete the examination, without having to wait until October. The examination was also graded on a plus-minus system, instead of the letter grade provided for in the course catalog. Claimant alleges that she was treated in an arbitrary manner by the school officials.

As a result, claimant filed a grievance against the college and was granted a hearing before the grievance committee on September 12, 1977. The committee chairman, Dr. William Crockett, testified that the department failed to follow the letter of the catalog with regard to the Practicum course and the MCE but that the claimant was not treated differently than other students. The committee recommended that the claimant be given a "C" in the Practicum course and be allowed to retake the failed portion of the MCE. These recommendations were followed and claimant completed her degree requirements in December 1977, receiving her diploma in May 1978.

As a result of the delay between claimant's anticipated graduation date of December 1977, and actual graduation date of May 1978, claimant alleges that she contracted a manic depressive illness which has resulted in hospitalization on two occasions. Claimant remains under medical treatment with therapy and medications; her prognosis is guarded. At the time of the hearing, claimant was unemployed as a result of her illness. Dr. Robert Ovington, the psychiatrist treating the claimant, testified that the claimant was vulnerable to the kind of psychotic breakdown she experienced when subjected to certain intense pressures. He suggested that there may be an hereditary predisposition to a manic-depressive condition. Furthermore, he testified that the home environment in which the claimant was reared contributed to her condition. Dr. Ovington stated that the troubles with West Virginia College of Graduate Studies were contributing factors to claimant's mental problems.

Dr. Charles C. Weise examined claimant at respondent's request. In his report, he stated that claimant's illness appeared to be produced by a combination of biological, genetic, psychological, and sociological factors. An individual who is predisposed to the illness, in about 85% of cases, will have a depressed episode within six months of a negative life event, but in about 15% of cases depressed episodes do not have a negative event preceding them. Dr. Weise stated that it is conceivable that the conflict with the school could have precipitated an episode of illness but added, "I do not, however, feel that a negative event could produce a manic depressive illness in a person otherwise not vulnerable to it."

The general rules of law applicable to this case are delineated in 15A Am. Jur.2d *"Colleges and Universities"* §31, where it is stated:

> "* * * Where a student matriculates at a college or university, a contractual relationship is established under which, upon compliance with all the requirements for graduation, he is entitled to a degree or diploma. However, the faculty or other governing board of a college or university, which is authorized to examine the students

and to determine whether they have performed all the conditions prescribed to entitle them to a degree or diploma, exercises quasijudicial functions, in which capacity its decisions are conclusive, except that a degree or diploma may not be refused arbitrarily."

Although the listing of the Practicum in the Bulletin for 1974-75 as a three-hour course may have been misleading and although various other items among the claimant's litany of complaints may involve something less than excellence on the part of faculty or administration, the Court cannot conclude from all of the evidence that the delay in the award of claimant's master's degree was arbitrary. For that reason, the claim must be denied.

Claim disallowed.

Opinion issued March 11, 1983

BILLY SUTPHIN

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-416)

Claimant appeared in person.

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

WALLACE, JUDGE:

The claimant is the owner of a 1975 Cadillac which was damaged when it collided with a manhole located in W. Va. Route 16, in Beckley, on November 6, 1981. The manhole cover struck the undercarriage of the car and one wheel fell into the manhole. The claimant incurred $170.15 in towing charges and damage to the automobile of $756.84.

Charles Bragg, Assistant County Supervisor in Raleigh County, testified that the manhole cover in question had been in place about six months. During that time, there had been no complaints about it. The evidence indicates that the top of the manhole was level with the paved surface of the high-

way and offers no clue as to how or why the accident happened. Since the Court cannot speculate as to that matter, the claim must be denied.

Claim disallowed.

Opinion issued March 14, 1983

SUSAN L. GREEN

vs.

SUPREME COURT OF APPEALS

(CC-80-385)

Lee H. Adler, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

Claimant was hired in May 1975 as secretary to the Judge of the Circuit Court of Raleigh County. When she began in this position, her duties were those of a general secretary. Starting in October 1975 claimant was required to report and transcribe uncontested divorce cases. She continued to transcribe these cases until August 1979. Claimant seeks compensation in the amount of $15.00 per case, which is the fee that had been paid to the previous court reporter. Claimant's records indicate that she transcribed 1,529 cases, representing a claim of $22,935.00.

Claimant testified that the court reporter, prior to October 1975, received a $15.00 fee, in addition to her regular salary as an employee of the State of West Virginia, for each uncontested divorce case. In October 1975 there was a change in court reporters. The new court reporter refused to take uncontested divorce cases because this $15.00 fee was not going to be paid. Instead, the fee would be paid to the Circuit Court Clerk's Office, and then forwarded to the Treasury of the State of West Virginia. Ms. Green was then assigned the job of transcribing uncontested divorce cases. Claimant testified that she received repeated promises of compensation from the Circuit Court Judge. The $15.00 fee was reinstated

September 1, 1979. Claimant sues on a theory of implied contract, in that she performed work which was beyond her job description and had been promised compensation for this work. She also advances a theory of unjust enrichment of the State of West Virginia, in that the State received both the benefit of her work, as well as the $15.00 fee which was sent to the State Treasury.

While the Court is sympathetic to the claim presented, we can find no basis from which to make an award. The transcription of uncontested divorce cases became a part of claimant's job which her employer required her to perform. A change in policy occurred during the 1975-1979 time period, and this policy was uniformly applied. The $15.00 fee was paid into the clerk's office even when someone else performed the transcriptions. After 1979, there was a reversion to the former policy. The Court must therefore deny the claim.

Claim disallowed.

Opinion issued March 14, 1983

KELLER INDUSTRIES, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-29)

and

RYDER TRUCK RENTAL, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-80 381)

Gary W. Hart, Attorney at Law, for claimants.

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

WALLACE, JUDGE:

These claims, which were consolidated for hearing, arise out of an accident which occurred on March 23, 1980, on State Route 50, in Taylor County, West Virginia. Russell Heatherly,

an employee of Keller Industries, Inc., was driving a truck rented by Keller and owned by Ryder Truck Rental, Inc. Mr. Heatherly encountered a dropoff in the road, which caused the steering gear to break. Mr. Heatherly lost control of the truck and an oncoming vehicle was forced off the road, resulting in damage to both vehicles. An out-of-court settlement was reached between the driver of the other vehicle and claimant Keller Industries. Keller seeks $663.44 as the costs incurred in settling that suit. Claimant Ryder Truck seeks $9,261.63 for towing and repairs on the truck. The claimants allege that the respondent failed to adequately maintain the road and to warn travelers of the defective condition of the road. The respondent contends that a slide area exists in the vicinity of the accident which was not caused by any action or inaction on its part.

Mr. Heatherly testified that as he drove down Route 50, he encountered a "hump in the road" and then hit a rough spot which was six inches to a foot deep. He said that the only sign he could remember seeing was a curve sign. Mr. Heatherly stated that he drove back over this stretch of road two or three days later and observed new rough road signs.

John William Bishop, supervisor of the sign and paint shop in District 4, which includes Taylor County, testified that the signs on Route 50, in the area of the accident, were checked on January 3, 1980. At that time, hazard boards, rough road signs, and curve signs were in place. He said that while he had no personal knowledge that the signs were in place on March 23, 1980, there were no records of work being done on the signs after that date. Had a sign been removed or knocked down, his office would be aware of that fact within a day. A photograph taken on the day of the accident shows what appears to be a hazard paddle located near the site where the truck went off the road.

Barney Stinnett, a soils engineer employed by respondent, stated that the hillside above Route 50 is a deep slide area which was caused by strip mining. The magnitude of the slide involved is greater than any for which a slide correction has been attempted. Paul Curry, road maintenance supervisor

for Taylor County, testified that the area of Route 50 at the accident site is a trouble area. He estimated that the road could sag up to a foot within an hour. A maintenance log introduced into evidence showed numerous patching jobs on this stretch of road.

There can be no doubt that the stretch of Route 50 in question is a potential hazard due to its unstable condition. There is also no doubt that the respondent has monitored the road and placed signs warning of the danger. There is little else the respondent could do short of closing down the road or undertaking a massive correction project. 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 (1947). For negligence of the respondent to be shown, proof of notice of the defect in the road is required. *Davis Auto Parts v. Dept. of Highways,* 12 Ct.Cl. 31 (1977). While the road is a potential danger, Mr. Heatherly testified that he had driven the road a "hundred" times before and knew the road was rough. Under the doctrine of comparative negligence, the Court is of the opinion that the negligence of the driver was equal to or greater than the respondent's and disallows the claims.

Claims disallowed.

Opinion issued March 14, 1983

CARL R. MOORE

vs.

GOVERNOR'S OFFICE OF ECONOMIC AND COMMUNITY DEVELOPMENT

(CC-80-137)

Claimant appeared in person.

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

GARDEN, JUDGE:

This claim, in the amount of $1,299.23, is for overtime pay which claimant alleged he is owed for work performed for the Governor's Disaster Recovery Office, which is now an office of the respondent agency. Prior to December of 1978,

claimant was working within the Office of Economic and Community Development (OECD), under an assignment contract from the Farmers Home Administration (FmHA), an agency of the federal government. The FmHA paid the claimant's salary. In December of 1978, claimant was transferred to the Disaster Recovery Office to manage a disaster center. Claimant's salary was to be paid by the FmHA, and the State of West Virginia would reimburse the FmHA for 55% of the basic salary.

During claimant's tenure with the Disaster Recovery Office, from December 1978 to January 1979, he worked 85 overtime hours. There was no provision in the contract between the respondent and the FmHA to provide overtime payments. However, the claimant testified that there was an understanding between the agencies that overtime at the rate of time and a half would be paid. Claimant has made numerous attempts to secure payment, but his requests have been denied.

It is obvious to the Court that it lacks the jurisdiction over this claim. The respondent is not the claimant's employer. His contract was with a federal agency and that agency paid his salary. Any claim for overtime must be made to that agency. The court must therefore deny the claim.

Claim disallowed.

Opinion issued March 14, 1983

GEORGE A. STOVER AND
CARMA STOVER

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-261)

Claimant appeared in person.

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

RULEY, JUDGE:

At 6:30 p.m., Sunday, July 19, 1981, claimant Carma Stover was driving a 1975 Chevrolet north on Route 62 near Buffalo in Putnam County at a speed of approximately 30 m.p.h.

when she encountered mud in the northbound lane, causing her vehicle to slide off the road and into a ditch. Route 62 is a paved, two-lane roadway, straight and level at the accident site. Claimants contend that the mud was left on the road by Department of Highway personnel, who had been ditching along Route 62 during the week of July 13-17, 1981. The claim is for damage to the vehicle in the amount of $677.35.

Mrs. Stover testified that she had driven over the accident site every day during the week preceding the accident, and that on Saturday, July 18, she had noticed dirt on the road surface. As she approached the accident site on Sunday, July 19, she observed an area of mud approximately one inch thick covering her entire lane before she actually drove into it, but did not reduce her speed between the time that she noticed the mud and the time that she drove into it.

John Johnson, Putnam County Road Supervisor for the Department of Highways, testified that DOH personnel had been ditching along Route 62 during the week of July 13-17, and that the road surface had been scraped and cleaned when the ditching was completed. He observed a small amount of dirt on the road surface when work stopped on Friday, July 17. On Monday, July 20, he visited the accident site and found no mud or debris of any type on the road surface.

Donald Atkins, Road Foreman for the Department of Highways, testified that he observed personnel of the respondent cleaning the road surface with a grader at the completion of the job on Friday, July 17.

The duty of the State to a traveller is a qualified one, namely, that of reasonable care and diligence in the maintenance of a highway under all circumstances. *Parsons v. State Road Commission,* 8 Ct.Cl. 35 (1969). Testimony given by Mr. Johnson and Mr. Atkins established that the Department of Highways carried out this responsibility. The State neither insures nor guarantees the safety of motorists travelling its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be found liable for damages caused by a road defect of this type, the claimant must prove that the respondent had actual or constructive knowledge of the defect plus a

reasonable amount of time to take corrective action. Since the claimant presented no evidence to that effect and did not meet the burden of proof, the claim must be disallowed.

Claim disallowed.

Opinion issued March 14, 1983

UNITED FARM BUREAU MUTUAL INSURANCE COMPANY

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-82-93)

Ralph C. Dusic, Jr., Attorney at Law, for claimant.

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

PER CURIAM:

A 1978 Pontiac Sunbird was stolen from its owner, Gay Burrows, on or about January 11, 1979. Ms. Burrows, who had insured the vehicle with the claimant, received the full cash value for the vehicle from the claimant, in exchange for the title to the vehicle. At some time prior to June 25, 1979, the respondent, Department of Public Safety, came into possession of the vehicle. On or about June 26, 1979, the claimant was informed by respondent's employee, Officer Pennington, that the vehicle was located at respondent's headquarters in Princeton, West Virginia. The investigation into the theft of the automobile was incomplete at that time. Officer Pennington informed the claimant that the vehicle could not be released, and any charges against the vehicle would be less than $40.00. Between June 1979 and June 1980, claimant contacted respondent on several occasions and was informed that the vehicle could not yet be released, and that the vehicle was being stored on the respondent's impound lot in Princeton with no storage charges being levied against claimant.

On June 30, 1980, claimant contacted the National Automobile Theft Bureau (NATB) to try to regain possession of the automobile. In June 1981, claimant learned that the vehicle had been removed from respondent's impounding lot by Danieley, Inc., of Princeton, West Virginia, and had been

stored by Danieley, Inc., since May 5, 1980. Towing and storage charges were assessed against claimant from May 5, 1980. On or about July 14, 1981, claimant was informed that a lien had been filed against the vehicle by Danieley, Inc., and that the vehicle would be sold at public auction. Claimant then filed suit in the Circuit Court of Mercer County to obtain possession of the automobile. Claimant paid $2,136.50 to Danieley, Inc. for towing and storage charges; $507.50 for attorney's fees; $120.00 in court costs; and $1,816.75 for services rendered by Crawford and Company to obtain possession of the automobile. Claimant also alleges that as a result of the arbitrary, careless and negligent conduct of respondent, claimant has incurred total losses of $6,080.75, and further requests interest of 10% per annum from May 5, 1980.

The respondent, in its Answer, alleges that at the time the claim was filed, April 5, 1982, the automobile was being held by the Prosecuting Attorney of Mercer County. The vehicle was turned over to the Prosecuting Attorney in 1980, to be used as evidence in the trial of the individual accused of stealing the automobile, and had been under the control of the Prosecuting Attorney since that time. The evidence indicates that the charges against the vehicle were assessed after the vehicle left the possession of the respondent. The respondent had no control over the vehicle, and cannot, therefore, be found liable for the charges assessed after turning the vehicle over to the Prosecuting Attorney. The Court must deny the claim.

Claim disallowed.

Opinion issued March 16, 1983

JAMES E. BAILEY, JR.

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-145)

Claimant appeared in person.

Douglas Hamilton, Attorney at Law, for respondent.

RULEY, JUDGE:

Claimant filed this claim against the Department of High-

ways seeking to recover $616.20 which he expended for repairs to a broken water line near his home in Bluefield on December 17, 1979, and January 8, 1980. The water line in question runs underneath W.Va. Route 290 and U.S. Route 460; the two breaks occurred at the same spot, in an area between the two roads, slightly north of W.Va. 290, on the State right-of-way.

The claimant testified that the pipeline was installed in 1976 by West Virginia Pipe Line, Inc., an independent contractor, and that the same company repaired the two breaks in the line. Claimant testified twice that he did not know the cause of the breaks, but later stated that he thought they were caused by settling of the ground between the two roadways.

In sum, the evidence disclosed that: a water line installed on a State right-of-way by a private contractor had broken on two separate occasions, each time in the same spot; that on each occasion, the same private contractor repaired the breaks; and that the cause of the breaks was unknown.

The Court fails to see how the Department of Highways can be held liable for these damages. For an award to be made, it must be proved that some negligent act or omission of the respondent proximately caused the damage sustained by the claimant. The evidence presented did not meet this burden of proof, and thus the claim must be denied.

Claim disallowed.

Opinion issued March 16, 1983

WAYNE K. BAKER, d/b/a
BAKER COAL COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-405)

Andrew Fusco, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, and *Henry C. Bias, Jr.,* Deputy Attorney General, for respondent.

WALLACE, JUDGE:

In August 1980, severe rains caused flooding in Monongalia

County, West Virginia, washing out a number of roads. The respondent used rocks to stabilize stream banks along many of these roads. On August 20, 1980, the claimant was requested to furnish rocks, which were a by-product of claimant's strip mining operation. Rocks were loaded on respondent's trucks between August 20 and October 6, 1980. The respondent has refused to pay for the rock supplied by the claimant and the claimant now seeks an award of $22,800.00 for the rock.

The evidence elicited at the hearing was in conflict on the question of whether the respondent was informed that payment would be requested for the rock. It was uncontroverted that the respondent took a quantity of rock, which the claimant estimated at 475 truckloads, of 16 tons each, at $3.00 a ton. No records were kept for the entire period. One of claimant's employees kept an informal record for part of the time, but the record was lost.

It is clear from the evidence that the failure of the parties to make their intentions known has left the parties in an ironic position. The respondent could have received rock from another mine site for free, but went to Baker because it was closer. The claimant had a client to buy its rock for $3.00 a ton, but instead furnished the rock to the respondent. The respondent has received a commodity and for this, there is liability. As there was not adequate evidence produced to show that 475 loads of material was taken, the Court makes an award based on a figure of 187.5 loads. The Court has determined from the evidence that an average of one to five trucks hauling an average of one to five loads per day for a 30-day period, with 16 tons per load would total approximately 3000 tons of rock. Based upon the $3.00 a ton figure at which the claimant normally sold the rock, the Court hereby makes an award of $9,000.00.

Award of $9,000.00.

Opinion issued March 16, 1983

DAVID R. BASSETT

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-294)

Claimant appeared in person.

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

PER CURIAM:

This claim for $167.62 arises out of damages sustained by the claimant's 1978 Chevrolet Monza. The accident occurred between 11:00 p.m. and 12:00 midnight on October 16, 1982, on I-79 at the bridge in Elkview, West Virginia. The approach to the bridge was being paved, and, when the claimant entered the bridge approach, he struck a hole where excavation had been done. The right ball joint of the automobile snapped, causing a loss of steering. The claimant testified that he saw a sign, which said either "Slow" or "Bump", which was placed about 100 feet from the bridge. He stated that he saw tne light on the sign when he was a quarter of a mile from it. The claimant said, however, that the sign was inadequate warning and he therefore had not slowed down enough to avoid the accident.

Herbert C. Boggs, interstate supervisor, testified that there were construction signs on both sides of the road at Elkview, as well as the lit "Bump" sign. He said that a "Bump" sign is normally placed about 100 feet in front of the bump.

The law of West Virginia is well established that the State neither insures nor guarantees the safety of motorists upon its highways. *Adkins v. Sims*, 130 W.Va. 645 (1947). However, the respondent does owe a duty of exercising reasonable care and diligence in the maintenance of the highways.

It is the opinion of the Court that the respondent has met its duty of reasonable care under the circumstances of this case. The Court must therefore deny the claim.

Claim disallowed.

Opinion issued March 16, 1983

C. W. LEWIS, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-82-103)

Ralph Hanna, Jr., appearing as representative of C. W. Lewis, Inc., claimant.

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

PER CURIAM:

This claim, for $410.20, is for work allegedly performed on the brakes of a 1966 Chevrolet bus, used at respondent's Anthony Correctional Center, at Neola, West Virginia. According to Ralph Hanna, Jr., President of C. W. Lewis, Inc., of White Sulphur Springs, West Virginia, the work was performed on December 5, 1980. Two bills, one for $326.15 and the other for $84.05, were introduced into evidence. Mr. Hanna explained that Everett Norton, the purchasing officer at the Anthony Center, requested two bills because he could not authorize a bill of over $400.00. There was no written authorization for the work, only oral from Mr. Norton. While this authorization was not received until after the work had been performed, Mr. Hanna stated that unless there is a question concerning the owner's credit, his company does not consult the owner prior to making the repairs.

In view of the evidence presented, the Court has concluded that to deny the claim would result in unjust enrichment of the respondent. Previous decisions of the Court have made awards for goods or services furnished by a claimant in the absence of proper authorization. Respondent's witness, Steven Farren, an instructor at Anthony Center, testified that the brakes were not improved by the repair work; however, the brakes were repaired in December 1980, and the witness did not drive the bus until sometime in February 1981. There was no evidence presented which would indicate that the claimant was made aware of this fact, and Mr. Hanna testified that the work was guaranteed. The Court therefore makes an award in the amount of $410.20.

Award of $410.20.

Opinion issued March 16, 1983

DOY P. CRITES

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-378)

No appearance by claimant.

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

PER CURIAM:

The claimant in this case seeks compensation for property taken by the respondent in widening and moving Route 36 in Sutton, Braxton County, West Virginia. Approximately one half of an acre of claimant's land was taken in the process of moving the roadbed. The respondent filed a Motion to Dismiss, as the claim is the proper subject for condemnation. It appears to the Court that the claimant has an adequate remedy at law; therefore, the motion should be sustained based on the provisions of West Virginia Code §14-2-14(5). The Court therefore orders that the claim be dismissed.

Claim dismissed.

Opinion issued March 16, 1983

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

DEPARTMENT OF FINANCE & ADMINISTRATION

(CC-82-335)

Jack O. Friedman, Attorney at Law, for claimant.

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

PER CURIAM:

This claim for $6,457.34 arises out of the payment of unemployment security benefits to two former employees of the respondent. The claimant seeks $5,403.08 as the amount of the benefits and $1,054.26 as accumulated interest.

The first employee received benefits totalling $3,640.00 following his dismissal from respondent's employ. He was reinstated, with full back pay after appealing his dismissal through the Civil Service Commission and the West Virginia Supreme Court. Under West Virginia Code §21A-6-1(4), he was not eligible for the benefits received because he was not totally or partially unemployed for the period in question.

The second employee was dismissed from his position for misconduct. He received $1,763.08 in benefits before a Board of Review Decision held him ineligible for those benefits.

West Virginia Code §21A-7-11 governs the payment of benefits pending appeal. This section states in part:

> "If the final decision in any case determines that a claimant was not lawfully entitled to benefits paid to him pursuant to a prior decision, such amount of benefits so paid shall be deemed overpaid. The commissioner shall recover such amount by civil action or any manner provided in this Code for the collection of past-due payment and shall withhold, in whole or in part, as determined by the commissioner, any future benefits payable to the individual and credit such amount against the overpayment until it is repaid in full."

As this section indicates that overpayments to an individual are to be collected from that individual and not from the agency which employed him, the Court denies the claim.

Claim disallowed.

Opinion issued March 16, 1983

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

DEPARTMENT OF HEALTH

(CC-82-263b&c)

Jack O. Friedman, Attorney at Law, for claimant.

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

PER CURIAM:

These two claims are for unemployment compensation tax

arising for the quarters ending March 31, 1972, June 30, 1972, and June 30, 1977. Claim No. CC-82-263b is for $52,730.71, of which $28,296.17 is the amount of the tax and $24,434.54 is accumulated interest. Claim No. CC-82-263c is for $21,213.07, of which $9,490.64 is the amount of the tax and $11,722.43 is accumulated interest. The respondent, in its Answer, denies any liability for the tax based on the statute of limitations. The Court finds that under W.Va. Code §55-2-6, the five-year statute of limitations applies. As no action was taken on these claims until October 5, 1982, the claims are barred by this statutory provision.

Any claim for accumulated interest is denied based on our opinion in *Dept. of Employment Security vs. Dept. of Corrections*, 14 Ct.Cl. ..... (1983).

Claims disallowed.

Opinion issued March 16, 1983

IDA M. HINER AND NORMAN F. HINER,
d/b/a HERCULES CONSTRUCTION COMPANY

vs.

DEPARTMENT OF NATURAL RESOURCES

(CC-80-150)

Fred A. Jesser, III, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, and *Leonard Knee*, Assistant Attorney General, for respondent.

PER CURIAM:

In an opinion dated December 3, 1980, the Court dismissed the claimants' complaint for failure to state a claim upon which relief could be granted. The Court, however, granted the claimants leave to file an amended notice of claim, and the matter is now before the Court upon the respondent's motion to dismiss the amended notice.

The basis of the claim is that the Director, Department heads and other employees of the respondent formed a conspiracy as a result of which the claimants were required to forfeit a

bond which had been posted as security for a strip mining permit, and deprived of the privilege to mine coal on property owned by them.

In our earlier decision, we cited 16 Am. Jur. 2d *"Conspiracy,"* §67, in which it is stated:

> "The rules governing pleadings in conspiracy actions are not materially different from those applicable to other actions. The complaint must state facts that constitute a cause of action, that is, the complaint must allege the formation and operation of the conspiracy, the wrongful act or acts done pursuant thereto, and the damage resulting from such act or acts. Facts, not legal conclusions, must be pleaded, including facts showing damages."

The amended notice also fails to allege such facts. The legal conclusion that a conspiracy existed is insufficient to state a cause of action. The Court therefore sustains the respondent's motion to dismiss the amended notice of claim.

Claim dismissed.

Opinion issued March 16, 1983

CHARLES E. MOORE

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(CC-76-127)

H. John Rogers, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

The claimant entered a plea of guilty to an indictment charging incest, and on May 15, 1961, he was sentenced to a definite term of five years. The applicable statute, West Virginia Code §61-11-16, provides for a mandatory indefinite sentence of five to ten years. The Prosecuting Attorney and claimant's court-appointed counsel mistakenly informed him that he could be sentenced to the definite five-year term.

Upon claimant's arrival at the West Virginia Penitentiary, his sentence was administratively changed to a five-to-ten-year sentence. By Federal Court Order entered on September 4, 1964, the claimant's conviction was declared null and void and he was released from confinement. Claimant seeks $4,000,000.00 in damages as a result of his alleged illegal incarceration.

The respondent, in its Answer, moves to dismiss, or, in the alternative, moves for summary judgment based upon the Notice of Claim. The grounds for the Motion to Dismiss is that the claim is barred by the applicable statute of limitations. This claim was filed with the Court on October 27, 1976. As this is more than ten years from the time of the alleged wrong, the Court sustains the respondent's Motion to Dismiss.

Claim dismissed.

Opinion issued March 16, 1983

ROBERT G. RINER

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-288)

Claimant appeared in person.

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

PER CURIAM:

The claimant's automobile, a 1973 Cadillac, was damaged in the sum of $244.25 at about 10:00 a.m. on Monday, October 18, 1982, at the intersection of Center Street and Second Avenue in Prosperity, Raleigh County, West Virginia. Center Street was in the process of being repaved at the time of the accident. As the claimant turned off of Center Street and onto Second Avenue, he encountered a drop-off where the pavement had not been levelled with Second Avenue. The claimant testified that the drop-off was about a foot high but Bobby Daniels, an employee of the respondent, testified that the drop-off was about six inches. Respondent's employees had begun the

paving operation the previous Friday, but stopped when the paving machine broke down. The asphalt was raked down to try to even out the road, and the work crew returned on the day of the accident to finish the project.

The evidence clearly established that the respondent created a hazardous condition in the roadway. However, it was also established with equal clarity that the claimant was aware of that condition.

He testified that he had driven another vehicle over the same drop-off the night before. At the time of the accident, the claimant testified that he drove over the drop-off slowly, believing his car would not drag, but, unfortunately, it did with the resulting damage to the exhaust system. In view of the circumstances, it appears that the claimant was guilty of negligence which equalled or exceeded that of the respondent; therefore, the claim must be denied.

Claim disallowed.

Opinion issued March 16, 1983

CALVIN L. SARGENT

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-319)

Claimant appeared in person.

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

PER CURIAM:

The claimant's vehicle, a 1973 Volkswagen Beetle, was damaged on November 22, 1982, when he struck a rock on U.S. Route 60 west of Montgomery, West Virginia. The accident occurred at approximately 6:40 a.m. on a foggy morning. The claimant testified that he did not see the rock, which was three to four feet long and two feet high, until he was almost upon it. The vehicle sustained damages in the amount of $1,410.19.

Carl E. King, maintenance foreman for Kanawha County, stated that time sheets indicated a rock slide had occurred in the area that day. There was a complaint received, but he did not know at what time it was received. The slide was removed that day.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims,* 130 W.Va. 645 (1947). For the respondent to be liable for damages in this case, the claimant must prove that the respondent had actual or constructive notice of the defect and a reasonable amount of time to take suitable corrective action. *Davis v. Department of Highways,* 11 Ct.Cl. 150 (1976). The Court is of the opinion that the claimant failed to meet this burden of proof and therefore denies the claim.

Claim disallowed.

Opinion issued March 16, 1983

ROBERT VARNEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-304)

Claimant appeared in person.

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

PER CURIAM:

The claimant is the owner of a 1981 Chevrolet Monte Carlo. On November 7, 1982, at approximately 9:30 p.m., the claimant was a passenger in his automobile which was being driven by his nephew on Route 52 near Crum, Wayne County, West Virginia. The automobile struck a pothole measuring approximately sixteen inches by twenty inches. The right front tire, rim, and wheel cover had to be replaced at a cost of $208.97.

The State neither insures nor guarantees the safety of motorists travelling on its highways. *Adkins v. Sims,* 130 W.Va. 645 (1947). In order for negligence to be shown, proof of

notice, either actual or constructive, must be shown. As there was no positive showing of notice to respondent, the claim must be denied.

Claim disallowed.

Opinion issued March 16, 1983

XEROX CORPORATION

vs.

DEPARTMENT OF NATURAL RESOURCES

(CC-82-236)

R. Edison Hill, Attorney at Law, for claimant.

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

WALLACE, JUDGE:

In September 1981, claimant entered into an agreement with the Water Resources Division of respondent agency for the rental of a Xerox Model 8200 copying machine. The machine was installed on a limited trial basis, and on September 25, 1981, Lendin Conway, the property officer of the Division of Water Resources, signed a contract with claimant. Under the contract, respondent would pay a basic monthly charge of $1220.00, plus a usage fee for copies in excess of 30,000. The machine was removed eight months later because of nonpayment. Rental and removal charges amount to $12,065.88. The respondent alleges that no contract was made because of the failure of the Department of Finance and Administration to approve the contract. At the hearing, respondent suggested that any award be limited to a quantum meruit recovery.

The Court is of the opinion that the claimant is entitled to some recovery—the respondent benefited from the use of claimant's copier for eight months. The difficulty lies in deciding the amount of recovery. In order for the contract signed by Mr. Conway to be valid, approval, in the form of a purchase order from the Department of Finance and Administration, had to be issued. This approval was not obtained. Mr. Conway testified that his "understanding at the signing of the agree-

ment was that the approval was just a formality and there would be no problem with it." He was unaware of the necessity of a purchase order. Linda Jo Thompson, a senior marketing representative with Xerox, testified that she was unaware of any requirement of a purchase order for the lease of a copier.

While the Court recognizes that the claimant is entitled to a monetary award on a quantum meruit basis, the Court is also unable to determine the damages as the claimant has not provided the Court with the data necessary to make this determination. Therefore, the Court directs the claimant and the respondent to agree upon an amount fair to both parties based upon the reasonable value of the use of the equipment rented by the respondent. The claim will be held open for 60 days for such agreement to be filed with the Court.

Opinion issued March 16, 1983

MARTHA P. YOAK, BY HER AGENT,
JUDSON K. YOAK

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-380)

Judson K. Yoak appeared for claimant.

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

RULEY, JUDGE:

The claimant is the owner of a parcel of real property located on Route 16 near Grantsville, Calhoun County, West Virginia. In March or April 1977, a portion of the land along Route 16 began to slip. According to the testimony of the claimant's son, the respondent would repair the slip and shortly thereafter, it would begin again. In December 1978, the respondent performed a slide correction which involved moving the road eastward, away from the slip and the claimant's property. The claimant's son stated that the respondent dumped dirt from the construction area onto his mother's

property, and that the slide has continued to damage the property. The slip was estimated at 54 feet wide and 300 feet long. The claimant seeks damages in the amount of $60,000.00.

The claimant's son testified that the repeated slips caused dirt and debris to come onto his mother's property, but that no damage occurred to any structure on the land. An appraisal of the property made by the claimant's son did not reflect a decrease in the monetary value of the land due to the slip. An appraisal report submitted by respondent established a decreased value of $1,000.00.

Samuel H. Beverage, assistant district engineer in charge of maintenance, described the area and the relocation of the road. He stated that the area was slide prone, and that the soils have a safety factor of about one "which means that they are just on the balance of being stable or unstable so anything that would upset that balance to make that factor of safety drop below one would cause or create possibly a slip." Saturation of the soils with water is the usual reason for a slide to begin. The correction project, which involved relocating the road and putting predrilled piling into the slip area, benefited the claimant by preventing more material from coming onto the property. Mr. Beverage stated that he did not recall seeing any prior construction or any evidence of a drainage system installed by respondent which would have contributed to the slide.

Alton Smith, district supervisor involved in the relocation project, testified that a site was obtained to dump the waste material from the project. He stated that as far as he was aware, all the waste was deposited on this site.

From the evidence presented in the claim, the Court is of the opinion that there was insufficient proof of any acts or omissions by the respondent which were the proximate cause of the claimant's damages. The slide appears to be caused by the natural movement of unstable soils. This being the case, the Court must deny the claim.

Claim disallowed.

Opinion issued April 22, 1983

BECKMAN INSTRUMENTS, INC.

vs.

DEPARTMENT OF HEALTH

(CC-83-30)

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 $198.50 representing an unpaid invoice for a monthly charge on answer pak agreement 679131. The unpaid invoice was billed in May 1982, for invoice date May 7, 1979. In its Answer, the respondent admits the validity of the claim and states that sufficient funds were on hand from which to pay the claim.

The Court therefore makes an award to the claimant in the amount of $198.50.

Award of $198.50.

Opinion issued April 22, 1983

ANNA LOU BOOTEN

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-176)

WILLARD LUCAS

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-177)

GLEN L. RAMEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-178)

H. R. ARROWOOD

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-180)

William L. Redd, Attorney at Law, for claimants.

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

RULEY, JUDGE:

These four claims were consolidated for hearing as all arise from the same factual situation. The claimants are landowners on Beech Fork Road, Lavalette, Wayne County, West Virginia. Situated from west to east on the south side of Beech Fork Road is a mobile home owned by Mr. Lucas, a mobile home owned by Mrs. Booten, the Ramey house, and the Arrowood house. Mrs. Booten also owns a house located on the north side of Beech Fork Road, almost across from the Lucas mobile home. She resides in this house. The claimants allege damage to their properties due to the respondent's failure to provide adequate drainage for the area.

Claimant Ramey has made two prior claims for damage to his land. The first claim was disallowed. The claimant then obtained legal counsel, and the Court granted a Motion for Rehearing. In the second proceeding, the claimant was awarded $4,933.13 for damages resulting from the respondent's failure to maintain two culverts and ditch lines. This failure allowed water to drain onto the Ramey property. The claimants presently allege that subsequent repair work performed by the respondent has caused further damage to all four properties.

The repair work involved deepening a ditch line between

the Arrowood and Ramey properties. Mr. Arrowood testified that his yard has settled since the work and cracks have developed in one corner of his house. He had no estimates of the amount of damage to the house.

According to Mr. Ramey, his property has been flooded when it rains. There has also been a problem with raw sewage rising to the surface when it rains. Similar complaints were voiced by Mr. Lucas and Mrs. Booten, but none presented any evidence of damages.

Mary Sue Malik, a sanitarian for the Wayne County Health Department testified that there is a septic system located behind the Booten mobile home. This system was malfunctioning. She stated that this malfunction was "probably" caused by surface water, although the adjacent septic system on the Lucas property was functioning properly.

An appraiser employed by the respondent, Joel Nunes, visited the Ramey property in July 1980, and April 1982, and in his opinion the land was in better condition on the latter date. Two engineers also testified for the respondent. David Bevins, assistant maintenance engineer, stated that the ditch line in question was an improvement to the existing drainage system. There has been no other changes to the natural drainage in the area by the respondent. Frank Hamrick, roadway design engineer, studied the drainage system at the claimants' properties, and found it adequately designed for the age of Beech Fork Road. He stated that the land slopes downward from the Booten house to the other properties, with the Ramey land being the lowest point. The drainage problems, in his opinion, are due to water running through the septic tank field and not from drainage from the roadway.

From the evidence adduced at the hearing, the Court cannot find that the problems were caused by the actions of the respondent. It appears that two other factors are involved. The first is the natural drainage of the area. The second is the inadequate septic system on the Booten property. If the surface water were the sole source of the malfunction in the septic system, it would seem likely that the adjacent system

would be similarly affected. The Court, therefore, disallows the claims.

Claims disallowed.

Opinion issued April 22, 1983

JAMES BURCHAM and
PATRICIA J. BURCHAM

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-252)

Claimants appeared in person.

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

RULEY, JUDGE:

Claimants reside on Locust Hill Road in Chester, Hancock County, West Virginia. Their home is a four-room structure which is located on the south side of Locust Hill Road. There is a hillside to the north. On May 20, 1980, at approximately 2:00 a.m., two trees fell across the house. These trees had been situated five or six feet from the road, and were caught in a slide in which a portion of Locust Hill Road gave way. A ditch line along the north side of the road was clogged, and the claimants allege that this condition caused the slide. The claimants incurred $2,006.67 in damages.

Elmer Shepherd, then general foreman in respondent's Hancock County Office, testified that the clogged ditch line caused water to run down the hill onto the Burcham property, and, in his opinion, this water "helped create the slide." The ditch line is required to be pulled, i.e., cleaned and cleared, every two years, and in Mr. Shepherd's inspection of respondent's records, the ditch line was last pulled January 2, 1980. However, this pulling was performed on only a portion of Locust Hill Road, and did not include the area where the slide occurred. Mr. Shepherd reviewed the records back through February 1979, and found no evidence that this portion of the ditch line had been pulled.

The respondent is charged with the legal duty to use reasonable care to maintain a ditch line in such condition that it will carry off surface water and prevent its passage upon adjacent properties. *Stevens v. Dept. of Highways,* 12 Ct.Cl. 180 (1978). The respondent apparently failed to discharge that duty, and, as a result, the claimants' damage occurred.

In making an award, however, the Court must also look to the action or inaction of the claimants. Although the claimants were aware of the clogged condition of the ditch line, they never made any complaint to the respondent. For that reason, the Court finds that the claimants also were negligent, and, under the doctrine of comparative negligence, the Court reduces the claimants' damages by 20%.

Award of $1,605.33.

Opinion issued April 22, 1983

BUTLER CORPORATION

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-440)

James Butler appeared on behalf of claimant.

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

RULEY, JUDGE:

Claimant entered into a contract to build a fence around the respondent's Tyler County Office in Sistersville, West Virginia. The claimant's bid of $5,200.00 was based on a diagram furnished by the respondent which showed only half of the property involved. As a result, the claimant had to use eight more terminal posts than were contemplated for which it claims $752.00.

The failure of the claimant to include the terminal posts in its bid was based on the incomplete information provided by the respondent. When it became apparent that additional terminal posts were necessary, the claimant informed the

respondent of this fact. There was no action on respondent's part, so the claimant bought and installed the posts at its own expense to complete the project. To deny the claim would unjustly enrich the respondent for its own mistake. The Court therefore grants an award in the amount sought.

Award of $752.00.

Opinion issued April 22, 1983

ROBERT HART, d/b/a
BOB'S BAKE SHOP

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-685)

Claimant appeared in person.

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

RULEY, JUDGE:

Claimant was the owner and operator of Bob's Bake Shop, located at 930 Maple Drive, Morgantown, West Virginia. The shop occupied approximately half of a building, owned by William Marsh, which was located at that address. All the equipment inside the bakery was owned by the claimant. The respondent acquired the property by eminent domain in July 1979, as part of a four-lane highway improvement project. The claimant closed his business on June 7, 1979, even though he had received no written notification from the respondent to vacate. Claimant alleged that he had received oral notice that he might possibly have to leave by June 1 and definitely by July 1. He stated the June date came from Kathleen Berry, the respondent's right-of-way agent for District 4. The July date came from Elwood Penn, chief of relocation operations. Claimant seeks an award of $40,000.00 as compensation for propertly allegedly taken by respondent. The claimant has already received a $10,000.00 "in lieu of" payment instead of actual reimbursement for moving costs.

The testimony of respondent's witnesses contradicted much

of the claimant's testimony. Ms. Berry and Mr. Penn both deny telling the claimant to leave by a certain date. Contact sheets maintained by Ms. Berry indicated that she told the claimant to "plan on continuing his business thru June." The 30-day notice to vacate was sent July 30, 1979, advising the claimant to vacate on or before September 1, 1979. Relocation assistance was offered to the claimant by Paul McMahan, a right-of-way agent. His records indicate "about 10" relocation sites which were recommended. The claimant states that only four or five were mentioned and none was acceptable.

The respondent's evidence indicates that it attempted to aid the claimant by suggesting relocation sites and offering to pay for moving expenses. There is no evidence that the respondent acquired any of claimant's property. Claimant's equipment apparently was transferred to William Marsh as payment for rent due him from the claimant. The $10,000.00 in lieu of payment was the maximum amount allowable. The Court can find no basis for an award to the claimant.

Claim disallowed.

Opinion issued April 22, 1983

HOLZER MEDICAL CENTER

vs.

DEPARTMENT OF HEALTH

(CC-83-28)

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 in the Notice of Claim and the respondent's Answer.

Claimant seeks payment of $99.00 for medical services rendered for a patient at Lakin State Hospital. In its Answer,

the respondent admits the validity of the claim and states that sufficient funds were available from which the claim could have been paid.

In view of the foregoing, the Court makes an award to the claimant in the amount requested.

Award of $99.00.

Opinion issued April 22, 1983

MRS. JUANITA McCLARIN

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-246)

Claimant appeared in person.

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

RULEY, JUDGE:

On June 14, 1981, the claimant was driving her 1978 98 Oldsmobile on U.S. Route 60 heading west towards Charleston, West Virginia. She observed gravel in the road ahead of her, and changed lanes, going from the right lane to the left lane where there was less gravel. Claimant struck a pothole just after changing lanes. The left rear wheel was damaged. The wheel cover was replaced at a cost of $95.81. The tire was also damaged and both rear tires were replaced at a cost of $112.00.

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 (1947). For the State to be found liable, it must first have had either actual or constructive notice of the defect in the roadway. Since there was no proof in this case that the State had notice of the defect, the claim must be denied.

Claim disallowed.

Opinion issued April 22, 1983

KENNETH H. PATRICK, JR.

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-315)

Larry Ford, Attorney at Law, for claimant.

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

RULEY, JUDGE:

The claimant is the owner of a tract of land in Booth Creek, Taylor County, West Virginia. There is a house and a tool shed located on the land. The land is bordered by two county roads maintained by the respondent and two streams. The property lies below the level of the roads. Sometime in 1972, a culvert which passes under one of the roads was replaced. The claimant alleges that since that time, his property has been repeatedly flooded, because the new culvert was placed in a different position, causing the water to be diverted onto his land. The respondent denies that the new culvert was misaligned and that respondent in no way contributed to the water damages suffered by the claimant.

The claimant moved onto the property in 1965. He testified that between 1965 and 1972, he had never had any water damage. After the culvert was replaced, he has had water on his land two or three times a year. The water has flooded his tool shed, which is located several feet from the creek, as well as damaging the cement porch behind claimant's home. Claimant seeks $20,000.00 in damages to the land and for loss of personal property.

John Jeffries, a heavy equipment operator employed by respondent, testified that he replaced the culvert in question. According to his testimony, the old culvert was replaced because it was rusted and caving in, making the road unsafe for vehicular traffic.

James M. Beer, II, an area maintenance engineer, made a study of the culvert. He stated that the new culvert had to be

in approximately the same place as the old culvert, because of the existence of two bridge abutments under the road. The abutments limit the area where the culvert can be placed. He further testified that from an engineering standpoint, the culvert is adequate to handle a 10-year storm. The problem is the natural drainage in the area and the fact that the stream above the culvert is unstable. Mr. Beer stated: "A 10-year storm, anything bigger, would really have no way of channeling itself to the culvert. It could go over the road just as easy as it could go through the culvert but you would have the problem no matter where you put the culvert because of the way the stream is."

The respondent has a duty to maintain State roads and the culverts under State roads. In replacing the culvert in question, the respondent was performing the kind of routine maintenance with which it is charged. The Court cannot say, as a matter of law, that the respondent acted in a negligent manner when the culvert was replaced in 1972. The evidence indicates that the new culvert's position was substantially the same as that of the old one. Other factors appear to be the source of the flooding. As we cannot find that the respondent acted negligently, the claim must be denied.

Claim disallowed.

Opinion issued April 22, 1983

GARY L. PRITT and JEANETTE PRITT

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-418)

Claimant, *Gary L. Pritt*, appeared in person.

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

WALLACE, JUDGE:

This claim was filed by Gary L. Pritt against the respondent

for damages sustained to a 1980 Phoenix automobile titled in his name and that of his wife, Jeanette. The Court on its own motion amended the complaint to include Jeanette Pritt as a claimant.

On October 19, 1981, at approximately 7:45 p.m., claimant Gary Pritt was driving the automobile northerly on Interstate 77 near Sissonville, West Virginia, at about 55 miles per hour. The weather was clear. It was dark and the automobile lights were on low beam. There was no traffic immediately in front of him. As he crossed the Hayne's Branch Bridge, the vehicle struck a piece of loose concrete in the road. He proceeded to the Kenna Exit and had the automobile checked at an Exxon Service Station. Damage to the automobile including two wheel covers amounted to $637.23. There was also a towing charge of $24.00 and approximately $14.00 worth of gasoline lost from the punctured gas tank. Claimant's insurance paid all of the loss except $14.00 for gasoline and $100.00 deductible.

Claimant Gary Pritt testified that he had driven that same area of Interstate 77 several days before the accident and that there was no loose concrete at that time. Carroll Monday, respondent's supervisor of Interstate 77 in the Sissonville area, testified that no complaints had been received about anything in the roadway.

The law of West Virginia is well established that the State neither insures nor guarantees the safety of motorists on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be found liable for damages caused by road defects on this type, the claimants must prove that the respondent had actual or constructive notice of the defect and a reasonable amount of time to take suitable corrective action. *Davis v. Dept. of Highways,* 12 Ct.Cl. 31 (1977); *Hoskins v. Dept. of Highways,* 12 Ct.Cl. 60 (1977); *Hicks v. Dept. of Highways,* 13 Ct.Cl. 310 (1980). As there was no such evidence presented, the claim must be denied.

Claim disallowed.

Opinion issued April 22, 1983

ROGER RICHMOND and SANDRA RICHMOND

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-458)

Claimant appeared in person.

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

WALLACE, JUDGE:

Claimant seeks to recover $67.44 for damages sustained by his 1979 Plymouth Volare automobile.

On November 16, 1981, the claimant was a passenger in his automobile being driven by his wife. They were proceeding at 35 to 40 miles per hour westerly on Route 214 towards Yeager, West Virginia. It was early evening and dark. There was no traffic in front of them. At a point about one-eighth of a mile from the intersection of Route 214 and Route 3, an oncoming tractor-trailer approached with its wheels on the claimants' side of the yellow line. The claimant testified that his wife, in order to avoid the truck, drove into a hole in the pavement damaging the vehicle. He further testified that his wife travelled this road often going to work; that he was aware of the existence of the hole but did not alert her; and that he did not attempt to notify the respondent of the hole. The claimant's wife was at work and did not testify at the hearing.

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 the highways. *Adkins v. Sims*, 130 W.Va. 645, 45 S.E.2d 81 (1947); *Parsons v. State Road Comm'n*, 8 Ct.Cl. 35 (1969). For the respondent to be found liable for damages caused by road defects of this type, the claimant must prove that the respondent had actual or constructive notice of the defect. *Davis Auto Parts v. Dept. of Highways*, 12 Ct.Cl. 31 (1977). Since the claimant brought forth no evidence to that

effect and did not meet the burden of proof, this claim is denied.

Claim disallowed.

Opinion issued April 22, 1983

DONALD F. UDELL

vs.

BOARD OF REGENTS

(CC-81-359)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, and *Ann V. Gordon*, Assistant Attorney General, for respondent.

RULEY, JUDGE:

Claimant is a piano tuner technician who seeks $102.00 for work performed under a contract with the West Virginia State College at Institute, West Virginia. This dispute arose out of the differing interpretations of the contract. This contract states that it is for furnishing "all labor, materials and equipment necessary to tune and maintain in good working condition the pianos . . ." and lists various "minor repairs, adjustments and regulations." However, the last page of the contract lists a price of $24.00 per piano for tuning alone. The claimant testified that he understood that any work beyond tuning would not be included in the $24.00 price, particularly when it would not be possible in advance to determine how much work a specific instrument might need. He stated that the items listed on the contract were simply types of work that he believed the respondent wanted him to perform. The respondent claims that all work was included in the contract price.

The Court has reviewed the contract in question and finds that it is, by its terms, ambiguous. Nowhere in the contract does it state that "minor repairs, adjustments and regulations" are part of the $24.00 base price. As the claimant testified, some of the "minor repairs" can be expensive. Inasmuch as the

claimant performed work beyond tuning, it would be inequitable not to compensate him for that work.

Award of $102.00.

Opinion issued April 22, 1983

VECELLIO & GROGAN, INC., for
PERALDO CONSTRUCTION COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-343)

Charles W. Yeager, Attorney at Law, for claimant.

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

RULEY, JUDGE:

This claim for $11,585.20 arises out of a contract on Project RS-617 (21) in Wayne County, West Virginia. The project involved the improvement of Route 52 along the Big Sandy River by extending a box culvert under the highway through which Davis Creek flows to the Big Sandy River. Peraldo Construction Company was the subcontractor of Vecellio & Grogan, Inc.

On December 11, Plinio Peraldo and his two sons visited the construction site and, observing that the river was above the existing box culvert, they assumed that, when the river receded, the flow line of the river would be below the culvert. In fact, the flow line was three to eight feet above the culvert. In order for the construction to proceed, it was necessary to dam the creek and pump the water around the construction site. This claim is for the rental cost of the pump and the cost of operating the pump beyond normal working hours. The respondent contended that the claimant's failure to notify respondent of these additional costs barred any award under Section 105.17 of the Standard Specifications of 1972, and moved to dismiss the claim.

Plinio Peraldo testified that he did not notify respondent that there would be an additional charge for the pumping, al-

though he was aware of the provisions for notice. He stated that Mr. Spence, whose position with the respondent was unclear in the record, knew of the pumping because "he was going by there every evening and that was past work hour (sic) and he seen (sic) that the pump was going . . ."

Section 105.17 reads in part:

> "If, in any case, the contractor deems that additional compensation is due him for work or material not clearly covered in the contract or not ordered by the Engineer as extra work, as defined herein, the contractor shall notify the Engineer in writing of his intention to make claim for such additional compensation before he begins the work on which he bases the claim. If such notification is not given, and the Engineer is not afforded proper facilities by the contractor for keeping strict account of actual cost as required, then the contractor hereby agrees to waive any claim for such additional compensation. . ."

Neither the claimant nor the Court can disregard that provision of the contract. It required the claimant to give the Engineer written notice of its intention to make a claim for additional compensation; failure to do so constituted a waiver. Accordingly, the Court disallows this claim.

Claim disallowed.

Opinion issued April 22, 1983

GARY L. and BRENDA WORKMAN

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-132)

Claimants appeared in person.

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

PER CURIAM:

This claim was originally titled in the name of Gary Workman, but when the testimony disclosed that the damaged vehicle, a 1981 Bronco Ranger, was titled in the joint names

of the claimant and his wife, Brenda Workman, the Court on its own motion joined Brenda Workman as an additional claimant.

On April 4, 1982, between 9:00 and 10:00 p.m., claimants were driving north on West Virginia Route 85, approximately 30 miles south of Madison, West Virginia. Route 85 is a two-lane blacktop road. The Workmans were driving at about 35 to 40 miles per hour when the vehicle struck a pothole. At the time of the accident, it was raining and the pothole was filled with water. One wheel and the cracked windshield had to be replaced at a total cost of $394.43.

The State is neither an insurer nor guarantor of the safety of motorists travelling on its highways. *Adkins v. Sims,* 130 W.Va. 645 (1947). For the respondent to be held liable for damages caused by road defects of this type, the claimant must prove that the respondent had actual or constructive notice of the existence of the defect and a reasonable amount of time to correct the defect. *Davis v. Department of Highways,* 11 Ct.Cl. 150 (1976). Since the claimant did not meet that burden of proof, this claim must be denied.

Claim disallowed.

Opinion issued May 19, 1983

LESTER ROLLINGS HAINES

vs.

DEPARTMENT OF CORRECTIONS

(CC-76-89)

Elden Allamong and *Charles W. Smith,* Attorneys at Law, for claimant.

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

GARDEN, JUDGE:

The claimant was charged with the commission of armed robbery, which allegedly occurred on February 13, 1971. The claimant was convicted as a principal in the first degree in the Circuit Court of Morgan County, West Virginia, on April 12, 1971. The Supreme Court of Appeals of West Virginia, upon

petition of the claimant, set aside the verdict and granted the claimant a new trial, by order dated November 28, 1972. The Prosecuting Attorney of Morgan County thereupon entered a *nolle prosequi* order. The claimant, who was imprisoned on April 15, 1971, was released on April 10, 1973. He seeks $200,000.00 as damages resulting from his incarceration.

The respondent filed a Motion to Dismiss based on the two-year statute of limitations, West Virginia Code §55-2-12. This claim was filed on August 13, 1976, three years and nine months after the verdict was set aside, and three years and four months following the claimant's release from the penitentiary. Under West Virginia Code §14-2-21, this Court cannot take jurisdiction of any matter barred by the statute of limitations. This section reads in part:

> "The court shall not take jurisdiction of any claim, whether accruing before or after the effective date of this article, 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 W. Va., . . ."

The Court, therefore, grants respondent's Motion to Dismiss.

Claim dismissed.

Opinion issued May 19, 1983

MILLARD A. HARMON

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-373)

Charles M. Moredock, Attorney at Law, for claimant.

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

RULEY, JUDGE:

On February 21, 1980, at approximately midnight, the claimant was driving his 1978 Ford Thunderbird on Route 65, Mingo County, West Virginia. He was travelling from his place of employment, Goff Brothers Coal Co., Inc., of Delbarton, West

Virginia, to his home in Pilgrim, Kentucky. In the vicinity of Naugatuck, West Virginia, claimant's car struck a pothole and he lost control of the car, going into a gully, then back across the road and down an embankment. The claimant sustained numerous injuries, which included a broken back, ribs, and ankle, and a lacerated nose. He was placed in a body cast for six weeks, and continues to use a back brace intermittently. The claimant alleges that respondent negligently failed to maintain this section of Route 65, and this failure was the proximate cause of claimant's injuries. He seeks an award of $200,000.00.

Claimant testified that he had travelled on Route 65 twice daily since June 1978. During that period, broken pavement and potholes had existed in the area where the accident occurred. The berm had begun to slip and the condition of the road had continued to deteriorate. He stated that it was possible for two vehicles to pass one another only at a slow rate of speed. He was travelling 20-25 mph at the time of the accident. The road was repaired once that he could remember, but after several weeks, the potholes began to reappear and the deterioration progressed.

James Webb, assistant supervisor for Mingo County in February 1980, testified that all of Route 65 in Mingo County was repaired during the summer of 1979. Mr. Webb said that he had been aware of the road's condition in 1979 and had watched the slip after the repair. He stated that Route 65 is heavily travelled, but he did not know whether there had been complaints about potholes prior to February 1980. Photographs taken after the accident show a sizable patch in the road covering all of one lane and part of the other.

In sum, it appears from the evidence that the accident was caused both by the respondent's negligence in failing to exercise reasonable care in the maintenance of the highway and by the contributory negligence of the claimant who, though being aware of the hazardous condition of the pavement at the place where the accident happened, nonetheless drove onto it at a speed great enough that he was unable to maintain control of his car. We are disposed to allocate the negligence

of the parties, respectively, at 60% to the respondent and 40% to the claimant. *Barkley vs. Dept. of Highways*, 13 Ct.Cl. 83 (1979).

The parties stipulated the following damages: lost wages of $12,597.12 and medical expenses of $2,894.80. Claimant testified that his automobile was totalled, but he received $4,800.00 from his insurance company. He had a $500.00 deductible on the car. A medical evaluation by Dr. H. M. Hills, Jr., resulted in the determination that the claimant has a 20% permanent partial disability as a result of his injuries. The Court determines that $24,676.32 is a fair and just award, based on claimant's economic losses and his pain and suffering. Reducing this amount by 40%, we award the claimant $14,805.79.

Award of $14,805.79.

Opinion issued May 19, 1983

U. G. HARRISON AND EDNA HARRISON

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-173)

Arden J. Curry, Attorney at Law, for claimants.

Douglas Hamilton and *Nancy J. Aliff,* Attorneys at Law, for respondent.

RULEY, JUDGE:

Claimants are the owners of a tract of land on Newhouse Drive in Kanawha County, West Virginia. This property is adjacent to and below Interstate 77. Following the construction of I-77, a slip occurred on the downhill side of the highway. A land fill buttress was constructed on property purchased from the claimants, in order to stabilize the slip. Claimants allege that this construction resulted in a change in the drainage of surface water from I-77, which has caused their property to be flooded on two occasions. Prior to the first flood in August 1978, water drained through a culvert under I-77 which emptied onto claimants' land. Following that flood, respondent

lands of Grantor, and hindering the flow of water and water courses; it being agreed that the compensation herein provided for as purchase price is full compensation both for the land herein described and for all rights and easements hereby released and all damages herein mentioned which Grantor has or may hereafter suffer." (Emphasis supplied.)

The respondent argued that the release was a covenant that ran with the land; that the claimants were subsequent purchasers who took the land with notice of the prior deed; and, that the claimants were, therefore, bound by the quoted language. When the language of a document is clear on its face, the Court will construe the document in accordance with specific language therein. The word "covenant" is not used in the deed, only the word "release." The release applies only to the Grantor and does not purport to bind his heirs, successors, and assigns. Therefore, the release does not bar the claimants, as subsequent purchasers of the land, from pursuing this claim which arose subsequent to the release.

Claimant, U. G. Harrison, testified that at the time the slip correction was being performed, he told an unidentified engineer that inadequate provision was being made for drainage. Photographs introduced by respondent show the lack of a discrenable drainage ditch alongside the buttress. Mr. Harrison testified about his concerns over the placement of the culvert, or pipe under I-77.

"I stood on top of the hill when they put the pipe through and when they started making the fill, and I tried my best to talk them into making a concrete trough there to shed the water down through the ditch and in the creek.

Now, I said, 'Fellows, that pipe through there and the way you've got me fixed here—I'll never be able to take care of it.' I said, 'You're going to flood me out of here.' "

The respondent, through its project engineer for design, Frank Hamrick, contended that neither the culvert nor the

constructed a catch basin at the end of the culvert, which attached to a pipe. This pipe extended towards the buttress across claimants' property. The purpose of the pipe was to direct water towards a drainage ditch, located approximately 30-40 feet from the end of the pipe. The ditch eventually emptied into a creek which runs alongside claimants' land. The second flood occurred after that construction. Claimants allege damages of $32,400.84, for damages to their home, personal property, and for mental anguish as a result of the two floods. Respondent, in its Answer, denies any act of negligence which caused damage to the claimants. Respondent further states that it is not liable for any alleged damages, due to a release contained in a deed between the respondent and the claimants' predecessors in title to this land.

The claimants purchased the property in question in 1970. This land was the residue of a tract of land owned by the heirs of A. C. Surface, which had been condemned by the respondent during the construction of I-77. The deed, between the heirs, as Grantor, and the respondent, as Grantee, contained the following language:

> "For the consideration hereinbefore set forth the *Grantor hereby releases Grantee, its successors and assigns forever,* from any and all claims for damages or compensation of any nature whatsoever arising directly or indirectly from the purchase of the herein described land, or from the construction and maintenance of a highway, or the improvement and maintenance of said land and adjoining lands of Grantee for highway purposes, or from work performed or material placed upon or removed from said land or any adjoining land owned by Grantee. Without limiting the generality of the foregoing, Grantor further expressly releases all claims of Grantor for damages to any residue of land retained, or adjoining or nearby land owned by Grantor; and all damages by reason of increased lateral burden, loss of lateral support, diversion of water courses and streams, concentration and discharge of water on

extension pipe could have caused the flooding. In his opinion, the flooding resulted from an overflow of the creek at a point where a 48-inch culvert passes under a driveway to claimants' property. This culvert was insufficient to handle the creek during a heavy rain, and the overflow would go onto claimants' land. Claimants testified that they had never seen the creek overflow its banks.

The evidence presented at the hearing was contradictory, but it is the opinion of the Court that the claimants have shown, by a preponderance of the evidence, that the respondent's actions caused the damages to their property. The construction of I-77 and the buttress, as well as the placement of the pipe, have resulted in an increase in the amount of surface water discharged onto claimants' property. One who collects and discharges surface water by means of artificial channels, thereby diverting it from its natural course and increasing its volume, is liable for damages caused by it. *Grafton vs. Dept. of Highways,* 13 Ct.Cl. 147 (1980).

The only testimony presented concerning the value of the lost personal property was given by Mrs. Harrison. The property included various pieces of furniture, as well as a 5-year-old freezer and the food it contained. These damages amounted to $3,085.00. The Court has taken age and depreciation into consideration of these damages, and has determined that $500.00 is a just, fair and adequate measure of damages. Three estimates of damage to the real property were submitted. The Court has determined that the amount of $7,325.00 contained in the appraisal report, prepared by Gerald Terry on behalf of the respondent, is a reasonable and fair determination of damages. There is, however, one item of damage not included in this report. This is the replacement of a floor in a small building on the property used as an apartment. As the only estimate of replacement cost of the floor was $975.00, the Court includes that amount in addition to the other damages. The Court, accordingly, makes an award to the claimants in the amount of $8,800.00.

Award of $8,800.00.

Opinion issued May 19, 1983

LOIS V. HAYNES AND
E. ROBERT HAYNES

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-415)

J. P. McMullen, Jr., and *Charles D. Bell*, Attorneys at Law, for claimants.

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

RULEY, JUDGE:

On December 21, 1978, at about 10:30 p.m., Lois V. Haynes was a passenger in an automobile being driven by Yonhyong Maidens. They were traveling west on W.Va. Route 27 towards Wellsburg, Brooke County, West Virginia. As they approached an intersection called Brady's Ridge intersection, at a speed of approximately 25-30 mph, they encountered ice on the road. Mrs. Maidens lost control of the car, which struck a guardrail and then went about 200 feet down a steep hillside. Mrs. Haynes suffered serious permanent injuries as a result of the accident. Claimants allege that the respondent knew that ice would accumulate at that place on Route 27 and that the respondent's failure to provide proper drainage or warn motorists of this condition constituted negligence. Lois Haynes claims damages in the amount of $200,000.00 for her injuries. Her husband, Robert Haynes, claims $50,000.00 for medical expenses and loss of the society, pleasure, services and consortium of his wife.

Mrs. Haynes sustained injuries to her spine, legs, arms and nervous system. She was initially hospitalized from December 22, 1978 until March 3, 1979, and twice briefly in October and November, 1979. She continues to have difficulty walking and has significantly impaired use of her arms. Dr. Reza P. Asli, one of her treating physicians, reported, "I, therefore, believe that Mrs. Haynes is going to remain with significant degree of permanent neurological deficit which would incapacitate her for all kind of gainful employment or any significant physical activities." Her medical expenses were stipulated to be $17,859.29.

Earl Miller, a member of the Franklin Volunteer Fire Department, testified that he was following Mrs. Maidens' vehicle on the night of the accident. He observed the automobile go out of control and over the embankment, so he returned to the Fire Department for help. He estimated that there was several hundred feet of ice on the road at and near the accident site; Route 27 had been clear to the east. Daniel Gilchrist, a Brooke County commissioner in December 1978, testified that he had personal knowledge of complaints made to respondent concerning ice at the place of the accident before it occurred. Respondent's witness, John Isinghood, a road patrolman during the winter, testified that respondent was aware that the accident site was hazardous, and gave it special attention. In view of the evidence, the Court is constrained to conclude that the respondent was negligent in failing to take reasonable measures to prevent the ice or to warn approaching motorists of that hazard.

In view of the nature and extent of the injuries incurred, we feel that an award of $65,000.00 to Mrs. Haynes is just. We also make an award of $5,000.00 to Mr. Haynes. The record discloses, however, that the claimants have received $20,000.00 from Mrs. Maidens' insurance carrier. The respondent is entitled to a set-off in that amount, so we accordingly reduce the award by $20,000.00.

Award of $50,000.00.

Opinion issued May 19, 1983

ROBERT MARCUM AND
LORETTA MARCUM

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-248)

Hazel A. Straub, Attorney at Law, for claimants.

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

RULEY, JUDGE:

The claimants were the owners of a house situated on Secon-

dary Route 5/5, Dempsey Branch, Logan County, West Virginia. Route 5/5 is a dirt road. During a flood, approximately 500 feet of the road was washed away. The date of the flood was not clearly established, although Mrs. Marcum thought it might have occurred in the summer of 1977. In the spring of 1978, the respondent performed repair work on Route 5/5 which involved elevating the level of the road. As a result, the road, which had been level with or below the level of the claimants' property, was at least four inches above it. The claimants allege that the respondent was negligent in its repair work, and has caused water to pool on their property, resulting in damages of $25,000.00.

The evidence established that prior to the repair work, the claimants had not encountered any water problems on their property. Since the repair work, water has not drained from their land, but pooled on it for up to three or four days after a rainstorm. The floors of the house have rotted, and furniture and clothing are damaged from mildew.

It is not clear whether the water, which has collected on the land, is due to run-off from the road's surface or from the hillside behind the property. In either case, it is clear that the elevation of Route 5/5 has altered the prior drainage at claimants' location, and that the respondent has negligently failed to provide adequate drainage. The Court concludes that respondent's action is the proximate cause of claimants' damages, and makes an award in their favor. See *White v. Dept. of Highways,* 12 Ct.Cl. 271 (1979); *Ferguson v. Dept. of Highways,* 13 Ct.Cl. 103 (1980). The parties have stipulated that damage to personal property amounted to $3,299.00. A real estate appraisal estimated the diminution of value of the real property at $7,500.00. The Court, therefore, makes an award of $10,799.00.

Award of $10,799.00.

Opinion issued May 19, 1983

ANDREW S. MCGALLA

vs.

BOARD OF REGENTS

(CC-81-90)

Claimant appeared in person.

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

RULEY, JUDGE:

Claimant's wife was admitted to West Virginia University Hospital in Morgantown, on January 1, 1981. She died there on January 2, 1981. Upon her admission, she had in her possession a medical alert necklace, a diamond engagement ring, and a wedding ring. These items were taken and inventoried by hospital personnel as part of their standard procedure. After the body was taken to a morgue, claimant discovered that the rings and necklace were missing. He valued the necklace at $10.00 and the rings, purchased as a set in 1960 for $300.00, at $600.00.

Claimant reported the loss to Bernard Westfall, associate administrator of the hospital, and a search was conducted to no avail. Claimant said that Mr. Westfall showed him a copy of the inventory report which showed the items checked into the hospital, but not checked out. Respondent presented no evidence to the contrary. In a bailment, where one party is entrusted with the care of another's property, and:

> ". . .where a bailor alleges and proves simply the delivery of the property to the bailee and the latter's failure to return it on demand, a prima facie case is made out against the bailee; . . . But if the bailee proves that the property was stolen or destroyed by fire or accounts for his failure to return or for the injury in any other way which does not on its face involve negligence or call for further explanation, the bailor must prove negligence." 2B M.J., *Bailments*, §18.

The claimant has proved a prima facie case by showing de-

livery and failure to return. Since the respondent has presented no explanation for the loss of the items, the Court makes an award to the claimant in the amount of $610.00.

Award of $610.00.

Opinion issued May 19, 1983

RONALD R. McGRAW

vs.

DEPARTMENT OF CORRECTIONS

(CC-78-50)

Claimant appeared in person.

Joseph Cometti, Assistant Attorney General, for respondent.

GARDEN, JUDGE:

The claimant was an inmate at the Huttonsville Correctional Center in August 1974. He was charged with escape, tried in the prison police court, and sentenced to one extra year plus 14 days in isolation. The claimant was due for a parole hearing in September 1974, but because of the escape, he did not receive the hearing. In an order entered July 9, 1975, in the U.S. District Court for the Northern District of West Virginia, the respondent was required to expunge any reference to the escape from the claimant's record, or hold a new hearing on the matter which complied with constitutional requirements. The matter was expunged. The claimant seeks $45,000.00 in damages for the extra time he served and for the failure to receive a parole board hearing in September 1974.

In its Answer, the respondent denies that it acted in bad faith or with malice or willful disregard for the claimant's rights to due process, and therefore, the claimant is not entitled to damages. The respondent further alleges that any claim for damages has been resolved by a court of record, and seeks dismissal under the principle of res judicata and collateral estoppel.

The order entered by the U.S. District Court was in response to a civil action filed by the claimant entitled "Complaint

for Declaratory Judgment, Injunctive Relief and Damages." The District Court action was filed against the then Director of the West Virginia Department of Corrections, Warden and Associate Warden of Huttonsville Correctional Center. This claim was also filed against those named individuals, but was amended at the hearing. It is apparent that those individuals were sued in District Court in their capacities as officials of the respondent. It appears from the Order entered by the U.S. District Court in the record in this claim that the damages sought herein were fully and sufficiently considered previously. The purpose of the doctrine of res judicata is to end controversy. Where it appears that parties to the controversy are the same, the doctrine makes the prior judgment an absolute bar to all questions which were or could have been litigated in the prior decision. The Court, therefore, dismisses the claim.

Claim dismissed.

Opinion issued May 19, 1983

PRESTON CONTRACTOR'S INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-158)

Phillip Gaujot, Attorney at Law, for claimant.

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

RULEY, JUDGE:

The only issue before the Court, at this time, is respondent's defense based upon release. The claim grows out of a construction contract which was performed by the claimant in 1978 and 1979. At the conclusion of performance, the parties were in disagreement as to the quantities of aggregate for which respondent was liable, but claimant apparently agreed that respondent was entitled to a credit of $9,716.63 inasmuch as the final estimate, which it submitted on November 5, 1979, provided:

"The within amount of Minus Nine Thousand Seven Hundred Sixteen Dollars and Sixty Three Cents (—$9,716.63) set out and shown in this final estimate, being Estimate No. 6 and Final, is hereby accepted and approved by Preston Contractors, Incorporated as full and complete payment and settlement for all sums, claims and monies due and owing or to become due and owing, to it, as the contractor for Project U339-53-0.00, Preston County, West Virginia and the said Preston Contractors, Incorporated does hereby agree that all previous payments shown deducted therein and all amounts retained or deducted under the provisions of the contract are proper and correct; subject to the exception and the reservation of the right of the Preston Contractors, Incorporated to file its petition in the West Virginia Court of Claims against the State of West Virginia and the West Virginia Department of Highways within 120 days, from the date of *acceptance and approval* of this final estimate, . . ." (Emphasis supplied.)

This claim was filed on March 20, 1980, and thereupon, the respondent filed its Special Plea of Release asserting that, since the claim was not filed within the 120-day limitation contained in the exception, the claim was barred. It appears from the record that, although respondent received the final estimate on November 6, 1979, it did not accept or approve it on that date but, rather, promptly on November 7, 1979, returned it to the claimant with instruction. It was not submitted again by the claimant until December 18, 1979, after which it was accepted. The Court is unable to perceive, under those circumstances, any legal basis for making November 5, 1979, the date from which the 120-day limitation should be computed and, accordingly, the Special Plea of Release is overruled.

Opinion issued May 19, 1983

VECELLIO & GROGAN, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-425 and CC-82-92)

Lee M. Kenna, Attorney at Law, for claimant.

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

RULEY, JUDGE:

These claims were consolidated for hearing because they arise out of the same facts. The claimant, through its subcontractor, Charleston Construction Co., performed paving work on Project I-79-1(36)2 between Mink Shoals Run and Cooper's Creek Interchange on Interstate 79. The claim arises out of the reduction in payments for concrete pavement. The contract required the pavement to be nine inches thick, but allowed for a 7/10-inch variation. Therefore, pavement 8.3 inches thick was acceptable. The respondent, through statistical analysis, concluded that a certain amount of the pavement was less than 8.3 inches thick and reduced the contract payments by $12,930.32 and $1,911.88, respectively, the amounts of the two claims.

Subarticle 501.3.19 of the *Standard Specifications Roads and Bridges* states:

> "It is the intent of these Specifications that the pavement shall be constructed in substantial conformity with the specified thickness. Paving operations shall be directed toward obtaining an average and uniform thickness equal to or greater than the specified thickness.
>
> For the purpose of establishing an adjusted unit price for pavement areas deficient in thickness, the thickness characteristics will be determined in accordance with the criteria specified hereinafter."

Subarticle 501.3.19.1 states:

> "The pavement thickness characteristics shall be de-

termined from an analysis of measurements made on cores, said cores being taken with a frequency of one core from each sampling unit as hereinafter defined."

Seventy-four cores were taken from the reinforced sections of pavement. The average thickness of the cores was 9.362 inches. Eight cores were less than 9 inches thick, but all were greater than 8.3 inches. The other 66 cores were nine inches or greater.

Twenty-seven cores were taken for the non-reinforced sections of pavement. The average thickness of those cores was 9.489 inches. Five cores were less than 9 inches, but all were greater than 8.3 inches. The remainder were all 9 inches or greater. The thicker cores resulted from the contractor's filling low areas of sub-grade with concrete. This procedure is allowed under Subarticle 501.3.4.3.

The pertinent regulations concerning payment are as follows:

"501.5.2: When the pavement is deficient in thickness, payment will be made at an adjusted price for the entire item based on the criteria specified hereinafter.

501.5.2.1: No payment will be made for pavement areas deficient in thickness by more than 7/10 inch.

501.5.2.2: If the mean value of the pavement thickness is equal to or greater than the specified thickness, then the contract unit price will be paid for the fraction of pavement having a thickness equal to or greater than the specified thickness minus 7/10 inch."

These regulations provide for a reduction in price only when the pavement thickness is below a specified amount, not above. The analysis performed by the respondent was based on the assumption that there would be as many thin cores as thick, and that, therefore, some areas would be less than 8.3 inches thick. The evidence presented did not bear out this assumption; in no instance was there a core sample of

less than 8.3 inches. The Court, therefore, makes an award in the amounts requested for each claim.

Award of $12,930.32 in Claim No. CC-81-425.

Award of $1,911.88 in Claim No. CC-82-92.

Opinion issued May 25, 1983

APPALACHIAN POWER COMPANY

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-83-111)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $29.36 for an unpaid bill for electrical services furnished to respondent's Horsepen Mountain Fire Tower in Hampden, West Virginia. Respondent admits the validity and amount of the claim. The Court, therefore, makes an award to the claimant in the amount requested.

Award of $29.36.

Opinion issued May 25, 1983

APPALACHIAN POWER COMPANY

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-83-118)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $106.80 for an unpaid

bill for electrical services furnished to respondent's Williamson, West Virginia, office. Respondent admits the validity and amount of the claim. The Court, therefore, makes an award to the claimant in the amount requested.

Award of $106.80.

Opinion issued May 25, 1983

BAILEY, INCORPORATED

vs.

BOARD OF REGENTS

(CC-83-35)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of the sum of $131.01 for unpaid freight charges. As the respondent admits the validity of the claim, and as there were funds remaining in its appropriation for the fiscal year in question from which the claim could have been paid, the Court makes an award to the claimant in the amount requested.

Award of $131.01.

Opinion issued May 25, 1983

MILLER'S IMPLEMENT, INC.

vs.

DEPARTMENT OF HEALTH

(CC-83-43)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision based upon the pleadings, claimant seeks payment of the sum of $92.65 for services rendered to Denmar State Hospital. In its Answer, the respondent admits the validity of the claim and that there were sufficient funds remaining in its appropriation for the

pertinent fiscal year from which the claim could have been paid. The Court, therefore, makes an award in the amount requested.

Award of $92.65.

Opinion issued May 25, 1983

ELLERY H. MORGAN

vs.

PUBLIC EMPLOYEES INSURANCE BOARD AND ALCOHOL BEVERAGE CONTROL COMMISSIONER

(CC-83-13)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings, claimant seeks payment of $2,189.24 for overpayment of his insurance premiums. Respondent's Answer, although admitting the validity of the claim, also states that there were insufficient funds remaining in its appropriation for the pertinent fiscal year 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, the Court is of the opinion that an award cannot be made, based on our decision in *Airkem Sales & Service, et al. vs. Dept. of Mental Health,* 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued May 25, 1983

POTOMAC VALLEY HOSPITAL

vs.

DEPARTMENT OF CORRECTIONS

(CC-83-37)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings,

claimant seeks $56.10 for medical services rendered to an inmate of the Huttonsville Correctional Center.

Respondent's Answer, although admitting the validity of the claim, also states that there were not sufficient funds remaining in its appropriation for the fiscal year in question from which the obligation could have been paid.

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

Claim disallowed.

Opinion issued May 25, 1983

S. S. LOGAN PACKING COMPANY

vs.

BOARD OF REGENTS

(CC-83-26)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision based on the pleadings, the claimant seeks payment of the sum of $819.86 for food supplies sold and delivered to West Virginia State College, an institution under the direction of the respondent. As the respondent admits the amount and validity of the claim, the Court makes an award to the claimant in the amount requested.

Award of $819.86.

Opinion issued May 25, 1983

EDWIN O. WALKER, M. D.

vs.

DEPARTMENT OF HEALTH

(CC-83-40)

No appearance by claimant.

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

PER CURIAM:

In this claim, submitted for decision upon the pleadings,

claimant seeks payment of the sum of $30.00 as reimbursement for the replacement cost of a medical school diploma. The diploma had been sent to the West Virginia State Board of Medicine in order for claimant to be licensed to practice medicine and was returned to him in a damaged condition. Respondent admits the validity and amount of the claim. The Court, therefore, makes an award in the amount requested.

Award of $30.00.

Opinion issued June 1, 1983

SHELLY & SANDS, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-165)

Sarah Sullivan, Attorney at Law, and *W. Warren Upton,* Attorney at Law, for the claimant.

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

RULEY, JUDGE:

Claimant seeks to recover liquidated damages assessed against it for delay in completion of a contract for construction of a segment of the Appalachian Corridor E in Monongalia County, West Virginia. The project involved excavation, embankment, concrete paving, asphalt paving, grading, draining, etc., all of which are a part of roadway construction projects. Claimant required a large supply of limestone aggregate on the project which it contracted to buy from Greer Limestone, the principal source of aggregate in northern West Virginia.

The project began in 1972 with completion scheduled in October 1974. However, claimant contends that inability to obtain the limestone aggregate necessary for the project and wet weather caused actual completion of the project to be delayed until September 19, 1975. The respondent initially assessed liquidated damages for 270 days against the claimant but later reduced that number to 131 days.

The project entailed earth work using heavy equipment for excavation and embankment. Inclement weather during the spring and fall of 1973 affected the excavation and embankment operations. There was good weather during the construction season in 1974, but at that time claimant needed limestone aggregate delivered to the project.

The construction of two secondary roads required limestone aggregate. Claimant experienced a shortage of aggregate delivered to the project site during the fall of 1974. The project was shut down on November 8, 1974, primarily due to the aggregate shortage. During the first week of May 1975 the claimant was back on the project. Wet weather prevented actual work on the subgrade until late May 1975. At that time, the deliveries of aggregate were sufficient for claimant to complete the project with actual completion on or about September 19, 1975.

The wet weather experienced during 1973, the first year of the project, was certainly a contributing factor in the delay in completion of the project. However, the problem of obtaining limestone aggregate contributed to the delay in the performance of the contract. Both the governor and the former state highway engineer testified that the State desired Interstate 79 be completed as soon as possible. The Governor met with the president of Greer Limestone to indicate his desire to have I-79 completed in 1974. In fact, the governor, in discussing the impact of directing aggregate to the I-79 projects, testified as follows:

> "A. As a matter of fact, to reach a hypothetical question, and I realize I'm not in the position to volunteer here, but had the question arisen that this would have impacted other contractors and that a question would have been arrived at as to whether or not they should have had additional time to complete their projects, I would have directed that they be given additional time."

For the respondent to assess liquidated damages when it was aware of the shortages of aggregate available to all contractors seems unreasonable. This Court has previously enunciated the rule that liquidated damages may not be assessed

by a party who has contributed to cause the delay for which the damages are sought. *Whitmyer Brothers, Inc. v. Dept. of Highways,* 12 Ct.Cl. 9 (1977). It is clear from the record that the governor's conduct at least contributed to cause the shortage of aggregate which, in turn, contributed to cause the claimant's delay in completion of its contract. Furthermore, no substantial damages resulted to the respondent which would justify liquidated damages, since the highway could not be opened until completion of an adjacent project. *J.F. Allen Company vs. Dept. of Highways,* 13 Ct.Cl. 364 (1981). The Court, therefore, grants claimant an award of $39,300.00.

The Court has determined that the date from which to calculate an award of interest is March 6, 1978, the date of the signing of the final estimate. Interest is calculated at 6% per annum from the 151st day after March 6, 1978, or August 4, 1978 to June 1, 1983, the issuance date of the opinion, in accordance with Section 1, Article 3, Chapter 14 of the Code of West Virginia. The interest amounts to $11,365.56, for a total award of $50,665.56.

Award of $50,665.56.

Opinion issued June 13, 1983

FOSTER & CREIGHTON COMPANY
and VECELLIO & GROGAN, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-153)

Lee M. Kenna, Attorney at Law, for claimant.

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

PER CURIAM:

This claim was submitted upon a written order and stipulation to the effect that the factual situation and applicable law is the same as in the claims of *Vecellio & Grogan, Inc. vs. Department of Highways,* CC-81-425 and CC-82-92, and should be considered with those claims. Based on the opinion of *Vecellio*

& Grogan, Inc. vs. Department of Highways, issued on May 19, 1983, the Court makes an award to the claimant in the amount of $2,499.74.

Award of $2,499.74.

Opinion issued June 24, 1983

JESSE J. CRANK

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-114)

Claimant appeared in person.

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

PER CURIAM:

Claimant seeks $308.76 as the replacement cost of a tire and rim for his 1982 Ford Mustang which were damaged by a piece of a metal reflector which had broken out of I-64-77 near the 35th Street Bridge Exit in Charleston, Kanawha County, West Virginia. Claimant testified that the piece of metal became imbedded in the tire and he did not see the metal prior to striking it. The incident occurred on October 31, 1982, between 3:00 and 4:00 a.m.

Ken Kobetsky, director of the traffic engineering division, testified that his division had never received any complaints about the reflectors. There are approximately 90,000 of these reflectors in roads in the State, and about 1% are replaced each year. Mr. Kobetsky did not know of any prior damage being caused by a reflector.

The State is neither an insurer nor a guarantor of the safety of travellers 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. Since there was no proof in this case that the State had notice of the defect, the claim must be denied.

Claim disallowed.

Opinion issued June 24, 1983

PAUL E. MILLER and
MARGUERITE MILLER

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-396)

Phillip D. Gaujot, Attorney at Law, for claimants.

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

LYONS, JUDGE:

Claimants Paul E. Miller and Marguerite Miller filed their claim against the respondent for the loss of their house situate in Bancroft, West Virginia, below W.Va. Route 35/9, just off Route 62. The claimants had lived on their property at Bancroft since 1950, and in 1980, as a result of slides or a slip, their home was destroyed. An appraisal, introduced as a joint exhibit by the parties, assessed the damages from the loss of the home as $39,000.00. The claimants contend that the respondent has failed to properly maintain a drainage ditch above claimants' property. Respondent's failure to maintain the ditch properly caused water to be discharged over claimants' property causing the earth slippage over the hillside above claimants' property.

The respondent contends that the slide was caused by a natural drainage condition off the hillside itself and that the hillside is a slide prone area. There have been a number of slides on the same hillside area, but they are not before us for decision. The slippage of earth involved here is approximately 2,000 feet wide and 300 feet long. A number of experts testified, including Bhajan S. Saluja, who testified that the cause of the slippage was due to an improper drainage from W.Va. Route 35/9. This condition of excessive drainage was communicated to the respondent in 1976. Respondent admitted that the road has caused maintenance problems that it was almost impossible to provide drainage, and that funds were not available to correct the condition.

A preponderance of the evidence indicated that claimants' home was destroyed as a result of the improper maintenance of Route 35/9, although the respondent had sufficient notice to correct the same. The respondent is under a legal duty to use reasonable care to maintain the ditch line in such condition that it would carry off the surface water and not direct it onto claimants' property. See *Wotring v. Dept. of Highways,* 9 Ct.Cl. 138 (1972); *Stevens v. Dept of Highways,* 12 Ct.Cl. 180 (1978).

The Court is of the opinion that claimants have shown, by a preponderance of the evidence, that the damage resulted from the improper maintenance of the ditch line, and makes an award to the claimants in the amount of $39,000.00.

Award of $39,000.00.

Opinion issued June 24, 1983

LAIRD MINOR and
NANCY G. MINOR

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-327)

Claimant appeared in person.

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

PER CURIAM:

On November 7, 1982, at 6:30 p.m., claimants were driving in their 1981 DeLorean automobile on Route 119 north of Logan, Logan County, West Virginia. Claimants encountered a pothole on the right edge of the road, aproximately eight inches from the berm. The right front rim was damaged and replaced at a cost of $397.97. Mr. Minor, the driver of the vehicle, testified that he did not observe the pothole prior to striking it. He had no knowledge of how long the pothole had been in the road.

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 have had either actual or constructive notice of the defect in the roadway. Since there was no proof in this case that the State had notice of the defect, the claim must be denied.

Claim disallowed.

Opinion issued June 24, 1983

ROBERT B. MORAN

vs.

DEPARTMENT OF MOTOR VEHICLES

(CC-83-116)

Claimant appeared in person.

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

PER CURIAM:

Claimant seeks to recover $6.00 as the difference between the fees for registration of two motor vehicles. Claimant paid $36.00 for a Class A Motor Registration plate for a vehicle weighing 4,400 pounds. He then transferred the plate to a vehicle of lesser weight, for which a $30.00 fee was required. Claimant contends that since he would have been required to pay an additional fee for transferring the plate from a lighter to a heavier vehicle, he should be allowed the refund.

West Virginia Code §17A-4-1 provides for the transfer, surrender or retention of plates upon expiration of registration. While this section does provide for payment of a greater fee upon transfer, no provision is made for a refund. The Court finds that there is no basis for a refund, and disallows the claim. See *Pawnee Trucking Company, Inc. vs. Dept. of Motor Vehicles*, 13 Ct.Cl. 416 (1981).

Claim disallowed.

Opinion issued June 24, 1983

DAVID E. PAUL and
DOLORES R. PAUL

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-310)

Claimant appeared in person.

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

PER CURIAM:

This claim was originally filed in the name of David E. Paul, but when the testimony disclosed that the damaged automobile,

a 1976 Buick Century Custom, was titled in the joint names of the claimant and his wife, Dolores R. Paul, the Court on its own motion joined Dolores R. Paul as an additional claimant.

On August 18, 1982, the transmission pan of the claimants' vehicle was damaged in the amount of $128.68, when it was caught on a raised corner of a steel plate on Jefferson Road, Charleston, Kanawha County, West Virginia, which is part of the Corridor G Construction Project. The plate was on the road to cover a drainage ditch. David Lee Maner, project engineer for the Corridor G Construction Project, testified that the steel plate had been placed on Jefferson Road by Holloway Construction Company, an independent contractor, performing the Corridor G construction.

The Court is of the opinion that the record established that an independent contractor was engaged in the construction work, and the respondent cannot be held liable for the negligence, if any, of such independent contractor. See *Harper vs. Dept. of Highways,* 13 Ct.Cl. 274 (1980); *Safeco Insurance Company vs. Dept. of Highways,* 9 Ct.Cl. 28 (1971). Accordingly, the Court disallows the claim.

Claim disallowed.

Opinion issued June 24, 1983

ALEX TOTH

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-113)

Andrew Toth appeared for claimant.

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

PER CURIAM:

This claim was originally filed in the name of Andrew Toth, but when the testimony disclosed that the damaged automobile, a 1974 Monte Carlo, was titled in the name of his father, Alex Toth, the Court on its own motion amended the style of the claim to reflect Alex Toth as the claimant.

Andrew Toth was driving his father's automobile on Febru-

ary 14, 1983, on Route 16, south of Squire, McDowell County, West Virginia. It was 8:30 p.m., and he was travelling at 35 - 40 mph when he struck a crack or a slip in the road. The vehicle's transmission and alignment were damaged in the amount of $491.95. Mr. Toth stated he had not travelled the road for several months prior to February 14, and did not notice any signs warning of the condition.

Testifying for respondent was Thomas O. Henderson, Jr., McDowell County Maintenance Superintendent. He stated that he had been informed of the road's condition on February 9, 1983. On February 13, 1983, he placed "Rough Road" signs in both the north and southbound lanes of Route 16, approximately 500 feet from the crack or slip.

The evidence presented established that respondent had placed warning signs in the location of the damaged area of the road. Mr. Toth, by his own testimony, did not observe these signs. The Court concludes, therefore, that the negligence of the driver was equal to or greater than any negligence on the part of the respondent. The Court is of the opinion and does deny the claim.

Claim disallowed.

Opinion issued June 24, 1983

CAROLE E. UPDYKE and
LIONEL JOE UPDYKE

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-122)

Claimant appeared in person.

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

PER CURIAM:

This claim was originally filed in the name of Carole E. Updyke, but when the testimony disclosed that the damaged automobile, a 1978 Oldsmobile Custom Cruiser, was titled in the joint names of the claimant and her husband, Lionel Joe

Updyke, the Court on its own motion joined Lionel Joe Updyke as an additional claimant.

Mrs. Updyke testified that she was travelling on Route 61, also known as MacCorkle Avenue, Charleston, Kanawha County, West Virginia, on January 7, 1983. At approximately 2:00 p.m., she struck a piece of concrete or tar which was located on the right-hand side of her lane. The right rear tire was punctured, and was replaced at a cost of $86.97. She said that she thought the concrete or tar had broken off a seam in the pavement, but had no knowledge of how long it had been in the road.

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. Since there was no proof in this case that the State had notice of the defect, the claim must be denied.

Claim disallowed.

Opinion issued June 24, 1983

A. B. WILLIAMS

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-466)

Robert F. Gallagher, Attorney at Law, for claimant.

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

GARDEN, JUDGE:

The claimant purchased property on the north side of State Route 7 near Terra Alta, Preston County, West Virginia, in 1941. This property is on a hillside. During the late 1940's, substantial improvements were made to the land. The hillside was terraced and stone retaining walls were added for support. Two houses were built, one of which the claimant has used as her residence. The other house has been used as rental property. A garage was constructed for each house. An automobile

body shop was built on the eastern corner of the property below the houses. Claimant also purchased property on the south side of Route 7. This tract was directly opposite the tract with the houses, garages and body shop. On the tract of land to the south of Route 7, claimant built a store. She no longer owns this property. There are two catch basins on the north side property. An upper catch basin is located near the northeast corner of the claimant's home. This catch basin connects to a six-inch drainpipe which runs south between the house and the body shop. The drainpipe connects with the lower catch basin, which is located on the north side of Route 7. The lower catch basin is maintained by the respondent, and leads to a culvert which runs underneath Route 7. The culvert runs under the store and exits on the south side of the store. The claimant alleges that the respondent has failed to maintain the lower catch basin, which has caused an increase in the water table resulting in substantial damages to the residence, body shop, and retaining walls, for which the claimant seeks damages of $13,500.00. She seeks an additional $567.92 for restoration of a gas line allegedly destroyed by the respondent during a ditch cleaning operation.

Lyle Moulton, a Ph.D. in Soils and Foundations Engineering, examined the property at the claimant's request. Dr. Moulton testified that the clogged catch basin has contributed to a rise in the water table which has increased the hydrostatic pressure on the retaining walls and the buildings. The retaining walls, as was evidenced by photographs, are in danger of collapse. One wall of the body shop has collapsed and been replaced by a plywood wall.

On cross-examination, Dr. Moulton stated he did not know where the culvert was clogged. He viewed where the drainpipe went under the store and stated there were two right-angle bends in it, which was not the condition of the pipe when the claimant owned the store. Dr. Moulton also said that there are numerous springs on the property, which make the area "quite wet seasonally." This would "depending upon the drainage that was placed behind the walls or water that might get out through the walls, this generally would lead to higher

lateral pressure on the wall throughout the area." He conceded that some of the walls are of marginal construction.

Paul Guthrie, an employee of the respondent, stated that the only portion of the culvert maintained by the respondent is the part which is under Route 7. There is a ditch line along Route 7 which is adequate to drain the road. Mr. Guthrie said that the current owner of the store closed the culvert to prevent odor from sewage water from entering the store. It is not possible to unclog the culvert without going into the store, which respondent cannot do.

Barney Stinnett, a soils engineer working for the respondent, testified that the clogged culvert should not have much effect on the water table because of the presence of the ditch line which should carry the flow of water away from the top of the hill. In his opinion, the damage was caused by the construction of the retaining walls, which lack weep drains which could reduce the level of hydrostatic pressure on the walls. The springs in the hillside further serve to lessen the general stability of the land.

After careful review of all the evidence presented, the Court finds that several conditions existed which led to the damages to claimant's property. The hillside is unstable due to the presence of one or more underground springs. The amount of construction which the claimant has performed has significantly contributed to the increased instability of the hillside. Experts for the claimant and respondent noted the inadequate construction of the retaining walls, which require special construction to allow a continuing flow of water down the hillside. The clogged culvert has, in all probability, aggravated this situation, but it has not been established, by a preponderance of the evidence, that any negligence of the respondent outweighed that of the claimant. Under the doctrine of comparative negligence, therefore, the Court finds that the negligence of the claimant was equal to or greater than that of the respondent and disallows that portion of the claim.

The evidence established that the repairs to the ruptured gas line occurred in May 1977. The respondent has pled that this portion of the claim is barred by the statute of limitations.

The claim was filed in September 1979. Since the claim was not filed within the two-year statute of limitations, the Court has no jurisdiction of the claim under West Virginia Code §14-2-21. Therefore, this portion of the claim is also denied.

Claim disallowed.

Opinion issued June 24, 1983

ROY FRANKLIN WILLIAMS, JR., and
BEVERLY WILLIAMS

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-117)

Claimant appeared in person.

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

PER CURIAM:

This claim was originally filed in the name of Roy Franklin Williams, Jr., but when the testimony disclosed that the damaged automobile, a 1982 Toyota Tercel, was titled in the joint names of claimant and his wife, Beverly Williams, the Court on its own motion joined Beverly Williams as an additional claimant.

On January 23, 1983, claimant was driving south on Route 622 near Cross Lanes, Kanawha County, West Virginia. It was about 9:00 p.m., and it was dark and raining. The car struck a pothole which was located approximately a foot and a half over from the edge of the berm. The right front and rear tires had to be replaced at a cost of $85.54. Claimant had no knowledge of how long the pothole had been in existence.

The State is neither an insurer nor a guarantor of the safety of travellers 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. Since there was no proof in this case that the State had notice of the defect, the claim must be denied.

Claim disallowed.

Opinion issued June 29, 1983

BETTY COOK

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-527)

John L. Boettner, Jr., Attorney at Law, for claimant.

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

RULEY, JUDGE:

This $25,000.00 claim arises out of alleged negligence of the respondent in the location, construction, and maintenance of a drainage ditch on W.Va. Route 53, Kanawha County, West Virginia. Route 53 is also known as Buff Lick Road. In 1968, claimant purchased a house and 4-acre lot, located on the downhill side of Buff Lick Road. Between 1968 and 1974, she experienced no problem with water drainage on the property. In 1974, a driveway was built upon nearby property on the uphill side of Buff Lick Road. That driveway is opposite claimant's driveway. The record was unclear as to who constructed the driveway, although there was some evidence that it was constructed under a permit issued by respondent. Concurrent with the construction of the driveway was the construction of a ditch line. The ditch line was built on respondent's right-of-way. Scant description was given of the ditch line, although it was called "basically a homemade structure" by claimant. The ditch line was lined with cinderblock, and underneath the driveway was a 15-inch culvert. Since that construction, claimant has had water damage to her land and home.

The claimant testified, as did several of respondent's employees, that she has made numerous complaints about the ditch line since 1974. She stated that the ditch was frequently clogged with debris, which diverted water onto her land. Respondent would pull the ditch, but it would quickly become clogged again. In July 1979, claimant sustained major flood damage. After that damage, respondent repaired the ditch line and re-

placed the 15-inch culvert with a 24-inch culvert. There have been no problems since.

Respondent's witness, Hardeep Chawla, an engineer, testified that the clogged ditch would have caused drainage problems for the claimant. He further stated that while a 15-inch culvert is the minimum accepted size, this would not be an adequate size for the location. The claimant has established by a preponderance of the evidence that the respondent was aware of the drainage problem for aproximately five years before making adequate repairs. The respondent has, therefore, failed to exercise reasonable care to prevent damage to claimant's property, and is liable for the damages sustained. *Wotring vs. Dept. of Highways*, 9 Ct.Cl. 139 (1972). The only evidence of damages presented was an estimate in the sum of $18,910.00 for costs of repair to claimant's house. The Court renders an award in that amount. See *Jarrett vs. E. L. Harper & Son, Inc.*, 235 S.E.2d 362 (1977).

Award of $18,910.00.

Opinion issued June 29, 1983

KENNETH PAGE

vs.

ALCOHOL BEVERAGE CONTROL COMMISSIONER

(CC-80-357)

William L. Redd, Attorney at Law, for claimant.

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

RULEY, JUDGE:

Claimant alleges that he was wrongfully terminated from his position as a clerk at respondent's State Store on Route 60 in Huntington, West Virginia, in 1977. Claimant alleges that the termination occurred because he was unable to perform heavy lifting, due to a medical condition. He seeks an award of

$33,600.00 as accumulated sick pay and back salary, based on this alleged wrongful termination.

In June 1977, claimant was treated for chronic osteomyelitis of the left upper arm by Dr. Hassan Vaziri. In a letter dated June 25, 1977, Dr. Vaziri stated in part, "He has developed pain in the left arm recently which incapacitates him to lift heavy objects." Claimant's job included, but was not limited to, the lifting of cartons of bottles from trucks and loading the bottles onto shelves. Since the claimant was not able to do this type of work, he did not return to work.

On August 18, 1977, Gary Hamrick, Assistant Commissioner of the Alcohol Beverage Control Commission, sent claimant a letter which stated: "If you are disabled to such an extent that you cannot perform all of the duties required by your job and if you can obtain a medical report so stating, you can obtain a leave of absence without pay." The letter added that if a report was not obtained and claimant did not return to work at full capacity within 15 days, he would be terminated. Claimant did not submit further medical evidence concerning his condition, nor did he return to work. He was subsequently terminated.

Claimant was originally informed by Mr. Hamrick that he would be paid his accumulated sick leave. Lynn M. Schillings, respondent's payroll clerk, testified that claimant was not paid for his sick leave because the governing regulations of the Civil Service Commission do not allow such payment to an employee who has been terminated.

The evidence in the record does not indicate to the Court that the claimant was wrongfully terminated. He was afforded the opportunity to either establish his inability to work or return to work. He did neither, so his employment was terminated. Since the claimant is not entitled to payment for his sick leave under these circumstances, and since his termination was not wrongful, the Court denies the claim.

Claim disallowed.

Opinion issued June 29, 1983

FRANCIS L. PARKER

vs.

DEPARTMENT OF HEALTH

(CC-79-679)

Garry G. Geffert, Attorney at Law, for claimant.

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

RULEY, JUDGE:

Claimant voluntarily admitted himself to Weston State Hospital on September 22, 1977, for treatment of nervous problems. He was originally placed on a medical ward, and, after two or three months, was transferred to the halfway house at Weston. The halfway house is a separate building which is the least supervised unit at Weston. There are no guards on the unit, and only one aide for approximately 40 patients. The halfway house is reserved for the least troublesome patients and those about to be released. They are free to move about the hospital grounds until curfew. On December 8, 1977, claimant was sitting in an office in the Rehabilitation Building, when he was attacked by another patient who resided at the halfway house. The other patient had entered an unlocked woodshop and obtained a wrench with which he struck claimant behind the left ear. Claimant alleges that respondent negligently breached its duty towards claimant by failing to exercise care to protect him from the other patient. Claimant seeks an award of $12,000.00.

Following the assault, claimant became disoriented and began vomiting. He suffered a seizure of three to five minutes in duration. A laceration by the left ear requiring suturing. Claimant was hospitalized until December 22, 1977. The injury has resulted in a hearing loss in claimant's left ear, and he testified that he experienced severe headaches, numbness in his left side and arm, and blurred vision immediately after the attack. While these last problems have diminished over time, claimant testified that he still has headaches several times a month as well as numbness in his left hand. He did not have these problems prior to the assault.

The patient who attacked the claimant was transferred to the halfway house on September 15, 1977. Evidence was presented which indicated that he had a history of violent behavior, but he had shown improvement prior to his transfer to the halfway house. Claimant testified that the other patient had acted hostilely towards him, calling him a "white son-of-a-bitch" about a month before the assault. Claimant also stated that the other patient once had thrown an ashtray at another patient. Joel Flaxer, administrative assistant at Weston, confirmed that this incident occurred several weeks prior to the assault on claimant.

On December 8, the patient who attacked the claimant entered the unlocked woodshop alone and unsupervised, even though patients were not supposed to do so without being accompanied by an instructor. Flaxer testified:

> ". . .I have spoken with Mr. Sutlip who was then the head of the rehab unit, chief of vocational rehabilitation at Weston State Hospital, and the indication I got from him was that the area was just left, the tools were there and were available if somebody was in the area. They were not locked up and put away."

Mr. Flaxer also indicated that the woodshop was no longer in use because there was no instructor.

The evidence in this claim established the violent, unpredictable nature of the patient who attacked the claimant, but also indicated improvement on his part, just prior to his placement in the halfway house. The Court is not prepared to find that the transfer itself was an act of negligence; the Court recognizes the need to grant patients certain privileges in return for more acceptable behavior. However, the Court previously has held that the State has an obligation to exercise ordinary care to protect patients in its mental institutions from harm at the hands of other patients. *House vs. Dept. of Mental Health*, 10 Ct.Cl. 58 (1974). Permitting the unused woodshop to remain unlocked, thereby allowing unsupervised patients access to tools, was an omission constituting negligence on the part of respondent and was the proximate cause of the injuries claimant sustained. In view of the evidence respecting

the nature and extent of those injuries, the Court is of the opinion that $8,000.00 is a fair award.

Award of $8,000.00.

Opinion issued June 30, 1983

LILLIAN AKERS, ADMINISTRATRIX OF THE ESTATE OF GARY WAYNE AKERS, DECEASED

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-222)

Gordon T. Ikner, Jr., Attorney at Law, for claimant.

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

RULEY, JUDGE:

Claimant seeks recovery of damages for the alleged wrongful death of her husband, Gary Wayne Akers, who died as the result of a single-car accident at Bias Branch on W.Va. Route 17 near the town of Jeffrey in Boone County, at approximately 8:30 p.m., on February 24, 1977.

Akers was driving his 1974 Ford Mustang north on Route 17 on his way to a service station to refuel the vehicle. At a curve in the road, approximately one mile north of Jeffrey, he encountered a mudslide and the car spun, went over an embankment and into the Little Coal River below. Akers was thrown from the vehicle, suffering fractures of his pelvis and left humerus. He was taken to Boone Memorial Hospital, then transferred to Charleston Area Medical Center for surgery, where he remained for approximately three weeks. He then was taken home, where he died on March 22, 1977, from pulmonary emboli, i.e., blood clots within the lungs, a complication of the injuries sustained in the accident. The autopsy report reflects that his death was attributable to those injuries.

Thomas Bias, Deputy Sheriff of Boone County, investigated the accident. He testified that a film of mud covered much of the road, but was greater in the northbound than southbound

lane. He estimated that Akers' automobile slid 30-50 feet before going into the river.

Herbert Cook, a grader operator employed by the respondent, testified that he had been sent with a work crew to clear mud from Route 17 on the day before the accident. The slide had covered the road when he arrived with the grader, and he worked from 9:00 p.m. on the 23rd until 3:00 p.m. the next afternoon. Mud was still sliding onto the road and, despite Mr. Cook's repeated requests, no signs or smudge pots were placed at the scene. Mr. Cook testified that he was unable to clear all of the mud from the road because the blade on the grader was worn. He stated that he had requested a new blade, but his superiors denied the request.

Barney Stennett, a soils engineer, evaluated the landslide in April 1980. He estimated that the slide had been in existence for 15-20 years and had a "very low" priority correction rating.

William E. Cobb, a Ph.D. in economics, prepared three estimates of economic loss caused by the death of Akers. The first estimate of $367,201.00 is the most liberal figure, based on widely recognized academic assumptions. The second figure of $142,730.00 is the "absolute minimum in terms of the economic damages resulting from the death of Mr. Akers." The third figure, $248,540.00, is Dr. Cobb's professional estimate of economic damage. All figures were reduced to present-day value.

The State is not an insurer of the safety of travelers on its roads and its duty to travelers is a qualified one of reasonable care and diligence in the maintenance of a highway under all circumstances. *Parsons v. State Road Commission*, 8 Ct. Cl. 35 (1969). However, the State may be found liable "if the maintenance of its roads falls short of a standard of 'reasonable care and diligence . . . under all circumstances.'" *Farley v. Dept. of Highways*, 13 Ct. Cl. 63 (1979). Having knowledge of the dangerous condition of the highway, it clearly was the duty of the respondent, under that standard, to remove the danger rather than leave it or, at least, to erect warning signs. *Pullen v. Dept. of Highways*, 13 Ct. Cl. 278 (1980). Its failure to do so constituted negligence which proximately caused the accident

and the resulting death of the decedent. In view of the decedent's previous knowledge of at least some hazard at the place of the accident, the court is disposed to find that his own negligence contributed by 20% to cause the accident.

Considering the evidence respecting damages, the Court will make an award of $142,730.00, reduced by 20% to $114,184.00, that sum to be distributed equally between the decedent's widow and two children, i.e., one-third to each. In addition, the Court will award medical expense in the sum of $4,789.00 and funeral expense in the sum of $1,200.00 to the administratrix pursuant to West Virginia Code §55-7-6, in effect at the time of the accident.

Award of $44,050.34 to Lillian Akers Meade, Administratrix of the Estate of Gary Wayne Akers, deceased.

Award of $38,061.33 to Lillian Akers Meade, as guardian for and on behalf of Steven Wayne Akers.

Award of $38,061.33 to Lillian Akers Meade, as guardian for and on behalf of Christopher Lewis Akers.

Opinion issued June 30, 1983

APPALACHIAN ENGINEERS, INC.

vs.

BOARD OF REGENTS

(CC-81-55)

Elmer H. Dodson and *Stanley E. Deutsch*, Attorneys at Law, for claimant.

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

RULEY, JUDGE:

This is a contract claim. The contract provided for the preparation of plans and specifications for parking lot improvements and an analysis and recommendation of regulations for permanent and transient parking at Marshall University in

Huntington, West Virginia. Under its terms, the claimant was to begin performance on September 8, 1976, and complete performance by December 31, 1976. The total cost of the study was not to exceed $4,500.00 and travel expenses were not to exceed $500.00. The contract was dated July 30, 1976. Actual services by the claimant began in August 1976, at the request of officials at the university who were anxious to obtain the results of the contemplated studies. The claimant contends that subsequent requests by personnel of the university changed the scope of the work which was not completed until August 1977. The claimant submitted its invoice for the study and travel expenses in the amount of $9,434.53 to the university. The invoice was properly processed by the university, but, ultimately, was denied by the Department of Finance and Administration because the invoice did not meet the time frame or the dollar limitation in the contract.

Although the total cost of this project was not to exceed $4,500.00 for the study and $500.00 for travel expenses, the evidence is undisputed that the claimant included parking studies for a proposed sports center and a medical school at the request of personnel at the university.

The terms of the purchase order were not strictly adhered to by the claimant, but the claimant was acting contrary to those terms at the request of the officials with whom it was dealing at the university.

For the respondent to now deny the claimant payment for services admittedly rendered to the respondent would constitute unjust enrichment. See *Modern Press, Inc. vs. Board of Regents,* CC-80-277, 13 Ct. Cl. 341 (1981); *Sinclair vs. OECD,* CC-77-95, 12 Ct. Cl. 19 (1977); and *Dunbar Printing Company vs. Department of Education, Division of Vocational Education,* CC-77-41, 11 Ct. Cl. 282 (1977). For that reason, this Court is of the opinion that the claimant is entitled to an award and, accordingly, the Court makes an award in the amount of $9,434.53.

Award of $9,434.53.

Opinion issued June 30, 1983

ARMEDA JEAN BUSH

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-204)

Ross Maruka, Attorney at Law, for the claimant.

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

RULEY, JUDGE:

This claim in the sum of $50,000.00 for damages for personal injuries grows out of an accident which happened at about 9:30 a.m., on October 17, 1979, on W.Va.-U.S. Route 19, Jackson Street, in Fairmont, Marion County, when the claimant fell while walking across the street. Claimant alleges that her fall was caused by a "hump" of blacktop pavement which, according to the undisputed evidence, was about six inches high. Claimant contended, and the contention may be inferred fairly from the evidence, that the hump was caused by the respondent while removing the old blacktop with a Rotomill machine in preparation for repavement. There was no evidence that the respondent had utilized any warning signs or devices incident to the repairing project. The gist of the evidence of the respondent was that the machine usually left a relatively level surface but there was no specific testimony respecting the surface at the time and place of the accident. However, that area was lighted by street lamps and there was no evidence that the street surface was obscured in any way. From that evidence, it appears that the respondent was negligent in that it created a condition dangerous to pedestrians and then left it without any sign or device whatever to warn pedestrians of the hazard. It also appears that the claimant herself was negligent in failing to maintain an adequate lookout upon the surface where she was walking. The negligence of both parties combined to cause the accident and the Court is disposed to allocate the negligence 70% to the respondent and 30% to the claimant.

Turning to the issue of damages, the claimant sustained a

Opinion issued June 30, 1983

ROBERT W. BURKE

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-318)

Claimant appeared in person.

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

RULEY, JUDGE:

Claimant is the owner of property located on Midway Drive, Dunbar, Kanawha County, West Virginia. The land is located at a low point in the road. There is a ditch along the road, and a drainpipe under the road empties in a hollow on claimant's property. Claimant alleges that his property has been damaged in the amount of $9,000.00 by water flowing out of the ditch and onto the land. Part of this damage occurred in late August 1980, following a period of heavy rain. The rest of the damage has occurred over the course of several years. Claimant alleges the resurfacing of Midway Drive in October 1979 changed the elevation of the road, diverting water onto the land.

Respondent contends that claimant's property lies in a natural drainage area. It was further alleged that debris placed by claimant in the hollow blocked the outlet end of the pipe causing water to back up into the ditch. Photographs introduced into evidence show old sinks, stoves, hot water heaters, and other debris in the hollow. Claimant stated he had been placing this material there for "a great number of years" to slow erosion in the hollow.

The evidence presented indicated that claimant's property is located in a natural drainage area. Much of the damage occurred after a heavy rain, when the water followed its natural course onto claimant's land after the ditch line back-up. The evidence does not support a finding that the elevation of the road, even if performed in a negligent manner, was the proximate cause of the damage. *Wotring vs. Dept. of Highways*, 12 Ct. Cl. 162 (1978).

Claim disallowed.

fracture of her right kneecap but it does not appear from the evidence that there was any resulting permanent injury. Her medical expense was $364.50 and her net lost earnings were $416.39. The Court finds that $1,500.00 is a fair and just compensation, and reduces that sum by 30% to reflect claimant's contributory negligence.

Award of $1,050.00.

Opinion issued June 30, 1983

HAYWARD JOBE CASTO, JR.

vs.

DEPARTMENT OF CORRECTIONS

(D-986)

Harry R. Cronin, Jr., Attorney at Law, and *A. Blake Billingslea*, Attorney at Law, for claimant.

Joseph C. Cometti, Attorney at Law, for respondent.

RULEY, JUDGE:

The claimant was convicted on February 8, 1972, for a violation of the Controlled Substances Act. On August 15, 1972, he began serving a sentence of one to five years at the West Virginia State Penitentiary at Moundsville, West Virginia. The claimant was discharged from prison on September 3, 1974, upon an order of the Criminal Court of Marion County, West Virginia, which voided claimant's conviction after the Supreme Court of West Virginia declared the statute under which the claimant was convicted unconstitutional. Claimant alleges that he was illegally incarcerated and seeks $16,767.59 as compensation for wages he could have earned during the period of his incarceration. At the time of his conviction the claimant was employed as a truck driver. The respondent has filed a motion to dismiss, or, in the alternative, motion for summary judgment, for failure to state a claim upon which relief can be granted. West Virginia Code §62-13-5 provides for the reception of convicted felons by the Commissioner of Public Institutions, now Dept. of Corrections. The section provides in part:

"All persons committed by courts of criminal and juvenile jurisdiction for custody in penal, correction or training institutions under the jurisdiction of the Commissioner of public institutions, shall be committed to an appropriate institution, but the director shall have the authority to and may order the transfer of any person committed to the division to any appropriate institution within the division."

Claimant was committed to the penitentiary under a law which, at the time of his conviction, was in full force and effect. Respondent was under a statutory duty to receive claimant into the penitentiary, and complied with that duty. It is not within the purview of respondent's duties to determine the constitutionality of statutes and it does not appear that the respondent failed to act in good faith. See *Steinpreis vs. Shook*, 377 F.2d 282 (4th Cir. 1967). Claimant's conviction was not voided until August 29, 1974, and he was then released pursuant to that order. The Court is of the opinion that respondent fully and properly performed the duty required of it under the law and finds no basis upon which to hold respondent liable for the damages sought. The Court, therefore, grants respondent's motion to dismiss.

Claim dismissed.

Opinion issued June 30, 1983

JAMES D. EADS

(CC-80-401a)

J. R. ALEXANDER

(CC-80-401b)

JACK D. BAYS

(CC-80-401c)

WILLIAM E. GARRETT

(CC-80-401d)

NANCY HUGHES

(CC-80-401e)

WILLIAM C. JOHNSON and
GLADYS M. JOHNSON

(CC-80-401f)

ZONA M. WISEMAN

(CC-80-401g)

and

EMMA JEAN RAMSEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-401h)

Robert Bland, Attorney at Law, for claimants.

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

RULEY, JUDGE:

These claims were consolidated for hearing as all of the claims arose out of the same factual situation. Claimants are residents of a subdivision in South Charleston, Kanawha County, West Virginia. Their homes either abut or front Pike Street. In the spring of 1980, respondent performed routine maintenance on Pike Street, which included the excavation for drainage ditches. Claimants contend that respondent agreed to pay for and install drainpipes under their driveways. These pipes were installed by respondent, but were purchased by claimants at an aggregate cost of $2,857.24. They seek reimbursement for the cost of the pipes.

Respondent contends that it is not its policy to pay for drainpipes under a property owner's driveway. Respondent requires a property owner, who wishes to install a pipe under a driveway, to obtain a permit before installation, and the costs are borne by the property owner.

From the evidence in the record, it is clear that the responsibility for drainage under a driveway rests with the property owner. Respondent's policy is clear that the homeowner must pay the cost of a drainpipe under a driveway. See also *Cowan*

vs. Dept. of Highways, 13 Ct. Cl. 124 (1980). The claims are, therefore, denied.

Claims disallowed.

Opinion issued June 30, 1983

GATES ENGINEERING COMPANY, ET AL.

vs.

BOARD OF REGENTS

(CC-82-68)

Robert B. Sayre, Attorney at Law, for claimant.

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

RULEY, JUDGE:

In 1977, claimant entered into a contract with respondent to provide engineering and architectural services for construction of the West Virginia University football stadium and team facilities building in Morgantown, West Virginia. Under the provisions of the contract, the respondent could request that the claimant, as architect on the project, procure the services of additional consultants, i.e., soils engineer, surveyor, aerial mapping consultant, etc., who would be subconsultants to the claimant. In those instances where claimant engaged a subconsultant the respondent would reimburse the claimant for the services rendered by the subconsultant. This dispute centers on whether the claimant must be compensated for providing the consultants under the terms of the contract which require that an additional service be paid at a rate 2.0 times the amount billed by the consultants or whether the claimant has been fully paid by the reimbursement of the consultant fees. The claimant paid professional consultants the sum of $71,612.84. The claimant claims twice that amount or $143,225.68 is still due and owing under the specific terms of the contract. The respondent takes the position that it has reimbursed the claimant for the services of the subconsultants as agreed by the terms of the contract and, therefore, the claimant is entitled to no further compensation.

The professional fee schedule in the contract provides for three types of compensation, i.e., for basic services, additional services, and reimbursable expenses.

Article 5 of the contract defines "reimbursable expenses" between claimant (Architect) and respondent (Owner) as follows:

"5.1 Reimbursable Expenses are in addition to the Compensation for Basic and Additional Services and include actual expenditures made by the Architect, his employees, or his professional consultants in the interest of the Project for the expenses listed in the following Subparagraphs:

5.1.2 If authorized in advance by the Owner, direct expense of Special Consultant Services, Land Surveys as described in Article 2.3, Test Boring and Soils Testing as described in Article 2.4."

Claimant seeks recovery under Section II.b.3 of the contract which provides as follows:

"II.b. FOR ADDITIONAL SERVICES, as described in Paragraph 1.3, compensation computed as follows:

3. Services of professional consultants at a multiple of (2.0) times the amount billed to the Architect for such services."

Letters from respondent to claimant requesting that claimant employ various consultants state that authorization is given in accordance with Articles 2.3, 2.4, 2.7, and 5.1.2 of the contract.

Article 2.7 of the contract provides as follows:

"2.7 The services, information, surveys and reports required by Paragraphs 2.3 through 2.6 inclusive shall be furnished at the Owner's expense, and the Architect shall be entitled to rely upon the accuracy and completeness thereof. *Should the Architect, at the Owner's election, furnish such services, the Architect shall be reimbursed by the Owner at cost as described in Article* 5.1.2. (Emphasis supplied.)

The letters indicate respondent's intention to reimburse claimant at cost for the hiring of consultants, and respondent has, in fact, done so.

It is clear that certain services of a professional consultant require respondent to pay claimant at the multiple rate of two times the cost. However, none of the authorization letters contemplate the application of the provisions of ¶1.3 Additional Services which involve the application of Section II.b.3 of the contract. Claimant was entitled to reimbursement for providing the consultants, and has received it. No further payments were authorized under the terms of the contract and none were intended by respondent as evidenced in its authorization letters. For those reasons, the Court must deny the claim.

Claim disallowed.

Opinion issued June 30, 1983

DOROTHY M. GORE

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-161)

PETITION FOR REHEARING

RULEY, JUDGE:

Although the Court adheres to the principles of law enunciated in *Dorothy M. Gore vs. Department of Highways* (1982), we conclude that the claimant should be given an additional opportunity to prove a factual situation complementary of that existing in *Smith and Smith vs. Department of Highways,* 11 Ct. Cl. 221 (1977). Since it appears that the respondent knew that the rock cut involved in this case presented a hazard to vehicular traffic, the principal issue which should be addressed upon rehearing is the issue of whether the respondent reasonably could have corrected the hazard within the limits of funds appropriated by the legislature for highway maintenance.

For the foregoing reason, the petition is granted.

Opinion issued June 30, 1983

HOOTEN EQUIPMENT COMPANY

vs.

BOARD OF REGENTS

(CC-80-337)

Robert H. C. Kay, Attorney at Law, and *Michael Bonasso,* Attorney at Law, for claimant.

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

RULEY, JUDGE:

Sometime prior to 1978, officials at the West Virginia University Medical Center decided to renovate its cafeteria facility. Margaret Abbott, director of the Department of Dietetics, was appointed to recommend equipment for the remodeling. She sought the advice of James Milleville, a representative of several food equipment manufacturers, and Al Ruff, a consultant in food equipment layout. They drew up specifications for the equipment, which were part of the Request for Quotations. Claimant's bid was accepted, and a contract was signed in July 1978. One piece of equipment to be furnished under the terms of the contract was a salad and dessert carrousel. The Request for Quotations listed certain requirements for the carrousel and provided as follows:

> "Carrousel unit to be Model No. 1652, as manufactured by SMS Division of Metalers Corp., St. Paul, Minn.
>
> Or: Equal."

The claimant furnished the carrousel from the Metalers Corp., but the equipment did not conform to all the requirements dictated by the contract. Respondent canceled that portion of the contract which involved the carrousel, and claimant seeks to recover the $31,051.00 contract price from respondent.

The carrousel was required to have two revolving shelves. The upper shelf was to be non-refrigerated, the lower refrigerated to 40°F, in order to comply with national and state standards. After installation, it was discovered that the

carrousel would not refrigerate to 40°F, and attempts to correct the defect failed. Metalers Corp. filed for bankruptcy after supplying the carrousel. Claimant contends that since respondent provided the specifications for the equipment, respondent impliedly warranted that the named machine would meet the specifications. Claimant further alleges that since a specific machine was listed, an "equal" machine could not be supplied, and even if one were provided, that in order to be an "equal" machine with Metalers', it, too, would not cool to 40°F. Therefore, claimant concludes, the fault lay with the specifications and respondent should bear the cost of the machine.

While the Court has considerable sympathy for the claimant, the Court cannot agree with its contention. Liability for the faulty machine is with its manufacturer, a company now in bankruptcy. Since recovery from Metalers Corp. may be precluded, the question then becomes, as between claimant and respondent, who should bear the cost of the machine. The contract specifications are clear. Claimant was to furnish a machine which would refrigerate to 40°F. It did not do that. As the supplier of goods, claimant is under an obligation to ascertain whether the goods will conform to the specifications in the contract. Since the machine would not refrigerate to 40°F, it failed to meet respondent's requirements, as well as standards established on the state and national levels. Provision 8 of the Terms and Conditions of the Contract state:

> "8. The State of West Virginia may reject, revoke, or cancel this agreement or any part thereof, and, . . . shall have the right to recover any and all damages sustained as a result of the vendor's failure to perform, in whole or in part, the terms and conditions of this agreement. The State may withhold from any remittance due the vendor under the terms and conditions of this agreement an amount equal to the damages sustained by such failure of performance on the part of the vendor."

Respondent provided notice to claimant of its intent to cancel the carrousel for failure to perform to specifications and to

withhold payment. In view of these circumstances, the claim must be denied.

Claim disallowed.

Opinion issued June 30, 1983

JOHN D. TONKOVICH AND SONS, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-140)

Robert Q. Sayre, Jr., Attorney at Law, for claimant.

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

RULEY, JUDGE:

The claimant was awarded a purchase order by the Purchasing Division of the Department of Finance and Administration in the fall of 1980 to supply 2,000 tons of winter grade asphalting mixture for use in respondent's northern district. The claimant alleges that the respondent, through the Purchasing Division, wrongfully canceled this purchase order thereby causing claimant to sustain damages in the amount of $11,563.00.

Claimant's bid for the winter grade asphalt mix was approved on November 21, 1980. Thereafter, in early December 1980, claimant produced approximately 1,100 tons of the winter grade asphalt mix. When this material was placed on the surface of the highway it failed to adhere. The claimant contends that the mix failed to adhere because the respondent did not allow the mix to remain stockpiled for a curing period of two weeks.

The parties determined that the mix might perform as specified if it were mixed with sand which would expedite the curing period. However, the mix, with and without the addition of sand, failed to conform to grading requirements when tested by the respondent. The purchase order was canceled on January 26, 1981.

The tests conducted by the respondent revealed that the

material did not meet the specifications and was not fit for its intended use. Accordingly, the respondent was obligated to cancel the purchase order and the claim must be denied.

Claim disallowed.

Opinion issued June 30, 1983

DAVID H. KISOR, ADMINISTRATOR
OF THE ESTATE OF JULIA KISOR, DECEASED

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-122)

Claimant Julia Kisor appeared in person.

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

RULEY, JUDGE:

This claim was filed by Julia Kisor. Subsequent to the hearing of the claim, Julia Kisor died, and David H. Kisor qualified as administrator of her estate. He maintains this claim for the estate of his mother.

This $10,000.00 claim is for damage to real property located on Green Valley Road, Huntington, Cabell County, West Virginia. The property is located on a hillside above the road. Claimant alleged that her home was damaged as the result of a slide caused by respondent's ditch cleaning operation. Specifically, claimant alleged that respondent's employees cut the toe of the slope in front of the house and the subsequent slide undermined a corner of the house.

Gary Adkins, a maintenance engineer employed by respondent, visited the property following the slide. He testified that the slide was not caused by actions of respondent's employees, but rather by the continuous saturation of the soil from the downspouts on the house. This caused instability in the land, resulting in the slide. Mr. Adkins stated that ditch cleaning consists of removing material that has gathered in the ditch, which would not cause a slide of this type. He said that plans

had been made to correct the slide, since it had affected the road surface and that this work would benefit claimant as well as respondent.

Additional testimony was taken after the repair work. Mr. Adkins again testified. He stated that the repairs consisted of grading claimant's property and building a retaining wall. This had appeared to stabilize the hill.

Respondent has the duty to maintain drainage ditches along roadways, which includes periodically cleaning those ditches. After careful consideration of the testimony presented, the Court is of the opinion that the claimant has not proved by a preponderance of the evidence that respondent was negligent in carrying out its duty. The evidence indicated that the slide resulted from the saturation of the hillside from the drainage from claimant's house. As no negligence has been found, the respondent cannot be held liable for the damage to the house. Therefore, the claim must be denied.

Claim disallowed.

Opinion issued June 30, 1983

NORMAN LEWIS

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-334)

William L. Lonesome, Attorney at Law, for Claimant.

W. Douglas Hamilton, Attorney at Law, for Respondent.

RULEY, JUDGE:

Claimant owns a tract of land on Cane Fork Road near St. Albans, Kanawha County, West Virginia. The area of the tract is approximately 1.5 acres and it is improved by a one-story house in which claimant resides. The western side of the property is bounded by 2 3/4 Mile Creek, and Cane Fork Road runs along the south side. When claimant moved onto the property, there was a bridge where the road crossed the creek. Sometime around 1974, the bridge was damaged, and respon-

dent replaced it with two 5 or 6 foot steel culverts. Claimant alleges that since the culverts were installed, trash and debris have blocked the culverts and caused flooding on the property. He seeks damages in the amount of $50,000.00.

Claimant testified that the creek had not flooded when the bridge was in place, and this testimony was corroborated by claimant's aunt, Edith Lewis, who has lived on nearby property for 28 years. Claimant stated that he had made numerous complaints to respondent concerning the condition of the culverts, but no action was taken. Photographs introduced into evidence show extensive flooding in the affected area, as well as debris partially blocking the culverts. No evidence was introduced by respondent to refute claimant's allegation that the flooding did not occur prior to the installation of the culverts. From those circumstances, the Court is constrained to conclude that the fill and culverts installed by the respondent have not served their intended purpose but, instead, have served to obstruct the natural flow of the creek and divert its waters onto the claimant's property. See *Haught vs. Department of Highways,* 13 Ct. Cl. 237 (1979); *Johnson vs. Department of Highways,* 13 Ct. Cl. 380 (1979); *Adkins, et al. vs. Department of Highways,* 12 Ct. Cl. 185 (1977); and *Wotring vs. Department of Highways,* 9 Ct. Cl. 138 (1972).

Claimant testified that he purchased the property intending to use .5 acres as a trailer court. It is this portion of the property which has been subject to floods; no damage has occurred to the house. The floods have occurred several times a year since the installation of the culverts, and have made the land unsuitable for use as a trailer court.

Testimony was presented in an effort to establish rental rates in other trailer courts near claimant's property. However, as claimant has never had trailers on the land, an award of damages for lost rent would be speculative. An appraisal report prepared by Dennis A. Robinson valued the entire tract of land without improvements at $10,000.00. Since approximately one-third has been affected by the flooding, the Court concludes that $3,000.00 would be a suitable award.

Award of $3,000.00.

Opinion issued June 30, 1983

MICHAEL E. WHALEN and
ANN WHALEN

vs.

DEPARTMENT OF HEALTH and
DONALD GREENE, SANITARIAN

(CC-81-219)

Paul A. Ryker, Attorney at Law, for the claimants.

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

RULEY, JUDGE:

Claimants contracted to sell their home on Sandhill Road, Point Pleasant, Mason County, West Virginia, to Mr. and Mrs. William Curnutt on October 11, 1981. This contract was contingent upon the Curnutt's obtaining a loan from the Mason County bond program. Before the loan could be granted, the septic system had to be approved. The septic system proved unsatisfactory, and several types of corrective measures were suggested; however, no repairs have yet been made. In March 1981, the Curnutts asked to be released from the contract and the claimants agreed. Claimants have rented the house since releasing the Curnutts from the contract, and the house has been continuously occupied since that time. The claimants allege that respondents acted in an arbitrary and capricious manner in denying approval for the septic system. They seek an award of $43,000.00, which is the contract price of the home less a lien on the property, based upon a theory of negligent interference with a contract.

Respondents have filed a motion to dismiss based on the lack of jurisdiction of the Court to hear the claim against Donald Greene, Sanitarian. The motion to dismiss also alleges that the Department of Health assumes no responsibility for reviewing or approving septic systems and therefore has breached no duty upon which liability may be predicated.

The Court sustains respondent's motion to dismiss as to Donald Greene, Sanitarian. Under West Virginia Code §14-2-13,

this Court is without jurisdiction to hear a claim against an individual.

After careful review of all of the evidence presented, the Court cannot conclude that respondent Department of Health was ultimately responsible for approving the septic system or whether such approval was the responsibility of officials with the county health department. A letter from the Mason County Health Department indicates that that office would grant an approval order for the septic system. A memorandum dated October 12, 1977, from respondent to all health officers and sanitarians states that as of October 28, 1977, responsibility for reviewing and approving water and sewage forms for various loan guaranteeing agencies would rest with the local health units. In view of the foregoing, the Court can find no basis for liability and, therefore, sustains respondent's motion to dismiss as to the Department of Health.

Claim dismissed.

Opinion issued June 30, 1983

JAMES WOODY AND LOTTIE L. WOODY

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-241)

HARRY W. SHOEMAKER AND WINIFRED G. SHOEMAKER

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-242)

DALE R. PENNINGTON AND GLORIA MAE PENNINGTON

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-243)

Claimants appeared in person.

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

RULEY, JUDGE:

These claimants have alleged various amounts of damage to

their homes situate on State Route 60/2, also known as Edgewood Drive, near Huntington, West Virginia, as a result of various alleged acts of negligence by the respondent.

The parties agreed that the question of liability of the respondent is the same as to all of the claimants, but the amounts of damage, if any, are to be determined separately as to the respective claimants, and accordingly, the evidence upon the question of liability is made applicable to all of the claims.

In early 1980, each claimant noticed cracks in the foundation and walls of their homes. Prior to that time, the claimants had experienced no such defects. These cracks became progressively worse, eventually rendering the Woody and Pennington homes unfit for habitation, and severely damaging the Shoemaker home. Apparently, the cracks were caused by forces exerted on the homes by one large landslide and several smaller landslides in the area. The claimants allege that the damages to their homes are due to two factors: undrained ditch lines along Route 60/2, and traffic vibrations from the nearby I-64 bridge. Thomas W. Olson, an Associate Professor of Engineering at Marshall University, testified that he examined the area on two separate occasions in the spring and summer of 1981. In his opinion, the ditch line along Route 60/2 did not drain properly, causing the soil to become saturated and thus more subject to motion and vibrations. He concluded that "saturation of the soil and the vibrations of traffic from the I-64 bridge both contributed materially to the slide." However, he did not measure the water content of the soil or the vibrations from the I-64 bridge, and stated that "every hillside in Huntington is slideprone."

Gary Adkins, an Assistant District Engineer for the respondent, testified that he visited the Edgewood Drive area in the spring of 1980, in response to telephone calls from the claimants. His inspection revealed a large landslide which began near the Pennington home and extended to the area of the Shoemaker home, running parallel to Route 60/2, a distance he estimated to be 300-500 feet. He also observed two areas of ponding along Route 60/2, and testified that drainage pipes were installed at that time to aid the drainage process.

The slide, however, was impossible to correct due to its size. He concluded that neither Route 60/2 nor the I-64 bridge had any effect on the slide, stating that the road was simply a part of the movement rather than a contributing factor. In his opinion, both Route 60/2 and the claimants' homes were being damaged by the same slide.

Dave Bevins, an Assistant Maintenance Engineer for the respondent, also observed the area in the spring of 1980 and agreed with the conclusions reached by Mr. Adkins. He added that there were many slides in the area, and that the probable cause was a combination of wet weather and unstable soil.

Gary Cooper, a Soils Engineer for the respondent, testified that he inspected the area in June or July of 1980 and again in September of 1982. He described the landslide in question as a "rotational failure through part of the upper side of Route 60/2 . . . about 800 to 900 feet long along the roadway and probably 300 feet between the break behind the houses on the upper side and where you can see it's coming out below the houses." In July of 1980 he tested for vibrations from the I-64 bridge, using a seismograph, which is an instrument that measures vibrations in millimeters per second. Taking readings when heavy trucks and buses were crossing the bridge, the highest reading obtained was .06 mm/sec., which he testified was so low that it was "not even listed on the [F.H.A.] chart as being noticeable. They don't even take the chart that low. Anything that low is just natural vibrations of the earth itself." In addition, he measured the distance from the bridge to the claimants' homes at 550 feet, and testified that the F.H.A. report on traffic vibrations stated that "the effect on anything over about 200 or 300 feet was negligible." Mr. Cooper concluded that traffic vibrations had no effect on the slide, adding that the most likely cause was ". . . just nature. It's actually an unstable area in the slope."

James Amenta, a Soils Geologist for the respondent, testified that he examined the area during the spring or summer of 1980. He opined that the slide in question was an older slide which had recently become unstable, and that the traffic vibrations from the I-64 bridge had no effect on the slide.

Mary Flora, a Seismologist-Geologist for the respondent, made a seismograph study of traffic vibrations in the area in September-October, 1982 (the seismograph study by Mr. Cooper was done in July of 1980). Measurements were taken from three different sites: directly under the east abutment of the I-64 bridge; on the approach side of the bridge; and 500 feet away, near the slide. The vibrations from 30-35 tractor trailers were recorded at each site. The highest readings obtained on the abutment and the approach sites were 1 mm/sec., while the highest reading at the site near the slide was .06 mm/sec. Ms. Flora testified that 1 mm/sec. was "far below the damage level", which begins at 100 mm/sec., and that according to the 1979 FHWA Report, vibrations beyond 200 to 300 feet are not considered damaging. She concluded that the traffic vibrations from the I-64 bridge would have no effect on the claimants' property.

Considering the evidence and testimony presented at the hearing of these three cases, and the legal principles applicable thereto, the Court is of the opinion that there is not sufficient proof that acts or omissions of the respondent were the direct or proximate cause of the damages sustained by the claimants. Instead, the overwhelming burden of the evidence suggests that the claimants simply had the misfortune of owning homes in an extremely slide-prone area. The Court is not unmindful of the disaster which has befallen the claimants, but, for the foregoing reasons, we are obliged to deny these claims.

Claims disallowed.

REFERENCES

Advisory Opinions
Agency
Annual Leave
Arbitration
Assumption of Risk
Bailment
Blasting
Board of Regents
Bridges
Building Contracts
Civil Service Commission
Colleges and Universities—See Board of Regents
Comparative Negligence
Condemnation
Conspiracy
Contracts—See also Building Contracts
Contributory Negligence
Damages
Department of Motor Vehicles
Drains and Sewers—See also Waters and Watercourses
Electricity
Expenditures—See also Office Equipment and Supplies
Falling Rocks—See also Landslides
Flooding
Foster Children
Hospitals
Independent Contractor
Insurance
Interest
Jurisdiction
Landlord and Tenant
Landslides—See also Falling Rocks
Limitation of Actions
Motor Vehicles—See also Negligence; Streets and Highways
Negligence—See also Motor Vehicles; Streets and Highways
Notice
Office Equipment and Supplies
Pedestrians
Personal Services
Physicians and Surgeons—See also Hospitals
Prisons and Prisoners
Public Institutions
Public Officers
Real Estate
Rehearing
Res Judicata
State Agencies
Statutes
Stipulation and Agreement
Streets and Highways—See also Falling Rocks; Landslide; Motor Vehicles; Negligence
Taxation
Trees and Timber
Trespass
Wages
Waters and Watercourses—See also Drains and Sewers; Flooding
Wells
W.Va. University—See Board of Regents
Workmen's Compensation Fund

ADVISORY OPINIONS

An advisory determination by the Court was sought where an institution of the respondent underpaid its statutory contribution to Employment Security. The Court indicated that an award could not be made based upon the *Airkem* decision, as sufficient funds were not available in the proper fiscal year. *Dept. of Employment Security vs. Dept. of Corrections* (CC-81-388) 89

An advisory determination claim for accrued interest on an amount due Employment Security when respondent's institution underpaid its statutory contribution to the claimant was denied as West Virginia Code §14-2-12 precludes the payment of interest by the Court. *Dept. of Employment Security vs. Dept. of Corrections* (CC-81-388) 89

In an advisory opinion issued by the Court, the respondent was held liable for work performed on a boiler at respondent's institution. Respondent's inability to pay claimant was the result of an administrative error. *Welding, Inc. vs. Dept. of Corrections* (CC-82-76) 150

AGENCY

A claim for injuries sustained by the decedent at the 34th Annual West Virginia Poultry Convention and Festival was denied as it was not established that an agency relationship existed between the respondent and the Poultry Association. *John Mullenax, Administrator of the Estate of Edith Mullenax vs. Dept. of Agriculture* (CC-78-157) 328

ANNUAL LEAVE

A claim for accumulated annual leave was granted where the Court determined that the authority to establish rules and regulations is granted to the Civil Service Commission by West Virginia Code §29-6-10, and, pursuant to the Code, the Civil Service Commission had established a provision allowing certain employees to carry forward more than thirty days from one year to the next. *Carol Jo Brown vs. Dept. of Health* (CC-82-81) 159

ARBITRATION

A claim for the enforcement of an arbitration action which involved the claimant and the respondent was awarded by the Court as the general law appears to indicate that a State or its agencies may enter a valid contract with a private party providing for arbitration of disputes that may arise under a contract. *Hughes-Bechtol, Inc. vs. Board of Regents* (CC-81-450) 189

In an action filed for the enforcement of an arbitration award made to the claimant based upon a contract provision which provided for the arbitration of disputes between the parties, the Court granted an award as it is clear that the

policy of the law of this State favors arbitration. *Hughes-Bechtol, Inc. vs. Board of Regents* (CC-81-450) 189

ASSUMPTION OF RISK

The Court held that the claimant assumed the risk of any loss which resulted when claimant entrusted a ward of the State with his vehicle, and denied the claim. *John Charles Bungard vs. Dept. of Welfare* (CC-80-352) 48

The Court denied a claim for personal property of the claimant, an employee of the respondent, as the Court held that the claimant assumed the risk in leaving the personal property in his unlocked desk. *Richard J. Lindorth vs. Workmen's Compensation Fund* (CC-81-41) 60

The Court denied an award to the claimant for work performed where the claimant acted without a contract and was informed by the respondent that any work done would be performed at the claimant's own risk. *Monsanto Company vs. Board of Regents* (CC-78-282) 251

BAILMENT

Claimant sought payment for a missing Victor 100 calculator which had been loaned to the respondent, and the Court made an award based upon the law of bailment. *Charleston Business Machines vs. State Tax Dept.* (CC-82-54) 161

While claimant was a patient at Huntington State Hospital, his property was lost, and the Court made an award for the property based upon the law of bailment. *Larry Greathouse vs. Dept. of Health* (CC-82-64) 154

A claim for damages to claimant's vehicle was granted where the respondent admitted the validity and amount of the claim. *The Hertz Corporation vs. Dept. of Public Safety* (CC-82-137) 170

In a bailment situation, where respondent took possession of claimant's property and failed to return it, the Court determined that claimant established a prima facie case against respondent as bailee, and made an award for the value of the property. *Andrew S. McGalla vs. Board of Regents* (CC-81-90) 463

The Court made an award for certain video equipment which was lost or stolen while being loaned to the respondent as the respondent admitted the claim. *Region V—Regional Education Service Agency vs. Dept. of Employment Security* (CC-81-426) 110

BLASTING

A claim for property damage which occurred while claimant's property was leased to the respondent was granted, as damages to the residence and other outbuildings were the

result of blasting activities performed on the property to quarry rock. *Chester Jones vs. Dept. of Highways* (CC-76-51) 221

The Court will deny a claim for damage to claimant's property allegedly caused by blasting operations performed by respondent's contractor where the blasting is done in a barren, rural section, or in a mountainous area far from human habitation. *Catherine Pasceri vs. Dept. of Highways* (CC-78-186) 313

BOARD OF REGENTS

The claimant was granted an award for work performed under a contract where the award exceeded the amount of the contract, but the claimant had performed work beyond the terms of the contract at the request of respondent's officials. To deny the claimant payment for the services actually performed would unjustly enrich the respondent. *Appalachian Engineers, Inc. vs. Board of Regents* (CC-81-55) 493

Where a miscalculation in claimant's rate of pay was made, the Court granted an award to the claimant in the amount of the underpayment. *Susan L. Cale vs. Board of Regents* (CC-82-160) 262

A claim for a cassette deck which disappeared from claimant's dormitory room was denied where there was no evidence of negligence on the part of the respondent in maintaining proper security for the dormitory. *Roger K. Clay vs. Board of Regents* (CC-82-123) 300

Claimant was granted an award for radio equipment lost by the respondent. *General Communications Company vs. Board of Regents* (CC-81-80) 5

When a tree on respondent's property fell during a snowstorm, cutting the power lines to claimant's residence and causing his tropical fish to freeze, a claim for the value of the fish was denied. *Henry W. Gould vs. Board of Regents* (CC-79-357) 304

Due to a clerical error, the claimant did not receive a pay increase. The Court made an award to the claimant for the amount of the increase. *Margaret Graff vs. Board of Regents* (CC-82-216) 318

A claim for breach of contract for personal services was denied by the Court where claimant alleged he was not paid for annual leave. The Court determined that the annual leave had been paid. *Francis J. Hennessy vs. Board of Regents* (CC-80-340) 103

The Court determined that respondent's failure to properly inspect and maintain the equipment in its laundry facility constituted negligence, and this negligence proximately caused the damage to claimants' personal property. *Mr. and Mrs. Stephen Kent Hill vs. Board of Regents* (CC-80-183) 283

A claim for the contract price of a piece of equipment was denied where the Court determined that the claimant failed to ascertain whether or not the equipment would conform to the specifications in the contract, and, because the equipment did not conform, the respondent, under the terms of the contract, had the right to cancel that portion of the contract. *Hooten Equipment Company vs. Board of Regents* (CC-80-337) 503

An award for damage to personal property was made where the respondent was negligent in failing to remedy a shelf defect of which it had prior knowledge. *Charles W. Jones vs. Board of Regents* (CC-81-35) 6

Claimant sought payment for loss of veteran's benefits allegedly due to counseling errors at Southern West Virginia Community College, and the Court made an award for the loss because claimant relied upon his adviser in selecting his course work. *Raymond L. Maynard vs. Board of Regents* (CC-81-206) 225

The Court granted an award to the claimant where it appeared that the respondent breached a contract of employment with the claimant. *William B. McGinley vs. Board of Regents* (CC-81-20) 271

A contract provision entered into by the claimant and West Virginia University, which provided that the meat was sold on a per piece basis, was enforced by the Court, and an award was made to the claimant based upon the terms of the contract. *Shane Meat Company vs. Board of Regents.* (CC-82-86) 233

The Court denied an award where the claimant alleged damages due to changes in the requirements for obtaining a Master's Degree which delayed claimant's receipt of the degree. The Court held that a college or university is authorized to examine students and determine whether or not they have met all requisites for a degree. The college or university's decision is conclusive, provided that the degree may not be arbitrarily refused, and the Court concluded that the delay was not arbitrary. *Terry Skeen vs. Board of Regents* (CC-79-194) 412

BRIDGES

An award for personal injury was granted by the Court when claimant, while acting as a deputy sheriff, was standing on a bridge and fell between the steel members of the bridge deck. The Court found that the respondent was negligent in its maintenance of the deck. *Norman E. Benson vs. Dept. of Highways* (CC-79-503) 193

A claim for damage to a vehicle which struck a hole in a bridge was granted where photographs of the pothole revealed

the hole to be sufficient depth that the steel reinforcing rods on the bridge were exposed. The respondent has the duty of exercising reasonable care and diligence in the maintenance of its highways. *Jack E. Brown vs. Dept. of Highways* (CC-82-6) 167

An award was made when a vehicle was damaged because of negligent maintenance by the respondent of a bridge on which the deck had settled. *John R. Coffman vs. Dept. of Highways* (CC-82-51) 216

A claim for damage to two tires of a vehicle, which occurred as the result of the poor condition of a bridge deck, was denied as there was no evidence of a defect, if any, in the bridge surface. *John J. Gaughan vs. Dept. of Highways* (CC-80-353) 122

Claimant was granted an award for damage to his vehicle which struck a large hole in the Patrick Street Bridge, which bridge was under construction, as the Court held that the respondent was aware of the particular hole prior to claimant's accident. *Alonzo Gibson vs. Dept. of Highways* (CC-81-7) 57

Claimant, who sustained injuries when he fell from a bridge on which the guardrails were missing, was denied an award as there was no proof that the respondent had notice of the missing rails and claimant had prior knowledge of the bridge's condition. *Nelson Gregory vs. Dept. of Highways* (CC-79-307) 355

A claim for damage to an automobile struck by a bolt which broke from a bridge was granted where the Court determined that the respondent was negligent in failing to use reasonable care to keep the bridge in reasonable safe condition. *Robert Howard Latta vs. Dept. of Highways* (CC-82-147) 289

An award for injuries received in a fall from a bridge was reduced under the doctrine of comparative negligence because the claimant had prior knowledge of the condition of the bridge. *John T. May vs. Dept. of Highways* (CC-81-165) 290

Where claimants' vehicles sustained damage when a concrete section of bridge fell on an interstate system, the Court held that respondent had a duty to maintain the bridge such that a major deck failure would not occur. The Court therefore made awards to the claimants for damage to their vehicles. *Thomas E. McNamee vs. Dept. of Highways* (CC-81-100); *Allstate Insurance Company as Subrogee of Jacqueline E. Delazio and Jacqueline E. Delazio, Individually* (CC-81-114) 62

A claim by a contractor for payment of a wash coat placed upon a bridge during a painting operation was denied by the Court as the *Standard Specifications of Roads and Bridges* requires a wash coat if recommended by the manufacturer.

The Melbourne Brothers Construction Company vs. Dept. of Highways (CC-77-150) 226

The Court made an award for damage to claimants' vehicle which struck a piece of steel protruding from the surface of a bridge on West Virginia Route 52. *Irlant E. Moore and Robert L. Moore vs. Dept. of Highways* (CC-82-179) 253

Where claimant's vehicle was damaged by loose timber decking protruding from a bridge on West Virginia Route 15, the Court made an award to the claimant. *John Orndoff vs. Dept. of Highways* (CC-82-111) 254

A claim for damage to a vehicle which struck a pothole on a bridge was denied as there was no evidence of notice on the part of the respondent. *Randall E. Rowley vs. Dept. of Highways* (CC-82-16) 183

The Court made an award to the claimant for damage to a tire on his automobile which struck a piece of metal protruding from a bridge. *Thomas R. Treadway vs. Dept. of Highways* (CC-82-227) 296

BUILDING CONTRACTS

A claim for additional compensation as the result of a change in the scope of a design contract was denied by the Court because the claimant designed the highway within the scope and intent of the agreement. *A. B. Engineering Company vs. Dept. of Highways* (D-773) 42

The record in a contract claim established that an unanticipated subsurface condition existed on the project, and this condition caused the contractor to incur extra expense for which the Court held that the contractor was entitled to be compensated. *McAnallen Brothers, Inc. vs. Board of Regents* (D-1031) 240

A claim by a contractor for payment of a wash coat placed upon a bridge during a painting operation was denied by the Court as the *Standard Specifications of Roads and Bridges* requires a wash coat if recommended by the manufacturer. *The Melbourne Brothers Construction Company vs. Dept. of Highways.* (CC-77-150) 226

The Court denied an award to the claimant for work performed where the claimant acted without a contract and was informed by the respondent that any work done would be performed at the claimant's own risk. *Monsanto Company vs. Board of Regents* (CC-78-282) 251

The Court made an award to the claimant contractor who incurred increased costs in labor and materials as the result of having been prevented from starting construction work at the time indicated in the contract. *Novo Corporation vs. Dept. of Highways* (CC-78-175) 140

In a contract claim for increased costs allegedly incurred by reason of delays caused when the site preparation work was not completed in time for the contractor to begin its work, the Court made an award for the increased costs. *Novo Corporation vs. Dept. of Highways* (CC-78-175) 140

The Court denied a claim for extra work in the excavation of a sewer project where the evidence revealed that the method of installing the storm sewer was chosen by the contractor, and it was that method which resulted in the extra costs claimed. *The Pioneer Company and Mountain State Construction Company, Inc. vs. Dept. of Highways* (CC-76-148) 256

Claimant contractor sought to recover the cost of the installation of hot laid bituminous concrete which resulted from delays on the part of respondent. The Court made an award to the claimant as the delays were caused by the respondent. *Savage Construction Company, Inc. vs. Dept. of Highways* (CC-81-14) 274

The Court made an award for liquidated damages assessed against the claimant for delay in the completion of a section of Corridor E where the respondent contributed to the delay on the project. *Shelly & Sands, Inc. vs. Dept. of Highways* (CC-78-165) 473

An award was made to the claimant for concrete grout which was supplied to the respondent for use in certain highway projects. *Wayne Concrete Co. vs. Dept. of Highways* (CC-82-109) 259

CIVIL SERVICE COMMISSION

The Court denied a claim wherein claimant asked the Court to rule upon a decision rendered by the Civil Service Commission. The Court determined that the claimant did not appeal to the Commission within the proper time period, and the decision of the Commission was correct. *Gary L. Batton vs. Civil Service Commission and Dept. of Natural Resources* (CC-81-203) 114

COLLEGES AND UNIVERSITIES—See Board of Regents

COMPARATIVE NEGLIGENCE

In a wrongful death action, the Court held that respondent was negligent in failing to remove a mud slide from the road, and in not warning the traveling public of the danger. The Court also found that the decedent, who had prior knowledge of a hazard in the road, was negligent; accordingly, the award was reduced, based upon the doctrine of comparative negligence. *Lillian Akers, Administratrix of the Estate of Gary Wayne Akers, Deceased vs. Dept. of Highways* (CC-78-222) 491

An award was made for damage to claimants' home where two trees fell on the house. The Court determined that the trees fell when caught in a slide which resulted when the respondent failed to maintain a ditch line; however, the award was reduced under the doctrine of comparative negligence, as the claimants were aware of the clogged ditch line but failed to inform the respondent of the condition. *James Burcham and Patricia J. Burcham vs. Dept. of Highways* (CC-80-252) 441

An award for an injury sustained in a fall was reduced to reflect claimant's comparative negligence where the respondent left a "hump" of blacktop pavement in a street which was being prepared for repaving, and the evidence also showed that the claimant was negligent in failing to maintain an adequate lookout upon the surface of the road. *Armeda Jean Bush vs. Dept. of Highways* (CC-81-204) 496

The Court denied a claim for damage to an automobile which struck a pothole under the doctrine of comparative negligence where the driver of the vehicle testified that she was aware of the potholes in the road. *Jerry M. Edwards and Edgar E. Edwards vs. Dept. of Highways* (CC-82-198) 354

The Court applied the doctrine of comparative negligence in a claim for personal injuries resulting from an automobile accident, where the respondent negligently failed to exercise reasonable care in maintaining the road, but the claimant was also negligent in failing to maintain proper control of his vehicle when he was aware of the hazardous condition of the road. *Millard A. Harmon vs. Dept. of Highways* (CC-80-373) 454

A claim for personal injuries and property damage to a vehicle was denied where the evidence revealed that the claimant was very familiar with the defect in the road which had been caused by a slip. Under the doctrine of comparative negligence, the negligence of the claimant in traveling a road at night in rain and fog, known by him to be in disrepair, was equal to or greater than the negligence of the respondent in its failure to repair the road. *Forrest C. Hatfield vs. Dept. of Highways* (CC-78-227) 220

Although the respondent had actual knowledge of the hazardous condition of the highway, the claimant operator of the vehicle also was aware of the propensity of ice to freeze upon the highway at that particular location. The Court applied the doctrine of comparative negligence and reduced the award to the claimant. *Robert N. Jarboe, Patricia Ann Jarboe, and Stephanie Jarboe vs. Dept. of Highways* (CC-79-297) 13

The Court applied the doctrine of comparative negligence and disallowed claims where the negligence of the driver was equal to or greater than that of the respondent. *Keller Industries, Inc. vs. Dept. of Highways* (CC-81-29) and *Ryder Truck Rental, Inc. vs. Dept. of Highways* (CC-80-381) 417

Although the respondent may have been negligent in failing to warn motorists of a flooded section of road, the negligence of the claimant in failing to exercise ordinary care equaled or exceeded the negligence of the respondent; therefore, the Court denied the claim. *Margo A. Keyser vs. Dept. of Highways* (CC-80-164) 27

In a claim for damage to a vehicle which struck a pothole, the Court applied the doctrine of comparative negligence and denied the claim where it appeared that the driver's negligence was equal to or greater than the respondent's negligence, based upon prior knowledge of the condition of the road. *Tommy Kinder vs. Dept. of Highways* (CC-82-110) 311

Where the claimant was aware of defects in the highway and the respondent had constructive notice of the defects, the Court followed the doctrine of comparative negligence and denied the claim. *Virginia Lewis vs. Dept. of Highways* (CC-80-421) 8

A claim for property damage and personal injury which occurred when claimants' vehicle struck an endloader parked on the edge of the highway was granted, as the Court determined that the respondent was negligent in failing to place a warning light to indicate the existence of the endloader. *Liberty Mutual Insurance Company, subrogee of Edward E. and Jennifer Dilling, and Edward E. and Jennifer Dilling vs. Dept. of Highways* (CC-81-93) 171

An award for injuries received in a fall from a bridge was reduced under the doctrine of comparative negligence because the claimant had prior knowledge of the condition of the bridge. *John T. May vs. Dept. of Highways* (CC-81-165) 290

The Court applied the doctrine of comparative negligence in a claim for water damage to claimants' property where it appeared that the damage resulted in part from respondent's failure to keep a ditch line clear and in part from claimants' negligent construction of a driveway which undercut the support of the road. The Court held that the negligence of the claimants was equal to or greater than that of the respondent, and denied the claim. *James Pack & Ella Mae Pack vs. Dept. of Highways* (CC-79-125) 337

Under the doctrine of comparative negligence, the Court determined that the claimant's negligence, where he knew of the road condition which damaged his vehicle, equalled or exceeded the negligence of the respondent, and the claim was denied. *Robert G. Riner vs. Dept. of Highways* (CC-82-288) 432

Where claimant's vehicle sustained damage when he collided with a median strip, the Court made an award as the respondent was guilty of negligence which was the proxi-

mate cause of the accident; however, the Court applied the doctrine of comparative negligence and reduced the award by 20%. *James Scott Sadler vs. Dept. of Highways* (CC-80-422) .. 17

The Court applied the doctrine of comparative negligence and denied a claim for damage to a vehicle which struck a pothole. The Court held that the negligence of the driver in striking a pothole located on the berm of the road equalled or exceeded any negligence of the respondent. *Robert C. Schumacher vs. Dept. of Highways* (CC-82-55) 315

Where the claimant had notified the respondent of the defect in the highway, and further testified that she knew of the existence of the defect in the highway, the Court denied the claim based upon the doctrine of comparative negligence. *Margaret Spatafore and Joseph Robert Spatafore vs. Dept. of Highways* (CC-80-185) 18

A claim for damages to an automobile was denied as the Court determined that the claimant, with prior knowledge of the condition of the road, was negligent, and this negligence was equal to or greater than that of the respondent. *Bertie Gibbs Thomas and Carolyn Thomas vs. Dept. of Highways* (CC-82-163) 316

A claim for vehicle damage was denied where it was established that the respondent had placed warning signs in the vicinity of the slip in the roadway, and the driver testified that he did not observe the signs. The Court held that the negligence of the driver equalled or exceeded any negligence on the part of the respondent. *Alex Toth vs. Dept. of Highways* (CC-82-113) 480

A claim for damage to real property based upon respondent's alleged negligence in maintaining a catch basin was disallowed where the Court determined that several conditions existed which led to claimant's damages. The Court applied the doctrine of comparative negligence where the claimant's acts significantly contributed to the problem, and this negligence was equal to or greater than that of the respondent. *A. B. Williams vs. Dept. of Highways* (CC-79-466) 482

CONDEMNATION

A claim was dismissed as it was the proper subject for condemnation proceedings. Under the provisions of West Virginia Code §14-2-14(5), the Court had no jurisdiction over the claim. *Doy P. Crites vs. Dept. of Highways* (CC-81-378) 428

The Court denied an award for equipment allegedly taken by respondent following an eminent domain proceeding. There was no evidence to suggest that respondent took possession of claimant's equipment, and claimant had received compensation as a result of the eminent domain proceeding. *Robert Hart, d/b/a Bob's Bake Shop vs. Dept. of Highways* (CC-79-685) 443

A claim for removal of a roadway from claimant's property was denied based upon a provision of the lease entered into by the claimant and the respondent. *Bessie M. Stone, by Charles H. Stone, her Attorney in Fact vs. Dept. of Highways* (CC-79-35) 143

CONSPIRACY

The Court dismissed a complaint for failure to state a claim upon which relief could be granted where the claimants failed to allege facts to show that respondent's employees formed a conspiracy to require claimants to forfeit a bond which had been posted as security for a strip mining permit. *Ida M. Hiner and Norman F. Hiner, d/b/a Hercules Construction Company vs. Dept. of Natural Resources* (CC-80-150) 430

CONTRACTS—See also Building Contracts

The claimant was granted an award for work performed under a contract where the award exceeded the amount of the contract, but the claimant had performed work beyond the terms of the contract at the request of respondent's officials. To deny the claimant payment for the services actually performed would unjustly enrich the respondent. *Appalachian Engineers, Inc. vs. Board of Regents* (CC-81-55) 493

As the evidence in the claim was clear that the contract project was stopped by the respondent, and the contract was terminated or rescinded without fault on the part of the contractor, the Court made an award for damages sustained by the claimant. *Black Rock Contracting, Inc. vs. Dept. of Highways* (CC-80-222) 340

Under claimant's contract with the respondent, claimant was to dispose of waste material from a project, and therefore entered into a contract with a third party for the waste material. When the respondent terminated the contract with the claimant, the claimant incurred expenses of litigation as the result of the breach of its contract with the third party. The Court determined that, although the general rule is that attorney's fees and expenses incurred in litigation are not recoverable, an exception to that rule exists where a breach of contract has forced a party to maintain or defend a suit with a third person, and the Court made an award for this portion of the claim. *Black Rock Contracting, Inc. vs. Dept. of Highways* (CC-80-222) 340

The claimant was granted an award for additional materials used in building a fence as the respondent failed to provide claimant with a complete diagram of the area. To deny the award would unjustly enrich the respondent. *Butler Corporation vs. Dept. of Highways* (CC-81-440) 442

The Court made an award to a contractor who filed a claim requesting payment for increases in transportation charges for

sand and gravel in bulk under a specific section of the *Standard Specifications for Roads and Bridges.* The Court determined that the deregulation of transportation rates occurred as the direct result of an act of a public authority, i.e., the Federal government, and that the claimant was entitled to the increase which resulted. *Carl M. Geupel Construction Co., Inc. vs. Dept. of Highways* (CC-79-172) 200

A delay by the respondent in approving materials through the "green tag" process delayed a contractor on a project for which the respondent then assessed liquidated damages. The Court made an award to the contractor for the liquidated damages. *Cochran Electric Company vs. Dept. of Highways* (CC-76-117) 206

The Court upheld an assessment of a portion of liquidated damages against a contractor where the evidence indicated that a portion of the delay was the result of a late start by the contractor. *Cochran Electric Company vs. Dept. of Highways* (CC-76-117) 206

The Court denied an award to a contractor who alleged that the failure of the respondent to permit the contractor from withdrawing a bid caused damages to the contractor. The Court determined that the Director of the Purchasing Division did not abuse the discretion granted to him under the purchasing regulations. *G. M. McCrossin, Inc. vs. Board of Regents* (CC-79-682) 265

Claimant sought recovery for services provided under an architectural agreement with the respondent, and the Court denied the claim as it was clear that the claimant had been reimbursed under the terms of the contract. *Gates Engineering Company, et al. vs. Board of Regents* (CC-82-68) 500

A claim for breach of contract for personal services was denied by the Court where claimant alleged he was not paid for annual leave. The Court determined that the annual leave had been paid. *Francis J. Hennessy vs. Board of Regents* (CC-80-340) 103

The Court denied a claim for architectural work performed for the Fairmont Emergency Hospital because claimant did not have a contract with the respondent. *Henry Elden & Associates vs. Dept. of Health and Dept. of Finance and Administration* (CC-79-367) 307

The Court made an award to the claimant for redesigning certain water and sewer facilities. The work was performed prior to the time claimant received authorization for the work; however, the Court determined that, based on the standard of equity and good conscience, an award must be granted. *Holly, Kenney, Schott, Inc. vs. Dept. of Highways* (D-893) 381

A claim for the contract price of a piece of equipment was denied where the Court determined that the claimant failed to ascertain whether or not the equipment would conform to the specifications in the contract, and, because the equipment did not conform, the respondent, under the terms of the contract, had the right to cancel that portion of the contract. *Hooten Equipment Company vs. Board of Regents* (CC-80-337) 503

In an action filed for the enforcement of an arbitration award made to the claimant based upon a contract provision which provided for the arbitration of disputes between the parties, the Court granted an award as it is clear that the policy of the law of this State favors arbitration. *Hughes-Bechtol, Inc. vs. Board of Regents* (CC-81-450) 189

A claim for the enforcement of an arbitration action which involved the claimant and the respondent was awarded by the Court as the general law appears to indicate that a State or its agencies may enter a valid contract with a private party providing for arbitration of disputes that may arise under a contract. *Hughes-Bechtol, Inc. vs. Board of Regents* (CC-81-450) 189

The Court denied a claim where the respondent canceled a purchase order for winter grade asphalting mixture. The material did not meet specifications, and because it was not fit for its intended use, the respondent was obliged to cancel the purchase order. *John D. Tonkovich and Sons, Inc. vs. Dept. of Highways* (CC-81-140) 505

The Court denied a claim for damages based on respondent's cancellation of a contract for the lease of a building where the contract contained a cancellation provision. *L. R. Lewis and B. L. Lewis vs. Dept. of Finance and Administration and Dept. of Welfare* (CC-82-235) 336

The Court granted an award to the claimant where it appeared that the respondent breached a contract of employment with the claimant. *William B. McGinley vs. Board of Regents* (CC-81-20) 271

The Court denied a portion of a contract claim based upon the cost of bond required by the U.S. Coast Guard in the removal of an existing structure on a river, as the Court determined that the contractor must bear this expense. *The Melbourne Brothers Construction Company vs. Dept. of Highways* (CC-77-150) 226

A claim for reimbursement for monies allegedly spent repairing a public road was disallowed as claimant had no contract to perform the work. *D. Albert Moore vs. Dept. of Highways* (CC-80-97a) 410

The Court overruled respondent's defense based on a Special Plea of Release as claimant's claim was filed within 120 days following claimant's acceptance and approval of the final estimate under a construction contract, as was provided in the estimate. *Preston Contractor's Inc. vs. Dept. of Highways* (CC-80-158) 465

Claimant corporation created a subdivision and filed a claim for the cost of widening an access road, which claim was denied because there was no contract with the respondent to bear this cost. *Rainbow Development Corporation vs. Dept. of Highways* (CC-81-350) 228

An award for medical services rendered to an inmate of the State Penitentiary at Moundsville was made where the Court determined that a Medical Respite signed by the wife of the inmate and the Governor of West Virginia did not establish a contract which would obligate the inmate's family to bear the inmate's medical expenses. *Reynolds Memorial Hospital, Inc. vs. Dept. of Corrections* (CC-82-28) 273

An agreement between claimant and a representative of respondent, by which claimant would provide medical services to respondent at a 10% discount, was invalid because respondent's representative signed the agreement without the authority to do so. While the claimant is entitled to the full value of its services, the Court disallowed the claims based upon the decision in *Airkem Sales and Service, et al. v. Dept. of Mental Health,* 8 Ct. Cl. 180 (1971). *Reynolds Memorial Hospital, Inc. vs. Dept. of Correction* (CC-82-212a&b) 321

A contract provision entered into by the claimant and West Virginia University, which provided that meat was sold on a per piece basis, was enforced by the Court, and an award was made to the claimant based upon the terms of the contract. *Shane Meat Company vs. Board of Regents* (CC-82-86) 233

An award was made for window cleaning services where the Court determined the amount due under the contract after a dispute arose. *Swain Window Cleaning Services vs. Dept. of Finance and Administration* (CC-82-301) 385

Claimant was awarded additional compensation for work performed under a piano tuning and maintenance contract where the Court determined that the contract was ambiguous, and the claimant performed services beyond the terms of the base price for tuning. *Donald F. Udell vs. Board of Regents* (CC-81-359) 450

Claimant's claim for additional costs under a construction contract was denied where the claimant failed to notify the project engineering in writing of its intention to make a claim for additional compensation as required under the contract. *Vecellio & Grogan, Inc., for Peraldo Construction Company vs. Department of Highways* (CC-81-343) 451

The Court made awards in the amounts withheld under two paving contracts. Respondent's statistical analysis concluded that a certain amount of the pavement would be below the required specification, but, as the evidence did not substantiate this conclusion, the Court made the awards. *Vecellio & Grogan, Inc. vs. Dept. of Highways* (CC-81-425 & CC-82-92) 467

The Court dismissed a claim based upon a theory of negligent interference with a contract due to respondent's alleged arbitrary and capricious denial of approval for a septic system where the evidence did not indicate that respondent was ultimately responsible for approving the system. *Michael E. Whalen and Ann Whalen vs. Dept. of Health and Donald Greene, Sanitarian* (CC-81-219) 509

The Court held open a claim so that the parties could agree upon an amount due the claimant based on a quantum meruit recovery. *Xerox Corporation vs. Dept. of Natural Resources* (CC-82-236) 435

CONTRIBUTORY NEGLIGENCE

The contributory negligence of the parent operator of a vehicle cannot be imputed to a child passenger. The child was granted an award for the injuries she received in an accident where the respondent was found negligent. *Robert N. Jarboe, Patricia Ann Jarboe, and Stephanie Jarboe vs. Dept. of Highways* (CC-79-297) 13

Where the claimant/operator and the claimant/owner/passenger were engaged in a joint venture at the time and place of the accident, the contributory negligence of the operator of the vehicle will be imputed to the passenger. *Robert N. Jarboe, Patricia Ann Jarboe, and Stephanie Jarboe vs. Dept. of Highways* (CC-79-297) 13

DAMAGES

The Court made an award for damage to real property when employees of the respondent performed negligently in certain excavation work. *Oncie E. Archer et al. vs. Dept. of Highways* (CC-81-390) 96

A claim for damages allegedly caused by respondent's alleged negligence in certifying a certain parcel of real estate for sale to the Commissioner of Delinquent and Forfeited Lands contained items of damages relating to costs of litigation or to ownership and maintenance of property, and if the claim were viewed as a contract claim, those items of expense could not be considered "foreseeable." For that reason, recovery would be precluded by the doctrine enunciated in *Hadley v. Baxendale,* 89 Exch. 341. *Willard Casto vs. State Auditor's Office* (CC-79-116) 86

A delay by the respondent in approving materials through the "green tag" process delayed a contractor on a project for

which the respondent then assessed liquidated damages. The Court made an award to the contractor for the liquidated damages. *Cochran Electric Company vs. Dept. of Highways* (CC-76-117) 206

An award was made to the claimant for damage to his vehicle which struck a broken metal drain hole cover. The Court found that respondent's failure to repair the broken cover was the proximate cause of the claimant's damages. *Glenn E. Hiller vs. Dept. of Highways* (CC-82-183) 269

In order for the Court to make an award for flood damages to claimant's property, the Court must be satisfied that respondent's actions resulted in the alleged damage. Since the evidence was conflicting as to the cause of the damage, and the Court cannot base an award upon speculation, the claim was denied. *James David Hutchinson vs. Dept. of Highways* (CC-80-291) 335

Claimant sought recovery of liquidated damages charged against it and the Court denied this portion of the claim as the claimant failed to complete its work on time and the bridge under construction was not able to be opened to traffic. *Savage Construction Company, Inc. vs. Dept. of Highways* (CC-81-14) 274

The Court made an award for liquidated damages assessed against the claimant for delay in the completion of a section of Corridor E where the respondent contributed to the delay on the project. *Shelly & Sands, Inc. vs. Dept. of Highway* (CC-78-165) 473

In an action to recover liquidated damages assessed against the claimant by the respondent for failure to complete the installation of a lighting system on I-64, the Court made an award to the claimant for the liquidated damages, concluding that respondent's inadvertent error of green tagging the junction boxes contributed to claimant's delay in completing the project. *Stark Electric, Inc. vs. Dept. of Highways* (CC-80-193) 277

In an action to recover liquidated damages assessed by the respondent, the Court made an award to the claimant for the liquidated damages as it did not appear from the evidence that the respondent suffered any damages as a result of the delay in completing the contract. *Stark Electric, Inc. vs. Dept. of Highways* (CC-80-193) 277

DEPARTMENT OF MOTOR VEHICLES

The Commissioner of Motor Vehicles is charged with making rules and regulations concerning the administration and enforcement of motor vehicle inspections. A claim for the cost of converting an automobile into a dune buggy which failed to meet inspection requirements was denied as there was

no evidence that the Commissioner abused his discretion in issuing the regulations. *Charles Dennis vs. Dept. of Public Safety* (CC-80-336) 301

The Court found that respondent was negligent in failing to record claimant's lien on a West Virginia Certificate of Title. An award was made to the claimant for the damages sustained. *General Motors Acceptance Corporation vs. Dept. of Motor Vehicles* (CC-82-46) 268

The Court denied a claim for the refund of costs experienced by the claimant when the respondent suspended claimant's license and registration pursuant to West Virginia Code §17D-3-3. *Cynthia Catherine McGrath vs. Dept. of Motor Vehicles* (CC-81-421) 132

As West Virginia Code §17A-4-1 provides for the transfer, surrender, or retention of plates upon expiration of registration, but makes no provision for refund of fees, the Court denied a claim for the difference between the fees paid for registration of two motor vehicles. *Robert B. Moran vs. Dept. of Motor Vehicles* (CC-83-116) 479

An award was made to the claimant where the Court determined that the respondent was negligent in erroneously titling claimant's vehicle, resulting in a higher license fee being incurred by the claimant. *Harold E. Wiley vs. Dept. of Motor Vehicles* (CC-80-331) 298

DRAINS AND SEWERS—See also Waters and Watercourses

An award was made for damage to a basement wall where the Court determined that water was discharged onto claimant's property due to respondent's failure to maintain a ditch line, and this failure was the proximate cause of the damage sustained. *Jesse C. Anderson vs. Dept. of Highways* (CC-81-110) 360

The Court disallowed claimants' claims for property damage allegedly caused by respondent's failure to provide and maintain adequate drainage in the area of their homes. The evidence indicated that other factors which were not the responsibility of the respondent caused the damage. *Anna Lou Booten, et al. vs. Dept. of Highways* (CC-81-176) 438

A claim for property damage as the result of a flood was denied where the evidence did not establish that the culverts involved in the flooding were clogged at the time of the storm. *Doris Jane Bowen, et al. vs. Dept. of Highways* (CC-80-342) 1

A claim for water damage to a barn allegedly caused by respondent's improper construction of a highway berm was denied where it was established that the respondent conducted the highway repairs to the satisfaction of the claimant prior to the flooding, that the flooding occurred as the result of a

heavy rainstorm, and that the respondent did nothing to increase the flow of water onto the claimant's land. *Charles N. Durbin vs. Dept. of Highways* (CC-81-181) 302

Claims for the costs of drainage pipes purchased by claimants and installed by respondent were denied as the drainpipes were installed under the claimants' driveways, and respondent's policy prohibited paying for drainpipes beneath private driveways. *James D. Eads, et al. vs. Dept. of Highways* (CC-80-401a-h) 498

The Court determined that respondent's construction of a new sewer system caused a substantial increase in the volume of surface water flowing onto claimants' land, and granted an award for the damages. *Silbern D. and Metta Goddard vs. Dept. of Corrections* (CC-81-301) 281

The Court made an award to the claimant for flood damage to his home caused by respondent's failure to maintain a culvert located near claimant's property. *Benjamin C. Henry vs. Dept. of Highways* (CC-82-96) 371

An award was made to the claimants for damages sustained when their home was flooded. The Court determined that the respondent negligently failed to design and provide adequate drainage. *Mark A. Hissam and Julia A. Hissam vs. Dept. of Highways* (CC-80-375) 284

The evidence indicated that the slide which damaged claimant's property was the result of continuous saturation of the land from the drainage from claimant's home, and not the result of respondent's ditch-cleaning operation. As the evidence did not indicate that respondent acted negligently in performing its duty of maintaining the drainage ditch, the Court denied the claim. *David H. Kisor, Administrator of the Estate of Julia Kisor, Deceased vs. Dept. of Highways* (CC-79-122) 506

The Court made an award for damage to claimant's property due to flooding where the evidence indicated that respondent's installation of two culverts obstructed the natural flow of the creek bordering claimant's property and diverted the water onto his land. *Norman Lewis vs. Dept. of Highways* (CC-80-334) 507

The Court denied a claim for damage to a home allegedly caused by respondent's failure to maintain a drainage line, where it appeared that the hillside behind claimant's home contained subsurface water which flowed continuously, resulting in movement of the land and damage to the house. *Bernard C. Lyons and Helen V. Lyons vs. Dept. of Highways* (CC-79-578) 358

Where the respondent was negligent in altering the drainage which was the proximate cause of the damages sustained by

the claimant, the Court made an award for the damages. *Donald C. Master vs. Dept. of Highways* (CC-80-131) 24

An award was made to the claimants for the loss of their home, which was destroyed by a landslide. The preponderance of the evidence established that the damage resulted from respondent's improper maintenance of a ditch line which caused water to be discharged over claimants' property, resulting in the slide. *Paul E. Miller and Marguerite Miller vs. Dept. of Highways* (CC-81-396) 477

The Court applied the doctrine of comparative negligence in a claim for water damage to claimants' property where it appeared that the damage resulted in part from respondent's failure to keep a ditch line clear and in part from claimants' negligent construction of a driveway which undercut the support of the road. The Court held that the negligence of the claimants was equal to or greater than that of the respondent, and denied the claim. *James Pack & Ella Mae Pack vs. Dept. of Highways* (CC-79-125) 337

The Court denied a claim for flood damage to claimant's property allegedly resulting from respondent's negligent replacement of a culvert, as the evidence did not establish that respondent acted negligently. *Kenneth H. Patrick, Jr. vs. Dept. of Highways* (CC-79-315) 446

A claim for damage to property caused by water from a drainage ditch was denied because it is the responsibility of the property owner to maintain driveways contructed upon the rights of way of the respondent. *Richard T. Philpot vs. Dept. of Highways* (CC-82-47) 181

The Court made an award to the claimants for flood damage to real and personal property where it was established that an inadequately designed and constructed drainage system failed to carry off water from the highway. *Ruby E. Shrader vs. Dept. of Highways* (CC-78-168), *James C. Martin, Jr. and Shirley B. Martin vs. Dept. of Highways* (CC-78-231) 364

The Court made an award for water damages to personal property which occurred when a culvert constructed beneath Interstate 79 prevented the continuous flow of water from a creek near claimant's property and resulted in the flooding of her property. *Velma Sutton vs. Dept. of Highways* (CC-80-249) 323

An award for property damage was granted where respondent's failure to maintain a drain caused water to flow across a road and onto claimants' property. *Paul J. and Betty O. Underwood vs. Dept. of Highways.* (CC-79-86) 242

The common law rule is that surface water is considered a common enemy, and that each landowner may fight it off as best he can, with the modification that an owner of higher

ground may not inflict injury on the owner of lower ground beyond what is necessary. The Court made an award to claimants whose properties were damaged as the result of negligence by the respondent in the installation of drains above the properties. *Alva Katherine White vs. Dept. of Highways* (D-748a) and *Paul White and Wanda White vs. Dept. of Highways* (D-748b) 212

A claim for damage to real property based upon respondent's alleged negligence in maintaining a catch basin was disallowed where the Court determined that several conditions existed which led to claimant's damages. The Court applied the doctrine of comparative negligence where the claimant's acts significantly contributed to the problem, and this negligence was equal to or greater than that of the respondent. *A. B. Williams vs. Dept. of Highways* (CC-79-466) 482

ELECTRICITY

The respondent admitted the amount and validity of a claim for an unpaid bill for electrical services, and the Court made an award in the amount requested. *Appalachian Power Company vs. Dept. of Public Safety* (CC-83-111). See also Appalachian Power Company vs. Dept. of Public Safety, 14 Ct. Cl. ..... (1983) (CC-83-118) 469

When a tree on respondent's property fell during a snowstorm, cutting the power lines to claimant's residence and causing his tropical fish to freeze, a claim for the value of the fish was denied. *Henry W. Gould vs. Board of Regents* (CC-79-357) 304

The Court made an award to the claimant for damage to its secondary power line caused by negligence on the part of the respondent's employees. *Monongahela Power Company vs. Dept. of Highways* (CC-82-116) 227

EXPENDITURES—See also Office Equipment and Supplies

The Court made an award to the claimant for merchandise which it delivered to the respondent but for which it had not been paid and sufficient funds were available within the proper fiscal year with which the agency could have paid the obligation. *A. B. Dick Company vs. Workmen's Compensation Fund* (CC-81-323) 95

The following claims were decided upon the same principle:

American Hospital Supply vs. Dept. of Health (CC-82-197) 244

Appalachian Engineers, Inc. vs. Dept. of Finance and Administration (CC-82-90) 159

Appalachian Power Company vs. Dept. of Public Safety (CC-83-111) 469

Bailey, Incorporated vs. Board of Regents (CC-83-35) 470

Beckman Instruments, Inc. vs. Dept. of Health (CC-83-30) 438

Narendra Bora vs. Dept. of Health (CC-82-97) 245

Chicago Embroidery Company vs. Office of the Secretary of State (CC-82-91) 168

County Commission of Webster County vs. Office of the Supreme Court (CC-81-168) 75

Chad Cunningham vs. Dept. of Health (CC-82-323) 370

Clifford Cupp vs. Dept. of Health (CC-81-341) 53

Energy Technology Consultants, Inc. D & M Weather Services vs. Board of Regents (CC-81-443) 101

Evans Lumber Company vs. Division of Vocational Rehabilitation (CC-82-249) 345

Firestone Tire & Rubber Company vs. Dept. of Natural Resources (CC-81-402) 102

C. Elaine Friend vs. Supreme Court of Appeals (CC-82-314) 370

Hawes Elecertic Co. vs. Dept. of Health (CC-81-431) 102

The Hertz Corporation vs. Dept. of Public Safety (CC-82-137) 170

Holzer Medical Center vs. Dept. of Health (CC-83-28) 444

Howard Uniform Company vs. Dept. of Public Safety (CC-81-367) 91

Johnson Controls, Inc. vs. Dept. of Finance and Administration (CC-81-316) 105

Johnson Controls, Inc. vs. Dept. of Finance and Administration (CC-81-454) 106

Johnson Controls, Inc. vs. Dept. of Finance and Administration (CC-82-87) 171

L. Robert Kimball & Associates vs. Tax Dept. (CC-81-70) 7

Lundia, Myers Industries Inc. vs. Board of Regents (CC-81-356) 92

McDonnell Douglas Corporation vs. Dept. of Education (CC-81-124) 16

Jeffrey O. McGeary vs. Human Rights Commission (CC-82-12) 117

The Michie Company vs. Office of the Supreme Court Administrator (CC-82-3) 109

The Michie Company vs. Dept. of Health (CC-82-35) 157

Miller's Implement, Inc. vs. Dept. of Health (CC-83-43) 470

Moore Business Forms, Inc. vs. Dept. of Public Safety (CC-82-41) 173

Moore Business Forms, Inc. vs. Dept. of Education (CC-82-298) 398

Angela Preston vs. Attorney General's Office (CC-82-79) .. 157

Region V — Regional Education Service Agency vs. Dept. of Employment Security (CC-81-426) 110

S. S. Logan Packing Company vs. Board of Regents (CC-83-26) 472

Southern Chemical Co. vs. Adjutant General (CC-81-129) 29

Janet T. Surface vs. Workmen's Compensation Fund (CC-82-280) 294

Janet T. Surface vs. Dept. of Health (CC-83-2) 375

Weslakin Corporation vs. Dept. of Corrections (CC-82-156) 296

Wheeling Multi-Service Center, Inc. vs. Division of Vocational Rehabilitation (CC-81-133) 112

Zummach-Peerless Chemical Coatings Corp. vs. Dept. of Natural Resources (CC-81-135) 31

An award was made for rocks which the claimant furnished the respondent as a by-product of claimant's strip mining operation. *Wayne K. Baker, d/b/a Baker Coal Company vs. Dept. of Highways* (CC-80-405) 424

An award was made for repair work to respondent's bus, as the Court concluded that to deny the claim would result in unjust enrichment on the part of the respondent. *C. W. Lewis, Inc. vs. Dept. of Corrections* (CC-82-103) 427

Where the respondent failed to insure items placed in the mail to be returned to the claimant, the Court made an award for the loss of such items, as the respondent failed to take the reasonable precaution of insuring the items. *Carter's Safety Systems, Inc. vs. Dept. of Finance and Administration* (CC-81-189) 52

The Court made an award for back charges for phone service at the Pipestem State Park which were discovered after an inventory of the phone system showed that billing errors had been made. The Court held that to deny the claimant relief would unjustly enrich the State. *The Chesapeake & Potomac Telephone Company vs. Dept. of Natural Resources* (CC-81-302) 332

Claimant insurer was reimbursed the cost of storage of its insured's vehicle when the vehicle was held by the Dept. of Public Safety on an arson investigation. *Dairyland Insurance Company, subrogee of Wesley D. Myers vs. Dept. of Public Safety* (CC-81-355) 100

In a claim for payment of unemployment benefits to two former employees of the respondent, the Court determined that overpayments to individuals are to be collected from the individuals, and not the agency, and denied the claim. *Dept. of Employment Security vs. Dept. of Finance and Administration* (CC-82-335) 428

Where claimants have sought payment for various goods and services furnished to respondent, but the respondent alleged that sufficient funds were not available at the close of the fiscal years in question from which the obligations could have been paid, the Court denied the claims based upon the principle established in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971). *Fullen Fertilizer Company, Inc., et al. vs. Farm Management Commission* (CC-81-231) 36

The following claims were decided upon the same principle:

A. H. Robins Co. vs. Dept. of Corrections (CC-82-315) 375

B. & S. Air Taxi Service vs. Office of the Secretary of State (CC-82-259) 261

Bennett Publishing Company, et al. vs. Dept. of Corrections (CC-81-444) 92

Gordon A. Bobbitt vs. Dept. of Corrections (CC-82-62) 152

Boso Agri-Center, Inc. vs. Farm Management Commission (CC-82-318) 378

Bowlings, Inc., et al. vs. Dept. of Corrections (CC-82-150) 261

Buckeye Gas Products Company vs. Farm Management Commission (CC-81-423) 83

C. H. James & Co. vs. Dept. of Corrections (CC-82-326) 379

Copy Graphics, Inc. vs. Insurance Department (CC-82-4) 99

J. P. Currence vs. Office of the Secretary of State (CC-82-186) 345

Dept. of Employment Security vs. Dept. of Corrections (CC-81-388) 89

Dept. of Finance and Administration vs. Dept. of Corrections (CC-81-117) 3

Dept. of Highways vs. Dept. of Corrections (CC-82-57) 152

Dept. of Highways vs. Farm Management Commission (CC-82-58) 186

Exxon Co., U.S.A. vs. Farm Management Commission (CC-82-136) 218

Jenkins Concrete Products Co. vs. Farm Management Commission (CC-81-187) 83

Kanawha County Commission vs. Dept. of Highways (CC-81-447) 397

Ellery H. Morgan vs. Public Employees Insurance Board and Alcohol Beverage Control Commission (CC-83-13) 471

Motor Car Supply Company, et al. vs. Farm Management Commission (CC-81-346) 94

Mountaineer Motor Sales, Inc. vs. Farm Management Commission (CC-82-106) 187

Peters Fuel Corporation, et al. vs. Dept. of Corrections (CC-82-185) 255

Scott Saw Sales & Service vs. Farm Management Commission (CC-82-165) 218

Charles H. Simmons d/b/a Simmons' Hauling, et al. vs. Dept. of Corrections (CC-82-130) 276

Walter J. Klein Company, LTD vs. Board of Regents (CC-81-201) 29

Westinghouse Electric Supply Company vs. Dept. of Corrections (CC-82-221) 297

Wilson Welding Supply Company vs. Railroad Maintenance Authority (CC-82-258) 298

Claimant was granted an award for typesetting a book for the respondent where payment was not made because statutory purchasing procedures had not been followed. *Green Tab Publishing vs. Dept. of Corrections* (CC-82-194) 239

The Court made an award to the claimant for goods sold under a contract with the respondent. *Industrial Gas & Supply Company vs. Dept. of Highways* (CC-82-182) 288

An award was made for travel expenses incurred by claimant in his employment with respondent. *Lester A. Kubski vs. Dept. of Health* (CC-82-167) 289

The Court granted an award to claimant for goods purchased by respondent where the goods were not paid for because respondent inadvertently failed to comply with the technical regulations of the State purchasing procedures. *Mountaineer Office Supply, a division of F & M Supply Co., Inc. vs. Secretary of State* (CC-82-337) 382

An award for medical services rendered to an inmate of the State Penitentiary at Moundsville was made where the Court determined that a Medical Respite signed by the wife of the inmate and the Governor of West Virginia did not establish a contract which would obligate the inmate's family to bear the inmate's medical expenses. *Reynolds Memorial Hospital, Inc. vs. Dept. of Corrections* (CC-82-28) 273

An award was made for storage and delivery costs incurred by the claimant as the result of respondent's failure to provide for the reconsignment of a shipment of wire gabions. *Terra Aqua Conservation vs. Dept. of Highways* (CC-82-283) 295

An award was made for the replacement cost of a medical school diploma which claimant delivered to respondent and which was returned to claimant in a damaged condition. *Edwin O. Walker vs. Dept. of Health* (CC-83-40) 472

An award was made to the claimant for processing and postage costs incurred as a result of the respondent's erroneous reporting of registered vehicles in West Virginia. *West Virginia Automobile and Truck Dealers Association vs. Dept. of Motor Vehicles* (CC-81-24) 13

FALLING ROCKS—See also Landslides

A claim for damage to a vehicle which struck a rock in the road was denied by the Court as there was no evidence that the respondent knew or should have known of the existence of the dangerous condition, and it was apparent from the evidence that the rock had fallen just prior to the accident. *Donald E. Ashley vs. Dept. of Highways* (CC-82-61) 174

The Court disallowed a claim for damages to a truck struck by falling rocks where the claimant testified that he knew the area was prone to falling rocks, and no evidence was presented to indicate that the respondent had notice or forewarning of the rock fall in question. *Connie Lawrence Bailey vs. Dept. of Highways* (CC-81-389) 405

The Court made an award to claimants for personal injuries sustained when the vehicle in which they were traveling struck a large rock located on the berm of the road. The Court held that the evidence established that the respondent had knowledge of the presence of the rock on the berm, and failure to remove the rock created a hazardous condition which constituted negligence. *Robert Conley, Geneva Conley and Michael Conley, by his mother Geneva Conley vs. Dept. of Highways* (CC-78-145) 263

In a claim for damages based on injuries the decedent received when a rock struck his vehicle, it must be established by a preponderance of the evidence that the respondent knew or should have known that a dangerous condition existed on the road. As the claimant did not meet this burden of proof, the claim was denied. *Azile Dean, Individually, and as Executrix of the Estate of Virgil Dean, Deceased vs. Dept. of Highways* (CC-79-632) 325

A claim for damage to a vehicle which struck a rock in the roadway was denied by the Court, as falling rock signs were present to warn the traveling public. *Dorothy M. Gore vs. Dept. of Highways* (CC-81-161) 175

In a petition for rehearing, the Court granted the rehearing on the issue of whether the respondent reasonably could have corrected a falling rock hazard within the limits of funds appropriated by the Legislature for highway maintenance. *Dorothy M. Gore vs. Dept. of Highways* (CC-81-161) 502

A claim for damage to a vehicle which struck a rock slide in the road was granted by the Court where the evidence established that the respondent had been notified of the slide but had failed to remove the slide or provide warning signs to the travelling public. *Patricia Ann Hall and Lacy Hall vs. Dept. of Highways* (CC-81-442) 169

A claim for damage to an automobile which struck rocks in a roadway was denied as respondent must have had actual or constructive notice of the defect in the roadway and a reasonable amount of time to take corrective action. *Donna F. Porterfield vs. Dept. of Highways* (CC-81-91) 373

Property damage and personal injury resulted when claimant encountered a rock slide in the roadway. The Court denied the claim as the evidence indicated that the rock slide had occurred shortly before the accident. The claimant failed to meet the burden of proving that the respondent failed to conform to a standard of "reasonable care and diligence. . . under all circumstances." *Keith Ray Roberts vs. Dept. of Highways* (CC-80-82) 25

A claim for damages to an automobile allegedly caused by large rocks left in the road after respondent performed maintenance on the road was denied as the evidence was insufficient to establish negligence on the part of respondent. *Clarence Shiflet & Florence Shiflet vs. Dept. of Highways* (CC-82-131) 339

A claim for damages to an automobile which struck a rock in the road was denied as the evidence did not indicate that the respondent had actual or constructive notice of the defect in the roadway, and the area was not one prone to rock falls. *Andrew S. Young vs. Dept. of Highways* (CC-81-75) 359

FLOODING

The Court made an award to the claimants where it appeared that surface water run-off from the respondent's roadway was diverted onto claimants' property due to a broken curb of which the respondent had actual notice. *Gene Brady Beegle vs. Dept. of Highways* CC-81-248. *St. Paul's Protestant Episcopal Church vs. Dept. of Highways* (CC-81-271) 361

Evidence established that a storm was of such magnitude that the water run-off went over the culverts and the road in the area. The Court found no negligence on the part of the respondent, and denied the claim. *Doris Jane Bowen et al. vs. Dept. of Highways* (CC-80-342) 1

Where the evidence showed that claimant's property flooded due to its location in a natural drain area, and not because the respondent elevated the road in front of the property, the Court denied the claim. *Robert W. Burke vs. Dept. of Highways* (CC-80-318) 495

A claim for water damage to a barn allegedly caused by respondent's improper construction of a highway berm was denied where it was established that the respondent conducted the highway repairs to the satisfaction of the claimant prior to the flooding, that the flooding occurred as the result of a heavy rainstorm, and that the respondent did nothing to increase the flow of water onto the claimant's land. *Charles N. Durbin vs. Dept. of Highways* (CC-81-181) 302

The claimant was granted an award after its warehouse was flooded immediately following respondent's redesigning of the storm drainage near the warehouse. The Court rejected respondent's defense based upon a release in a deed between the parties, as the damages which occurred were not of the kind contemplated by the parties when the release was executed. *Fibair, Inc. vs. Dept. of Highways* (CC-81-196) 393

The Court made an award to the claimants for damages to real and personal property due to a flood where it was shown by a preponderance of the evidence that respondent's construction of I-77 increased the amount of surface water discharged onto claimants' property. *U. G. Harrison and Edna Harrison vs. Dept. of Highways* (CC-80-173) 456

The Court made an award to the claimant for flood damage to his home caused by respondent's failure to maintain a culvert located near claimant's property. *Benjamin C. Henry vs. Dept. of Highways* (CC-82-96) 371

An award was made to the claimants for damages sustained when their home was flooded. The Court determined that the respondent negligently failed to design and provide adequate drainage. *Mark A. Hissam and Julia A. Hissam vs. Dept. of Highways* (CC-80-375) 284

A claim for surface water damage to a garden was denied where it appeared that the water followed its natural course downhill onto claimants' land. The evidence did not warrant a finding that any action or inaction on the part of the respondent was the sole cause of the flooding of claimants' property. *Bobbie E. Holmes and Neva I. Holmes vs. Dept. of Highways* (CC-81-191) 356

An award was made to the claimant for the destruction of his home by the respondent. The house was lifted from its foundation during a flood and came to rest across a highway. The Court determined that the respondent did not act reasonably in attempting to remove the house from the highway. *Ricky S. Howerton vs. Dept. of Highways* (CC-80-329) 286

The Court made an award for damages to claimants' property where respondent's failure to maintain a culvert caused the flooding of claimants' property. *Waitman D. Jett and Marilyn Jett vs. Dept. of Highways* (CC-78-17) 250

An award was made for flood damage to claimant's property where the damage was the result of respondent's negligent maintenance of the drainage system in the vicinity. *Ruth A. Krippene vs. Dept. of Highways* (CC-82-230) 348

The Court made an award for damage to claimant's property due to flooding where the evidence indicated that respondent's installation of two culverts obstructed the natural flow of the creek bordering claimant's property and diverted the water onto his land. *Norman Lewis vs. Dept. of Highways* (CC-80-334) 507

A claim for property damage due to flooding was disallowed where the evidence indicated that other factors, such as a high water table and low elevation, caused the flooding, and there was no actionable negligence on respondent's part. *Lucille Linville vs. Dept. of Highways* (CC-79-58) 408

The Court made an award for real and personal property damage where the respondent, in raising the elevation of the road in front of claimants' home, negligently failed to provide adequate drainage, causing water to pool on claimants' property. *Robert Marcum and Loretta Marcum vs. Dept. of Highways* (CC-78-248) 461

The Court made an award to the claimants for flood damage to real and personal property where it was established that an inadequately designed and constructed drainage system failed to carry off water from the highway. *Ruby E. Shrader vs. Dept. of Highways* CC-78-168. *James C. Martin, Jr. and Shirley B. Martin vs. Dept. of Highways* (CC-78-231) 364

Claimant sought payment for taxes paid on cases of beer which were destroyed after being in a flood, and the Court made an award to the claimant, as retention of the taxes would amount to unjust enrichment on the part of the State. *State Distributing Company vs. Nonintoxicating Beer Commission* (CC-81-385) 110

The Court made an award for water damages to personal property which occurred when a culvert constructed beneath Interstate 79 prevented the continuous flow of water from a creek near claimant's property and resulted in the flooding of her property. *Velma Sutton vs. Dept. of Highways* (CC-80-249) 323

It is well established law that land at lower level is subject to the servitude of receiving waters that flow naturally upon it from adjoining higher land levels. The Court made an award to claimants for property damage resulting from excess water being cast upon the properties of the claimants due

to the installation of drains on a road above the properties of the claimants. *Alva Katherine White vs. Dept. of Highways* D-748a and *Paul White and Wanda White vs. Dept. of Highways* (D-748b) 212

FOSTER CHILDREN

A claim for expenses incurred by claimants while they served as foster parents was denied as the claim was barred by the statute of limitations. *Thomas Harold Anderson, Sr. and Edith Iolene Anderson vs. Dept. of Welfare* (CC-79-554) 376

The Court held that the claimant assumed the risk of any loss which resulted when claimant entrusted a ward of the State with his vehicle, and denied claim. *John Charles Bungard vs. Dept. of Welfare* (CC-80-352) 48

In order for the Court to make an award for a window which was broken by a foster child who is a ward of the State, there must be a showing of negligence on the part of the respondent. As there was no evidence of negligence, the Court disallowed the claim. *Norma Dornbos, d/b/a The Party Beer Store vs. Dept. of Welfare* (CC-81-92) 407

HOSPITALS

The Court made an award for damaged goods where respondent admitted the validity of the claim and stated that sufficient funds were available for the payment of the claim. *American Hospital Supply vs. Dept. of Health* (CC-82-197)..... 244

An award was made for the cost of repair to the armature shaft of claimant's wheelchair which was broken by a rapidly closing elevator door in one of respondent's facilities. *William E. Coy vs. Dept. of Health* (CC-82-204) 344

Claimant's shirt was damaged by a patient at Spencer State Hospital, the respondent admitted the amount and validity of the claim, and the Court made an award to the claimant. *Chad Cunningham vs. Dept. of Health* (CC-82-323) 370

The Court denied an award for injuries sustained by the claimant when he jumped from the roof of a building at Weston State Hospital. The Court concluded that the injury was not foreseeable, and foreseeability is a necessary element in establishing negligence. *Nelson Eddie Furner, an Incompetent, sues by and through Ava Elizabeth Furner Young, his next friend, and Ava Elizabeth Furner Young, Individually vs. Dept. of Mental Health* (D-1010) 245

Where the claimants sought payment for various medical supplies or services furnished to the respondent, but the respondent alleged that sufficient funds were not available at the close of the fiscal years in question from which the obligations could have been paid, the Court denied the claims based upon the principle established in *Airkem Sales and Service,*

et al. vs. Dept. of Mental Health, 8 Ct. Cl. 180 (1971). *Greenbrier Valley Hospital, et al. vs. Dept. of Corrections* (CC-81-347) 39

The following claims were decided upon the same principle:

Ace Adjustment Service, Inc., Agent for United Hospital Center, Inc. vs. Dept. of Corrections (CC-82-78) 158

Grafton City Hospital vs. Dept. of Corrections (CC-82-36) 153

E. L. Jimenez, M.D., et al. vs. Dept. of Corrections (CC-81-320) 84

Lois McElwee Memorial Clinic, et al. vs. Dept. of Corrections (CC-82-299) 320

Memorial General Hospital Association, Inc. vs. Dept. of Corrections (CC-82-256) 291

Ohio Valley Medical Center vs. Dept. of Corrections (CC-81-89) 10

Ohio Valley Medical Center, Inc. vs. Dept. of Corrections (CC-82-276) 312

B. Payman, M.D., et al. vs. Dept. of Corrections (CC-82-205) 254

Potomac Valley Hospital vs. Dept. of Corrections (CC-83-37) 471

Reynolds Memorial Hospital, Inc. vs. Dept. of Corrections (CC-82-212 a&b) 321

Chandra P. Sharma vs. Dept. of Corrections (CC-82-22) 118

Utah Valley Hospital vs. Dept. of Corrections (CC-82-300) 324

West Virginia School of Osteopathic Medicine Clinic, Inc. vs. Dept. of Corrections (CC-82-306) 349

West Virginia University Hospital vs. Dept. of Corrections (CC-81-413) 116

West Virginia University Outpatient Pharmacy vs. Dept. of Corrections (CC-82-145) 260

The Court made an award for the wrongful death of claimant's decedent who died from injuries inflicted by a fellow patient at Weston State Hospital. The Court determined that the respondent failed to exercise reasonable care for the safety of the decedent and this failure proximately caused the injury and subsequent death. *William Paul Hall, Sr., Administrator of the Estate of William Paul Hall, Jr., vs. Dept. of Health, Division of Mental Health* (CC-76-134) 305

The Court denied a claim where the claimant's finger was broken in the spokes of a wheelchair in which she was being transported as there was no evidence that respondent's employee pushed the wheelchair in a negligent manner. *Barbara Haynes vs. Board of Regents* (CC-78-13) 327

An award was made for the value of a jacket which disappeared while claimant was a patient at Huntington State Hospital. *Donald R. Hogsett vs. Dept. of Health* (CC-83-16) 400

The Court made an award for the death of a patient of an institution operated by the respondent where the decedent was placed in a ward without adequate consideration being given to her mental history. The Court concluded that the respondent failed to fulfill its moral and legal obligation to protect the claimant's decedent, and its acts constituted negligence which was the proximate cause of the death. *Thelma E. McIntyre, Administratrix of the Estate of Wilma S. McIntyre, deceased vs. Dept. of Health* (CC-76-70) 209

An award was made for the wrongful death of a patient in respondent's State hospital when the Court determined that respondent failed to adequately protect the decedent when she was placed in a ward with no bars on the windows, and she died in a fall or jump from the window. *Thelma E. McIntyre, Administratrix of the Estate of Wilma S. McIntyre, deceased vs. Dept. of Health* (CC-76-70) 209

An award was made to the claimant for an injury sustained at the hands of a fellow patient at Weston State Hospital where the Court held that the respondent failed to exercise ordinary care to protect claimant from harm caused by another patient. *Francis L. Parker vs. Dept. of Health* (CC-79-679) 489

INDEPENDENT CONTRACTOR

The Court denied a claim for damages arising out of an automobile accident which allegedly occurred because traffic barricades obstructed the vision of the drivers, and it appeared that the barricades were placed by an independent contractor in accordance with respondent's regulations. *Pius B. Chumbow vs. Dept. of Highways* (CC-81-62) 363

The Court held that the respondent may not be held liable for the acts of an independent contractor, and disallowed a claim where claimants' private road was washed out due to a clogged culvert. The culvert had become clogged with refuse dumped by the independent contractor. *William Conner and Lois Conner vs. Dept. of Highways* (CC-80-154) 405

Claimant was denied recovery for damage to her vehicle which resulted when she was being flagged on a construction project performed by an independent contractor. *Nellie Evans vs. Dept. of Highways* (CC-80-339) 3

The Court held that the respondent cannot be liable for the negligence of an independent contractor engaged in construction work where the claimants' vehicle struck a metal plate in the road which had been placed there as part of the contractor's work. *David E. Paul and Dolores R. Paul vs. Dept. of Highways* (CC-82-310) 479

INSURANCE

A claim for overpayment of insurance premiums was denied based upon the *Airkem* decision, where the respondent admitted the validity of the claim but stated that there were insufficient funds remaining in its appropriation from which the claim could be paid. *Ellery H. Morgan vs. Public Employees Insurance Board and Alcohol Beverage Control Commission* (CC-83-13) 471

INTEREST

An advisory determination claim for accrued interest on an amount due Employment Security when respondent's institution underpaid its statutory contribution to the claimant was denied as West Virginia Code §14-2-12 precludes the payment of interest by the Court. *Dept. of Employment Security vs. Dept. of Corrections* (CC-81-388) 89

A request for payment of accrued interest on amounts due the Dept. of Employment Security from certain agencies of the State was denied pursuant to West Virginia Code §14-2-12. *Dept. of Employment Security vs. Dept. of Corrections* (CC-82-260a et al.) 387

JURISDICTION

A claim for workmen's compensation benefits was denied because the Court lacked jurisdiction based upon West Virginia Code §14-2-14. *Robert R. Brock vs. Workmen's Compensation Fund* (CC-81-457) 136

A claim for workmen's compensation benefits was denied because claimant did not exhaust his administrative remedies. *Robert R. Brock vs. Workmen's Compensation Fund* (CC-81-457) 136

This Court specifically lacks jurisdiction of a claim barred by the statute of limitations. *D. A. Burner vs. Dept. of Public Safety* (CC-78-278) 50

A claim for workmen's compensation benefits was denied because the Court lacked jurisdiction based upon West Virginia Code §14-2-14. *June Dorton vs. Workmen's Compensation Fund* (CC-81-103) 137

The Court lacked jurisdiction of a claim based upon claimant's alleged illegal incarceration, as the claim was barred under the applicable statute of limitations, West Virginia Code §55-2-12. The Court granted respondent's motion to dismiss. *Lester Rollings Haines vs. Dept. of Corrections* (CC-76-89) 453

A claim for overtime pay was denied where the evidence established that claimant was working for respondent under an assignment contract from an agency of the federal government, and this agency paid the claimant's salary. The Court

held that it lacked jurisdiction over the claim as respondent was not claimant's employer. *Carl R. Moore vs. Governor's Office of Economic and Community Development* (CC-80-137) 419

LANDLORD AND TENANT

The Court denied a claim for damages based on respondent's cancellation of a contract for the lease of a building where the contract contained a cancellation provision. *L. R. Lewis and B. L. Lewis vs. Dept. of Finance and Administration and Dept. of Welfare* (CC-82-235) 336

The Court made an award for rent due under a lease agreement with the respondent where the respondent admitted the claim. *Wheeling Multi-Service Center, Inc. vs. Division of Vocational Rehabilitation* (CC-81-133) 112

LANDSLIDES—See also Falling Rocks

The Court made an award for the wrongful death which occurred as a result of the slippery condition caused by respondent's failure to properly remove all materials left on the surface of the roadway. *Matta L. Brady, Administratrix of the Estate of Shell C. Brady, Dec., and Selected Risks Insurance Company, as subrogee of Shell C. Brady vs. Dept. of Highways* (CC-80-175) 33

An award for damage to real property was made where employees of the respondent broke a water line, causing a saturated soil condition in the area of claimants' property. *James W. Dixon and Doris A. Dixon vs. Dept. of Highways* (CC-80-365) 90

An award was made to the claimants for the loss of their home, which was destroyed by a landslide. The preponderance of the evidence established that the damage resulted from respondent's improper maintenance of a ditch line which caused water to be discharged over claimants' property, resulting in the slide. *Paul E. Miller and Marguerite Miller vs. Dept. of Highways* (CC-81-396) 477

A claim for damage to claimant's property as the result of a slip was denied by the Court as it was determined by a preponderance of the evidence that the respondent was not negligent in the maintenance of its road, and had attempted to correct the slip on claimant's property while remedying the slip problem in the road. *Clyde Wood vs. Dept. of Highways.* (CC-77-103) 243

In claims for slide damage to claimants' homes, the evidence indicated that the homes were situated in a slide-prone area. There was insufficient proof that the acts or omissions of the respondent were the cause of the damages sustained, and the Court denied the claims. *James Woody and Lottie L. Woody vs. Dept. of Highways* (CC-80-241). *Harry W. Shoemaker and Winifred G. Shoemaker vs. Dept. of Highways* (CC-80-242).

Dale R. Pennington and Gloria Mae Pennington vs. Dept. of Highways (CC-80-243) 510

A claim for property damage due to a slide was disallowed where there was insufficient proof of any acts or omissions by the respondent which were the proximate cause of the damage. The evidence indicated that the slide was due to the natural movement of unstable land. *Martha P. Yoak, by her agent, Judson K. Yoak vs. Dept. of Highways.* (CC-80-380) .. 436

LIMITATION OF ACTIONS

A claim for expenses incurred by claimants while they served as foster parents was denied as the claim was barred by the statute of limitations. *Thomas Harold Anderson, Sr. and Edith Iolene Anderson vs. Dept. of Welfare* (CC-79-554) 376

A claim for property damage based on the theory that the claim was *ex delicto* was denied by the Court, which applied the two-year period of limitations in accordance with West Virginia Code §14-2-21. *Pearl Hughes Bolling and Charles Hughes vs. Dept. of Highways* (CC-79-16) 119

The Court, upon rehearing the claim, determined that the claim was not barred by the Statute of Limitations, and made an award to the claimants for inconvenience suffered after respondent placed dye in a well in an effort to trace underground water to a surface mine site, and the dye contaminated claimants' water well. *Victor Frisco and Janet Frisco vs. Dept. of Natural Resources* (CC-80-121) 346

A claim for damage to an air-conditioning unit in claimant's dwelling house was barred by the Statute of Limitations. *Joyce Hupp vs. Office of the Chief Medical Examiner* (CC-81-238 186

MOTOR VEHICLES—See also Negligence; Streets and Highways

An award was made to the claimants for damages sustained by their automobile while driving through a construction area. The Court determined that the respondent was negligent in failing to properly maintain the construction area. *Shirley R. Adams and Billie Adams vs. Dept. of Highways* (CC-82-146) 279

Where damages to claimant's insured vehicle were determined to have been caused by respondent's negligent snow removal and cindering operations, the Court granted an award to the claimant for the damages sustained. *Allstate Insurance Co., as subrogee of Michael Hall vs. Dept. of Highways* (CC-81-149) 280

A claim for damage to a windshield was denied as the truck which threw the gravel against the windshield went off the travelled portion of the road and onto the berm. The Court held that this was an intervening act of negligence which was

the proximate cause of the damage. *Leona Asbury and Tom Asbury vs. Dept. of Highways* (CC-81-54) 45

The respondent owes the duty of exercising reasonable care and diligence in the maintenance of its highways, and where claimant's automobile sustained damage at a marked construction site, the Court held that the respondent had met its duty of reasonable care, and denied the claim. *David R. Bassett vs. Dept. of Highways* (CC-82-294) 426

An award was made for a damaged windshield which occurred when claimant drove his vehicle through an area where employees of the respondent were patching the road with tar and cinders. *Larry L. Bennett vs. Dept. of Highways* (CC-81-434) 216

A claim for the cost of having a motor vehicle license reinstated was granted by the Court because a clerical error in the Magistrate Court system resulted in the expenses to the claimant. *David Lee Closson vs. Office of The Supreme Court of Appeals* (CC-82-176) 237

In order for the Court to make an award in an accident claim, where a vehicle was destroyed after the driver lost control when he drove through water on a road, it is necessary to establish that the respondent had notice of the defect in the road. As no evidence was presented to show such notice, the Court denied the claim. *Ronald E. Cyrus vs. Dept. of Highways* (CC-82-196) 334

A claim for damages to a vehicle owned by claimant's insured was denied where it was established that the damage occurred in a construction area and that the contractor performing the work, not the respondent, was responsible for repairs on the road in question. *Dairyland Insurance Company, Subrogee of Jesse W. Coburn, Jr. vs. Dept. of Highways* (CC-82-10) 300

Respondent had no notice of a dangerous condition on the highway, and the Court denied liability for a windshield damaged by cinders. *William P. Estep, Sr. vs. Dept. of Highways* (CC-81-49) 55

A claim for property damage to a vehicle, which occurred when the vehicle struck a trench across the roadway, was denied as the Court found no negligence on the part of the respondent, and the damage occurred due to claimant's own negligence. *Veda E. Evans vs. Dept. of Highways* (CC-81-43) 121

Damage to a vehicle which struck a pothole was denied because claimant was aware of the existence of the hole. *Diana Lynn Hackney vs. Dept. of Highways* (CC-81-139) 77

Where respondent's flagman negligently flagged claimant's vehicle so that it was struck by another vehicle, the Court

made an award to the claimant for personal injuries. *Christine E. Henderson and Rodgers Paul Henderson vs. Deptment of Highways* (CC-78-234) 21

An award was made to the claimant for damage to his vehicle which struck a broken metal drain hole cover. The Court found that respondent's failure to repair the broken cover was the proximate cause of the claimant's damages. *Glenn E. Hiller vs. Dept. of Highways* (CC-82-183) 269

The Court denied a claim for damage to a vehicle which occurred when the vehicle was driven into water on the highway. The Court determined that the lighting on the vehicle should have enabled the claimant to see the flood water before driving into it, had she been exercising ordinary care under the circumstances. *Margo A. Keyser vs. Dept. of Highways.* (CC-80-164) 27

The Court made an award to claimant for damage to her vehicle which occurred when the vehicle dropped off a parking area into a large hole. The Court determined that the negligence of the respondent was the actual cause of the accident. *Barbara B. Krantz vs. Dept. of Highways* (CC-80-391) 116

A claim for damage to an automobile struck by a bolt which broke from a bridge was granted where the Court determined that the respondent was negligent in failing to use reasonable care to keep the bridge in reasonably safe condition. *Robert Howard Latta vs. Dept. of Highways* (CC-82-147) 289

A claim for property damage and personal injury which occurred when claimants' vehicle struck an endloader parked on the edge of the highway was granted, as the Court determined that the respondent was negligent in failing to place a warning light to indicate the existence of the endloader. *Liberty Mutual Insurance Company, subrogee of Edward E. and Jennifer Dilling, and Edward E. and Jennifer Dilling vs. Dept. of Highways* (CC-81-93) 171

Where the claimant testified that he did not know what caused the damage to a tire on his vehicle, the Court denied th claim as the Court would have had to resort to speculation or conjecture. *Dores D. McDonnell, Sr. vs. Dept. of Highways* (CC-81-31) 9

Where the claimant and the respondent stipulated that damage to claimant's vehicle occurred when a road sign belonging to the respondent fell and struck the vehicle, the Court made an award to the claimant. *Jimmy Polk vs. Dept. of Highways* (CC-81-132) 67

The Court denied a claim for damage to an automobile which struck a loose piece of concrete in the road as there was no evidence that respondent had either actual or con-

structive notice of the defect. *Gary L. Pritt and Jeanette Pritt vs. Dept. of Highways* (CC-81-418) 447

An award for damage to a vehicle which passed through tar applied to the highway by respondent's employees, who had not placed warning signs, was granted by the Court. *Frank E. Redd vs. Dept. of Highways* (CC-81-169) 231

The Court made an award for damages to a vehicle which passed through tar in an area where respondent's employees had failed to place warning signs. *Stanley T. Ruckman vs. Dept. of Highways* (CC-81-166) 232

Where claimant's vehicle sustained damage when he collided with a median strip, the Court made an award as the respondent was guilty of negligence which was the proximate cause of the accident; however, the Court applied the doctrine of comparative negligence and reduced the award by 20%. *James Scott Sadler vs. Dept. of Highways* (CC-80-422) 16

The Court denied an award where the claimant's vehicle struck a piece of metal in a highway where there was no evidence that the respondent knew of the presence of the metal. *Martha C. Scruggs vs. Dept. of Highways* (CC-81-428) 411

An award for damage to a vehicle, which occurred when a truck spreading cinders or salt on a highway passed claimant's car and threw cinders against it, was made by the Court. The claimant established, by a preponderance of the evidence, that the offending truck was owned and operated by the respondent and that the operator was negligently operating the truck at an excessive speed under the prevailing conditions. *Daniel Serge, Jr. vs. Dept. of Highways* (CC-81-95) 68

The Court made an award for damage to claimant's automobile caused when the vehicle struck an improperly secured metal sheet covering a road repair hole on a State-owned and maintained highway. *Charles R. Shaffer vs. Dept. of Highways* (CC-81-202) 28

A claim for damage to a vehicle caused by respondent's alleged failure to clear dirt off a roadway after a ditch cleaning operation was denied where it appeared that respondent performed the operation in a reasonable manner. *George A. Stover and Carma Stover vs. Dept. of Highways* (CC-81-261) 420

In a claim for damages to a vehicle and for personal injuries, the Court determined that the respondent was in violation of West Virginia Code §17C-13-1 when its employee stopped a truck in a roadway and an accident resulted when claimants attempted to avoid the truck. *Charles W. W. Stultz and Mary N. Stultz vs. Dept. of Highways* (CC-81-12) 292

The Court may not speculate as to the cause of an accident, and denied a claim for damage to a vehicle which struck a

manhole cover as no evidence was presented as to how or why the accident occurred. *Billy Sutphin vs. Dept. of Highway* (CC-81-416) 415

An award was made for damage to a vehicle which occurred as a result of the negligence of the respondent's employee in failing to exercise ordinary care in removing a fallen tree limb from the vehicle. *John F. Tomblyn vs. Dept. of Highways* (CC-81-192) 111

The Court made an award to the claimant for damage to a tire on his automobile which struck a piece of metal protruding from a bridge. *Thomas R. Treadway vs. Dept. of Highways* (CC-82-227) 296

A claim for storage charges assessed against claimant's vehicle was denied as the charges were assessed after the vehicle left respondent's possession. *United Farm Bureau Mutual Insurance Company vs. Dept. of Public Safety* (CC-82-93) 422

A claim for damage to a vehicle which struck a road grader was denied by the Court because claimant failed to remain in the line of traffic directed to proceed around the ditching operation. *Drema Faye Wheeler vs. Dept. of Highways* (CC-82-39) 184

Recovery was denied claimant who collided with steel beams erected on the berm of the highway to protect a steel grate cover. *Cecil Whitt, Sr. vs. Dept. of Highways* (CC-80-338) 30

NEGLIGENCE—See also Motor Vehicles; Streets and Highways

An award was made to the claimants for damages sustained by their automobile while driving through a construction area. The Court determined that the respondent was negligent in failing to properly maintain the construction area. *Shirley R. Adams and Billie Adams vs. Dept. of Highways* (CC-82-146) 279

Where damages to claimant's insured's vehicle was determined to have been caused by respondent's negligent snow removal and cindering operations, the Court granted an award to the claimant for the damages sustained. *Allstate Insurance Co., as subrogee of Michael Hall vs. Dept. of Highways* (CC-81-149) 280

A claim for damage to a windshield was denied as the truck which threw the gravel against the windshield went off the travelled portion of the road and onto the berm. The Court held that this was an intervening act of negligence which was the proximate cause of the damage. *Leona Asbury and Tom Asbury vs. Dept. of Highways* (CC-81-54) 45

Where the damages to a vehicle resulted from the negligent operation of a mower by an employee of the respondent, the Court made an award for damages to the vehicle. *Auto Tech, Inc. vs. Dept. of Highways* (CC-81-436) 113

A claim for money expended in repairs to a broken water line was denied as the evidence did not establish that some negligent act or omission of the respondent proximately caused the damage sustained by the claimant. *James E. Bailey, Jr. vs. Dept. of Highways* (CC-80-145) 423

A claim for loss of business which occurred during construction of a highway in front of claimant's business was denied because there was no negligence on the part of the respondent. *Steven Bellman d/b/a Baskin-Robbins vs. Dept. of Highways* (CC-81-36) 97

An award for personal injury was granted by the Court when claimant, while acting as a deputy sheriff, was standing on a bridge and fell between the steel members of the bridge deck. The Court found that the respondent was negligent in its maintenance of the deck. *Norman E. Benson vs. Dept. of Highways* (CC-79-503) 193

Claimant was granted an award for damage to a high-pressure water truck which struck a broken piece of concrete pavement on Interstate 64. The evidence indicated that a dangerous condition existed on I-64 for a week prior to the accident, and the respondent was negligent in failing to discover and repair the highway. *Browning-Ferris Industries, Chemical Service, Inc. vs. Dept. of Highways* (CC-82-247) 399

Where the claimant was required to furnish his own tools, and stored them in a locker provided by the respondent, the Court made an award for the tools when they were stolen from the locker. *L. D. Hall vs. Dept. of Highways* (CC-80-397). See CC-81-172 & 186 58

Where respondent's flagman negligently flagged claimant's vehicle so that it was struck by another vehicle, the Court made an award to the claimant for personal injuries. *Christine E. Henderson and Rodgers Paul Henderson vs. Department of Highways* (CC-78-234) 21

The Court determined that respondent's failure to properly inspect and maintain the equipment in its laundry facility constituted negligence, and this negligence proximately caused the damage to claimants' personal property. *Mr. and Mrs. Stephen Kent Hill vs. Board of Regents* (CC-80-183) 283

An award was made to the claimant for the destruction of his home by the respondent. The house was lifted from its foundation during the flood and came to rest across a highway. The Court determined that the respondent did not act reasonably in attempting to remove the house from the highway. *Ricky S. Howerton vs. Dept. of Highways* (CC-80-329) 286

An award for damage to personal property was made where the respondent was negligent in failing to remedy a shelf defect of which it had prior knowledge. *Charles W. Jones vs. Board of Regents* (CC-81-35) 6

A claim for personal injury was denied where the claimant had placed his hand in a dangerous position in the winch cable of a bulldozer being operated by a member of the West Virginia National Guard. The operator could not have anticipated nor foreseen that a person would place his hand in such a position. *Douglas Edward Keller and Patty Keller vs. Adjutant General and Department of Highways* (CC-78-219) 22

The Court made an award to claimant for damage to her vehicle which occurred when the vehicle dropped off a parking area into large hole. The Court determined that the negligence of the respondent was the actual cause of the accident. *Barbara B. Krantz vs. Dept. of Highways* (CC-80-391) 116

A claim for property damage and personal injury which occurred when claimants' vehicle struck an endloader parked on the edge of the highway was granted, as the Court determined that the respondent was negligent in failing to place a warning light to indicate the existence of the endloader. *Liberty Mutual Insurance Company, subrogee of Edward E. and Jennifer Dilling, and Edward E. and Jennifer Dilling vs. Dept. of Highways* (CC-81-93) 171

The Court made an award for real and personal property damage where the respondent, in raising the elevation of the road in front of claimants' home, negligently failed to provide adequate drainage, causing water to pool on claimants' property. *Robert Marcum and Loretta Marcum vs. Dept. of Highways* (CC-78-248) 461

The Court made an award for damage to a vehicle which passed through tar applied to the highway by the respondent, who failed to place proper warning signs. *Sidney Pozell and Lillian Pozell vs. Dept. of Highways* (CC-81-163) 227

An award was made to claimant, a State employee, for damage to her uniform, which became covered with oil and grease from an automobile seat after the vehicle had been serviced at respondent's garage. *Ethea M. Scott vs. Dept. of Highways* (CC-82-102) 292

An award for damage to a vehicle, which occurred when a truck spreading cinders or salt on a highway passed claimant's car and threw cinders against it, was made by the Court. The claimant established, by a preponderance of the evidence, that the offending truck was owned and operated by the respondent and that the operator was negligently operating the truck at an excessive speed under the prevailing conditions. *Daniel Serge, Jr. vs. Dept. of Highways* (CC-81-95) 68

A claim for damages to an automobile allegedly caused by large rocks left in the road after respondent performed maintenance on the road was denied as the evidence was insufficient to establish negligence on the part of respondent. *Clar-*

ence Shiflet & Florence Shiflet vs. Dept. of Highways (CC-82-131) 339

If a claimant fails to establish negligence on the part of the respondent, the Court will deny the claim. Therefore, the Court denied a claim for damage to claimant's vehicle caused by an open gate on an interstate. *State Farm Mutual Automobile Insurance Company, as Subrogee of Barbara A. Howe vs. Dept. of Highways* (CC-80-349) 71

In a claim for damages to a vehicle and for personal injuries, the Court determined that the respondent was in violation of West Virginia Code §17C-13-1 when its employee stopped a truck in a roadway and an accident resulted when claimants attempted to avoid the truck. *Charles W. W. Stultz and Mary N. Stultz vs. Dept. of Highways* (CC-81-12) 292

A claim for wrongful death, which occurred when a vehicle went over the side of the interstate, was denied because claimant failed to establish actionable negligence on the part of the respondent. *Audrey P. Tittle, Admin. of the Estate of Steven B. Parcell vs. Dept. of Highways* (CC-79-48) 146

NOTICE

Where there was no evidence to establish that the respondent was aware of or had any knowledge of the existence of a loose piece of concrete on a section of I-64, and said piece of concrete caused damage to claimant's vehicle, the Court denied the claim. *Bernard F. Carney vs. Dept. of Highways* (CC-81-38) 51

The Court made an award to claimants for personal injuries sustained when the vehicle in which they were traveling struck a large rock located on the berm of the road. The Court held that the evidence established that the respondent had knowledge of the presence of the rock on the berm, and failure to remove the rock created a hazardous condition which constituted negligence. *Robert Conley, Geneva Conley and Michael Conley, by his mother Geneva Conley vs. Dept. of Highways* (CC-78-145) 263

In order for the Court to make an award in an accident claim, where a vehicle was destroyed after the driver lost control when he drove through water on a road, it is necessary to establish that the respondent had notice of the defect in the road. As no evidence was presented to show such notice, the Court denied the claim. *Ronald E. Cyrus vs. Dept. Dept. of Highways* (CC-82-196) 334

Damage to a vehicle which struck a pothole was denied as there was no testimony regarding the time the particular defect existed, nor was there any evidence that the respondent had actual knowledge of the existence of the defect. *Kathleen R. Fewell vs. Dept. of Highways* (CC-81-153) 76

Claimant, who sustained injuries when he fell from a bridge on which the guardrails were missing, was denied an award as there was no proof that the respondent had notice of the missing rails and claimant had prior knowledge of the bridge's condition. *Nelson Gregory vs. Dept. of Highways* (CC-79-307) 355

Where the evidence established that the respondent had notice of the condition of the road and failed to remedy the defect, the Court granted an award to the claimants for damages to their vehicle and for medical expenses. *Paul Gyke and Joe Ann Gyke vs. Dept. of Highways* (CC-82-162) 282

A claim for damage to a vehicle which struck a rock slide in the road was granted by the Court where the evidence established that the respondent had been notified of the slide but had failed to remove the slide or provide warning signs to the travelling public. *Patricia Ann Hall and Lacy Hall vs. Dept. of Highways* (CC-81-442) 169

For the respondent to be held liable for damages caused by road defects, the claimant must prove that the respondent had actual or constructive knowledge of the existence of the defects and a reasonable amount of time to take suitable corrective action. *John A. Hannigan and Carolyn Ann Hannigan vs. Dept. of Highways* (CC-81-86) 5

The following claims were decided upon the same principle:

Arlene Burgess and Charles E. Burgess vs. Dept. of Highways (CC-82-84) 160

Dreama Dawn Cook vs. Dept. of Highways (CC-82-21) 217

Maurice V. Davis vs. Dept. of Highways (CC-81-170) 54

Kenneth N. Ellison vs. Dept. of Highways (CC-82-274) 380

Cheryl M. Fidler vs. Dept. of Highways (CC-82-50) 162

Earl F. Guthrie vs. Dept. of Highways (CC-82-125) 304

Atholl W. Halstead vs. Dept. of Highways (CC-82-40) 163

L. P. King, Jr. and Evelyn King vs. Dept. of Highways (CC-81-61) 79

Eugene A. Knotts vs. Dept. of Highways (CC-81-107) 108

Martha White Foods vs. Dept. of Highways (CC-81-111) 123

Mrs. Juanita McClarin vs. Dept. of Highways (CC-81-246) 445

Eugene P. Mullins vs. Dept. of Highways (CC-82-8) 164

Roger Richmond and Sandra Richmond vs. Dept. of Highways (CC-81-453) 449

Richard L. Sargent vs. Dept. of Highways (CC-82-98) 315

Oscar D. Smith vs. Dept. of Highways (CC-81-5) 11

Larry Lee Stricker vs. Dept. of Highways (CC-81-50) 12

David E. Utt vs. Dept. of Highways (CC-82-115) 236

Robert Varney vs. Dept. of Highways (CC-82-304) 434

Renna J. Wilcox vs. Dept. of Highways (CC-82-63) 166

Roy Franklin Williams, Jr., and Beverly Williams vs. Dept. of Highways (CC-83-117) 485

Gary L. and Brenda Workman vs. Dept. of Highways (CC-82-132) 452

An award was made for injuries sustained in an automobile accident which occurred when the vehicle encountered ice on a roadway. The evidence established that the respondent knew that ice accumulated at the site of the accident, but failed to take reasonable measures to prevent the ice formation or to warn motorists of the hazard. *Lois V. Haynes and E. Robert Haynes vs. Dept. of Highways* (CC-80-415) 460

A claim for property damage to a vehicle and personal injuries to the claimant, which occurred when the vehicle struck a pothole and berm of the road, was denied by the Court as the record did not contain sufficient evidence that the respondent knew or should have known of the existence of the pothole in question. *Nelva Munson vs. Dept. of Highways* (CC-80-355) 133

A claim for damage to an automobile which struck rocks in a roadway was denied as respondent must have had actual or constructive notice of the defect in the roadway and a reasonable amount of time to take corrective action. *Donna F. Porterfield vs. Dept. of Highways* (CC-81-91) 373

The Court denied a claim for damage to an automobile which struck a loose piece of concrete in the road as there was no evidence that respondent had either actual or constructive notice of the defect. *Gary L. Pritt and Jeanette Pritt vs. Dept. of Highways* (CC-81-418) 447

A claim for damage to a vehicle which struck a pothole was denied as the existence of road defects without notice to the respondent is not sufficient to establish negligence on the part of the respondent. *Eldean Russell vs. Dept. of Highways* (CC-82-60) 165

The State is neither an insurer nor a guarantor of the safety of motorists on its highways, and the Court denied a claim where claimant's vehicle struck a rock in the road as the claimant did not establish that the respondent had actual or constructive notice of the rock and a reasonable amount of time to remove it. *Calvin L. Sargent vs. Dept. of Highways* (CC-82-319) 433

The Court denied an award where the claimant's vehicle struck a piece of metal in a highway where there was no evidence that the respondent knew of the presence of the mental. *Martha C. Scruggs vs. Dept. of Highways* (CC-81-428) 411

In a claim for damage to a vehicle which struck a pothole, the Court granted an award because the respondent had constructive notice of the defect in light of the fact that the road was one of the main arteries for motorists travelling north in Kanawha County. *Harry R. Sellards and Francis A. Sellards vs. Dept. of Highways* (CC-82-83) 188

Although the Court has consistently held that the respondent is not an insurer of the safety of persons using the highways of this State, where it has been demonstrated that the respondent had actual knowledge of a dangerous defect in a highway and took no action to remedy the defect, an award has been made. As the evidence in this claim indicated that a hole in the road had been in existence for at least three weeks prior to the accident which damaged claimant's vehicle, the Court made an award for the damage sustained. *Ronald P. Stewart vs. Dept. of Highways* (CC-81-65) 72

Where the claimants' vehicle struck a piece of concrete or patch of tar in the highway, but there was no evidence that the respondent had actual or constructive notice of the defect in the roadway, the Court denied the claim. *Carole E. Updyke and Lionel Joe Updyke vs. Dept. of Highways* (CC-83-122) .. 481

OFFICE EQUIPMENT AND SUPPLIES

Claimant sought payment of unpaid rent due on leased equipment, and the Court made an award for the amount due. *Eastman Kodak Company vs. Dept. of Finance and Administration* (CC-81-386) 101

The Court held open a claim so that the parties could agree upon an amount due the claimant based on a quantum meruit recovery. *Xerox Corporation vs. Dept. of Natural Resources* (CC-82-236) 435

PEDESTRIANS

A motorist drove onto a defective berm of the road to avoid striking a pedestrian. The defective berm caused the truck to go out of control, cross the highway, and strike claimant's decedent. An award was granted by the Court as the berm of a highway must be maintained in a reasonably safe condition for use when the occasion requires. *Eli Blankenship, Jr., Administrator of the Estate of Johnny Blankenship, Deceased vs. Dept. of Highways* (CC-76-113) 194

A claim for personal injury which occurred when claimant fell on a curb was denied, because claimant's failure to exercise reasonable care and maintain a proper lookout was the proximate cause of her injuries. *Dolores Moore vs. Dept. of Highways* (CC-80-240) 179

A claim for personal injury to the claimant, who stepped into a hole in the sidewalk, was denied as there was no evidence that the respondent had actual or constructive knowledge of the defect in the sidewalk. *Tammy Lynn Priestley, an Infant who sues by her Mother, Carolyn Priestley, and Carolyn Priestley vs. Dept. of Highways* (D-732) 82

PERSONAL SERVICES

Where claimants were engaged by the respondent to defend an employee of the State, and the respondent failed to pay the claimants for their services, the Court made an award for the services as the fee charged was reasonable. *W. H. Ballard, II, and G. David Brumfield vs. Dept. of Natural Resources* (CC-81-44) 46

Claimant magistrates were granted awards for wages which were not paid during the 1981-82 fiscal year, based on the decision in *Graham, et al. vs. Office of the Supreme Court of Appeals,* ..... Ct.Cl. ..... (1983). *Arthur U. Browning, et al. vs. Office of the Supreme Court of Appeals* (CC-83-50-62 and 83-108 & 109) 402

Where a miscalculation in claimant's rate of pay was made, the Court granted an award to the claimant in the amount of the underpayment. *Susan L. Cale vs. Board of Regents* (CC-82-160) 262

Claimants were granted awards for serving as counsel for criminal indigents in juvenile, misdemeanor, and felony proceedings, and as counsel for indigents in mental hygiene hearings, where the attorney's fees were not paid because the funds had been exhausted. The Court determined that the factual situations were identical to those in *Swartling, et al. vs. Office of the State Auditor,* 13 Ct.Cl. 57 (1979). *David R. Gold and Louis H. Khourey d/b/a Gold & Khourey vs. Office of the State Auditor* (CC-82-192a & b) 247
248

The following claims were decided upon he same principle:

Richard D. Frum, et al. vs. Office of the State Auditor (CC-81-369) 32

Charles E. McCarty vs. Office of the Supreme Court Administrator (CC-81-400) 130

Eugene J. Sellaro, Jr. vs. Office of the State Auditor (CC-8-138) 85

Sterl F. Shinaberry vs. Office of the State Auditor (CC-81-142) 94

Larry N. Sullivan vs. Office of the State Auditor (CC-82-15) 119

James D. Terry vs. Office of the State Auditor (CC-82-44) 234

The Court found no basis for an award to the claimant, who

sought compensation for reporting and transcribing uncontested divorce cases. Claimant was required to perform the job as part of her employment as secretary to a circuit court judge. *Susan L. Green vs. Supreme Court of Appeals* (CC-80-385) 416

A claim for breach of contract for personal services was denied by the Court where claimant alleged he was not paid for annual leave. The Court determined that the annual leave had been paid. *Francis J. Hennessy vs. Board of Regents* (CC-80-340) 103

Where claimant sought additional compensation for service as the only magistrate in a county designated for two magistrates, the Court determined that the claimant received his proper salary based upon the total population served in accordance with West Virginia Code §50-1-3. *Richard A. Spotloe vs. Administrative Office of the Supreme Court of Appeals* (CC-80-223) 69

A claim for losses which claimant sustained as the result of prematurely assuming employment with the Office of Emergency Services was denied by the Court because there was no agreement between the parties concerning claimant's employment. *William M. Truman vs. Office of Emergency Services.* (CC-81-376) 235

PHYSICIANS AND SURGEONS—See also Hospitals

The Court made an award to the claimant for damaged personal property where the respondent admitted the validity of the claim and stated that sufficient funds were available from which the claim could be paid. *Narendra Bora vs. Dept. of Health* (CC-82-97) 245

The Court disallowed claims for medical and dental services based upon the *Airkem* doctrine where the respondent admitted the validity and amounts of the claims but stated that it did not have sufficient funds with which to pay them. *B. Payman et al. vs. Dept. of Corrections* (CC-82-205) 254

PRISONS AND PRISONERS

The Court held that the respondent carried out its statutory duty under West Virginia Code §62-13-5 when it received claimant into the penitentiary, and no award for lost wages was granted for the period during which claimant was incarcerated, even though his conviction was later voided. *Hayward Jobe Casto, Jr. vs. Dept. of Corrections* (D-986) 497

The Court lacked jurisdiction of a claim based upon claimant's alleged illegal incarceration, as the claim was barred under the applicable statute of limitations, West Virginia Code §55-2-12. The Court granted respondent's motion to

dismiss. *Lester Rollings Haines vs. Dept. of Corrections* (CC-76-89) 453

Recovery was allowed for various articles of personal property which were lost or returned in damaged condition to claimant's home after the articles were removed from claimant's possession while he was imprisoned at the West Virginia Penitentiary in Moundsville. *Donald A. Harmon vs. Dept. of Corrections* (CC-81-381) 347

A claim for damages based upon extra time the claimant served in prison for an escape which was expunged from claimant's record was dismissed as barred by the doctrine of res judicata, as the matter was fully and sufficiently considered in a previous U.S. District Court action. *Ronald R. McGraw vs. Dept. of Corrections* (CC-78-50) 464

A claim for damages where claimant's criminal conviction was declared null and void was dismissed as the claim was barred by the applicable statute of limitations. *Charles E. Moore vs. Dept. of Public Institutions* (CC-76-127) 431

PUBLIC INSTITUTIONS

The Court denied an award for injuries sustained by the claimant when he jumped from the roof of a building at Weston State Hospital. The Court concluded that the injury was not foreseeable, and foreseeability is a necessary element in establishing negligence. *Nelson Eddie Furner, an Incompetent, sues by and through Ava Elizabeth Furner Young, his next friend, and Ava Elizabeth Furner Young Individually vs. Dept. of Mental Health.* (D-1010) 245

The Court disallowed a claim for lost wages and mental anguish allegedly caused by respondent's delay in granting claimant a license to practice registered professional nursing. The Court concluded that the delay was not the result of any unlawful conduct on the part of the respondent and was in large part attributable to claimant's own inaction. *John Grey vs. Board of Examiners for Registered Nurses* (CC-81-151) 395

The Court made an award for the wrongful death of claimant's decedent who died from injuries inflicted by a fellow patient at Weston State Hospital. The Court determined that the respondent failed to exercise reasonable care for the safety of the decedent and this failure proximately caused the injury and subsequent death. *William Paul Hall, Sr., Administrator of the Estate of William Paul Hall, Jr., vs. Dept. of Health, Division of Mental Health* (CC-76-134) 305

The Court denied a claim for damages based on respondent's cancellation of a contract for the lease of a building where the contract contained a cancellation provision. *L. R. Lewis and B. L. Lewis vs. Dept. of Finance and Administration and Dept. of Welfare* (CC-82-235) 336

The Court made an award for the death of a patient of an institution operated by the respondent where the decedent was placed in a ward without adequate consideration being given to her mental history. The Court concluded that the respondent failed to fulfill its moral and legal obligation to protect the claimant's decedent, and its acts constituted negligence which was the proximate cause of the death. *Thelma E. McIntyre, Administratrix of the Estate of Wilma S. McIntyre, deceased vs. Dept. of Health* (CC-76-70) 209

An award was made to the claimant for an injury sustained at the hands of a fellow patient at Weston State Hospital where the Court held that the respondent failed to exercise ordinary care to protect claimant from harm caused by another patient. *Francis L. Parker vs. Dept. of Health* (CC-79-679) 489

A claim for injuries inflicted upon an inmate of the Anthony Forestry Center by another inmate was denied where the respondent had no knowledge of any unusual danger, or reason to anticipate such danger, to the claimant. *Charles S. Ward, guardian of Charles F. Ward vs. Dept. of Corrections* (CC-78-113) 368

PUBLIC OFFICERS

The Court dismissed a claim where it was not established that the damages suffered by the claimant were caused by any breach of duty on the part of the respondent. *Mary Lynn Cook vs. Dept. of Public Safety* (CC-82-157) 331

REAL ESTATE

The Court made an award for damage to real property when employees of the respondent performed negligently in certain excavation work. *Oncie E. Archer et al. vs. Dept. of Highways* (CC-81-390) 96

A claim for recovery of damages caused by respondent's alleged negligence in certifying a certain parcel of real estate for sale to the Commissioner of Delinquent and Forfeited Lands contained items of damage relating to cost of litigation or to ownership or maintenance of property, and if the claim were viewed as a tort claim, the Court could not conclude that such items of expense proximately caused the respondent's error. *Willard Casto vs. State Auditor's Office* (CC-79-116) 86

A claim for damages to unimproved real property allegedly caused by surface water draining onto the property was denied as the ditch was a natural drainage course and there was no evidence to attribute any legal fault to the respondent. *Ronald H. Harper and Sarah E. Harper vs. Dept. of Highways* (CC-80-134) 78

A release in a deed between the respondent and the claim-

ants' predecessors in title to a tract of land was not a covenant that ran with the land, and the claimants were not barred from pursuing a claim for damages to the land where the release only applied to the grantor and not his heirs, successors, and assigns. *U. G. Harrison and Edna Harrison vs. Dept. of Highways* (CC-80-173) 456

An award for property damage was granted based upon the cost of cleaning up the real property and the repairs to the residence and buildings, as the distinction between temporary and permanent damages to real estate was overruled by the West Virginia Supreme Court in the case of *Jarrett v. Harper & Son, Inc.*, 160 W.Va. 399, 235 S.E.2d 362 (1977). *Chester Jones vs. Dept. of Highways* (CC-76-51) 221

Where respondent's employees released Canada geese near claimants' farm, and the geese ate sorghum and corn plants on claimants' property, the Court made an award for the damages sustained. *Henry A. Kay and Charles E. Kay vs. Dept. of Natural Resources* (CC-80-146) 270

REHEARING

In a petition for hearing, the Court granted the rehearing on the issue of whether the respondent reasonably could have corrected a falling rock hazard within the limits of funds appropriated by the legislature for highway maintenance. *Dorothy M. Gore vs. Dept. of Highways* (CC-81-161) 502

RES JUDICATA

A claim for damages based upon extra time the claimant served in prison for an escape which was expunged from claimant's record was dismissed as barred by the doctrine of res judicata, as the matter was fully and sufficiently considered in a previous U.S. District Court action. *Ronald R. McGraw vs. Dept. of Corrections* (CC-78-50) 464

STATE AGENCIES

Claimant sought to recover damages allegedly caused by respondent's negligence in certifying a certain parcel of real estate for sale to the Commissioner of Delinquent and Forfeited Lands when, in fact, the property belonged to a corporation other than the claimant, as the property had been redeemed by the corporation. As the West Virginia Code provides a legal remedy by which claimant may recover the purchase money he paid, and a legal remedy for the recovery of taxes improperly required, the Court has no jurisdiction over that part of the claim. *Willard Casto vs. State Auditor's Office* (CC-79-116) 86

Where the parties stipulated that the respondent, acting as the agent of the claimant, failed to issue call notices on bonds and that the claimant incurred losses as a result, the Court made an award in the amount of the loss. *City of Oak Hill vs. Municipal Bond Commission* (CC-82-268) 344

The Dept. of Employment Security filed several claims against agencies of the State of West Virginia which failed to pay the proper amount of employment compensation tax owed by them. The Court made an award to the claimant as the cost of providing this tax cannot be predicted for any given fiscal year. *Dept. of Employment Security vs. Dept. of Corrections* (CC-82-260a et al.) 387

The Court made an award for loss of camera equipment furnished at the request of superiors. *Rabert Lee Fulks vs. Dept. of Education* (CC-81-172), *Ernest W. Lowe vs. Dept. of Education* (CC-81-186) 56

The Court denied an award to a contractor who alleged that the failure of the respondent to permit the contractor from withdrawing a bid caused damages to the contractor. The Court determined that the Director of the Purchasing Division did not abuse the discretion granted to him under the purchasing regulations. *G. M. McCrossin, Inc. vs. Board of Regents* (CC-79-682) 265

The Court denied an award of sick leave where the employee was terminated as part of a general reduction in force, and there was no policy in existence which required that an employee, on sick leave at the time of a reduction in force, be allowed to exhaust the balance of his sick leave hours before being terminated. *Claude W. Jarrell vs. Dept. of Highways* (CC-81-324) 407

Claimant filed an action to recover money spent to remodel a business for a State liquor store for which she had entered into an agreement with respondent. The agreement was rescinded because the county had voted dry, and the Court found that the claimant may be entitled to proven damages. *Pauline G. Malcolm vs. Alcohol Beverage Control Commissioner* (CC-80-275) 155

The Court made an award to claimant for travel expenses incurred on State business as the respondent admitted the validity of the claim. *Jeffrey O. McGeary vs. Human Rights Commission* (CC-82-12) 117

Claimant's claim for accumulated sick leave and back pay due to an alleged wrongful termination was denied where the Court determined that claimant's termination was not wrongful, and Civil Service Regulations do not allow the payment of sick leave to an employee who has been terminated. *Kenneth Page vs. Alcohol Beverage Control Commissioner* (CC-80-357) 487

An allegation that respondent negligently refused to permit a gasoline service station from opening was denied as the Court could not conclude from the evidence that respondent ordered the closure of the station or negligently refused

to permit it to reopen. *Southern Gas & Oil, Inc., vs. State Fire Marshal* (CC-79-56) 127

STATUTES

An award for the payment of jury commissioners was granted in accordance with West Virginia Code §52-1-3, since the obligation would have been paid if it had been submitted in the proper fiscal year. *County Commission of Webster County vs. Office of the Supreme Court* (CC-81-168) 75

Where claimant sought additional compensation for service as the only magistrate in a county designated for two magistrates, the Court determined that the claimant received his proper salary based upon the total population served in accordance with West Virginia Code §50-1-3. *Richard A. Spotloe vs. Administrative Office of the Supreme Court of Appeals* (CC-80-223) 69

STIPULATION AND AGREEMENT

The Court made an award for damages to claimant's vehicle which was damaged by snow and debris dumped from an interstate by employees of the respondent. *Frank Bonacci vs. Dept. of Highways* (CC-82-25) 135

An award was made when a vehicle was damaged because of negligent maintenance by the respondent of a bridge on which the deck had settled. *John R. Coffman vs. Dept. of Highways.* (CC-82-51) 216

The Court made an award where the parties stipulated that the factual situation and applicable law were identical to the claims of *Vecellio & Grogan, Inc. vs. Dept. of Highways,* (CC-81-425 and CC-82-92). See also *Vecellio & Grogan, Inc. vs. Dept. of Highways,* (CC-81-425 and CC-82-92). *Foster & Creighton Company and Vecellio & Grogan, Inc. vs. Dept. of Highways* (CC-83-153) 475

Where claimant and respondent stipulated that claimant's vehicle was damaged as it crossed over a portion of Interstate 79 which gave way due to the existence of a tunnel beneath the roadway, the Court made an award to the claimant. *General Accident F/L Assurance Corp., LTD., Subrogee of Innovative Industries vs. Dept. of Highways* (CC-80-386) 20

Where the claimant and the respondent stipulated that claimant's vehicle was damaged when it struck a steel plate covering a hole on a State highway, and that negligence on the part of respondent in failing to properly anchor the plate proximately caused the damage, the Court made an award to the claimant. *Kanawha Valley Regional Transportation Authority vs. Dept. of Highways* (CC-81-116) 60

Claimant's sewer line was crushed while respondent was widening a portion of the road adjacent to claimant's property,

and the Court made an award for the damages in the amount stipulated by the parties. *Lucas Tire, Inc. vs. Dept. of Highways* (CC-83-14) 397

The Court granted an award to the claimant for goods damaged while in the possession of the respondent. *Tri-City Welding Supply Company vs. Dept. of Highways* (CC-82-173a) 258

The Court granted an award to the claimant for goods which were lost due to the negligence of the respondent. *Tri-City Welding Supply Company vs. Dept. of Highways* (CC-82-173b) 259

STREETS AND HIGHWAYS—See also Falling Rocks; Landslide; Motor Vehicles; Negligence

A claim for damage to the tire of a vehicle was granted where a jagged metal protrusion in the roadway caused the damage. *Jimmie G. Adams vs. Dept. of Highways* (CC-82-139) 214

In a wrongful death action, the Court held that respondent was negligent in failing to remove a mud slide from the road, and in not warning the traveling public of the danger. The Court also found that the decedent, who had prior knowledge of a hazard in the road, was negligent; accordingly, the award was reduced, based upon the doctrine of comparative negligence. *Lillian Akers, Administratrix of the Estate of Gary Wayne Akers, Deceased vs. Dept. of Highways* (CC-78-222) 491

The Court made an award to the claimants where it appeared that surface water run-off from the respondent's roadway was diverted onto claimants' property due to a broken curb of which the respondent had actual notice. *Gene Brady Beegle vs. Dept. of Highways* (CC-81-248), *St. Paul's Protestant Episcopal Church vs. Dept. of Highways* (CC-81-271) 361

A motorist drove onto a defective berm of the road to avoid striking a pedestrian. The defective berm caused the truck to go out of control, cross the highway, and strike claimant's decedent. An award was granted by the Court as the berm of a highway must be maintained in a reasonably safe condition for use when the occasion requires. *Eli Blankenship, Jr., Administrator of the Estate of Johnny Blankenship, Deceased vs. Dept. of Highways* (CC-76-113) 194

A claim for damage to a vehicle which struck a hole in the berm of a highway was granted by the Court as the respondent was aware of the condition of both the road and the berm and was negligent in failing to maintain the berm. *J. C. Boland and Michael J. Boland vs. Dept. of Highways* (CC-78-15) 196

The Court made an award for damages to claimant's vehicle which was damaged by snow and debris dumped from

an interstate by employees of the respondent. *Frank Bonacci vs. Dept. of Highways* (CC-82-25) 135

The Court made an award for the wrongful death which occurred as a result of the slippery condition caused by respondent's failure to properly remove all materials left on the surface of the roadway. *Matta L. Brady, Administratrix of the Estate of Shell C. Brady, Dec., and Selected Risks Insurance Company, as subrogee of Shell C. Brady vs. Dept. of Highways* (CC-80-175) 33

Respondent must have notice of a hazard in the road and a reasonable time to remove it before the Court will make an award. As the tree which fell across a road and caused damage to claimant's automobile fell only a short time before the accident, the Court denied the claim. *Teresa Britt vs. Dept. of Highways* (CC-82-267) 378

Claimant was granted an award for damage to a high-pressure water truck which struck a broken piece of concrete pavement on Interstate 64. The evidence indicated that a dangerous condition existed on I-64 for a week prior to the accident, and the respondent was negligent in failing to discover and repair the highway. *Browning-Ferris Industries, Chemical Service, Inc. vs. Dept. of Highways* (CC-82-247) 399

A claim for damage to a vehicle which struck several potholes was denied as the claimant failed to produce evidence that the respondent had either actual or constructive notice of the potholes. *Arlene Burgess and Charles E. Burgess vs. Dept. of Highways* (CC-82-84) 160

A claim for damage to an automobile was denied when it was established that the road on which the incident occurred was not owned or maintained by the respondent. *Albert G. Capinpin vs. Dept. of Highways* (CC-82-158) 299

Where there was no evidence to establish that the respondent was aware of or had any knowledge of the existence of a loose piece of concrete on a section of I-64, and said piece of concrete caused damage to claimant's vehicle, the Court denied the claim. *Bernard F. Carney vs. Dept. of Highways* (CC-81-38) 51

The Court denied a claim for damages arising out of an automobile accident which allegedly occurred because traffic barricades obstructed the vision of the drivers, and it appeared that the barricades were placed by an independent contractor in accordance with respondent's regulations. *Pius B. Chumbow vs. Dept. of Highways* (CC-81-62) 363

An award for damage to a vehicle which occurred when the vehicle passed over a drain culvert cover which flipped up and damaged the vehicle was granted as respondent failed to

properly secure the culvert cover. *Mason M. Clay vs. Dept. of Highways* (CC-81-397) 115

The presence of an isolated patch of ice on a highway during the winter months is generally insufficient to charge the State with negligent maintenance of the highway. *Wilson R. Cole, et al. vs. Dept. of Highways* (CC-77-3a-d) 350

A claim for damage to a vehicle and for personal injuries to the claimant, which occurred when the vehicle skidded on ice and struck an embankment, was denied by the Court based upon the case of *Adkins vs. Sims,* 130 W.Va. 645 (1947). *Lillian West Collins and John Collins vs. Dept. of Highways* (CC-80-292) 131

The following claims were decided upon the same principle:
Jesse J. Crank vs. Dept. of Highways (CC-83-114) 476

Dae Anne Fletcher and Paul Norman Fletcher vs. Dept. of Highways (CC-82-52) 219

Sandra W. Phillips Larese vs. Dept. of Highways (CC-82-70) 164

Laird Minor and Nancy G. Minor vs. Dept. of Highways (CC-82-327) 478

Frank A. Payne vs. Dept. of Highways (CC-79-719) 330

Mary E. Peterson vs. Dept. of Highways (CC-82-246) 383

Michael A. Piazza vs. Dept. of Highways (CC-81-30) 65

Doris Randolph, Frank Randolph, her husband, and Yvonette (Suzie) Randolph, infant vs. Dept. of Highways (CC-76-12) 230

Calvin L. Sargent vs. Dept. of Highways (CC-82-319) 433

Ranson Bailey Ward and Debra Dawn Ward vs. Dept. of Highways (CC-81-145) 74

Wayne F. Wiggins vs. Dept. of Highways (CC-82-207) 386

An award was made to the claimant for damage to his home and vehicle caused by dust from the repaving of the highway near his property. *Michael Crouch vs. Dept. of Highways* (CC-78-236) 280

A claim for damage to a vehicle which struck a pothole was denied based upon lack of actual or constructive notice to the respondent of the condition of the roadway. *Cheryl M. Fidler vs. Dept. of Highways* (CC-82-50) 162

A claim for damage to an automobile which struck a pothole was denied as it was not established that the respondent knew or should have known of the existence of the pothole. *Earl F. Guthrie vs. Dept. of Highways* (CC-82-125) 304

Where the evidence established that the respondent had notice of the condition of the road and failed to remedy the defect, the Court granted an award to the claimants for damages to their vehicle and for medical expenses. *Paul Gyke and Joe Ann Gyke vs. Dept. of Highways* (CC-82-162) 282

A claim for damage to a vehicle was denied as there was no evidence in the record of any prior notice to the respondent of the existence of the hole. *Atholl W. Halstead vs. Dept. of Highways* (CC-82-40) 163

For the respondent to be held liable for damages caused by road defects, the claimant must prove that the respondent had actual or constructive knowledge of the existence of the defects and a reasonable amount of time to take suitable corrective action. *John A. Hannigan and Carolyn Ann Hannigan vs. Dept. of Highways* (CC-81-86) 5

The Court applied the doctrine of comparative negligence in a claim for personal injuries resulting from an automobile accident, where the respondent negligently failed to exercise reasonable care in maintaining the road, but the claimant was also negligent in failing to maintain proper control of his vehicle when he was aware of the hazardous condition of the road. *Millard A. Harmon vs. Dept. of Highways* (CC-80-373) 454

A claim for personal injuries and property damage to a vehicle was denied where the evidence revealed that the claimant was very familiar with the defect in the road which had been caused by a slip. Under the doctrine of comparative negligence, the negligence of the claimant in traveling a road at night in rain and fog, known by him to be in disrepair, was equal to or greater than the negligence of the respondent in its failure to repair the road. *Forrest C. Hatfield vs. Dept. of Highways* (CC-78-227) 220

An award was made for injuries sustained in an automobile accident which occurred when the vehicle encountered ice on a roadway. The evidence established that the respondent knew that ice accumulated at the site of the accident, but failed to take reasonable measures to prevent the ice formation or to warn motorists of the hazard. *Lois V. Haynes and E. Robert Haynes vs. Dept. of Highways* (CC-80-415) 460

Where the respondent was aware of a potentially hazardous condition of ice on the highway and failed to take action to remedy the situation or warn motorists, the respondent is guilty of negligence. *Robert N. Jarboe, Patricia Ann Jarboe, and Stephanie Jarboe vs. Dept. of Highways* (CC-79-297) 13

The Court made an award to the claimant for damages sustained when he lost control of his motorcycle upon encountering gravel in the roadway. The Court held that the respon-

dent was negligent in failing to place warning devices which would indicate that a hazardous condition existed. *Teddy Keiffer vs. Dept. of Highways* (CC-82-168) 319

The Court applied the doctrine of comparative negligence and disallowed claims where the negligence of the driver was equal to or greater than that of the respondent. *Keller Industries, Inc. vs. Dept. of Highways* (CC-81-29) and *Ryder Truck Rental, Inc. vs. Dept. of Highways* (CC-80-381) 417

A claim for loss of business based upon construction work performed by the respondent on a highway was denied as a nonabutting property owner is not entitled to damages for impairment of access if reasonable and adequate access is provided in another direction or by other means. *Charles L. Kinney and Joyce I. Kinney d/b/a The Southwood Carryout vs. Dept. of Highways* (CC-79-696) 177

The Court held that the responsibility for the general supervision of the State road program lay with the respondent, and an award was made to the claimant whose vehicle sustained damage when it struck a bolt on the metal plate of a floodgate system. *Thomas E. Layton, II vs. Dept. of Highways* (CC-82-245) 401

When claimant's vehicle was damaged when it traveled across a section of roadway which had been ditched across and filled with gravel by the respondent, the Court held that the damage occurred because of the negligence of the respondent, and made an award. *Doris Leslie vs. Dept. of Highways* (CC-82-285) 349

A claim for damage to a vehicle which struck white dome-shaped metal lane dividers was denied where the preponderance of the evidence indicated negligence only on the part of the claimant. *Dayton O. B. and Alline L. Matthews vs. Dept. of Highways* (CC-81-19) 124

As there was no proof that respondent had notice of a pothole which damaged claimant's car, the Court denied the claim. *Mrs. Juanita McClarin vs. Dept. of Highways* (CC-81-246) 445

A claim for damage to a vehicle, which occurred on a snow and ice-covered highway, was denied where the evidence indicated that the particular road had a priority of four, which maintenance men had not yet reached. *John McKendrick vs. Dept. of Highways* (CC-81-59) 125

Where claimants' vehicles sustained damage when a concrete section of bridge fell on an interstate system, the Court held that respondent had a duty to maintain the bridge such that a major deck failure would not occur. The Court therefore made awards to the claimants for damage to their vehicles. *Thomas E. McNamee vs. Dept. of Highways* (CC-81-

100), *Allstate Insurance Company as Subrogee of Jacqueline E. Delazio and Jacqueline E. Delazio, Individually* (CC-81-114) 62

A claim for damages to a vehicle which became stuck in mud was denied because the road had been maintained as well as could be expected, given its classification as a class 4/5 priority road. *Earl G. Muck vs. Dept. of Highways* (CC-82-69) 180

A claim for damage to a vehicle which struck a pothole was denied as no evidence was introduced to prove knowledge, either actual or constructive, of the existence of the pothole on the part of the respondent. *Eugene P. Mullins vs. Dept. of of Highways* (CC-82-8) 164

A claim for damage to the tire of a vehicle which struck debris left on the highway was denied as the debris was observable to the claimant. *Herbert O'Dell Parsons, III vs. Dept. of Highways* (CC-81-162) 81

Where the claimants alleged damage to their vehicle from striking potholes in the road, and one of the claimants testified that neither she nor her husband had ever called the respondent's headquarters to complain about the potholes, and that they were aware of the potholes, the Court denied the claim. *Donald E. Platt and Linda E. Platt vs. Dept. of Highways* (CC-81-101) 66

The Court made an award for damage to a vehicle which passed through tar applied to the highway by the respondent, who failed to place proper warning signs. *Sidney Pozell and Lillian Pozell vs. Dept. of Highways* (CC-81-163) 227

Claimant corporation created a subdivision and filed a claim for the cost of widening an access road, which claim was denied because there was no contract with the respondent to bear this cost. *Rainbow Development Corporation vs. Dept. of Highways* (CC-81-350) 228

An award for damage to a vehicle which passed through tar applied to the highway by respondent's employees, who had not placed warning signs, was granted by the Court. *Frank E. Redd vs. Dept. of Highways* (CC-81-169) 231

There was no evidence that respondent had actual or constructive notice of the pothole which damaged claimant's automobile; therefore, the Court denied the claim. *Roger Richmond and Sandra Richmond vs. Dept. of Highways* (CC-81-458) 449

Under the doctrine of comparative negligence, the Court determined that the claimant's negligence, where he knew of the road condition which damaged his vehicle, equalled or exceeded the negligence of the respondent, and the claim was denied. *Robert G. Riner vs. Dept. of Highways* (CC-82-288) 432

A claim for damage to a vehicle which struck a pothole was denied as the existence of road defects without notice to the respondent is not sufficient to establish negligence on the part of the respondent. *Eldean Russell vs. Dept. of Highways* (CC-82-60) 165

The Court applied the doctrine of comparative negligence and denied a claim for damage to a vehicle which struck a pothole. The Court held that the negligence of the driver in striking a pothole located on the berm of the road equalled or exceeded any negligence of the respondent. *Robert C. Schumacher vs. Dept. of Highways* (CC-82-55) 315

An award for property damage to a vehicle which struck a pothole was granted by the Court because the size of the pothole demonstrated its presence for a long time prior to the date of the accident, clearly establishing negligence on the part of the respondent. *Harry R. Sellards and Francis A. Sellards vs. Dept. of Highways* (CC-82-83) 188

An award was made for damages to claimant's vehicle which slid into a rock cliff after encountering mud in the road. The Court determined that respondent had failed to clear the road of dirt following a ditch cleaning operation. *Roy G. Shawver vs. Dept. of Highways* (CC-82-189) 384

The Court denied a claim where it was not established that the respondent dug the ditch in the road which caused damage to the claimant's automobile. *Alfred W. Smith vs. Dept. of Highways* (CC-82-177) 374

A claim for damage to a vehicle which struck a pothole in the highway was denied as the record contained no evidence of notice to the respondent or failure to act on the part of the respondent. *Oscar D. Smith vs. Dept. of Highways* (CC-81-5) 11

If a claimant fails to establish negligence on the part of the respondent, the Court will deny the claim. Therefore, the Court denied a claim for damage to claimant's vehicle caused by an open gate on an interstate. *State Farm Mutual Automobile Insurance Company, as Subrogee of Barbara A. Howe vs. Dept. of Highways* (CC-80-349) 71

Although the Court has consistently held that the respondent is not an insurer of the safety of persons using the highways of this State, where it has been demonstrated that the respondent had actual knowledge of a dangerous defect in a highway and took no action to remedy the defect, an award has been made. As the evidence in this claim indicated that a hole in the road had been in existence for at least three weeks prior to the accident which damaged claimant's vehicle, the Court made an award for the damage sustained. *Ronald P. Stewart vs. Dept. of Highways* (CC-81-65) 72

A claim for damages to a vehicle which struck a hole in the pavement was denied as claimant failed to prove that the respondent had actual or constructive knowledge of the existence of the defect and a reasonable amount of time to take corrective action. *Larry Lee Stricker vs. Dept. of Highways* (CC-81-50) 12

The Court denied a claim for damage to an automobile which struck a manhole as it was not established that the manhole was maintained by respondent or was within respondent's right-of-way. *Jack L. Taylor vs. Dept. of Highways* (CC-82-243) 386

A wrongful death action, which death occurred when decendent's vehicle went over the side of an interstate, was denied by the Court because the decedent was travelling at an excessive rate of speed, considering the condition of the highway. *Audrey P. Tittle, Admin. of the Estate of Steven B. Parcell vs. Dept. of Highways* (CC-79-48) 146

Where the roadway surface of Interstate 79 collapsed as a vehicle crossed over an area under which a tunnel existed, the Court made an award for the damage to the truck based upon failure of the respondent to properly maintain the highway. *United States Fidelity & Guaranty Company, Subrogee of H & A Coal & Hauling, Inc. and H & A Coal & Hauling, Inc. vs. Dept. of Highways* (CC-80-258) 26

Where the claimants' vehicle struck a piece of concrete or patch of tar in the highway, but there was no evidence that the respondent had actual or constructive notice of the defect in the roadway, the Court denied the claim. *Carole E. Updyke and Lionel Joe Updyke vs. Dept. of Highways* (CC-83-122) 481

The Court denied a claim where claimant's vehicle struck a pothole as there was no proof of notice, either actual or constructive, to the respondent. *Robert Varney vs. Dept. of Highways* (CC-82-304) 434

A claim for damage to the tire of a vehicle which struck a pothole was denied as the claimant failed to prove that the respondent had actual or constructive knowledge of the alleged defect. *John J. West vs. Dept. of Highways* (CC-81-122) 129

A claim for damage to a vehicle which struck a pothole was denied as there was no evidence that the respondent had either actual or constructive notice of the defect. *Renna J. Wilcox vs. Dept. of Highways* (CC-82-63) 166

The claimants presented no proof that the respondent had notice of the pothole which damaged their automobile, and the Court denied the claim. *Roy Franklin Williams, Jr., and Beverly Williams vs. Dept. of Highways* (CC-83-117) 485

In a claim for damage to a vehicle which struck a pothole, no proof was presented that the respondent had actual or constructive notice of the defect in the roadway; accordingly, the Court denied the claim. *Bob E. Willis and Ragene Willis vs. Dept. of Highways* (CC-82-100) 317

It was not established that the respondent had actual or constructive notice of the pothole which damaged claimants' vehicle; accordingly, the Court denied the claim. *Gary L. and Brenda Workman vs. Dept. of Highways* (CC-82-132) 452

TAXATION

The question of beer tax refunds has been before the Court on several occasions, and, where the State has not been damaged, the Court has held that the retention of the taxes paid would amount to unjust enrichment on the part of the State. The Court made an award to the claimant where beer was rendered unfit as the result of severe storms and flooding, and claimant had previously paid the tax on the beer. *Crosby Beverage Co., Inc. vs. Nonintoxicating Beer Commission* (CC-81-10) 19

An advisory determination by the Court was sought where an institution of the respondent underpaid its statutory contribution to Employment Security. The Court indicated that an award could not be made based upon the *Airkem* decision, as sufficient funds were not available in the proper fiscal year. *Dept. of Employment Security vs. Dept. of Corrections* (CC-81-388) 89

The Dept. of Employment Security filed several claims against agencies of the State of West Virginia which failed to pay the proper amount of employment compensation tax owed by them. The Court made an award to the claimant as the cost of providing this tax cannot be predicted for any given fiscal year. *Dept. of Employment Security vs. Dept. of Corrections* (CC-82-260a et al.) 387

The Court made an award as a refund of prepaid State excise taxes on beer as retention of such taxes would result in unjust enrichment of the State. *Henry F. Ortlieb Brewing Co. vs. Nonintoxicating Beer Commission* (CC-81-175) 104

Where the respondent owed property taxes on real estate it purchased, the Court made an award to the claimant for payment of the taxes. *Thomas G. Kimble vs. Dept. of Public Safety* (CC-80-396) 23

An error by the Treasurer's Office caused claimant taxpayer to lose his tax refund from the State Tax Dept., and the Court made an award. *William P. Knight vs. Treasurer's Office* (CC-79-667) 106

Claimant sought payment for taxes paid on cases of beer which were destroyed after being in a flood, and the Court

made an award to the claimant, as retention of the taxes would amount to unjust enrichment on the part of the State. *State Distributing Company vs. Nonintoxicating Beer Commission* (CC-81-385) 110

TREES AND TIMBER

Respondent must have notice of a hazard in the road and a reasonable time to remove it before the Court will make an award. As the tree which fell across a road and caused damage to claimant's automobile fell only a short time before the accident, the Court denied the claim. *Teresa Britt vs. Dept. of Highways* (CC-82-267) 378

An award was made for damage to claimants' home where two trees fell on the house. The Court determined that the trees fell when caught in a slide which resulted when the respondent failed to maintain a ditch line; however, the award was reduced under the doctrine of comparative negligence, as the claimants were aware of the clogged ditch line but failed to inform the respondent of the condition. *James Burcham and Patricia J. Burcham vs. Dept. of Highways* (CC-80-252) 441

An award was made for the value of two trees which were damaged when employees of respondent trespassed onto claimant's property while surveying. The parties stipulated the value of the trees. *C. O. Smith, Jr. vs. Dept. of Highways* (CC-82-311) 385

An award was made for damage to a vehicle which occurred as a result of the negligence of the respondent's employee in failing to exercise ordinary care in removing a fallen tree limb from the vehicle. *John F. Tomblyn vs. Dept. of Highways* (CC-81-192) 111

TRESPASS

An award was made for the value of two trees which were damaged when employees of respondent trespassed onto claimant's property while surveying. The parties stipulated the value of the trees. *C. O. Smith, Jr. vs. Dept. of Highways* (CC-82-311) 385

WAGES

The Court made an award for back wages improperly held by the respondent while claimant was a patient at respondent's hospital, where the respondent admitted the validity and amount of the claim. *Clifford Cupp vs. Dept. of Health* (CC-81-341) 53

Magistrates who filed claims based upon payment of wages not paid in accordance with the results of the 1980 decennial census were granted awards by the Court following the decision in *Ruth A. Donaldson, Magistrate, etc., et al. vs. Gainer, Jr., Auditor et al.* (June 30, 1982) ... W.Va. ..... *Richard D.*

Graham, Jr. vs. Office of The Supreme Court of Appeals (CC-82-190) and *Howard R. Nordeck vs. Office of The Supreme Court of Appeals* (CC-82-209) 238

See *Graham & Nordeck vs. Office of the Supreme Court of Appeals*, 14 Ct.Cl. 238 (1982). *Robert A. Isner vs. Office of The Supreme Court of Appeals* (CC-82-229) 239

WATERS AND WATERCOURSES—See also Drains and Sewers; Flooding

In a claim for water damage to real property, an award was made where the claimant established that the respondent knew of the drainage problem, and the Court determined that the respondent failed to exercise reasonable care to prevent the damage to claimant's property. *Betty Cook vs. Dept. of Highways* (CC-79-527) 486

A claim for damages to unimproved real property allegedly caused by surface water draining onto the property was denied as the ditch was a natural drainage course and there was no evidence to attribute any legal fault to the respondent. *Ronald H. Harper and Sarah E. Harper vs. Dept. of Highways* (CC-80-134) 78

A claim for water damage was denied where the evidence indicated that claimant's property was located in the natural drainage course. *Geneva Hill vs. Dept. of Highways* (CC-78-241) 249

WELLS

The Court, upon rehearing the claim, determined that the claim was not barred by the Statute of Limitations, and made an award to the claimants for inconvenience suffered after respondent placed dye in a well in an effort to trace underground water to a surface mine site, and the dye contaminated claimant's water well. *Victor Frisco and Janet Frisco vs. Dept. of Natural Resources* (CC-80-121) 346

W.VA. UNIVERSITY—See Board of Regents

WORKMEN'S COMPENSATION FUND

A claim for workmen's compensation benefits was denied because claimant did not exhaust his administrative remedies. *Robert R. Brock vs. Workmen's Compensation Fund* (CC-81-457) 136

A claim for excessive premiums paid to the respondent was denied under the general rule that, where an administrative remedy is provided by statute, relief must be sought from the administrative body. *Chafin Coal Company vs. Workmen's Compensation Fund* (CC-79-161) 98

A claim for workmen's compensation benefits was denied because the Court lacked jurisdiction based upon West Virginia Code §14-2-14. *June Dorton vs. Workmen's Compensation Fund* (CC-81-103) 137