STATE OF WEST VIRGINIA

Report

of the

Court of Claims

For the Period from July 1, 1997

to June 30, 1999

By

CHERYLE M. HALL

Clerk

Volume XXII

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Letter of Transmittal

To His Excellency
The Honorable Cecil H. Underwood
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 Court of Claims for the period from July one, one thousand nine hundred ninety-seven to June thirty, one thousand nine hundred ninety-nine.

Respectfully Submitted,

Cheryle M. Hall,
Clerk

Terms of Court

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

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In the Court of Claims in the
State of West Virginia

OPINION ISSUED *JULY 3, 1997*

OWEN HEALTHCARE, INC.
VS.
DEPT. OF HEALTH & HUMAN RESOURCES
(CC-97-26)

. . . . . Claimant represents self.
. . . . . Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant seeks $25,298.42 for pharmacy services provided to Welch Emergency Hospital, a facility of the respondent, in February 1994 and in February 1995. In its Answer, the respondent admits the validity of the claim and the amount, and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid. . . In view of the foregoing, the Court makes an award in the amount of $25, 298.42.

. . . . . Award of $25, 298.42.

OPINION ISSUED JULY 3, 1997

ROBERT M. VINCENT FUNERAL HOME
VS.
DEPT. OF HEALTH AND HUMAN RESOURCES
(CC-97-208)

Claimant represents self.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant seeks $400.00 for funeral services provided to an individual who died on September 14, 1996. The respondent administers a burial services program in which it pays a portion of the funeral expenses for qualified individuals. In its Answer, the respondent admits the validity of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $400.00.

Award of $400.00.

OPINION ISSUED JULY 3, 1997

UNITED HOSPITAL CENTER
VS.
DIVISION OF CORRECTIONS
(CC-97-230)

Claimant represents self.

Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment of $1,630.40 for medical services provided to an inmate in a county jail, but who should have been in the custody respondent. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the invoice.

While the Court believes that this is a claim which in equity and good conscience should be paid, the Court further believes that an award cannot be recommended based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED JULY 3, 1997

WV AMERICAN WATER COMPANY
VS.

DIVISION OF LABOR
(CC-97-198)

Claimant represents self.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant seeks $108.69 for water service provided to the respondent in February 1996. The proper documentation for the water service was not received by the respondent in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $108.69.

Award of $108.69.

OPINION ISSUED JUNE 4, 1997

JENNIFER MYERS
V.S.
DIVISION OF HIGHWAYS
(CC-94-172)

Charles West, Attorney at law for claimant,
Andrew F. Tarr, Attorney at law for respondent.

BAKER, JUDGE:

This claim, originally brought in the name of Sharon Kirk, as guardian of Jennifer Myers, and amended when the Court was informed that Jennifer Myers is now of majority, was filed against the Division of Highways alleging negligent failure to maintain a bridge on Route 3/5 near Breeden, Mingo County.

On May 28, 1993, Jennifer Myers, then 15, was riding her bicycle with several friends in the general vicinity of her home near Breeden. Between 6 and 7 p.m., she was crossing an old railroad bridge converted to highway traffic known as the Zion Church Bridge, when she fell with her bicycle through a gap between the bridge decking and the

bridge girders. She fell about ten (10) feet to the creek bed below, and suffered a cerebral concussion and compression fracture of five vertebrae. The parties stipulated that resulting incurred medical expenses were $6,590.25 and that respondent was responsible for maintenance of the bridge.

The record indicates that at the time of the accident, Miss Myers was wearing a helmet, and was sitting astride her bicycle, walking it across the bridge by pushing it with her feet. She testified that she had walked across this bridge previously, but that she had never ridden her bicycle across it. One of her friends was riding in front of her and inadvertently kicked up a loose board in passing. The front tire of Miss Myers' bicycle became lodged in the crack, causing her to lose control of her bicycle and fall through a gap between the bridge deck and girder.

The Zion Church Bridge was constructed for railroad use about 100 years ago and later was converted to highway use, and it was taken into the State highway system in 1933, according to respondent's witnesses. At the time of the accident, there were "Narrow Bridge" signs on both sides. The deck was 12 feet wide, consisting of laminated 2" by 6" planks, nailed together and turned up on end. Parallel 3" by 8" planks were nailed flat on the decking to direct traffic over the underlying, load-bearing I-beams of the bridge. The gap between the deck and the bridge girder, or railing, was roughly two (2') feet, three (3") inches.

Wilson Braley, Huntington District Engineer for respondent and district bridge engineer in 1993, testified that the purpose of the gaps between deck and girder on this type of converted railroad bridge is to discourage traffic from straying from the deck runners and underlying supporting I-beams, which could cause damage to the bridge.

Barry Mullins, respondent's Mingo County supervisor, testified that there are approximately 500 miles of state road in Mingo County, that State Route 3/5 is a secondary road in terms of maintenance priority, and that his crew does maintenance on these types of bridges approximately 10 to 12 times a year in the Breeden area. Mullins testified that the last major repairs to the Zion Church bridge were done was in 1991 or 1992, and that the wooden boards on these bridges break often. Mullins testified that the bridge, as depicted on video tape shortly after the accident, was indeed in need of repair and that a truck ran off it not too long before. And he further testified that the problem of boards breaking or coming loose is common on these types of bridges. This court notes that respondent did not produce DOH-12 records that would document maintenance performed during the year preceding the accident.

From the videotape introduced into the evidence as Claimant's Exhibit No. 2, the Court further observes that the bridge in question was a continuous hazard to automotive, bicycle and pedestrian traffic.

The law of West Virginia is well established that the state is neither an insurer nor a guarantor of the safety of travelers upon its highways. This Court has also previously held that two-wheeled motorcycles and bicycles are more hazardous to operate than an automobile, and that more care may be required of the operator. *Turner vs. Dept. of Highways*, 15 Ct. Cl. 185 (1984); *Bartz vs. Dept. of Highways*, 10 Ct. Cl. 170 (1975). Finally, the Court has held that when the respondent should have anticipated the deteriorating condition of wooden bridges under its control that failure to properly maintain them constitutes negligence. *Eller vs. Department of Highways*, 13 Ct. Cl. 155 (1980).

In the *Turner* decision, this Court disallowed a claim involving a bicycle accident, allegedly caused when respondent left debris on the road causing the claimant to lose control of his bicycle and crash during a cycling tour. The Court lacked sufficient evidence to determine what caused the accident, and whether claimant's own conduct was contributory. In the present case, the evidence indicates that the loose boards triggering this accident was a condition that was readily apparent and clearly foreseeable by respondent. Moreover, the testimony indicates that Jennifer Myers was proceeding with great care over the bridge. The Court finds that Respondent should have known or discovered the loose boards and made necessary repairs to its bridge, and that failure to do so constitutes negligence. This Court also finds that the claimant was free from any comparative negligence.

The parties stipulated to damages of $6,590.25, and claimant has submitted supporting medical documentation. The Court is also of the opinion that claimant should receive compensation for pain and suffering in the amount of $20,000.00.

It is therefore the opinion of the Court that an award be made to claimant in the amount of $26,590.25.

Award of $26,590.25.

OPINION ISSUED AUGUST 4, 1997

CHARLENE AND CORNICE ADKINS
VS.
DIVISION OF HIGHWAYS
(CC-96-454)

Claimant represents self.

Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants bring this action for compensation for damage to their 1996 Buick Century, which occurred on August 24, 1996, on Madison Creek Road, Route 49.

Claimant Charlene Adkins was driving northbound towards Huntington at approximately 8:30 p.m. She testified at the hearing of this claim that she was traveling about 35 miles per hour and as she topped a small grade her vehicle encountered a series of large holes located roughly in the center of the road.

The evidence indicates that Route 49 in this area is a narrow, paved two-lane road that drops off onto an embankment on claimant's side of the road. Claimant testified that she was familiar with the road and aware of the holes. She testified that the only way to avoid the holes was to straddle them with both sets of tires of her vehicle on either side, to avoid vehicle damage. However, on the evening in question, an oncoming vehicle prevented her from driving so as to straddle the holes with her vehicle and she was forced to drive directly across the damaged road surface. Vehicle damage on the driver's side consisted of a flat front tire, bent rim and damaged hubcap and alignment. Claimants submitted bills for repairs in the amount of $327.90; their insurance deductible was $100.00.

Charles Michael King, maintenance crew supervisor for the respondent, testified that he had no prior knowledge of the holes and that the area had been patched several weeks after claimant's accident. The respondent submitted into evidence a photograph of the patched road surface taken approximately ten months after the date of accident. The photograph and claimant's testimony establish that the holes in question had been significant in size and would have occupied a large portion of the traveled roadway. Although there was no direct evidence that the respondent had actual notice of this road defect, the Court is of the opinion that it did have constructive notice. The size of the pot-holed area is indicative of its presence for some time prior to the date of this incident. *Gillespie vs. Dept. of Highways*, 16 Ct. Cl. 148 (1987). The Court finds that these holes must have developed over an extended period of time; that respondent should have known of the holes; and that respondent had a reasonable opportunity to repair same. Accordingly, the Court makes an award to the claimants in the amount of $100.00.

Award of $100.00.

OPINION ISSUED AUGUST 4, 1997

JACKIE AND CONNIE COLEMAN
VS.
DIVISION OF HIGHWAYS

(CC-96-522)

Claimants represent self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants seek an award for damage to their 1992 Buick Skylark, which occurred on September 5, 1996. For reasons stated below, the Court will make an award of $250.00, the amount of claimants' insurance deductible, for damage to their vehicle.

The incident giving rise to this claim occurred about 9:30 p.m. in Clay County on Route 4/5, also known as Camp Creek Hill Road. The claimants had purchased their vehicle the day before for approximately $8,000 and were out for a ride. Claimant Jackie Coleman stated that as they were crossing a wooden bridge about a mile from their home, they encountered a steel plate that had been placed over a hole in the bridge as a temporary repair measure. The plate was about two feet square and had been bolted over the hole one or two months earlier, according to Mr. Coleman's testimony. Mr. Coleman testified that he was familiar with the bridge and that he usually straddles the plate with his vehicle when crossing the bridge.

However, the bridge is frequently used by logging trucks which had apparently jarred the plate loose, according to Mr. Coleman's testimony. On this evening, when Mr. Coleman drove the car over the plate it tipped up and struck the undercarriage of the vehicle, resulting in a broken manifold, and other damage to the oil pan, alignment and transmission. Mr. and Mrs. Coleman testified that the vehicle was still driveable but had severe exhaust and ventilation problems. It was ultimately declared a total loss in a subsequent unrelated accident.

It is the respondent's position that because claimants had paid only $500.00 down on the car and had made one insurance premium payment of $264.00 that there was no financial loss to the claimant resulting from this incident. The Court finds this argument unpersuasive. The Court has held that when the respondent's maintenance workers install temporary steel plates to cover holes in bridges maintained by the State, that the respondent will be held liable when these measures fail to protect traveling motorists as these bridge hazards are readily apparent upon casual inspection. *Dotson vs. Dept. of Highways*, 16 Ct. Cl. 104 (1986); *Mcmillan vs. Dept. of Highways*, 16 Ct. Cl. 64 (1986); *Fowler vs. Division of Highways*, Unpublished opinion issued September 26, 1994, (CC-94-10). The claimants submitted a statement from their insurance company indicating their deductible was $250.00. Accordingly, the Court is of the opinion to and does make an award in the amount of $250.00, the amount of claimants' insurance deductible.

Award of $250.00.

OPINION ISSUED AUGUST 4, 1997

ANSON J. FANARY
VS.
DIVISION OF HIGHWAYS
(CC-96-343)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover for damage to his 1995 Ford 150 pick-up truck, which occurred on July 1, 1996, on Interstate 64 westbound near Sandstone. The damage consisted of a puncture to the right front tire, caused when the claimant's son ran over a broken metal reflector post that was protruding from the ground on the shoulder portion of the highway.

The parties agreed to stipulate that the respondent was negligent, and the claimant submitted an invoice in the amount of $73.14, the cost of replacement of the tire.

In view of the foregoing, the Court makes an award to claimant in the amount of $73.14.

Award of $73.14.

OPINION ISSUED AUGUST 4, 1997

DAVID AND MARSHA GRESHAM
VS.
DIVISION OF HIGHWAYS
(CC-96-466)

Claimants represent selves.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for damage to their 1996 Mitsubishi Galant which occurred on or about July 11, 1996, on Interstate 77. For reasons stated below, the Court makes an award of $250.00, the amount of claimants' insurance deductible.

The evidence indicates that David Gresham was driving southbound in the left-hand lane on I-77, between the Pocatalico and Tupper's Creek exits, when his vehicle

struck a center-lane reflector marker that had become dislodged from the highway pavement. Mr. Gresham testified that he was traveling at approximately 65 miles per hour and that the marker was lying on the pavement about two or three feet from the center line in his lane of travel. It was between 6:00 and 7:00 p.m., and there was plenty of daylight. The claimant swerved to the left but was unable to avoid driving over the marker with his vehicle's right rear wheel, resulting in a flat tire and bent rim.

The claimant changed the tire, returned to the scene, and retrieved the lane reflector, which was admitted into evidence as Claimant's Exhibit No. 5. The claimant further testified that there were several other holes in the road surface where other lane reflector markers had apparently become dislodged.

Ronald Burdette, respondent's equipment operator in charge of maintenance on I-77 from Fairplain to Westmoreland, testified that the center lane reflectors frequently become dislodged as a result of heavy traffic on the highway and deterioration of the blacktop. He stated that respondent's road crews make repairs with cold mix.

The general rule in West Virginia is that the State is not a guarantor or insurer of the safety of motorists upon the state's roads and highways. The presence of debris on the road, without actual or constructive notice to the respondent and a reasonable opportunity to remedy the hazard, normally will not substantiate a finding of liability on the part of the respondent. However, the Court is of the opinion that respondent had reason to know of the propensity for these lane markers to become dislodged, especially considering its knowledge of the heavy volume of traffic on I-77. The Court, therefore, is of the opinion that an award should be made.

Although the claimants submitted bills for repairs totaling $348.13, claimants had full insurance coverage with a $250.00 deductible. Accordingly, Court makes an award of $250.00.

Award of $250.00.

OPINION ISSUED AUGUST 4, 1997

KIMBERLY LEWIS
VS.
DIVISION OF HIGHWAYS
(CC-96-306)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant Kimberly Lewis brought this action for compensation for damage

to her 1987 Cavalier automobile resulting from a slip in a road maintained by the respondent.

On or about June 2, 1996, at approximately 10.00 p.m., the claimant was operating her vehicle on Green Valley Drive, also known as Route 8, in St. Albans. The weather was clear, and claimant was driving at approximately 10 to 15 miles per hour. The evidence is that Green Valley Drive in this area is a paved narrow road with several curves and dips. Claimant was unfamiliar with the road, having never driven it before. The testimony and photographs introduced by the claimant indicate that claimant encountered a slip on the right side of the road just as she was topping the crest of a small incline, resulting in damage to her tire, wheel and suspension in the amount of $541.54, the cost of repairs. Claimant carried liability insurance only.

Charles E. Smith, maintenance crew chief for the respondent, testified that in late 1994 or early 1995 the road was undermined after a third party had undercut the road for purposes of a trailer foundation. In October 1995, the respondent installed gabion baskets, a temporary foundation made of rock and wire, to shore up the road. These gabion baskets held until a strong storm on or about May 27, 1996, just days before claimant's accident. Mr. Smith testified that as a result of the storm, the slip broke loose again.

Mr. Smith testified that after the storm, but prior to the claimant's accident, several "Hazard" signs were placed at the location of the slip to warn motorists. However, the claimant's testimony and photographic evidence establish that the location of the slip was not readily visible to approaching motorists, and there were no other warning signs installed until after claimant's accident, when the respondent installed a sign reading "One Lane Road 500 Feet."

The law is well settled that state is neither an insurer nor guarantor of the safety of persons traveling on its highways. For respondent to be held liable for damage caused by a road defect, it must have had actual or constructive knowledge of the condition and a reasonable amount of time to take corrective action. *Davis vs. Division of Highways*, 11 Ct.Cl. 150 (1977); *Chapman vs. Division of Highways*, 16 Ct. Cl. 103 (1986). The Court is of the opinion that the respondent had reason to know that the slip created a substantial risk to motorists and should have installed additional warning signs pending repairs. Accordingly, the Court is of the opinion that claimant is entitled to an award for her cost of repairs. The claimant submitted a bill documenting the costs of repairing her vehicle in the amount of $541.54, and the Court therefore makes an award of this amount.

Award of $541.54.

OPINION ISSUED AUGUST 4, 1997

RANDOLPH COUNTY COMMISSION

VS.
WV SUPREME COURT OF APPEALS
(CC-97-227)

Claimant represents self.
John M. Hedges, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant seeks payment of $1,463.31 in rent for a family law master for a nine-month period from October 1995 through June 1996. The documentation for this rent billing was not received by the respondent in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,463.31.

Award of $1,463.31.

OPINION ISSUED AUGUST 4, 1997

LEONARD WAYNE RIGGS
VS.
DIVISION OF HIGHWAYS
(CC-96-536)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks an award for damage to his 1991 Toyota Camry station-wagon which occurred when he encountered a depression in the berm area of Route 34 in Lincoln County.

Claimant states that on August 2, 1996, he was driving in an easterly direction on Route 34 towards Hurricane. It was between 6:00 and 8:00 p.m., and the claimant had just crossed a newly constructed bridge at Coon Creek. The evidence indicates that Route 34 in this area is a paved two-lane road with several curves. Photographs introduced by the claimant indicate that the road surface on the curve where claimant was traveling was slightly inclined towards the berm.

The claimant testified he was driving about 35 miles an hour when he steered to the right side of his lane to create enough room to safely avoid oncoming traffic. At this point, the vehicle's right wheels dropped off onto the berm where it encountered several holes where the berm area had apparently eroded away from the pavement. The claimant's right front tire was damaged and the wheel rim was bent. The vehicle also required a front alignment. Claimant's insurance deductible is $200.00.

The claimant testified that the oncoming traffic did not cross the center line into his lane, but that he moved to the right side of his lane to create a safe distance between the two vehicles. Claimant introduced into evidence several photographs taken two weeks after the accident indicating that the berm area was quite rough with numerous depressions and holes adjacent to the paved area of the road.

John Sammons, the respondent's maintenance assistant for Lincoln and Logan counties, testified that he was familiar with the road generally, but he had no personal knowledge of rough berm conditions prior to claimant's accident. Sammons testified that respondent's maintenance records do not indicate any prior complaints about the berm area. However, Mr. Sammons testified that construction on the bridge had just been completed in June or July of 1996, roughly two months before claimant's accident. He also testified that respondent's work crews continuously are engaged in berm maintenance and that the berm on Route 34 has been repaired several times since 1996.

It is the law of West Virginia that the State has a duty to exercise reasonable care and diligence in maintaining roads under all circumstances. In order to establish negligence on behalf of the respondent for damage caused by a road defect, a claimant must prove, by a preponderance of the evidence, that the respondent had either actual or constructive notice of the defect and a reasonable opportunity to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt vs. Division of Highways*, Unpublished opinion issued April 4, 1995, (CC-94-26). The Court has also held that when a motorist must use the berm area in order to safely avoid oncoming traffic, that the respondent has a duty to properly maintain the berm. *USF&G, as Subrogee of Margolis vs. Dept. of Highways*, Unpublished opinion issued November 28, 1989, (CC-87-20). *Cecil vs. Dept. of Highways*, 15 Ct. Cl. 73 (1984).

The evidence indicates that the respondent had recently been engaged in bridge construction in the area prior to claimant's accident and that berm maintenance work was an ongoing part of respondent's road maintenance concerns. Respondent should have known of the deteriorating condition of the berm in this area. Further, the claimant acted reasonably in steering his vehicle toward the berm to safely avoid oncoming traffic.

Accordingly, the Court is of the opinion to, and does make an award to the claimant in the amount of $200.00

Award of $200.00.

OPINION ISSUED AUGUST 4, 1997

CATHY B. RORRER
VS.
DIVISION OF HIGHWAYS
(CC-96-323)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage caused when she encountered a pothole on Martha Road, WV Route 31, in the vicinity of Barboursville.

The claimant states that on June 22, 1996, she was traveling on Martha Road at about 9:00 p.m. It was rainy, and she stated that she was traveling approximately 25 miles per hour. Claimant testified that there was a vehicle in front of her; that the vehicle suddenly swerved; and that she immediately hit the pothole. The claimant testified that she subsequently informed the respondent of the pothole, which was near an auto repair shop. Claimant testified that the impact destroyed her right front tire, which was new. She submitted an invoice for $102.81 for a new replacement tire. She had testified in a prior claim, (CC-96-283), that her insurance deductible at the time was $200.00.

Charles M. King, Cabell County maintenance crew supervisor for the respondent, testified that there had been a pothole near the auto repair shop. He testified that respondent's maintenance crew had been engaged in road patching operations between June 12, 1996, and June 18, 1996, and that DOH-12 daily work reports indicate that the pothole probably had been patched during that period. However, Mr. King testified that he was not present during those patching operations and was not personally aware of what work was performed.

The Court, having reviewed the evidence in this claim, has determined that the claimant's vehicle was damaged by a pothole and that respondent had actual or constructive knowledge of the pothole in question. In view of the foregoing, the Court is of the opinion to and does make an award in the amount of $102.81.

Award of $102.81.

OPINION ISSUED AUGUST 4, 1997

HELEN E. TOLLEY
VS.

DIVISION OF HIGHWAYS
(CC-96-342)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

Claimant brings this action to recover damages to her 1993 Buick Regal, which occurred on June 17, 1996, on Interstate 77 near Belle, when her vehicle encountered an exposed expansion joint which destroyed her right front tire. The Court finds the respondent was negligent in its oversight of a highway paving contractor, and makes an award in the amount of $26.18 as more fully explained below.

The incident giving rise to this claim occurred while claimant and her husband were proceeding northbound on I-77 past the Westmoreland exit. It was approximately 6:45 a.m., and the weather was clear. Claimant's husband was driving, and they were on their way to work. At the hearing, the claimant testified they were traveling in the right lane at about 50 miles an hour and slowed to approximately 35-40 miles an hour as they approached a construction area and a sign indicating "Bump."

The evidence adduced at hearing indicates that at the time of this incident, West Virginia Paving of Dunbar, a contractor of the respondent, was engaged in milling work and had removed the top layer of pavement. The claimant testified that as a result of this surface removal, the edge of the expansion joint was exposed and punctured a tire. Claimant testified she had a $250.00 insurance deductible and that she had to purchase two replacement tires at a documented cost with tax of $56.18 each. She testified that the tire that was destroyed had approximately 30,000 miles on it, with another 20,000 to 30,000 miles of tread wear still remaining.

The only evidence introduced at hearing by the respondent was testimony by Stephen Knight, respondent's interstate expressway maintenance supervisor, that the milling and repaving work was under contract to West Virginia Paving of Dunbar.

This Court has previously held that the respondent cannot be held liable for the negligent conduct of one of its contractors. *Paul vs. Department of Highways*, 14 Ct. Cl. 479 (1983); *Harper vs. Department of Highways*, 13 Ct. Cl. 274 (1980); *Safeco Insurance Co. vs. Department of Highways*, 9 Ct. Cl. 28 (1971). The underlying foundation for these cases is the custom and practice whereby independent contractors routinely agree to hold harmless or to indemnify the respondent State agency for any claim that arises during the course of, and resulting from the performance of the contract.

The Court, after reviewing the evidence, has determined that there was no evidence of such a hold harmless or other indemnity agreement was introduced at the hearing. It is the opinion of the Court that the respondent has a duty to ensure that independent contractors complete their work in such a manner that travelers will not be put in a position of unreasonable danger. Mere testimony that an independent contractor

was working on a particular section of road or highway, without more, is not enough to relieve the respondent of its duty to take reasonable steps to prevent foreseeable harm to travelers on roads under its control. Accordingly this Court is of the opinion to and does make an award in the amount of $26.18 to the claimant, representing the cost of the replacement tire reduced to the approximate value of the tire based upon the tread left on the old tire.

Award of $26.18.

OPINION ISSUED AUGUST 4, 1997

WEXFORD HEALTH SOURCES, INC.
VS.
DIVISION OF CORRECTIONS
(CC-97-262)

Matt Polka, Attorney at Law, for claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment of $16,328.75 for medical services provided to an inmate in the Mt. Olive Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the invoice.

While the Court believes that this is a claim which in equity and good conscience should be paid, the Court further believes that an award cannot be recommended based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED SEPTEMBER 16, 1997

PAULA GIVENS
VS.
DIVISION OF HIGHWAYS
(CC-96-465)

Claimant represents self
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brings this action for damage to her 1984 Nissan 300 ZX automobile, caused when she encountered a rock slide on Mile Fork Road, Route 27, near Charleston. The Court is of the opinion that claimant is entitled to a partial award as described below.

The incident giving rise to this claim occurred on July 30, 1996, at about 4:45 p.m., when claimant was driving northbound on her way home from work. The evidence is that Route 27 in this area is a one-lane paved road about 12 feet wide, with a 35 mile-per-hour speed limit. The claimant testified that she was familiar with the road and drove it daily to and from work.

The claimant testified that she was coming out of a bend in the road when she had to steer to the right to avoid an oncoming vehicle. At this point the claimant states that her vehicle encountered a rock slide that had spilled over onto the paved traveled portion of the road, causing damage to the right front fender. Claimant submitted a repair estimate of $934.83. The claimant did not repair the vehicle, and eventually she traded it in on the purchase of a pick-up truck. She carried liability insurance only.

The claimant submitted several photographs of the rock slide taken later the same evening that show the slide extending into the traveled portion of the road. The claimant testified that she knew this particular area frequently has rock slides and that the area had recently received a heavy rain. She stated that the slip she encountered was near a driveway leading to a trailer on a hill above the roadway. According to the claimant, there were no rock fall warning signs.

Calvert Mitchell, Elkview maintenance supervisor for the respondent, testified that Mile Fork Road, Route 27, is a low priority secondary road in terms of maintenance priority. He testified that he was aware of a previous slip along the road, after the trailer had been installed on the slope above the road. He testified that some of the fill graded out from the trailer site tended to slip down onto the road during heavy rain. He also testified that mud and gravel tended to run off from the driveway. Mr. Mitchell submitted several photographs of the road taken on July 3, 1997. It was his testimony that the photographs show that the slide the claimant encountered occurred approximately 150 feet past this driveway, on a fairly straight portion of the road with relatively unobstructed visibility, while the claimant testified that the slip occurred just passed the driveway entrance closer to the curve.

It is the general rule in West Virginia, that the unexplained falling of rocks or boulders onto a highway without a positive showing that the respondent knew or should have known of a dangerous condition posing injury to person or property is insufficient to justify an award. *Hammond vs. Dept. of Highways*, 11 Ct. Cl. 234 (1977); *Coburn vs. Dept. of Highways*, 16 Ct. Cl. 68 (1986). The Court is of the opinion that the evidence establishes that respondent had notice of the possibility of a rockfall on this road.

Accordingly, the Court has determined that the respondent was negligent in its maintenance of Route 27 on the date of claimant's accident. However, the Court is also of the opinion that the claimant was 25 percent at fault as she was aware of the potential for rock slides in this area and she should have been driving with particular care along this road. Therefore, the Court is of the opinion to and does make an award in the amount of $701.12, representing the amount of claimant's repair estimate reduced by 25 percent.

Award of $701.12.

OPINION ISSUED SEPTEMBER 16, 1997

NORTH HILL COAL COMPANY
VS.
DIVISION OF HIGHWAYS
(CC-96-292)

F.T. Graff, Jr., Attorney at Law, for the claimant.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

Claimant North Hill Coal Company brings this action for $408.78 for damages from a sewage back-up in the claimant's rental property, allegedly the result of negligent sign installation on part of the respondent. The Court is of the opinion that the respondent was at fault, and accordingly, makes an award to the claimant as described below.

Claimant North Hill Coal Company (hereinafter referred to as North Hill) is the owner of an apartment building located at 529 Main Street, also designated as WV Route 211, in Mount Hope, Fayette County. In May 1996, the North Hill's tenant discovered that sewage was backing up in the building. North Hill subsequently hired a plumber to run a sewer rooter, or "snake," from inside the building toward the main city sewer line on Main Street. The plumber discovered a blockage where a metal sign post had been driven directly through the four-inch sewer feeder line under the sidewalk approximately four feet from the building. The total cost for the plumber and the repairs was $408.78.

The issue to be decided by the Court is whether the City of Mount Hope or the respondent was responsible for installation of the signs in question. The evidence at hearing was that the metal sign post that was removed was approximately two feet long and that a longer sign post had been bolted on top of it upon which a "No Parking" sign would have been attached. North Hill operations manager John Gwinn Jr. testified that

the post had been cut off at grade and had been covered over with concrete. He testified that he had no actual knowledge of who installed the signs in the first instance.

A letter from the Mount Hope city attorney to the respondent dated April 7, 1993, stated that the City had adopted new parking regulations for WV Route 211 and requested that the respondent erect the appropriate signs. Mount Hope Mayor Floyd Bonifacio testified at hearing that his store was located immediately next door to the claimant's building and that he remembered seeing the installation of a number of "No Parking" signs. He testified that he knew all of the city employees who worked on road and sign maintenance and that he did not recognize any of the men who had actually installed the signs in question. A letter from Mr. Bonifacio to the respondent dated September 5, 1996, stated that the claimant's sewage blockage occurred "where the State Highway Department had driven a sign post into their sewer line. . ." Mr. Bonifacio testified that in his experience as mayor, the respondent would assume responsibility for installing signs on any State roads that lay within city limits.

Harry Honaker, District 9 sign shop supervisor for the respondent, testified that the signs were installed in November 1993. He testified that the Division of Highways relied upon information provided by the City of Mount Hope to determine where to install the sign posts. Mr. Honaker said that city street manager instructed where the signs could be installed without causing damage and that the city also provided an air compressor to drill holes in the sidewalk. He stated that the actual installation of the short posts "was probably a joint effort. . . . (M)y crew was probably setting some and the city crew probably set some. He stated that his crew would then have installed the final signs. Thirty-two signs were installed; all sign posts and signs were provided by the respondent. Finally, Mr. Honaker testified that respondent's daily work records indicate that two to three Division of Highways employees worked approximately six days in the process of installing these signs.

While the evidence as to who actually installed these signs is far from clear, the Court is of the opinion that the respondent played a substantial role in the sign work performed. WV Route 211 is a state road for which respondent is responsible for maintenance in a reasonably safe manner. While the City of Mount Hope may have had some part of the responsibility in the sign work performed, the Court cannot attribute a percentage of fault to the City as such apportionment would be speculation. The Court is of the opinion that the amount of work performed by the respondent's crew is indicative of substantial involvement on the part of respondent.

Accordingly the Court is of the opinion to, and does, make an award in the amount of $408.78.

Award if $408.78.

OPINION ISSUED SEPTEMBER 16, 1997

LONNIE M. SKEENS
VS.
DIVISION OF HIGHWAYS
(CC-96-360)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

Claimant seeks an award for damage to the wheel rim and tire on her 1991 Pontiac Grand Prix automobile, caused when she struck a pothole on the Ashford/Nellis Road (WV Route 1) in Boone County.

The claimant states that she was driving westbound on July 8, 1996, at approximately 7:00 p.m., when she encountered a hole approximately seven inches deep and 18 inches wide that extended into the regularly traveled portion of the blacktop. The evidence indicates that Route 1 in this area is a two-lane, paved road, with a center line. The claimant testified that she was familiar with the road and drove it two or three times a week. She testified that as she approached the hole in the pavement she was faced with oncoming traffic and she could not avoid driving her vehicle into the hole, resulting in a cracked rim and flat tire. Claimant submitted repair bills in the amount of $452.61; her insurance deductible was $1,000.

Rex Angel, acting Boone County road supervisor at the time of the accident, testified that the Ashford/Nellis Road is WV Route 1 and is a second priority road in terms of maintenance. He testified that he had no prior knowledge of a hole in the vicinity of claimant's accident. However, the claimant submitted a photograph, taken one week after her accident, showing a hole of significant size in the blacktop. (Claimant's Exhibit 1).

It is well established that the State is not an insurer or guarantor of the safety of motorists traveling on its highways. In order to establish negligence on behalf of the respondent for damage caused by a road defect, a claimant must prove by a preponderance of the evidence that the respondent had either actual or constructive notice of the defect and a reasonable opportunity to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. C. 103 (1986); *Pritt vs. Division of Highways*, 16 Ct. Cl. 8 (1985). The Court is of the opinion that the respondent was familiar with the road in question and that a hole of the size shown in claimant's Exhibit No. 1 would have developed over a considerable amount of time. Accordingly, the Court is of the opinion that the respondent had constructive notice of this hazardous condition on WV Route 1: therefore, the Court makes an award to the claimant in the amount of $452.61 for the damages to her vehicle.

Award of $452.61.

OPINION ISSUED DECEMBER 2, 1997

LANE S. AND BARBARA S. BOHRER
VS.
DIVISION OF CORRECTIONS
(CC-95-204)

Larry W. Blalock, Attorney At Law, for claimants.
Joy M. Cavallo, Assistant Attorney General, for the respondent.

WEBB, JUDGE:

The claimants in this case, Lane and Barbara Bohrer, seek an award of damages resulting from the escape of convicted murderer David Edward Williams from the West Virginia Penitentiary in Moundsville. The respondent having stipulated to liability, the Court held a hearing on the 9th day of September, 1997, to determine appropriate damages.

BACKGROUND

The Notice of Claim filed herein arises out of an escape which occurred on February 19, 1992. Three inmates, one of whom was Mr. Williams, had dug a tunnel down from a greenhouse located on prison grounds, some sixteen (16) feet deep and thirty-two (32) feet long under the wall of the prison to make their escape. After escaping, Mr. Williams entered the New Martinsville home of the claimants in the early morning hours of March 6, 1992, and held them hostage at gunpoint and otherwise terrorized them from approximately 2:00 a.m. until 1:00 p.m., on the following day when the claimants were able to make their escape through a window above ground level. Claimant Barbara Bohrer fractured her left knee in the drop from the window, which required surgery and resulted in impaired range of movement and physical activity for Mrs. Bohrer and ensuing effects upon the claimants' lifestyle. Claimants seek an award for various economic losses, including medical expenses, lost wages and home-care services, as well as pain and suffering, mental anguish, loss of enjoyment of life and loss of consortium.

DISCUSSION

To assess properly the measure of damages, the Court finds it necessary briefly to discuss the events giving rise to this claim. The claimants were married in 1960 and have lived in their New Martinsville home for 31 years. Mr. Bohrer works at ORMET, an aluminum company in Hannibal, Ohio. On the night in question, he was sleeping on the living room floor when he was awakened by David Edward Williams, an escapee from the West Virginia Penitentiary in Moundsville, who had broken into their home and was holding Mr. Bohrer's .41 caliber magnum handgun pointed at his face. Mr. Williams held him at gunpoint for approximately three hours, while Mrs. Bohrer was

asleep in their bedroom. During this three hour period, Mr. Williams threatened and harassed Mr. Bohrer. Thereafter, Mr. Williams instructed him to awaken his wife, and they were ordered to place pillowcases over their heads. Mr. Williams instructed Mrs. Bohrer to cook him some breakfast while having the pillowcase over her head and he continually threatened to kill them both. Thereafter, Mr. Williams tied Mr. Bohrer's hands and feet and left them in a bedroom with instructions that they were not to move or attempt to leave the room under threat of death. He was going to take a nap in their living room. The claimants made their escape by jumping out of a window in the bedroom when they did not hear any sounds from Mr. Williams for many hours. Apparently, Mr. Williams fled from the Bohrer home in one of their vehicles during that time frame.

The testimony of Mrs. Bohrer reveals the nightmarish hours they passed as hostages in their own home. Mr. Williams repeatedly taunted her with threats. She explained that he appeared to be a mind player. She testified, "He'd come back through the hall and he'd say, 'Barbara, I have a surprise for you. I have a surprise for you.' And you never knew. . . (Y)ou were afraid to even think of what his surprise might be." After her return from the hospital, that she was unable to remain home alone. "[I] was scared to death, scared to death. I felt his presence in every room."

The evidence revealed that as a result of this incident Mrs. Bohrer required company around the clock in her home for approximately eight months thereafter. During the day, her mother Wanda Musgrave remained with her and during the evenings, her husband Lane Bohrer was present depending on which shift he worked. Lane Bohrer regularly turned down overtime work to be with his wife because she was afraid to remain home alone.

The testimony in this claim establishes that claimant Barbara Bohrer's lifestyle has changed significantly in that she is less active and no longer enjoys pastimes such as bowling or golf. The injuries to her leg which occurred when she jumped out of the window to escape from her own home have prevented her from taking part in any of the physical activities which she had previously enjoyed. The evidence was that the fracture was repaired with a screw and Steinman pin and staple. Dr. Edgar Barett, Mrs. Bohrer's treating orthopedic surgeon, testified that residual effects of her knee injury include post-traumatic arthritis and muscle and ligament weakness. The claimants submitted a number of medical bills relating to treatment of Mrs. Bohrer's knee. The Court will now address the items of damages separately.

DAMAGES

The claimants submitted the following bills totaling $3,496.33 for medical treatment and other costs:

(a) The hospital bill for treatment of Mrs. Bohrer's knee amounted to $11,256.91. Of this amount, insurance covered all but $152.00 -- the additional cost for Mrs. Bohrer's private room.

(b) A bill of $71.00 for a new brace, dated April 10, 1992.

(c) A bill of $525.33 for a Medtronic electrical stimulator for Mrs. Bohrer's knee.

(d) A one-time charge of $98.00 for a visit by a psychologist on March 12, 1992, while Mrs. Bohrer was in the hospital.

(e) Payment of $2,650.00 for a home security system.

The Court finds that all of the aforementioned expenses were reasonable and necessary as a result the incident giving rise to this claim. It appearing that these expenses were borne by claimant Lane Bohrer, the Court makes an award to him in the amount of $3,496.33 for these various economic damages. The Court finds that the payment for a hot tub in the amount of $4,234.70, dated April 13, 1995, some three years after the incident, was not reasonably related to the claim and will be disallowed.

The claimants also seek an award for lost overtime pay and for the value of home care services provided gratuitously by members of Mrs. Bohrer's family. Mr. Bohrer has declined overtime shifts since March 6, 1992, and he continues to decline these shifts to the present day at his place of employment in order to be home with his wife as she is unable to stay in their home alone after dark. Mr. Bohrer's regular hourly compensation in 1992 was $13.50 an hour, and his overtime pay would have been approximately $20.25 per hour. Mr. Bohrer documented 54 missed overtime shifts in the five months between March and August 1992. He still regularly declines overtime shifts at least once a week. In addition, the claimants submitted evidence regarding the present value of approximately eight months of home care services provided to Mrs. Bohrer by her mother Wanda Musgrave and other members of the Bohrer family. William Cobb, an economist at Marshall University, is of the opinion that the present value of these services is $24,053.00.

It is the law of West Virginia that claims for damages cannot be proven by speculation or conjecture and that the permanency or future effect of an injury must be proven with reasonable certainty. *Jordan vs. Bero*, 210 S.E.2d 618 (W.Va. 1974) It is the opinion of the Court that an award for lost overtime and gratuitous home care services is not warranted in this case, as these damages are speculative in nature and their relationship to this claim has not been established with sufficient certainty. The Court notes that the West Virginia Supreme Court of Appeals has previously ruled that an injured person may recover damages for reasonable and necessary home care services, regardless of whether such services are rendered gratuitously or for pay. *Kretzer vs. Moses Pontiac Sales, Inc.*, 201 S.E.2d 275 (W.Va. 1973). While such an award may in some cases constitute a legal obligation, the Court is of the opinion that the State has no moral obligation to make such a award in the present case, as the evidence indicates that these services were rendered voluntarily with no expectation of payment and such an award would constitute a windfall to the claimants.

Finally, the Court turns to the matter of pain and suffering and mental anguish which resulted from this incident. Clearly there can be few events more traumatic than being tied up and held at gunpoint in one's own home by a convicted murderer under constant and repeated threat of being murdered. This event will be forever seared into

the memory of the claimants and will continue to haunt them during the remainder of their lives. Accordingly, the Court finds that claimant Barbara Bohrer is entitled to an award for past and future pain and suffering as there is the strong probability that the claimant will be required to undergo replacement knee surgery in the future. The claimant has also suffered mental anguish and loss of enjoyment of life, for all of which the Court makes a total award in the amount of $100,000.00. The Court further finds that the claimant Lane Bohrer has suffered loss of consortium and loss of enjoyment of life and is entitled to an award of $22,000.00. Accordingly, the Court makes awards to the claimants as provided herein below.

Award of $100,000.00 to Barbara S. Bohrer.

Award of $25,496.33 to Lane S. Bohrer.

OPINION ISSUED DECEMBER 5, 1997

LORETTA L. BALDWIN
VS.
DIVISION OF HIGHWAYS
(CC-96-261)

Claimant represents self.

Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her 1995 Chevrolet Cavalier Coupe caused when her vehicle struck a large hole in U.S. Route 250 in Marion County. For the reasons stated below, the Court makes an award in favor of the claimant.

The incident giving rise to this action occurred on May 14, 1996. Claimant was traveling southbound at approximately 4:30 p.m., from Mannington towards Fairmont in the general vicinity of Katy. The weather was clear and the road was dry. U.S. Route 250 in this area is a two-lane paved road that is first priority in terms of maintenance. The speed limit was 55 miles per hour. The evidence adduced at hearing established that the claimant was traveling at or below the speed limit when she was forced toward the berm as a result of oncoming traffic in the opposite lane. Claimant's vehicle struck a large hole which extended from the paved portion of the road and into the berm. One of the vehicle's tires was destroyed, resulting in repair costs in the amount of $194.03. Claimant's insurance deductible was $250.00.

Several photographs taken shortly after this incident were introduced into evidence, showing that the hole in question was approximately five to six inches deep and several feet long. The evidence does not indicate that there were any warning signs posted. The testimony at hearing further established that the respondent had been aware

of this particular hole for some time prior to the claimant's accident and had repaired the hole on repeated occasions with temporary cold mix patch. The Court has previously held that the respondent has a duty to maintain road berm in a reasonably safe condition for use when the occasion requires, and liability may arise when a motorist is forced onto the berm in an emergency. *Sweda vs. Dept. of Highways*, 13 Ct. Cl. 249 (1980), *Hinkle vs. Div. of Highways*, (CC-89-97), unpublished opinion issued December 10, 1991. In view of the foregoing, the Court finds that the respondent had notice of the road defect in question and had a duty either to warn the traveling public about the hazard or to repair same in a timely manner. Therefore, the Court makes an award to the claimant in the amount of $194.03.

Award of $194.03.

OPINION ISSUED DECEMBER 5, 1997

JOHN W. MARSHALL AND JESSICA A. HADEN
VS.
DIVISION OF HIGHWAYS
(CC-96-230)

Claimants represent themselves.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimants seek $2,200.00 for damage to their 1988 Ford Tempo, caused when claimant Jessica Haden encountered deteriorated pavement and a large hole on the berm on Kings Run Road in Randolph County. The Court makes an award based upon comparative negligence for the reasons stated below.

The incident giving rise to this action occurred on March 14, 1996, at approximately 7:00 p.m. Claimant Jessica Haden was driving west on Kings Run Road approximately one quarter of a mile from US Route 250 near Elkins. The weather was clear and dry. Kings Run Road (County Route 24) in this area is a paved, unlined road, and drivers must necessarily drive on the berm in order to pass oncoming vehicles safely. It is a second priority road in terms of maintenance. The evidence adduced at hearing established that as the claimant came around a curve, she encountered an area where the road surface was severely deteriorated with multiple holes and cracks in the pavement. She slowed down and steered her vehicle to the right to avoid the rough pavement. At that point the vehicle's right tire lodged in a hole in the gravel berm, causing her to lose control of the vehicle which struck an embankment and flipped over

onto its roof. The claimant stated that she was traveling approximately 40 miles per hour just prior to encountering the rough road. The respondent introduced evidence establishing that the current posted speed limit is 35 miles per hour, although it was not clear what the speed limit might have been at the time of the accident.

The claimant was the sole occupant and she did not suffer any physical injuries. The vehicle was a total loss and was sold for salvage value of $185.00. The claimants had purchased the vehicle in 1995 for $2,800 and now seek recovery of $2,200 representing the depreciated value of the vehicle immediately prior to the accident. Claimants carried liability insurance only.

Claimant Jessica Haden was familiar with the road and traveled it daily to and from work. She stated that it was her normal practice to avoid the rough pavement by steering over to the right-side berm to avoid the holes.

Respondent's evidence established that respondent was aware of the deteriorated conditions on Route 24 at the time of the accident. Lewis Gardner, assistant supervisor for Randolph County, testified that the road surface had considerable "alligator cracking" on blacktop which was indicative of underlying base failure. He stated that the road was scheduled for resurfacing, but that the respondent's employees had to concentrate maintenance efforts on widespread flood damage throughout the county at the time. The testimony further established that the respondent was aware that motorists on Route 24 were likely to use the berm area.

This Court has held that in order for the respondent to be held liable for a road hazard, the respondent must have actual or constructive notice of the defect and a reasonable opportunity to take remedial measures. *Pritt vs. Division of Highways*, 16 Ct. Cl. 8 (1985). The Court has also held that the respondent has a duty to maintain road berms in a reasonably safe condition and liability may arise when a motorist is forced onto the berm in an emergency. *Sweda vs. Dept. of Highways*, 13 Ct. Cl. 249 (1980). In view of the foregoing the Court is of the opinion that the respondent failed to take adequate remedial measures to repair the road in question. However, the Court is also of the opinion that the claimant was 20 percent at fault for failing to exercise due caution. Therefore, the Court makes an award of $1,612.00, representing 80 percent of the vehicle's $2,200.00 value less its $185.00 salvage value.

Award of $1,612.00.

OPINION ISSUED DECEMBER 5, 1997

LINDA McCORD
VS.
DIVISION OF HIGHWAYS

(CC-96-170)

Claimant represents self.

Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her 1989 Chevrolet Corsica, after encountering a washed out area on WV Route 7 near Shriver in Monongalia County.

The incident giving rise to this action occurred on March 31, 1996, at approximately 1:30 p.m. The weather was clear and dry. Route 7 in this area is a two-lane paved road that is a first priority road in terms of maintenance. The claimant and her daughter-in-law were passengers in the vehicle which was being driven by her son. The evidence adduced at hearing established that as they were approaching a small bridge on Route 7 eastbound, the claimant's son was suddenly forced to apply the brakes to avoid a potential collision with a vehicle in front of them. As a result, the claimant's vehicle slid towards the side of the bridge and came to rest on two washouts along the guardrail.

A video tape was introduced into evidence showing significant washouts that were several feet in depth and width on the head wall along this bridge. The claimant's vehicle grounded out, causing extensive damage to the undercarriage, transmission, and wheel and tire assemblies. The total cost of repairs was $2,685.83. The claimant had full coverage, with a $250.00 deductible.

Testimony from the respondent's Monongalia County supervisor indicated that the respondent was not aware of this particular road defect prior to the claimant's accident. The evidence further established that there had been several snow storms in March, which could have contributed to the washout. It is well established that to be held liable for defects of this type, the claimant must prove that the respondent had actual or constructive notice of the defect and a reasonable opportunity to take remedial action. The Court is of the opinion that the washouts in question had developed over some period of time and that the respondent had reason to know of this particular road defect, which posed a significant hazard to motorists. Therefore, the Court will make an award in favor of the claimant in the amount of $250.00.

Award of $250.00.

OPINION ISSUED DECEMBER 5, 1997

STORMIE D. MELOY

VS.
DIVISION OF HIGHWAYS
(CC-97-121)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her 1989 Mercury Tracer, which occurred after her vehicle dropped off onto the berm area on US 219 South in Randolph County. For the reasons stated below, the Court will make a comparative award in favor of the claimant.

The incident giving rise to this claim occurred on June 7, 1997, at approximately 1:00 p.m. The claimant was traveling approximately 55 miles per hour southbound on US 219 towards Elkins. The weather was dry and clear. Route 219 in this area is a straight and level, two-lane, paved road with a gravel berm. The claimant stated that when she steered to the edge of her lane to avoid an oncoming logging truck, her vehicle dropped onto the berm, bending the stabilizer bar and causing her to lose control. The vehicle flipped several times and came to rest on an embankment. The claimant suffered bruises and lacerations and required 17 stitches. The claimant's infant son was riding in a child restraint seat and was unhurt. The claimant's medical bills were covered by insurance. The vehicle, valued at $960.00, was a total loss. The claimant carried liability insurance only on the vehicle.

The evidence adduced at hearing was that the claimant pulled over to the edge of her lane to avoid an oncoming logging truck, but the truck had not actually crossed into her lane of traffic. The police report stated that the cause of the accident was the claimant's failure to maintain control. A video tape admitted into evidence indicated that the drop-off onto the berm in this area was approximately five to seven inches deep in places.

It is well established that the State of West Virginia is neither an insurer nor a guarantor of thesafety of motorists upon its roads. To be held liable for road defects, the claimant must prove that the respondent had actual or constructive notice of the defect and a reasonable opportunity to take remedial action. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8, (1985), *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The Court has also held that, in the absence of an emergency, when motorists drive on the berm area due to failure to maintain control, the driver takes the berm as he or she finds it. *Sweda vs. Dept. of Highways*, 13 Ct. Cl. 249 (1980). After mature review of the evidence, the Court is of the opinion that the berm area at issue had been in a state of disrepair for some time and that the respondent had reason to know of this defect. However, the

Court is also of the opinion that the claimant's failure to maintain control played a substantial contributing factor in this accident. Therefore, the Court reduces the award to the claimant by 25 percent. Accordingly, the Court makes an award in the amount of $720.00.

Award of $720.00.

OPINION ISSUED DECEMBER 5, 1997

LINDA O'CONNOR
V.S.
DIVISION OF HIGHWAYS
(CC-96-565)

Claimant represents self.
Andrew F. Tar, Attorney at Law, for the respondent.

PER CURIAM:

Claimant seeks an award for damage to her vehicle which occurred when she encountered a depressed manhole cover on WV Route 20 in Clarksburg, Harrison County.

The Court is of the opinion to make an award in favor of the claimant for the reasons stated herein below.

The incident giving rise to this claim occurred on October 20, 1996. Claimant was driving her 1993 Ford Probe from US Route 50 onto Route 20 southbound at approximately 9:00 p.m. The weather was dark and it was raining heavily. Route 20 in this area is a paved, heavily-traveled road, primary in terms of maintenance. The evidence adduced at hearing established that the claimant had just exited Route 50 on the Joyce Street exit and was traveling southbound on Route 20 when her vehicle struck a depressed manhole cover in the pavement. The claimant's left front tire was destroyed and the front end was knocked out of alignment. The repair bill submitted into evidence was in the amount of $158.71. Claimant's insurance deductible was $500.00.

Claimant encountered the hole immediately after traveling through a four-way intersection with a traffic light. A home was being demolished on the right side of the road and several traffic cones had been placed in the immediate vicinity of the intersection. Claimant estimated her speed at no more than 15 miles per hour. She could not see the hole because of the rain.

Respondent's evidence established that the intersection in question is a very heavily traveled area and that the respondent was engaged in road construction and

resurfacing in the area. The City of Clarksburg is responsible for the manhole, but respondent is responsible for the road surface of Route 20 in the vicinity of claimant's accident. Approximately one month prior to the accident, the ring on the manhole cover had dropped and respondent had to resurface the hole to raise it to back to grade. The Court has held that to be held liable for a road hazard, the respondent must have actual or constructive notice of the defect. *Chapman vs. Division of Highways*, 16 Ct. Cl. 103 (1986), *Pritt vs. Division of Highways*, 16 Ct. Cl. 8 (1985), *Hamon vs. Division of Highways*, 16 Ct. Cl. 127 (1986). The Court is of the opinion that the respondent knew or should have known of the hazard presented by the manhole cover and should have taken precautionary measures to prevent this accident. Accordingly, the Court is of the opinion to and does hereby make an award to the claimant in the amount of $158.71

Award of $158.71.

OPINION ISSUED DECEMBER 5, 1997

WEXFORD HEALTH SOURCES, INC.
VS.
DIVISION OF CORRECTIONS
(CC-97-367)

Matt Polka, Attorney at Law, for the claimantf.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment of $35,363.32 for medical services provided to various inmates in the Mt. Olive Correctional Center, a facility of the respondent, for Fiscal Year 1996-1997. Respondent, in its Answer, admits the validity of the claim, but avers that the proper amount due and owing for the relevant time period is $35,278.32. Claimant further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay this amount.

While the Court believes that this is a claim which in equity and good conscience should be paid, the Court further believes that an award cannot be recommended based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED DECEMBER 15, 1997

MICHAEL F. BENNETT
VS.
DIVISION OF HIGHWAYS
(CC-97-222)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to a 1993 BMW which occurred when the vehicle struck a hole on Route 64 in Marion County. The Court on its own motion amended the claim to reflect the proper claimant.

The incident giving rise to this action occurred on February 7, 1997, at approximately 7:30 p.m. The claimant's fiancé, Julia A. Ralston, was traveling on Pleasant Valley Road (Route 64) towards Fairmont. Mr. Bennet is the owner of the vehicle; Ms. Ralston was the driver. The weather was dark and it had rained earlier that day. Route 64 in this area is a paved, two-lane road, secondary in terms of maintenance priority. The evidence adduced at hearing was that as Ms. Ralston came around a turn near an area known as Morris Park, she steered towards the edge of her lane to avoid oncoming traffic in the other lane. At this point, the vehicle struck a hole on the edge of the pavement, destroying the right rear tire. Cost to repair the tire and wheel rim was in the amount of $438.30. The claimant had a $500.00 insurance deductible.

Ms. Ralston was driving at approximately 25 to 35 miles per hour. It was not clear from the evidence whether the oncoming vehicle actually crossed into her lane. Several photographs, taken approximately in April 1997, were introduced into evidence, showing a hole roughly one foot deep and two to three long along the edge of the pavement. Testimony from the respondent indicated that the respondent had no actual prior notice of this hole until after the accident. The evidence further established that the respondent did not repair the hole for several months as hot mix was unavailable during the winter. It is the respondent's position that the hole was too close to the road to properly install interim warning signs.

It is the general rule that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads. In order to hold the respondent liable for a defect of this type, the claimant must prove that the respondent had actual or constructive notice of the road hazard. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985). *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The Court is of the opinion that the size of the hole in question is indicative of its presence for some time and that respondent had

constructive notice of same. The respondent, at a minimum, could have installed hazard signs or markers in question to warn motorists. Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $438.30.

Award of $438.30.

OPINION ISSUED DECEMBER 15, 1997

JAMES DILLOW
VS.
DIVISION OF HIGHWAYS
(CC-97-5)

C. Paul Estep, Attorney at Law, for the claimant.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

Claimant seeks an award for damage to his 1987 Ford F-150 pickup truck, caused when the claimant's son encountered standing water on Route 857 in Monongalia County and lost control of the vehicle.

The incident giving rise to this claim occurred on February 27, 1996. The Claimant's son, Aaron James Dillow, was driving north on Route 857 at approximately 3:30 p.m. Route 857 in this area is a paved two-lane road with several curves and a 45 mile-an-hour speed limit. It is a first priority road in terms of maintenance. The area had received heavy snow fall earlier that winter and had been experiencing heavy rain and thawing over a number of days.

The evidence adduced at hearing establishes that as Aaron Dillow drove around a curve, his vehicle encountered a pool of water on the right-hand side of the road. When he attempted to drive through the water, the truck hydroplaned, struck an embankment on the right side of the road, and flipped over. Aaron Dillow testified that he was traveling at approximately 30 miles per hour and that he was unable to steer around the water because of an oncoming vehicle in the other lane. The truck was a four-wheel-drive vehicle, valued at approximately $5,550.00, and was declared a total loss. The claimant carried liability insurance only.

The area in question had received an unusually heavy rainfall on the day of the accident. The claimant introduced testimony which established that there was a culvert in the vicinity of the accident that was not draining properly. Several photographs taken two hours after the accident were admitted showing a flooded area extending well into the traveled portion of the road. Aaron Dillow was familiar with the road and drove it daily to and from Morgantown.

It is the law of West Virginia that the respondent is neither an insurer nor a guarantor of the safety of persons traveling upon its highways. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). The Court is of the opinion that the respondent knew or had reason to know of the risk of water hazards along this portion of Route 857. However, the Court is also of the opinion that the claimant's son bears substantial responsibility for failing to exercise due caution. Therefore, under the doctrine of comparative negligence, the Court finds that the respondent is 60 percent at fault and the driver is 40 percent at fault.

Accordingly, the Court makes an award to the claimant in the amount of $3,300.00.

Award of $3,300.00.

OPINION ISSUED DECEMBER 17, 1997

LINDA BOLYARD
VS.
DIVISION OF HIGHWAYS
(CC-97-36)

Claimant represents self.

Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her 1987 Subaru station wagon, which occurred when she struck a hole on a road maintained by the respondent in Marion County. The Court will make a comparative award for the reasons stated below.

The incident giving rise to this action occurred on December 26, 1996, at approximately 6:25 p.m. There was some question about the exact location of the accident, but the evidence adduced at hearing indicated that the road in question was Route 27/4 in Marion County, approximately two miles from what is known as the Enterprise bridge. Route 27/4 in this area is a paved two-lane road that is second priority in terms of maintenance. The claimant was driving her vehicle approximately 30 miles per hour behind another vehicle, which was driven by a friend, Nina Todd. The evidence was that both vehicles struck a large hole on the edge of the pavement. The claimant's exhibits admitted into evidence establish that Ms. Bolyard's vehicle sustained damage to the tire, rim, strut and axle in the amount of $532.27. The claimant carried liability insurance only.

The hole in question was described as approximately one-and-a-half feet in diameter, six to eight inches deep, and was located roughly one foot from the edge of the

road. The evidence at hearing established that the respondent had no prior notice of the hole in this particular location. The claimant testified that at the time she was familiar with the road and traveled it daily.

It is the general rule that the State of West Virginia is neither an insurer nor a guarantor of the safety of motorists upon its roads. In order to hold the respondent liable for a road defect of this nature, the claimant must prove that the respondent had actual or constructive notice of the defect. *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986), *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985). The Court is of the opinion that a hole of the dimensions described herein would develop over a period of time, and that the respondent therefore had constructive notice of this hazard. However, the Court is also of the opinion that the claimant was 40 percent at fault of failing to exercise due care. Therefore the Court hereby makes an award in the amount of $319.36, reflecting 60 percent of the claimant's damages.

Award of $319.36.

OPINION ISSUED DECEMBER 17, 1997

TIMOTHY BROWN AND DARLA BROWN
VS.
DIVISION OF HIGHWAYS
(CC-96-609)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimants seek recovery of an award for damage to their 1996 Subaru Outback which occurred after encountering a large hole along the shoulder of Route 857 in Monongalia County. For the reasons stated below the Court is of the opinion to make an award for the claimants.

The incident giving rise to this action occurred on September 17, 1996, at approximately 8:55 p.m. The Claimants were traveling southwest on Greenbag Road (Route 857) in Morgantown. The weather was dark and it was dry. Route 857 in this area is a paved two-lane road that is first priority in terms of maintenance. The evidence adduced at hearing was that as the claimants proceeded over a small hill, driver Timothy Brown steered the vehicle towards the edge of his lane to avoid traffic in the opposite lane. At that moment the vehicle dropped into a large depression along the shoulder, resulting in two flat tires and bent rims. The claimants had to buy two new wheels and tires costing a total of $425.00. The claimants' insurance deductible was $500.00.

Testimony from the claimants indicated that the depression was approximately

six inches deep and a foot wide where the pavement had eroded away. The claimants introduced photographs taken several days later, after the area had been filled in and patched. The photographs demonstrated that the patched area was of significant width and length along the shoulder, indicative of a hole of considerable dimensions. Testimony from the respondent indicated that Route 857 carries a substantial amount of heavy truck traffic, but the testimony did not establish whether there had been prior complaints of this particular road hazard.

The Court has ruled that in order to hold the respondent liable for a road defect of this type that the claimant must prove by a preponderance of the evidence that the respondent had actual or constructive notice of the defect and a reasonable opportunity to take remedial action. *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986), *Chapman vs. Dept. of Highways*, 16 Ct Cl. 103 (1986). *Ball vs. Division of Highways*, (CC-94-214), unpublished opinion issued February 7, 1994. It is the opinion of the Court that the road defect giving rise to this claim was substantial in size, indicating its presence for some time. Accordingly, the Court is of the opinion that the respondent had, at a minimum, constructive notice of this defect and ample opportunity to repair same. Therefore the Court makes an award in the amount of $425.00.

Award of $425.00.

OPINION ISSUED DECEMBER 17, 1997

JAMES AND JANE HEPNER
VS.
DIVISION OF MOTOR VEHICLES
(CC-97-299)

Claimant represents self.
Joy Cavallo, Assistant Attorney General, for the respondent.

STEPTOE, JUDGE:

Claimants seek an award of $975.00 representing excess taxes paid on Ford Explorer vehicle purchased in 1995. For the reasons stated below, the Court finds that an error was made to the detriment of the claimants.

The evidence adduced at hearing was that on 10 February 1995, claimants purchased a Ford Explorer from Courtesy Ford in Altoona, Pennsylvania. On 8 March 1995, the respondent's Martinsburg office assessed a 5% road privilege tax on the $24,000.00 cash value of the new vehicle. However, the trade-in value of the claimant's prior vehicle was $19,500.00. Claimants contend that the tax should have been assessed on the difference of $4,700.00, not the entire $24,000.00.

The respondent admits that a clerical error was made and that the claimants were over-taxed. However, the claimants did not discover the error until July 16, 1997, when they contacted the respondent in order to pay taxes on a subsequently purchased vehicle and noticed the difference in the tax bill paid on the new vehicle. WV Code §17A-10-12 states that whenever the respondent through error collects any fee not required by law, the same shall be refunded upon application therefor made within six months after the date of such payment. It is the position of the respondent that the law is unequivocal and that the six-month rule precludes recovery in this case.

The Court has previously refused to award refunds of state road privilege taxes in cases when the buyer arbitrates a repurchase agreement and waives any right to recover said costs from the seller. In these cases, the Court has held that it lacks jurisdiction to hear these claims and that the proper forum, if any, lies in state court. *Linksweiler vs. Division of Motor Vehicles*, (CC-90-295), unpublished opinion issued 22 February 1991. However, the Court has also held that when the respondent assesses road privilege taxes incorrectly that an award may be justified. *T.H. Compton vs. Division of Motor Vehicles*, (CC-88-293), unpublished opinion issued 8 August 1989. The respondent in the case at bar admits that the road privilege tax assessed the claimants was assessed improperly. The Court is of the opinion that the claimants had no reason to suspect any error prior to July 16, 1997, when they approached the respondent to pay taxes on their new vehicle. While there may be no legal obligation to refund the claimants for the improperly assessed taxes, the Court is of the opinion that the State was unjustly enriched by an error on the part of one its employees; therefore, the State has a moral obligation to refund same. Accordingly the Court makes an award in the amount of $975.00 for the improperly assessed tax on their 1995 vehicle.

Award of $975.00.

OPINION ISSUED DECEMBER 17, 1997

TEDDY STULL AND LINDA STULL
VS.
DIVISION OF HIGHWAYS
(CC-97-156)

Claimant represents self.

Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimants brought this action for damage to their 1994 Buick Skylark, which occurred after the vehicle encountered a large hole on a road maintained by the

respondent in Marion County. For the reasons stated below the Court will make an award in favor of the claimant.

The incident giving rise to this action occurred on February 19, 1997. The claimant Linda Stull was driving with her son on US Route 250 southbound in Fairmont towards Bridgeport at approximately 7:30 p.m. The weather was dark and it was raining lightly. Route 250 in this area is a two-lane paved road that is first priority in terms of maintenance. The evidence adduced at hearing was that the claimant struck a large hole, destroying one wheel and tire. Total repair and replacement costs were $193.70. The claimant carried full coverage with a $100.00 deductible.

The claimant testified that on the night in question she saw several other vehicles striking this hole. She stated that she could not estimate the size of the hole because a police cruiser was eventually parked over it to keep motorists at a safe distance. There were no warning signs in the vicinity. The evidence established that the respondent had repaired and patched this particular hole on multiple occasions that winter. However, the evidence does not establish that the respondent had actual notice that the hole was again in need of repair on this particular occasion. It is the general rule that to hold the respondent liable the claimant must prove that the respondent had actual or constructive notice of the defect. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985), *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The Court is of the opinion that the respondent had reason to know that the hole in question would present a hazard to motorists, and, at a minimum, could have taken remedial action such as installing warning signs. Therefore, the Court is of the opinion to and does hereby make an award in the amount of $100.00.

Award of $100.00.

ORDER ENTERED DECEMBER 18, 1997

AT&T
Claimant,

Claim Nos.CC-95-55;
CC-95-57;
CC-95-58;
CC-95-59;
CC-95-60;
and
CC-95-62

STATE OF WEST VIRGINIA,
Respondent

AGREED ORDER OF SETTLEMENT AND DISMISSAL

AT&T, Claimant, by counsel, and the State of West Virginia, Respondent, by counsel, by their signatures below, represent to the Court that they agreed to compromise AT&T's claim of $321,241.70 by the payment of the sum of $179,892.93.

It is, accordingly, ORDERED, that the State of West Virginia, shall pay AT&T as soon as the legislation is effective and the monies are available, the sum of $179,892.93 in full satisfaction of the claims in this matter and that these cases are hereby submitted to the Court.

IN THE COURT OF CLAIMS OF THE STATE OF WEST VIRGINIA

AT&T

Claim Nos. CC
95-55; 95-57; 95-58;
95-59; 95-60; and
95-62

STATE OF WEST VIRGINIA,

SETTLEMENT AGREEMENT

WHEREAS, AT&T filed six Notices of Claim against various agencies and political subdivisions of the State of West Virginia (hereinafter collectively referred to as the "State") in the West Virginia Court of Claims styled AT&T v. Department of Administration, CC95-57; AT&T v. Department of Highways, CC95-58; AT&T v. Department of Administration, CC95-59; AT&T v. Department of Administration, CC95-62; and AT&T v. Department of Health and Human Resources, CC95-60 (hereinafter collectively referred to as the "Disputed Claims").

WHEREAS, AT&T asserts in the Disputed Claims that the State has failed to pay AT&T $321,214.70 for telecommunications services provided by AT&T to the State, as are more fully described in the invoices submitted in support of the Disputed Claims.

WHEREAS, the State disputes that AT&T is entitled to recover the $321,214.70 claimed in the Disputed Claims;

WHEREAS, on May 29, 1997, AT&T and the State appeared before the Court of Claims for a hearing on the Disputed Claims (the "Hearing");

WHEREAS, subsequent to the Hearing, AT&T and the State entered into negotiations resulting in a compromise and settlement of the Disputed Claims;

WHEREAS, the settlement and compromise is contingent upon the passing of a special appropriation of the West Virginia Legislature.

NOW THEREFORE, in recognition of the receipt of good and valuable consideration, the sufficiency of which the parties acknowledge and accept, AT&T and the State do hereby agree to the following as a compromise and settlement of the Disputed Claims;

1.

At the Stat's request, AT&T and the State will enter into a stipulation to be filed with the Court of Claims under which the Disputed Claims will be consolidated and styled "AT&T and the State&T v. State of West Virginia."

2.

AT&T and the State will immediately enter into a stipulation to be filed with the Court of Claims under which AT&T and the State&T shall be entitled to receive payment from the State in the amount of One Hundred Seventy-Nine Thousand Dollars Eight Hundred Ninety-Two Dollars and Ninety-Three Cents ($179,892.93) (the "Proposed Payment") in satisfaction of the Disputed Claims.

3.

AT&T and the State shall execute all documents necessary for the timely presentment of the Proposed Payment to the 1998 Regular Session of the West Virginia Legislature.

4.

Upon the enactment of a law authorizing the expenditure of funds and the

State's payment to AT&T of monies in satisfaction of the Proposed Payment, AT&T will execute the Release Agreement attached hereto as Exhibit A.

5.

Should, for whatever reason, the Court of Claims fail to enter an Order awarding AT&T the entire amount of the Proposed Payment on or before January 14, 1998, then this settlement Agreement including the stipulations entered into hereunder shall be null and void and AT&T shall have the right to pursue the entire amount alleged due and owing under the Disputed Claims.

6.

The terms contained within this Settlement Agreement constitute the entire agreement, and anything not expressly stated herein shall not be considered as part of this Settlement Agreement.

OPINION ISSUED JANUARY 9, 1998

JAMES M. CASEY
VS.
SUPREME COURT OF APPEALS
(CC-97-188)

Claimant represents self.
Richard Rossworm, Administrative Counsel, for respondent.

PER CURIAM

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment in the amount of $297.00 for serving as a Special Family Law Master in Mason County. The respondent failed to receive the necessary documentation in the proper fiscal year; therefore, the claimant has not been paid. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

While the Court believes that this is a claim which in equity and good conscience should be paid, the Court further believes that an award cannot be recommended based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED JANUARY 9, 1998

DIVISION OF HIGHWAYS
VS.
DEPARTMENT OF ADMINISTRATION
(CC-97-400)

Patricia J. Lawson, Attorney at Law, for the claimant.
William J. Charnock, Assistant General Counsel, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment in the amount of $337.09 for gasoline provided to the Revolving Fund, a division of the respondent. Respondent, in its Answer, admits the validity of the claim and the amount, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

While the Court believes that this is a claim which in equity and good conscience should be paid, the Court further believes that an award cannot be recommended based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health,* 8 Ct.Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED JANUARY 9, 1998

DIVISION OF NATURAL RESOURCES
VS.

DIVISION OF FORESTRY
(CC-97-404)

Claimant represents self.

Danyus Jividen, Senior Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant seeks $1,900.80 for rent due for the period of July 1996 through June 1997 for which claimant has not been paid. The rent was not paid by the respondent in the proper fiscal year, because a lease had not been signed; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the rent could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,900.80.

Award of $1,900.80.

OPINION ISSUED JANUARY 23, 1998

AMERICAN DECAL & MFG. COMPANY
VS.
DEPARTMENT OF TAX AND REVENUE
(CC-97-403)

Claimant represents self.

Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant seeks $22,657.50 for providing cigarette stamps to respondent in the

1996 fiscal year. The invoice for these stamps was not forwarded to the respondent in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $22,657.50.

Award of $22,657.50.

OPINION ISSUED JANUARY 23, 1998

RICHARD W. ARMSTRONG, JR.
VS.
DIVISION OF HIGHWAYS
(CC-97-242)

Claimant represents self.

Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his 1992 Eagle Premier, which occurred after encountering a large hole in a road maintained by the respondent in Ohio County.

The incident giving rise to this claim occurred on June 7, 1997, at approximately 2:00 p.m. The claimant was driving with his father on Dickson's Run Road (Route 29) approximately one eighth of a mile from U.S. Route 40. The weather was clear. Route 29 in this area is a narrow, two-lane paved road with numerous twists and curves. It is third priority in terms of maintenance. The evidence adduced at hearing was that the claimant steered to the right to avoid a large hole in the road, whereupon the vehicle struck a second hole in close proximity resulting in damage to front struts. The claimant's cost of repairs was in the approximate amount of $$416.32. Replacement rental car costs for one day was in the amount of $34.97. The claimant's insurance deductible was in the amount of $500.00.

The claimant submitted into evidence a photograph taken shortly after the accident, indicating two holes of significant breadth and depth. The evidence further established that the respondent was aware of an ongoing drainage problem from underground springs in the area along Dickson's Run Road and had performed ditching work in the area in May 1997.

It is well established that the State is neither a guarantor nor an insurer of the safety of motorists upon its roads. For the respondent to be held liable for defects of this type, the claimant must prove that the respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985), *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The Court is of the opinion that the size of the holes in question is indicative of their presence for a substantial period of time and that the respondent, at a minimum, had constructive notice of this defect. Therefore, the Court is of the opinion to and does make an award to claimant in the amount of $451.29, representing his out-of-pocket costs for repairs and for the rental car.

Award of $451.29.

OPINION ISSUED JANUARY 23, 1998

LARRY BLEVINS
VS.
DIVISION OF HIGHWAYS
(CC-97-298)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his 1990 Volvo automobile which occurred after encountering a hole in a road maintained by the respondent in Fayette County. The Court is of the opinion that the respondent had reason to know of this road defect and makes an award as stated more fully below.

The incident giving rise to this claim occurred on June 22, 1997. The claimant was traveling westbound on Interstate 64 and exited at County Route 15 near Collinsdale to purchase some gasoline. County Route 15 in this area is a two-lane paved road that is low priority in terms of maintenance. The evidence adduced at hearing was that the vehicle encountered a hole on the edge of the road in the vicinity of a Sunoco service station. The vehicle sustained two flat tires and bent rims on the right-hand side as well as damage to the motor mounts. The total cost of repairs was in the amount of $744.70. Evidence from the claimant's insurance carrier established that the claimant's applicable insurance deductible was in the amount of $250.00.

The hole was described as approximately two feet long, one-and-a-half feet wide and three to four inches deep. It was located on the edge of the road, approximately seven feet from the center line. The claimant was driving approximately 25 to 30 miles per hour. His wife and son were passengers. The claimant testified that he was unable to avoid the hole because another vehicle was approaching in the oncoming lane and there was no shoulder on the right side of his lane.

Respondent's evidence established that maintenance on this road was normally performed upon receiving requests or complaints from motorists, and that no complaints had been received regarding this hole prior to the claimant's accident.

The general rule is that the state is neither an insurer nor a guarantor of the safety of motorists upon its roads. For the respondent to be held liable for defects of this kind, the claimant must prove that the respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 127 (1985), *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (196), *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). The Court is of the opinion that a hole of this size would have developed over a significant period of time and that the respondent therefore had reason to know of the defect in the road giving rise to this claim.

In accordance with the finds of fact and conclusions of law as stated herein above, the Court is of the opinion to and does grant an award to the claimant in the amount of $250.00.

Award of $250.00.

OPINION ISSUED JANUARY 23, 1998

JASON SHAWN BOWERS
VS.
DIVISION OF HIGHWAYS
(CC-97-117)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his 1980 Ford Fiesta which occurred after encountering a hole in a road maintained by the respondent in Hardy County. The Court is of the opinion that the respondent had reason to know of the poor road conditions and makes an award to the claimant as stated more fully below.

The incident giving rise to this action occurred on March 1, 1997, between 10 a.m. and 11 a.m. The claimant was driving on Route 23/10 (Trout Run Road) towards Wardensville, approximately half way between Perry and Wardensville. The weather was dry and clear. Route 23/10 in this area is a rock-based low priority road in terms of maintenance. The evidence adduced at hearing was that the claimant encountered a large depression in the road, which caused his windshield to crack vertically near the middle. Estimated repair costs ranged from $123.00 to $250.00. The claimant had liability insurance only; the vehicle has not been repaired.

The hole was described as being located in the middle of the road, and there were several holes in the vicinity. There were no warning signs. The claimant was driving approximately 30 miles per hour when his vehicle struck the hole. The respondent's evidence established that flooding in September 1996 had washed out several portions of the road and that the respondent had been engaged in stabilization and shoulder work in the area on January 29, February 20, and February 21, 1997.

It is well established that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). For the respondent to be held liable for defects of this type, the claimant must prove that the respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 127 (1985), *Hamon vs. Dept. of Highways*, 16 Ct. C. 127 (1986). The evidence established that the respondent was aware that the road was in need of repairs in January and February and failed to make adequate repairs to the road surface. Accordingly, the Court is of the opinion to and does hereby make an award in the amount of $123.00.

OPINION ISSUED JANUARY 23, 1998

BUCKY'S LIMITED AUTO BODY, INC.
VS.
DIVISION OF HIGHWAYS
(CC-96-585)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent

PER CURIAM:

Claimant Regina Hess brought this action for damage to her 1987 Mercedes 300 after encountering an area of broken pavement on US Route 11 in Berkeley County. Ms. Hess and her husband together own Bucky's Limited Auto Body, Inc., which is the titled owner of the vehicle. The Court, on its own motion, amended the claim to reflect the proper parties.

The incident giving rise to this action occurred on October 2, 1996, at approximately 6:30 p.m. Ms. Hess was driving northbound on US Route 11 between Inwood and Barkesville. The evidence adduced at hearing was that as Ms. Hess proceeded around a turn, her vehicle encountered an area of broken pavement along the edge of the road along the berm and shoulder. Both passenger-side wheels and tires were damaged as a result. Ms. Hess submitted into evidence a repair estimate, generated from her own company, in the amount of $1,190.80 together with a towing bill of $90.00. The claimant's insurance deductible was $1,000.00.

Ms. Hess testified that the vehicle caught the edge of the pavement as she came

around the bend in the road. She estimated her speed at between 35 and 40 miles per hour. There was no evidence that she was forced onto the berm because of oncoming traffic. Route 11 in this area in a two-line paved road that is first priority in terms of maintenance. Photographs introduced by the claimant showed that the drop-off from the pavement to the gravel berm was approximately four to five inches deep and proceeded along the road for several yards. The evidence established that the respondent was aware that other vehicles had failed to negotiate the turn and had crossed onto the berm and shoulder. It was the respondent's position that the principal cause of these accidents was excessive speed. The posted speed limit as 40 miles per hour. The shoulder area was subsequently paved.

It is the general rule that in order to hold the respondent liable for damage caused by a road defect, the claimant must prove by a preponderance of the evidence that the respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985), *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). It is also well established that where a claimant proceeds onto the berm of his own accord, that he takes the berm in the condition he finds it. *Mesisenhelder vs. Dept. of Highways*, (CC-88-149), unpublished opinion issued August 10, 1990. The evidence established that the respondent was aware of the road defect giving rise to this claim. However, the Court is also on the opinion that Ms. Hess was 40 percent at fault for failing to maintain control of her vehicle. Accordingly, based on the principles of comparative negligence, the Court does hereby make an award in the amount of $600.00

Award of $600.00

OPINION ISSUED JANUARY 23, 1998

CORRECTIONAL MEDICAL SERVICES, INC.
VS.
DIVISION OF CORRECTIONS
(CC-98-457)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment in the amount of $222,789.88 for medical services provided to inmates of the Mount Olive Correctional Center, Huttonsville Correctional Center, Pruntytown Correctional Center, and Denmar Correctional Center, facilities of the respondent. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay for these medical expenses.

While the Court believes that this is a claim which in equity and good conscience should be paid, the Court further believes that an award cannot be recommended based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED JANUARY 23, 1998

BEVERLY BLACK DAVIS
VS.

DIVISION OF HIGHWAYS
(CC-96-499)

Claimant represents self.
Julie Meeks, Attorney at aw, for the respondent.

PER CURIAM:

The claimant seeks $688.75 for damage to her vehicle which occurred after a traffic sign fell onto the hood of the vehicle on a road maintained by the respondent in Weirton.

The incident giving rise to this claim occurred on March 12, 1996. The claimant had parked her 1983 Buick Riviera on Pennsylvania Avenue in Weirton in the vicinity of a DeCaria's restaurant where she worked. The weather was rainy and windy. The evidence adduced at hearing was that a traffic sign blew down onto the car, damaging the antenna, hood emblem, fender and front of the hood. The claimant submitted into evidence a repair estimate in the amount of $688.75, a significant portion of which involved body and paint work. Antenna repair was itemized as a $104.97 expense. Brandt Motor Company, of Steubenville, OH, had done some paint work on the vehicle shortly before the accident. When the claimant brought the vehicle to Brandt Motor Company for an estimate the company repainted and buffed part of the damaged area at no cost to the claimant. The claimant eventually repaired the antenna but the rest of the repairs were not done. The claimant carried liability insurance only. She subsequently gave the vehicle to her step-daughter.

The sign was described as a route designation sign, either for Route 105 or for Route 22. The respondent's evidence was that the sign was replaced in May 1995 and that the respondent had no record of the sign blowing down, or of any subsequent repairs thereto. The evidence established that the standard sign installation involved a long upright metal sign post bolted to a short post driven into the ground.

The Court is of the opinion that the sign in question was under the control of the respondent and would not ordinarily have fallen had it been properly maintained. This kind of occurrence is one which does not normally happen in the absence of negligence. Therefore, under the doctrine of *res ipsa loquitur*, the Court is of the opinion that an award is warranted. The Court finds that the claimant's out-of-pocket expenses were limited to the cost of repairing the antenna. Therefore the Court does hereby make an award in the amount of $104.97.

Award of $104.97.

OPINION ISSUED JANUARY 23, 1998

KENNETH ALVAH EAST
VS.
DIVISION OF HIGHWAYS
(CC-97-65)

Claimant represents self.
Andrew F. Tarr, Attorney t Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his 1991 Plymouth Laser which occurred after the vehicle encountered a loose drain cover on a road maintained by the respondent in McDowell County. The Court is of the opinion that the road defect at issue posed a substantial threat to motorists and that the respondent was negligent in failing to remedy same as stated more fully below.

The incident giving rise to this claim occurred on January 14, 1997, at

approximately 3:00 p.m. on Alternate U.S. Route 52. The claimant was driving northbound toward Welch when his vehicle struck a loose drain hole cover, which kicked up and struck the side and undercarriage. The vehicle sustained a flat tire and bent rim on the rear passenger side as well as significant damage to the paneling. The claimant submitted repair estimates ranging between $1,722.29 and $1,946.96. The claimant carried liability insurance only.

The evidence adduced at hearing was that Alternate US 52 in this area is a two-lane paved road that is secondary in terms of maintenance priority. The drain hole in question was subsequently paved over. Photographs of this new paved area were admitted into evidence establishing that the drain cover was of significant size and was located well into the traveled portion of the road.

It is well established that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). However, it is also well established that the State has a duty to take reasonable steps to ensure that its roads are safe for traveling public. The Court is of the opinion that a loose drain cover of this type constitutes nothing less than a trap for motorists, and that the respondent is liable for resulting damages to the claimant's vehicle.

Accordingly, the Court is of the opinion to and does grant an award in the amount of $1,722.29.

Award of $1,722.29.

OPINION ISSUED JANUARY 23, 1998

DORRAINE GIBSON
V.S.
DIVISION OF HIGHWAYS
(CC-96-557)

Claimant represents self.
Andrew F. Tar, Attorney t Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her 1993 Nissan Sentra after encountering a concrete head wall on the berm of a road maintained by the respondent in Summers County.

The incident giving rise to this claim occurred on October 20, 1996, at approximately 10:20 p.m. The claimant was driving on County Route 17 (Barger Springs Road) toward Alcott. The evidence adduced at hearing was that Route 17 in this area is a one-lane paved road with a gravel berm that is secondary in terms of maintenance priority. The claimant testified that her vehicle struck a culvert head wall when she pulled over onto the berm in order to permit an emergency vehicle to pass her. The vehicle sustained two flat tires. The claimant seeks damages in the amount of $107.00 to replace the tires, as well as $66.88 in lost wages from her job that night. The claimant's insurance deductible was $250.00.

The claimant testified that she was driving approximately 25 miles per hour. The evidence established that the paved portion of the road is approximately eleven feet wide and that the gravel berms are approximately three to four feet wide. The evidence further indicates that in order for two vehicles to safely pass one another, the berm must be used. The head wall was described as approximately eight inches wide and ten inches high. At the time, it was not marked with reflectors. Photographs introduced by the respondent established that the head wall was located on the outside edge of the berm and was partially obscured by grass and debris. Respondent's position is that it had no prior notice that the head wall created a hazard for motorists.

The Court has held that where the claimant is forced to use the berm in an emergency situation, he/she may be entitled to recover damages if the berm is not properly maintained. However, where the claimant proceeds onto the berm of his own accord, he/she takes the berm as he/she finds it. *Sweda vs. Dept. of Highways*, 13 Ct. Cl. 249 (1980), *Meisenhelder vs. Dept. of Highways*, (CC-88-149), unpublished opinion issued August 10, 1990. The evidence establishes that the proximate cause of the claimant's accident was the respondent's failure to properly maintain the head wall at issue so that motorists would be able to see and avoid it when forced to use the berm. Therefore, the Court is of the opinion that the claimant is entitled to an award in the amount of $107.00 for her out-of-pocket costs for damage to her vehicle. The Court is also of the opinion that the claimant is entitled to an award of $51.50 in net lost income, reflecting her total lost wages reduced by her approximate income tax rate of 23 percent. Accordingly the Court does hereby grant an award in the amount of $158.50.

Award of $158.50.

OPINION ISSUED JANUARY 23, 1998

ANDREW GILMAN AND LAURA GILMAN
VS.
DIVISION OF HIGHWAYS
(CC-96-587)

Claimants represents self.
Julie Meeks, Attorney at Lw, for the respondent.

PER CURIAM:

The claimants brought this action for damage to their 1991 Nissan Quest van, which occurred after encountering broken pavement along the berm area on a road maintained by the respondent in Ohio County. The Court is of the opinion to make an award for the reasons stated more fully below.

The incident giving rise to this claim occurred on February 19, 1996. Claimant Laura Gilman was driving southbound on Peters Run Road near Elm Grove at approximately 9:10 a.m. There were six children in the vehicle. Peters Run Road in this area is a two-lane paved road. The evidence adduced at hearing was that as Ms. Gilman proceeded around a turn, she was forced to the edge of the road to avoid an oncoming garbage truck that had crossed into her lane of traffic. The edge of the pavement along the berm was broken and deteriorated. The claimants' vehicle sustained a flat tire and bent wheel rim and was knocked out of alignment. There were no physical injuries. The claimants' insurance deductible was $250.00.

The claimant submitted into evidence several photographs taken in April 1996 establishing that the edge of the pavement along this area of Peters Run Road was in extremely deteriorated condition, with a significant drop off along approximately 12 feet of the road where the pavement had broken away. The Court has previously held that the berm or shoulder area must be maintained in a reasonably safe condition for use when the occasion requires, and that liability may ensue when a motorist is forced to use the berm in an emergency. *Sweda vs. Dept. of Highways*, 13 Ct. Cl. 249 (1980). The evidence indicates that the claimant was forced to the edge of her lane in just such an emergency situation. Accordingly, the Court is of the opinion to and does hereby make an award to the claimants in the amount of $250.00.

Award of $250.00.

OPINION ISSUED JANUARY 23, 1998

PATRICIA GOEDDEL
VS.
DIVISION OF MOTOR VEHICLES
(CC-96-626)

Joseph J. John, Attorney at Law, for the claimant.
Joy M. Cavallo, Assistant Attorney General, for the respondent.

PER CURIAM:

The claimant brought this action for recovery of sales tax paid on her 1995 Chevrolet Cavalier. The Court is of the opinion that the claimant is entitled to an award as stated more fully below.

On or about October 8, 1996, the claimant Ms. Goeddel purchased a vehicle from Quality Motors of Martins Ferry, OH, for $11,995.00. Sales tax in the amount of $599.75 was forwarded to the West Virginia Division of Motor Vehicles. After the purchase, claimant discovered several defects and revoked acceptance pursuant to WV Code §46-2-608 of the Uniform Commercial Code. The claimant sent the title to the dealer, and the dealer returned the full purchase price. However, the respondent refused to return the sales tax and title fees.

WV Code §46-2-608 provides that a buyer who properly revokes purchase has the "same rights and duties with regard to the goods involved as if he had rejected them." The claimant asserts that she had to send the original title to the dealer in order to get the purchase price refund and that the provisions of §46-2-608 entitle her to a refund of sales tax and title fees from the respondent. The respondent's position is that WV Code §17A-3-4 imposes a 5 percent tax on the titling of motor vehicles in West Virginia and that a refund is precluded without return of the original title.

The Court is of the opinion that relevant codes sections appear to be in conflict and that the respondent has been unjustly enriched to the detriment of the claimant. Therefore, the Court is of the opinion to and does hereby make an award in the amount of $599.75. The Court is further of the opinion that no award will be made for the titling fees, as these were reasonable costs incurred by the respondent.

Award of $599.75.

OPINION ISSUED JANUARY 23, 1998

REBECCA JONES AND DAVID JONES
VS.
DIVISION OF NATURAL RESOURCES
(CC-97-328)

Claimant represents self.
Daynus Jividen, Senior Assistant Attorney General, for the respondent.

PER CURIAM:

The claimants brought this action for damage to personal property resulting from flooding at the Watoga State Park in Pocahontas County. The Court is of the opinion to make an award as stated more fully below.

Claimant David Jones was, at all relevant time periods, the superintendent of Watoga State Park. The parties stipulated that as condition of employment, Mr. Jones was required to live at the park in the superintendent's residence. On or about June 2, 1997, Pocahontas County experienced an extremely heavy rainfall, estimated to be in the neighborhood of up to 10 inches of rain. The evidence adduced at hearing was that

a large amount of water flowed downhill from nearby hillsides and flooded the basement of the superintendent's residence.

The testimony established that the water level in the basement was between five and six feet deep. The claimant submitted into evidence photographs showing that the basement and personal property therein sustained heavy damage. The items destroyed included a clothes washer and dryer, a dehumidifier, a vacuum cleaner and a Christmas tree and decorations. The claimant's renter's insurance did not cover flood damage. The respondent's insurer denied the claim as well, on the basis that the damage was caused by an act of nature.

The respondent moved for summary judgment on the basis that there was insufficient evidence of negligent conduct on the part of the respondent and that the sole cause of this incident was an Act of God. *Adkins vs. City of Hinton*, 142 S.E.2d 889 (W.Va. 1965); *American Coal Co. vs. De Wese*, 30 F. 2d 349 (4th Cir. 1929); *Bennett vs. State Road Commission*, 5 Ct. Cl. 153 (1950). The claimant conceded that the flood was an uncontrollable act of nature and that the respondent was not at fault. However, it was the claimants' position that they should be compensated for loss of personal property due to the fact that they were required to live on the premises.

The Court recognizes that the respondent may not be legally obligated to compensate the claimants under existing law. However, the Court is of the opinion that because the claimants were required to live at the park as a condition of employment, the respondent has a moral obligation, in equity and good conscience, to compensate the claimants for loss of their property. *Hammack vs. Division of Highways*, (CC-93-176a), unpublished opinion issued December 17, 1993. Therefore the Motion for Summary Judgment is denied.

Claimants have based their request for an award upon full replacement costs for their personalty in the total amount of approximately $3,800.00. The Court has examined and evaluated the record independently and makes an award in the amount of $1,992.80 which the Court considers to be fair and reasonable compensation for claimants' loss.

Therefore, in view of the foregoing, the Court makes an award in the amount of $1,992.80.

Award of $1,992.80.

OPINION ISSUED JANUARY 23, 1998

KENHILL CONSTRUCTION COMPANY, INC.
VS.
WEST VIRGINIA REGIONAL JAIL AND FACILITY AUTHORITY
(CC-95-137)

Carl L. Fletcher, Jr. and Robert A. Lockhart, Attorneys at Law, for claimant.
John S. Dalporto, Senior Assistant Attorney General, and Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

STEPTOE, JUDGE:

The claimant contractor, Kenhill Construction Company, Inc., brought this claim which arises out of the construction of the Southern Regional Jail located in Raleigh County. Claimant contractor (hereinafter referred to as Kenhill) entered into a contract with respondent, West Virginia Regional Jail and Facility Authority, on July 28, 1992, for the construction of the Southern Regional Jail facility. Respondent gave its notice to proceed to Kenhill on that same date, July 28, 1992. The terms of the contract provided that Kenhill would have 600 days in which to build the facility. The regional jail was actually completed on July 14, 1994, 89 days beyond the planned contract completion date of March 20, 1994. The failure to complete this construction project

within the 600 days provided by the terms of the contract formed the basis of this claim by Kenhill as it alleges that the 89 days required for the completion of the project were the result of unforeseen latent subsurface conditions. Kenhill alleges damages in the amount of $774,734.00. Included in this total is the amount of $177,134.00 for liquidated damages assessed by respondent and interest upon the liquidated damages of $38,255.00.

Kenhill alleges that the unforeseen latent subsurface conditions caused it to incur indirect costs including costs related to inefficiencies in its construction of the project, costs for its acceleration efforts in an attempt to complete the project in a timely manner, additional expenses for backfill material, dewatering, equipment, management personnel, travel expenses, employee benefits, and costs for fuel and lubricants for equipment, utilities, escalation of Workers' Compensation Premiums for labor, and home office overhead and loss of profit. Kenhill also urges that the liquidated damages wrongfully assessed by respondent and the interest thereon be made a part of the damages awarded to it.

Respondent contends that Kenhill failed to provide timely notice in accordance with the terms of the contract as to its intention to make a claim for indirect costs related to the delay in the completion of the project. For this reason, respondent contends that the claim fails in its entirety and should be denied by the Court. Furthermore, respondent contends that actions on the part of Kenhill and its subcontractors were the cause for the delay in completing this project as well as certain weather factors, and it was not the unforeseen latent subsurface conditions that caused any delay.

It is necessary for the Court to begin its discussion of the this claim by describing the construction of the Southern Regional Jail as adduced from witnesses during the nine days of hearing this claim which took place February 1997 and May 1997. The Court then will address each of the issues raised by the parties in the context of the evidence, and lastly, the Court will address the issue of damages.

FINDINGS OF FACT

CONSTRUCTION OF THE SOUTHERN REGIONAL JAIL

As stated hereinabove, Kenhill entered into a contract (known as a Purchase Order) with respondent for the construction of the Southern Regional Jail with notice to proceed being given Kenhill on July 28, 1992. Kenhill's contract provided that it would be the general construction trades contractor meaning that it would have the responsibility for coordinating the activities of all of the prime contractors on the project.[1] The architect for this project, having been contracted for the job by respondent, was ZMM/CRA (hereinafter referred to as ZMM) and it commenced the project by holding a pre-construction conference on August 18, 1992. The schedule provided at that meeting by Kenhill indicated that it intended to pour slabs on grade between October 14, 1992, and December 16, 1992. Pouring the slabs on grade was determined to be the first construction step necessary by Kenhill as the project as constituted, consisted of several pods for a block building requiring thousands of concrete masonry units. Excavation to a depth of 15 feet below subgrade or to rock was to begin that week when Kenhill immediately encountered a large amount of subsurface water. The plans prepared by ZMM for this project indicated that a large French drain was beneath the surface of the ground on which the regional jail was to be constructed, said drain having been placed there previously during the construction of I-64 which abuts upon this project on the project's southerly side. Although Kenhill attempted to locate this French drain, it was to no avail. On September 18, 1992, respondent determined that Kenhill would have to install a large French drain with a connecting finger drain and a small

[1] This is fairly typical on construction projects built by respondent as this affords local bidders an opportunity to seek and be successful in obtaining contracts for projects in West Virginia. However, other and perhaps all of the prime contractors may be subject to delay problems if one of the prime contractors fails to complete its work in a timely manner.

curtain drain. This work was defined in a change order entered into by the parties and designated as GT-01.[2] Kenhill proceeded to excavate below the planned excavation grade to place the French drain. The French drain extended from the area southeast of E pod (the in-take area) through the area of D pod to the northwest corner of A pod (the out-flow area). The trench was approximately seven to eight feet in depth and six feet in width with a rubber membrane placed in the bottom and on the sides, large rocks layered on the bottom, then a layer of gravel, and finally covered with a layer of filter fabric. This structure allowed for drainage from the interstate through the construction site to a marsh located adjacent to the site on the west side. The French drain and the curtain drains were deemed by the parties to be necessary to protect the engineered fill from subsurface water and, in turn, to protect the integrity of the slabs on grade which would form the pad for the jail facility. Kenhill and respondent agreed upon the terms of payment for the direct costs of this extra work and Kenhill was paid accordingly. These directs costs are not in issue in this claim.

However, the construction of this French drain altered the sequence planned for the construction of the various pods for the jail facility. These pods were designated as A pod, B pod, C pod, D pod, and E pod. A pod, B pod, and C pod were the areas of the jail for housing prisoners while D pod and E pod were visitor and administration areas. A pod was a maximum security area and had different security requirements than B pod and C pod. Originally, Kenhill planned to construct the pods beginning with E pod, then C, D, B, and A pods, but it started excavating at E and D pods in it efforts to find the French drain, then went to B and C pods when it was determined that either the French drain was not there or that Kenhill just could not find it.[3] In any event, the unplanned construction of the French drain by Kenhill began on or about September 18, 1992, the final decision having been made by respondent and its architect as to the remedial measures to be taken for the extensive water problems at the site. The French drain ran east to west through the project with a curtain drain around the south end of B pod. This work was completed on November 13, 1992.

During the months of September through December, Kenhill was excavating at various areas and placing the engineered fill in lifts as required by the terms of the contract. Footers for the building were also being laid. On January 12, 1993, Kenhill was directed by respondent to halt all work in the area of B pod while a decision was made as to the course of action to be taken at this site due to continuing subsurface water problems. Kenhill installed a second curtain drain around the south end of B pod when it became apparent to respondent that the subsurface water problems were continuing to hamper construction in this area. This work was later confirmed and paid for by GT-02. The second curtain drain alleviated the water problem, but another problem was encountered which concerned respondent. The integrity of the engineered fill at B pod was believed to have been affected by subsurface water problems. At a meeting of the parties in Charleston on April 21,1993, a decision was made to attempt a pressure grouting procedure to stabilize the soil beneath B pod. This course of action was thought to be a way to avoid removing all of the engineered fill which had already been placed. Respondent, through its architect and engineer[4], directed that EB Consultants, Inc., should be used for the work, but after several weeks of unsuccessful efforts to engage this company as the subcontractor, Kenhill entered into a subcontract with Intrusion Pre-Pakt. This took several additional weeks. Thus the work on B pod was

[2] Although the normal designation would be CO-01, Kenhill as the general contractor had all of its change orders designated by letters GT meaning general trades contractor.

[3] Whether the drain noted on the plans by the architect exists has never been determined.

[4]Respondent's engineering firm for this project was Triad Engineering, Inc.

not completed until June 23, 1993. The original change order for this work, GT-03, was for a guaranteed maximum price of $85,000.00, but Kenhill was paid its actual costs which were approximately $51,000.00. These direct costs are not in dispute.

The weather during the 1992-93 winter months was another obstacle to Kenhill in its progression of the project. There was wet weather in February and a severe snow storm in March 1993 resulted in a shut-down of the project for two weeks. Kenhill continued to pour footers for the pods as weather permitted, but no slabs on grade were poured at the site until April 18, 1993. The last slab on grade was poured on July 20, 1993, at the site for A pod, approximately seven months after the originally planned date of December 16, 1992, for the completion of the slabs on grade.

During the construction season of 1993, Kenhill's masonry subcontractor manned the project such that the block structures for C pod, D pod, E pod, and B pod were under roof by the fall. However, A pod was not roofed until late 1993 and was not "dried in" until the spring of 1994. The area of A pod had been used for storage of material during excavation activities so the engineered fill was placed there last and it did not dry for some months due to having been subjected to winter weather during the 1992-93 season. The fact that A pod was not "dried in" until the spring 1994 became a critical issue to Kenhill for the completion of the project.

During the 1994 spring, Kenhill had a subcontractor engaged in painting the pods and it was engaged itself in performing the final work on the project. During this same period of time there was work being completed by the other prime contractors. There were punch list items to be accomplished and this process took several months. The majority of the punch list work was the responsibility of Kenhill's painting subcontractor, NLP Enterprises (hereinafter referred to as NLP). The completion date provided in the contract was March 20, 1994, but Kenhill did not receive a certificate for substantial completion from ZMM until June 17, 1994.

Thus, the Southern Regional Jail was ready for occupancy. Kenhill continued to assert its claim as first stated in its December 20, 1993, letter based upon events which had occurred during construction. Respondent assessed liquidated damages against Kenhill for the 89 day delay in the completion of the project and an additional amount of retainage for warranty issues.

The Court, having stated the basic relevant facts adduced during the hearing of this claim, now proceeds to the consideration of the various issues presented to it during the hearing. These issues will be considered individually.

ISSUE OF NOTICE

The respondent herein has put forth with some particularity its position that Kenhill failed to give it notice in a timely manner of its intentions to make a claim for indirect costs resulting from the delay in the completion of the Southern Regional Jail as required by the terms of the contract. Respondent relies upon language in its contract

with Kenhill as well as language on the change orders, particularly GT-01, GT-02, GT-03 and GT-04. The General Conditions to the contract provide as follows:

§4.3.8.1 If the Contractor wishes to make Claim for an increase in the Contract Time, **written notice shall be given**. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay only one Claim is necessary. (Emphasis supplied.)

§4.3.3 Time Limits on Claims. Claims by either party **must be made within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be made by written notice.** An additional Claim made after the initial Claim has been implemented by Change order will not be considered unless submitted in a timely manner. (Emphasis supplied.)

It is uncontroverted that the claim by Kenhill for indirect costs based upon delay was put forth with particularity in correspondence from Kenhill dated December 20, 1993. Kenhill takes the position that the notice was timely because this was the time at which it became fully cognizant that it could not complete the contract by March 20, 1994, due to its inability to complete A pod. Respondent is of the opinion that the language on the face of the change orders provides the contractor with the opportunity to give notice of its claim for additional time needed to complete the project as it contains the following statement:

"The Contract Time will be (increased) (decreased) (unchanged) by
( ) days."

This space was left blank by Kenhill as was the next line on the GT-01 change order which states:

"The date of Substantial Completion as of the date of this Change Order therefore is"

GT-01 was executed by Kenhill on January 25, 1993, although the work was completed in November 1992. This was the work for the French drain and certain finger drains necessitated by the unforeseen latent subsurface conditions. Kenhill contends that at that point during construction of the project it did not have reason to believe that additional time would be needed to complete its work; therefore, it could not have completed these blanks with any degree of certainty. Likewise, the change orders for the additional

curtain drain at B pod (GT-02) and the pressure grouting work (GT-03) had the same spaces blank. These were executed by Kenhill on May 19, 1993, and June 1, 1993, respectively. On September 29, 1993, GT-04 was executed by Kenhill with language that

"The date of Substantial Completion as of the date of this Change Order therefore is March 20, 1994."

On GT-05 executed on November 11, 1993, the line for days had "(0) days." and the date of substantial completion as March 20,1994. GT-06 executed on February 11, 1994, (executed by the parties after Kenhill had made its claim known to respondent by letter dated December 20,1993) had a blank for days and the substantial completion date of March 20, 1994. The Court makes specific reference to the language of the change orders as respondent relies heavily on this language in its theory of a lack of notice by Kenhill of its claim for delay. However, respondent was certainly aware of the unforeseen latent subsurface condition as it worked with Kenhill to determine any remedial work necessitated by the water on the project, and it directed the remedial work made necessary by these water problems. There were specific references to time impact in letters dated April 22, 1993, and May 11, 1993, that accompanied both GT-01 and GT-02, respectively, wherein Kenhill stated

> "Any schedule or time impact is not included and has yet to be determined."

Kenhill's testimony as well as that proffered by the respondent established that at the time the French drain, curtain drains, and pressure grouting work was on-going, Kenhill believed that it would be able to complete the project on or before March 20, 1994. It intended to make up any delay in pouring the slabs on grade, originally scheduled for completion in December 1992, by executing the block work portion of the work in an accelerated and expedited manner; in fact, this was almost accomplished by Kenhill. It is also obvious that the language in the change orders could not have been so crucial to the parties as GT-07 did not have any language change as to the contract time (marked [0] days and completion date of March 20, 1994) when both parties were well aware of Kenhill's claim for additional time to complete this project by that date.

CONCLUSIONS OF LAW AS TO THE ISSUE OF NOTICE

The Court is aware that the issue of notice is one of the most important issues in this claim and it will be addressed prior to the consideration of any other facet of the claim. Respondent's position that the whole claim fails due to the lack of timely notice by Kenhill rests with its interpretation of certain claims decided by this Court previously. In the claims of *Holloway v. Div. of Highways*, Unpublished opinion (1991), *Westbrook Construction, Inc. v. Div. of Highways*, (Unpublished opinion), and *Tri-State Asphalt,*

Inc. v. Div. of Highways, (Unpublished opinion), the Court considered claims for damages due to extra work not contemplated by the terms of the contract and held that written notice to the owner must be provided in order that the owner and the contractor both have an opportunity to accurately document the work being performed by the contractor so there could be a comparison of the costs incurred. The work performed by Kenhill per the change orders for the French drain and the curtain drains constituted the extra work on this project; however, both parties kept records for the labor and equipment so that the cost of the extra work was documented and paid for by the change orders.

The damages claimed by Kenhill in the instant claim are indirect in nature as these flow from the extra work resulting from the discovery by the parties that there were unforeseen latent subsurface conditions. Work done in the winter which was contemplated by the contractor to be done in more seasonable weather, for instance, may result in inefficiencies on the project. Thus, a claim based upon a changed condition such as unforeseen latent subsurface conditions constitutes a breach of contract by the owner and the same principle of notice does not apply. *C.J. Langenfelder, Inc. v. Dept. of Highways*, 8 Ct.Cl. 193 (1971). Notice is not the crucial issue in a claim of unforeseen latent subsurface conditions as it is in extra work claims. The work being performed is contemplated by the contract and both parties can be expected to maintain all the necessary records to document the direct costs being charged against the contract. However, there may be accelerated activity by the contractor, inefficiencies in performing its work, or a change in the sequence of the work causing additional costs in performing the same work. These are indirect costs not contemplated by the parties. The delay in the progress of the work is not known by either party until the work progresses to a point that the completion of the contract is not possible within the contract time. There certainly was notice to respondent of the changed physical condition on this project as respondent had to determine the remedy to correct the changed physical condition not contemplated by the parties. Once the delay appears to be a reality then, and only then, the terms of the contract requiring notice to the owner become a matter of importance. The Court has determined that the state of mind of the parties during the 1992-93 winter was that the project would be completed timely; therefore, the issue of notice does not bar Kenhill's claim based upon delay as put forth in its letter of December 20, 1993.

DELAYS ON THE PROJECT

As part of the delay issue, the Court first must address the matter of the schedules provided to respondent throughout the construction of this facility. Emphasis was placed upon the so-called Strickland schedule (a computer generated program known as Primavera) of January 22, 1993, such that the Court must comment upon this

aspect of the claim. The schedule was prepared by John Strickland, Project Manager on this project and a Vice President of Kenhill. This was the only schedule to show an early completion date of December 1993. The schedule was based upon a January 7, 1993, data date at which time the major problems with the shut down of B pod had not yet occurred. Also, John Strickland left the project before this event occurred. All of the other schedules showed a completion date of March 20, 1994, per the contract time. The personnel most closely in contact with the project, being Michael Leach for Kenhill and Henry Breeden for respondent, agreed that the monthly "look ahead" schedules actually used on the project provided all of the contractors on the job with the true picture of what could be anticipated to be accomplished monthly. This may not meet the specific terms of the contract, but with the problems resulting from the water issue, this scheduling method was considered appropriate at the time to meet the needs of the contractors. The bar charts put forth by Kenhill did provide a more accurate schedule for "as planned" activities. Respondent's expert used the Strickland schedule to form his basis of the "remaining days analysis" theoretically to prove that Kenhill should have completed the project by March 20, 1994, per the 600 days in the contract. Since the Court does not give much weight to the Strickland schedule, the expert's analysis does not provide the Court with substantial and conclusive evidence that Kenhill should have completed the project on time and is, therefore, solely responsible for the 89 days of delay in the completion of the project.

The issue of the completion of the slabs on grade forms Kenhill's basis for the delay of the completion of this project. Kenhill desired to pour all of the slabs on grade by mid-December 1992 in order to have a platform on which to proceed with the masonry work. The regional jail is a block project by nature so the sooner block can be laid, the sooner the project can progress to completion. The slabs on grade were scheduled for the front 20 per cent of the project time, but actually took 60 per cent of the total contract time. As soon as Kenhill came on the project, its schedule was disrupted by the unforeseen latent subsurface condition, *i.e.*, the water problems. Kenhill could not proceed until the water problem was addressed by respondent's design engineer and architect. Of course, Kenhill was able to man the project to perform some tasks which had to be done, but excavation activities were limited until the decision to excavate the large French drain and the curtain drains was made by respondent and the drains were in place. Then Kenhill had problems with where to put wet material excavated. Its sequence for the areas to be completed with the engineered fill was disrupted. Its attempt to recover the lost project time for the unforeseen latent subsurface condition was evident in the way the masonry work progressed during the summer of 1993. In fact, Kenhill was able to recover a substantial amount of the lost time. Its inability to complete A pod and have it "dried in" by the winter of 1993 affected the completion of the project. The Court is of the opinion that the late

completion of A pod was a direct result of the water problems experienced early in the project when the slabs on grade could not be poured per the original plan. This finding by the Court leads to the conclusion that the delay in the completion of the project was caused by the unforeseen latent subsurface conditions. Therefore, the Court attributes the delay to circumstances beyond the control of Kenhill.

MASONRY SUBCONTRACTOR ISSUE

The masonry subcontractor for Kenhill was Bat Masonry. Personnel from this company came onto the project on November 23, 1992, which was nine days after masonry work could have actually begun. In accordance with the terms of the contract, Bat Masonry was required to submit a cold weather plan to respondent for approval as well as other submittals. Respondent contends that part of the 89 day delay is attributable to the failure of Bat Masonry to start its work timely and to submit its cold weather plan and other submittals when it came onto the project. At this early stage of construction in November 1992, the footers were being placed and Bat Masonry's employees were stockpiling block at various locations in preparation to begin its work. It later had to shut down its workforce on the project due to the shut down of B pod in January 1993. The evidence establishes that Bat Masonry had employees on-site and working prior to the approval of its cold weather plan and other submittals. The Court does not believe that any time was lost on the project due to failure to act on the part of Bat Masonry. In fact, documentation submitted to the Court substantiates Kenhill's assertion that its masonry subcontractor manned this project in an exemplary manner in an attempt to bring the project to completion in March 1994. The Court has determined that Bat Masonry did not cause any delay as contended by respondent.

DELAY BASED UPON WEATHER

There were delays on this project occasioned by events other than the delay in pouring the slabs on grade. Weather was a factor on the progression of this project during the winter of 1992-93. The testimony and evidence established that Kenhill was forced to shut down the job for a severe winter snowstorm during March 1-18, 1993. In its December 20, 1993, letter to respondent putting forth its claim, Kenhill lists delay occasioned by weather at 36 days due to abnormal amounts of precipitation during February and March 1993. The testimony for both parties acknowledges that weather certainly did affect the progress of work during this time frame. However, the schedule for performance of the contract prepared by Kenhill included a certain number of days for "float" for the completion of various critical path items. For a contractor to ignore the severe winters known to be the norm for the Beckley area is then the contractor's error in judgment and not the fault of the respondent. The General Conditions in the contract state as follows:

> §4.3.8.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time and could not have been reasonably anticipated, and that weather conditions had an adverse effect on the scheduled construction.

The Court does not believe that 36 days of the delay alleged for weather is fair and reasonable and, further, it is unsubstantiated by the record. The Court has determined that a portion of the delay in the completion of the project is attributable to weather factors.

PUNCH LIST DELAYS

There was testimony during the hearing concerning the punch list process and the events that occurred during the period from March 1994 through the completion of the project in June 1994. Kenhill takes the position that the process took far longer than necessary by reason of events related to other prime contractors. Respondent on the other hand contends that the delay in the punch list process was the fault of NLP, the painting subcontractor to Kenhill, and that Kenhill is not entitled to any delay for this period of time. The alleged paint problems were based upon the fact that respondent was demanding a certain level of perfection which was not met by NLP, such that eventually there was a determination made as to which level of anticipated paint finish would be required in the various pods. This appeared to resolve the problems and NLP completed its work. The evidence in this claim supports the contention of the respondent that NLP was not performing its subcontract as anticipated and that even Kenhill appeared to be frustrated by the progress and performance of its subcontractor. The Court is of the opinion that NLP did not perform as normally anticipated by an owner such as respondent, and failed to complete the painting of the jail in a timely and workmanlike manner.

Other on-going problems during the punch list process are attributable to other aspects of the project. There were problems with the day room tables placed in each of the pods providing living quarters for inmates. These specially ordered tables were being furnished by Peterson Enterprises, a subcontractor of the prime contractor Norment Industries, W.S.A. Inc., which had its own contract with respondent. The first problem was with the gussets attaching the tables to the floor and the second problem was with the inadequacy of the seats at the tables. The table gussets were to be secured to the floor in each pod, but there was a problem with the gussets being too loose. After the correction of this problem, the floors had to be finished by NLP. NLP also had to paint the tables as well as the seats. There was a problem with the welds for the seats and the correction entailed the installation of a second seat cover being fitted over the

original seat. Peterson finally completed the corrections to the seats on June 22, 1994. These were problems solely in the control of the respondent.

There was also a problem with Security Fence Company in its installation of the fence and gates at the jail. Kenhill could not finish its final seeding and mulching of the grounds surrounding the facility until such time as the fencing was in place. The fence contractor was under the control of respondent, and the fence was not in place until May 20, 1994.

On April 25, 1994, the Fire Marshal inspected the project for a Certificate of Occupancy which was not granted because there were items listed to be accomplished before such Certificate could be given. The items listed were minor on the part of Kenhill, but other items listed were under the control of the respondent. The Court considers all of these items to be accomplished during the punch list process to be *de minimis* in time as other major issues were on-going at the time. The Court concludes that was no delay in the completion of the project based upon the fact that the Fire Marshal's Certificate of Occupancy was not granted for the project until June 20, 1994.

Similarly, the Court does not give any merit to respondent's contention that Kenhill's steel erector, Summit Erectors, was off the job for two to three weeks in 1994. There was no general work stoppage for this period of time and Kenhill continued with the masonry work on the pods during this time frame. Respondent could have shut down the project had this been such an important event.

ISSUE OF DELAYS - FINDING OF FACT BY THE COURT

The Court finds that the number of days delay attributable to the owner and the number of days attributable to adverse weather as determined by the Court, grossly exceeds the number of days by which Kenhill failed to meet the original contract completion date notwithstanding any delays attributable to the performance of NLP.

DAMAGES

Kenhill put forth a theory on inefficiencies which is one of first impression for the Court. Kenhill asserts that its inefficiencies can be quantified by using a percentage method developed by the U.S. Army in a study of airport runway construction and repairs. The inefficiencies allegedly occurred when Kenhill had to perform construction work in winter weather, specifically during the period from December 1992 through April 1993, which would have been performed during the fall months of 1992 but for the unforeseen subsurface conditions encountered at the beginning of the project. The formula presents a method for a daily calculation of the windchill factor based upon temperature and wind. Then a composite effective rate for the period is calculated. The percent calculated for the winter of 1992-93 by Kenhill was 28.3%. This percentage was multiplied by labor costs with a resulting loss calculated at $24,433.00; for equipment the loss was calculated to be $11,193.00. Kenhill used four months in its calculation of inefficiencies for equipment, but only three months for labor. This seems inconsistent

to the Court; therefore, only the months of December 1992 through March 1993 will be considered under any theory of inefficiency due to weather. As to the U.S. Army theory, it seems logical to the Court that a contractor will incur inefficiencies for both its equipment and labor during winter months. However, to attempt to calculate an exact percentage may stretch that logic somewhat. The Court is of the opinion that Kenhill was not performing sufficient work during the months of January through March 1993 to assess any coefficient for alleged inefficiencies. The record establishes that the weather prevented any appreciable amount of work from being performed. Since it is not an item that may be ascertained with any degree of accuracy, the Court has determined that it will not grant any award based upon inefficiencies alleged by Kenhill. Thus the labor costs in the amount of $24,430.00 and the equipment costs in the amount of $11,193.00 are denied as these costs were calculated solely as the costs of inefficiencies on the project.

ADDITIONAL EXPENSES

In prior claims based upon a changed condition, this Court has determined awards on the theory of quantum meruit. Most of the damages which issue from a changed condition are indirect costs to the contractor. The reason for this is that work performed pursuant to a change order is paid based upon quantified costs agreed to by the parties. Indirect costs include those costs based upon acceleration costs incurred in an attempt to make up time lost due to delays on the project and additional costs incurred during the extended time on the project. The Court analyzed the damages put forth by Kenhill from the position of each party.

Additional expenses alleged to have been incurred by Kenhill during the winter months include the items of backfill in the amount of $22,113.00, unsuitable backfill material expenses in the amount of $4,312.00, and dewatering expenses in the amount of $9,116.00.

The unsuitable backfill material item represents the excavation of wet material that had been placed by Kenhill as engineered fill, but was rendered unsuitable due to the wet winter conditions to which it was subjected when slabs on grade were not poured when anticipated. The backfill material put in its place was gravel purchased by Kenhill. The contract provided for payment of the engineered fill. Kenhill asserts this work was done to accelerate the project. These items are considered by the Court to be costs directly related to expenses resulting from the delay on the project and the Court will include $26,425.00 in its award.

As to the dewatering item, Kenhill claims this amount for extra dewatering of the footers due to the winter months and the excess water on the project. There was an item in the contract for dewatering as this was anticipated due to weather conditions, but Kenhill asserts that the item exceeded expectations due to the particular conditions on this job. The Court has determined that Kenhill experienced excessive water on this project which cannot be attributed just to the weather. Therefore, the Court will

consider this item in the amount of $9,116.00 as part of the damages.

In addition to the items mentioned specifically above, Kenhill submitted an extensive list of its damages for the period of March 20, 1994, through project completion on July 14, 1994. Certain of these items have been considered by the Court to be actual costs incurred by Kenhill during the March through June 1994 time frame. Other items are considered by the Court to be speculative in nature or in previous contract claims which have been denied by the Court. Therefore, the Court will not consider the home office overhead item, even though Kenhill used the Eichleay Formula to calculate this amount. The Court considers this element of damages to be speculative in nature and it has consistently refused to speculate as to home office overhead in contract claims. The Court also denies wage escalation costs, Workers' Compensation escalation costs, and the vehicle expense item for the superintendent. The contract provides for profit at 15% which has been calculated by the Court upon its award for those items stated hereinabove.

LIQUIDATED DAMAGES

At the close of this project, respondent assessed liquidated damages against Kenhill alleging that the 89 days delay in the completion of this project was attributable to actions on its part during construction. Liquidated damages in the amount of $89,000.00 calculated at $1,000.00 per day in accordance with the terms of the contract were withheld from Kenhill at the completion of the project. An additional amount of $88,134.00 was withheld for retainage for alleged warranty problems existing on the project at this time which were not addressed in any detail by respondent. Kenhill asserts that it is entitled to recover $177,134.00, plus interest. The Court, having addressed the issue of the delay in the completion of the project, is of the opinion that Kenhill is entitled to recover the assessed liquidated damages. The completion of the regional jail beyond the date of March 20, 1994, was the result of many factors some of which involved the other prime contractors. Therefore, the Court will grant Kenhill the amount of $177,134.00 plus interest as provided by the terms in the contract.

In accordance with the findings of fact and conclusions of law as stated hereinabove, the Court grants an award as an equitable adjustment to Kenhill for the unforeseen latent subsurface conditions encountered in its construction of the Southern Regional Jail and for liquidated damages, in the total amount of $380,862.25. Additionally, interest upon this award has been calculated in accordance with §13.6.1 of the contract at the legal rate from the 17th day of August, 1994, through and including the date on which this opinion is issued.

Award of $489,519.39.

OPINION ISSUED JANUARY 23, 1998

KENNETH WAYNE LACY, II
VS.
DIVISION OF HIGHWAYS
(CC-96-615)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his 1991 Mercury which occurred after encountering a hole on the edge of a road maintained by the respondent in Raleigh County. The Court is of the opinion that the respondent had reason to know of the road defect and makes an award as stated more fully below.

The incident giving rise to this claim occurred on October 30, 1996, at approximately 12:00 p.m. The claimant's wife, Stacie Lacy, was driving on County Route 18 near Crab Orchard when the vehicle struck a hole on the edge of the pavement along the berm. Route 18 in this area is a two-lane paved road that is approximately 16 feet wide with numerous curves. It is secondary in terms of maintenance priority. The claimant's vehicle sustained two flat tires and a bent wheel. Total damages were in the amount of $452.06. The claimant carried liability insurance only.

The evidence adduced at hearing was that the hole was approximately five inches deep and was located along the edge of a gravel berm. Ms. Lacy, testified that she was traveling approximately 20 to 25 miles per hour and that she steered toward the edge of her lane to avoid a truck in the oncoming lane. The respondent's position was that the respondent did not have any prior knowledge of the road defect. However, photographs introduced by the claimant established that the pavement on the edge of the hole was worn smooth by traffic, indicating the hole's presence for some time.

It is the general rule that for the respondent to be held liable for defects of this nature, the claimant must prove by a preponderance of the evidence that the respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985), *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The evidence indicates that the hole had been at this location for some time and that the respondent had reason to know of this defect. Therefore, the Court is of the opinion to and does hereby make an award in the amount of $452.06.

Award of $452.06.

OPINION ISSUED JANUARY 23, 1998

GILBERT R. McDANIEL
VS.

DIVISION OF HIGHWAYS
(CC-94-320)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his vehicle after encountering a hole on road maintained by the respondent in Martinsburg, Berkeley County.

The incident giving rise to this claim occurred on March 10, 1994, at approximately 8 p.m. Claimant was driving his 1978 Pontiac Bonneville on US Route 11, also known as Winchester Avenue, when he struck a hole. Damage included two hub caps, the fender skirt, wheel rim and outside mirror. The vehicle has not been repaired. The claimant carried liability insurance only. Estimated cost of repair was roughly $200.00.

The hole was described as approximately five or six inches deep and approximately two feet in breadth. Route 11 in this area is a high priority road in terms of maintenance and carried an average daily traffic count of approximately 20,000 vehicles in 1996. The City of Martinsburg and the respondent share responsibility for maintaining this road. However, there was no evidence that the respondent had actual notice of the hole in question prior to the claimant's accident.

The general rule is that in order to hold the respondent liable for defective road conditions, the claimant must prove, by a preponderance of the evidence that the respondent had actual or constructive notice of the defect in question. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986), *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986), *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8, (1985). The Court is of the opinion that a hole of this size must have developed over a significant amount of time and the respondent had reason to know of the defect. Therefore, the Court finds that the respondent had constructive notice of the defect and does hereby make an award in the amount of $100.00 as fair and reasonable compensation to the claimant.

Award of $100.00.

OPINION ISSUED JANUARY 23, 1998

MARION COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-97-394)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

The claimant, Marion County Commission, is responsible for the incarceration of prisoners who have committed crimes in Marion County, but have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. The claimant brought this action to recover the costs for providing housing for prisoners who have been sentenced to a state penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the custody of the county for periods of time beyond the date of the commitment order.

The Court previously determined in *County Comm'n. of Mineral County vs. Div. of Corrections*, unpublished opinion issued November 21, 1990, CC-89-340, that the respondent is liable to the claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, the respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $44,700.00 which is different than the amount claimed of $47,975.00. The claimant, having duly considered the admitted amount, contacted the Court in writing to accept $44,700,00 as full and complete satisfaction of this claim.

In view of the foregoing, the Court makes an award to claimant in the amount of $44,700.00.

Award of $44,700.00.

OPINION ISSUED JANUARY 23, 1998

ROBERT PALUMBO
VS.
DIVISION OF HIGHWAYS
(CC-96-586)

Claimants represent themselves.
Julie Meeks, Attorney at Law, for the respondent.

PER CURIAM:

Claimant Robert Palumbo and his son David Palumbo together brought this

action for damage to a 1988 Ford Taurus which occurred when the vehicle encountered a large hole on a road maintained by the respondent in Ohio County. The driver of the vehicle was David Palumbo. The owner was Robert Palumbo. The Court, on its own motion, amended the style of the claim to reflect the owner as the sole claimant.

The incident giving rise to this claim occurred on March 29, 1996, at approximately 9:30 p.m. David Palumbo was driving on WV Route 88 southbound from Bethany towards Wheeling. There were several other passengers in the vehicle. The weather was rainy. Route 88 in this area is a two-lane paved road with a rock-based berm. The evidence adduced at hearing was that as Mr. Palumbo proceeded around a corner near Belle's Lane, the vehicle struck a large hole on the edge of the pavement along the shoulder. The vehicle sustained damage to the strut housing, sway bar, and a bent wheel rim. The claimant submitted a repair estimated in the amount of $1,047.39. The claimant carried liability insurance only.

The hole in question was described as approximately four feet in breadth and approximately five and a half inches in depth. The claimant submitted into evidence several photos taken the day after the accident which established that there was an unusually large hole on the shoulder that extended into the traveled portion of the road. The respondent's evidence was that patching work with temporary cold mix was underway along the length of Route 88 at the time of the claimant's accident. Route 88 in this area was known to have drainage problems resulting in holes and washouts. The evidence also established that the cold mix used in 1996 was defective. There were no "Rough Road" warning signs.

It is the general rule that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). In order for the respondent to be held liable for defects of this nature the claimant must prove, by a preponderance of the evidence, that the respondent had actual or constructive notice of the defect. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The Court is of the opinion that the size of this pothole is indicative of its presence for a substantial period of time. Therefore, the Court is of the opinion that the respondent, at a minimum, had constructive notice of the hole and could have installed a warning sign. The Court finds that certain items of the repair estimate submitted by the claimant were not proven to be reasonably related to this claim. Therefore, the Court makes an award in the amount of $351.79, reflecting the estimated cost of repair to the strut, sway bar, and realignment.

Award of $351.79.

OPINION ISSUED JANUARY 23, 1998

JOHN ROBINSON AND GLENDA ROBINSON

VS.
DIVISION OF HIGHWAYS
(CC-97-362)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant Glenda Robinson brought this action for damage to her 1993 Subaru Legacy which occurred after encountering a tree limb on a road maintained by the respondent. The vehicle was co-owned by her husband John Robinson. The Court on its own motion amended the style of the claim to reflect the proper parties.

The incident giving rise to this claim occurred on September 11, 1997, at approximately 7:45 a.m. Ms. Robinson was driving on Poe's Run Road (Route 13) in Ohio County at about 25 to 30 miles per hour. Route 13 in this area is a two-lane paved road with numerous curves. It is third priority in terms of maintenance. The evidence adduced at hearing was that as Ms. Robinson proceeded around a turn, her vehicle struck a tree limb. The limb had been cut and was lying on the side of the road near the guardrail along with other brush. The limb cracked the windshield on the passenger side. The claimants submitted into evidence a repair estimate in the amount of $429.72. The claimants' insurance deductible was $250.00.

The evidence established that the respondent had been engaged in ditch and culvert work on Route 13. A paving company was preparing the road for resurfacing at the time of the claimant's accident. It is well established that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads. For the respondent to be held liable, the claimant must prove that the respondent had actual or constructive notice of the defect. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985), *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986), *Jeffries vs. Dept. of Highways*, 16 Ct. Cl. 79 (1986). In the present case, the
Court is of the opinion that the respondent had reason to know of the potential hazard presented by brush and limbs stacked on the edge of the road. The respondent has a duty to ensure that road maintenance work is performed in a reasonably safe manner for passing motorists. In view of the foregoing, the Court does hereby make an award in the amount of $250.00.

Award of $250.00.

OPINION ISSUED JANUARY 23, 1998

UNIVERSITY HEALTH ASSOCIATES

VS.
DIVISION OF CORRECTIONS
(CC-97-416)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment in the amount of $46,034.10 for medical services rendered to inmates in various correctional facilities administered by the respondent. Respondent, in its Answer, admits the validity of the services rendered, but states that the amount owed for the prior fiscal year is $33,436.10 and the remaining amount of $12,598.00 may be paid by respondent in the current fiscal. Respondent further states that there were insufficient funds in its appropriation for the 1997 fiscal year with which to pay the amount $33,436.10 incurred for these medical services.

While the Court believes that this is a claim which in equity and good conscience should be paid, the Court further believes that an award cannot be recommended in the amount of $33,436.10 based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971). The Court recognizes that respondent may process those invoices for payment to claimant which were incurred in the current fiscal year.

Claim disallowed.

OPINION ISSUED JANUARY 23, 1998

WEST VIRGINIA ASSOCIATION OF REHABILITATION FACILITIES
VS.
DIVISION OF REHABILITATION SERVICES
(CC-97-397)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant seeks $19,197.41 for contracted services provided to respondent for

which claimant has not received payment. The invoices for these services were not paid by the respondent in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $19,197.41.

Award of $19,197.41.

OPINION ISSUED JANUARY 23, 1998

WEST VIRGINIA ASSOCIATION OF REHABILITATION FACILITIES, INC.

VS.
DEPARTMENT OF ADMINISTRATION
(CC-97-466)

Claimant represents self.
William J. Charnock, Assistant General Counsel, for the respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant seeks payment in the amount of $303,595.91 for janitorial services in 1996 and 1997. The documentation for the these services was not properly processed for payment by the respondent in the appropriate fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $303,595.91.

Award of $303,595.91.

OPINION ISSUED JANUARY 23, 1998

WV REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY

VS.
DIVISION OF CORRECTIONS
(CC-98-409)

Chad Cardinal, Assistant Attorney Geeral, for claimant.
Joy M. Cavallo, Assistant Attorney Geeral, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant, Regional Jail and Correctional Facility Authority, provides and maintains the Eastern Regional Jail, the Central Regional Jail, the South Central Regional Jail, the Southern Regional Jail, and the Northern Regional Jail as facilities for the incarceration of prisoners who have committed crimes in various counties. Some of the prisoners held in these regional jails have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. Claimant brought this action in the amount of $1,968,970.00, to recover the costs of housing and providing associated services to prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the claimant, these prisoners have had to remain in the regional jails for periods of time beyond the dates of the commitment orders.

Respondent filed an Answer admitting the validity of the claim and that the amount of $1,968,970.00 has been agreed to by the parties as a fair and reasonable settlement for the housing costs and associated services provided by claimant in this claim.

This Court has determined in prior claims by claimant for the cost of housing inmates that respondent is liable to claimant for these costs, and the Court has made the appropriate awards. This issue was considered by the Court previously in the claim of *County Comm'n. of Mineral County v. Div. of Corrections*, an unpublished opinion of the Court of Claims issued November 21, 1990, wherein the Court held that the respondent is liable for the cost of housing inmates.

In view of the foregoing, the Court makes an award to claimant in the amount of $1,968,970.00.

Award of $1,968,970.00.

OPINION ISSUED JANUARY 23, 1998

PATRICIA WILLIAMS, M.D.
VS.
SUPREME O APPEALS

(CC-97-360)

Michael J. Benninger, Attorney at Law, for claimant.
John M. Hedges, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant seeks $1,319.00 for examining a defendant and providing expert witness testimony per a subpoena from the Ohio County Circuit Court. The Circuit Court Order directing payment for her services has not been provided to the respondent State agency; therefore, the claimant has not been paid. An Order from the Ohio County Circuit Court dated the 15th day of January, 1998, and entered by Judge Martin J. Gaughan was forwarded by the prosecuting attorney of Ohio County to this Court to establish the basis for paying the claim. After reviewing the Order, the Court herein has determined that claimant be granted an award for professional services provided to respondent.

In view of the foregoing, the Court makes an award to the claimant in the amount of $1,319.00.

Award of $1,319.00.

OPINION ISSUED MARCH 10, 1998

MAGDY AKLADIOS
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY SYSTEM
(CC-96-528)

Claimant represents self.
Samuel R. Spatafore, Assistant Attorney General, for the respondent.

PER CURIAM:

The claimant lessee brought this action for flood damage to personal property stored in a faculty housing complex owned and maintained by the respondent lessor.

On March 1, 1995, the claimant signed an apartment lease for a two-bedroom faculty housing apartment on the respondent's Morgantown campus. The lease agreement expressly incorporated terms of the West Virginia University apartments handbook, which provides in relevant part:

The University assumes no liability for the loss, damage or theft of any of the tenant's personal

property resulting from explosion, fire, mechanical failure, water, steam gas line breaks or from any defective wiring; for loss or damage resulting from the negligence of any other residents of the building; for loss or damage resulting from the negligence of its employees or any other cause. It is suggested that proper insurance be obtained by the tenant to protect himself, his/her family and personal property.

On or about July 19, 1996, the Morgantown area sustained an unusually severe rain storm, resulting in extensive flood damage throughout Monongalia County. The claimant/tenant had stored a substantial amount of personal property in a storage area of the faculty apartment complex. This property was also severely damaged. The claimant seeks compensation in the amount of approximate $1,740.00. This claim and a companion claim, *Sardinia vs. Board of Trustees*, (CC-97-82), were submitted on the issue of the legal effect of the liability exclusion contained in the lease and accompanying handbook.

In the *Sardinia* claim, the claimant made two principal arguments: (1) that the contract is a contract of adhesion and that the exclusion language is therefore non-binding due the claimant's lack of bargaining power; (2) that the exclusion is against the public policy that a landlord is obligated to provide a habitable residence to a tenant. This public policy is clearly enunciated in the provisions of W.Va. Code §37-6-30 (1996), which state generally that a landlord is required to deliver and maintain premises in a habitable condition, and is required to make all repairs necessary thereto. This policy was also expressed by the West Virginia Supreme Court in *Teller vs. McCoy*, 253 S.E.2d 114 (W.Va. 1978), wherein the Court stated:

There is, in a written or oral lease of residential premises, an implied warranty that the landlord shall at the commencement of a tenancy deliver the dwelling unit and surrounding premises in a fit and habitable condition and shall thereafter maintain the leased property in such condition. *Syllabus No. 1.*

Teller, at 128, further states that the determination of whether a landlord has breached the warranty of habitability is a factual question to be determined by the circumstances of each case.

The respondent's position is that the terms of the contract are clear, unambiguous and legally binding upon the tenant, and that the claimant could have rented his apartment from any of a number of landlords in the Morgantown area. The respondent further distinguished between the apartment and the storage unit to argue that there was no breach of warranty of habitability of the claimant's apartment unit.

This Court has reviewed its prior decisions involving water damage to personal property in university housing facilities and notes that many of these claims involved students and were uncontested by the respondent. In *Wickline vs. Board of Regents*, 15 Ct. Cl. 163 (1984), the Court found the respondent's employees were negligent in turning off heat during Christmas break, which resulted in frozen pipes and

water damage. This ruling was based upon the terms of the housing and food service contract, which excluded liability except in the case of employee negligence. Other decisions were uncontested by the respondent. See: *Rowsey vs. Board of Directors of the State College System*, (CC-96-25), unpublished opinion issued May 1, 1995, and *Li vs. Board of Trustees*, (CC-96-13), unpublished opinion issued October 25, 1996, and *Dimmick vs. Board of Trustees*, (CC-94-520), unpublished opinion issued October 24, 1994.

The Court, having reviewed the record and the applicable law, is of the opinion that the terms of the lease and handbook are extremely broad and may, in some circumstances, abrogate the stated public policy of the State of West Virginia that in a lease of residential premises, there is an implied warranty that a landlord shall provide and maintain dwelling units and surrounding premises in a fit and habitable condition. The Court notes that university housing is generally required of first-year students, while faculty housing is offered as a convenience to professors and faculty such as the claimant. When a faculty member signs a lease for faculty housing, he or she agrees to abide by the terms of the lease in return for the convenience of those apartment units. A faculty tenant may choose other housing if he or she desires, while a first-year student will normally be required to live on campus. A liability disclaimer is therefore to be viewed with much greater skepticism when applied to student housing. Under the unique circumstances arising from special benefits of faculty housing, the Court is constrained to rule that the respondent's lease disclaimer at issue does not present a clear abrogation of the State's public policy of implied warranty of habitability.

Having ruled on the legal effect of the lease language, the Court must also examine the factual circumstances of this case. See *Teller*, supra. The evidence established that Monongalia County sustained extremely heavy rains in the vicinity of five inches in a short period of time. Flood damage was widespread throughout the county. The only evidence of negligence proffered by claimant *Sardinia* is a statement that construction of the housing complex at issue changed the natural drainage pattern in the area. The Court is of the opinion that there is insufficient evidence of negligence on the part of the respondent upon which to base a claim. Therefore, in view of the foregoing, the Court does hereby deny the claim.

Claim disallowed.

OPINION ISSUED MARCH 10, 1998

DR. ANTONIO SARDINIA

VS.

BOARD OF TRUSTEES OF THE UNIVERSITY SYSTEM
(CC-97-82)

James B. Zimarowski, Attorney at La, for the claimant.
Samuel R. Spatafore, Assistant Attorey General, for the respondent.

PER CURIAM:

The claimant lessee brought this action for flood damage to personal property stored in a basement storage area in a faculty housing complex owned and maintained by the respondent lessor.

On June 27, 1996, the claimant signed an apartment lease for a two-bedroom faculty housing apartment on the respondent's Morgantown campus. The lease agreement expressly incorporated terms of the West Virginia University Apartments handbook, which provides in relevant part:

The University assumes no liability for the loss, damage or theft of any of the tenant's personal property resulting from explosion, fire, mechanical failure, water, steam gas line breaks or from any defective wiring; for loss or damage resulting from the negligence of any other residents of the building; for loss or damage resulting from the negligence of its employees or any other cause. It is suggested that proper insurance be obtained by the tenant to protect himself, his/her family and personal property.[5]

On or about July 19, 1996, the Morgantown area sustained an unusually severe rain storm, resulting in extensive flood damage throughout Monongalia County. The claimant/tenant had stored a substantial amount of personal property in a basement storage area of the faculty apartment complex. This property, stereo equipment, books, furniture and clothes, was also severely damaged. The claimant's Notice of Claim seeks compensation in the amount of approximate $7,900.00. This matter was submitted on briefs of the parties on the issue of the legal effect of the liability exclusion contained in the lease and accompanying handbook.

The claimant makes two principal arguments: (1) that the contract is a contract of adhesion and that the exclusion language is therefore non-binding due the claimant's lack of bargaining power; (2) that the exclusion is against the public policy that a landlord is obligated to provide a habitable residence to a tenant. This public policy is clearly enunciated in the provisions of W.Va. Code §37-6-30 (1996), which state generally that a landlord is required to deliver and maintain premises in a habitable condition, and is required to make all repairs necessary thereto. This policy was also expressed by the West Virginia Supreme Court in *Teller vs. McCoy*, 253 S.E.2d 114

[5] The evidence is conflicting as to whether the claimant received a copy of this handbook.

(W.Va. 1978), wherein the Court stated:
There is, in a written or oral lease of residential premises, an implied warranty that the landlord shall at the commencement of a tenancy deliver the dwelling unit and surrounding premises in a fit and habitable condition and shall thereafter maintain the leased property in such condition. *Syllabus No. 1*.

Teller, at 128, further states that the determination of whether a landlord has breached the warranty of habitability is a factual question to be determined by the circumstances of each case.

The respondent's position is that the terms of the contract are clear, unambiguous and legally binding upon the tenant, and that the claimant could have rented his apartment from any of a number of landlords in the Morgantown area. The respondent further distinguishes between the apartment and the storage unit to argue that there was no breach of warranty of habitability of the claimant's apartment unit.

This Court has reviewed its prior decisions involving water damage to personal property in university housing facilities and notes that many of these claims involved students and were uncontested by the respondent. In *Wickline vs. Board of Regents*, 15 Ct. Cl. 163 (1984), the Court found the respondent's employees were negligent in turning off heat during Christmas break, which resulted in frozen pipes and water damage. This ruling was based upon the terms of the housing and food service contract, which excluded liability except in the case of employee negligence. Other decisions were uncontested by the respondent. See: *Rowsey vs. Board of Directors of the State College System*, (CC-96-25), unpublished opinion issued May 1, 1995, and *Li vs. Board of Trustees*, (CC-96-13), unpublished opinion issued October 25, 1996, and *Dimmick vs. Board of Trustees*, (CC-94-520), unpublished opinion issued October 24, 1994.

The Court, having reviewed the record and the applicable law, is of the opinion that the terms of the lease and handbook are extremely broad and may, in some circumstances, abrogate the stated public policy of the State of West Virginia that in a lease of residential premises, there is an implied warranty that a landlord shall provide and maintain dwelling units and surrounding premises in a fit and habitable condition. The Court notes that university housing is generally required of first-year students, while faculty housing is offered as a convenience to professors and faculty such as the claimant. When a faculty member signs a lease for faculty housing, he or she agrees to abide by the terms of the lease in return for the convenience of those apartment units. A faculty tenant may choose other housing if he or she desires, while a first-year student will normally be required to live on campus. A liability disclaimer is therefore to be viewed with much greater skepticism when applied to student housing. Under the unique circumstances arising from special benefits of faculty housing, the Court is constrained to rule that the respondent's lease disclaimer at issue does not present a clear abrogation of the State's public policy of implied warranty of habitability.

Having ruled on the legal effect of the lease language, the Court must also examine the factual circumstances of this case. See *Teller*, supra. The evidence established that Monongalia County sustained extremely heavy rains in the vicinity of five inches in a short period of time. Flood damage was widespread throughout the county, and the respondent's employees assisted in recovering the claimant's property to the extent possible. The only evidence of negligence proffered by the claimant is a statement that construction of the housing complex at issue changed the natural drainage pattern in the area. The Court is of the opinion that there is insufficient evidence of negligence on the part of the respondent upon which to base a claim. Therefore, in view of the foregoing, the Court does hereby deny the claim.

Claim disallowed.

ORDER ENTERED MARCH 24, 1998

DAVE HINKLE ELECTRIC, INC.

Claimant

V. CASE NO. CC-95-134

REGIONAL JAIL AND CORRECTIONAL AUTHORITY, an agency of the State of West Virginia

Respondent.

FINAL ORDER

On a prior day came the Claimant, by counsel, James R. Watson, and came the Respondent, by counsel, John S. Dalporto, Senior Assistant Attorney General, who represented to the Court that the matters at issue in this claim have fully compromised and settled, subject to the approval of this Court and the Legislature, and that the parties have agreed that the sum of one hundred thousand dollars ($100,000.00) should be paid to the Claimant and that such sum includes any and all claims, causes of action, counter claims, affirmative defenses, interest, and/or set-offs of whatever design or character which each respective party may have or hereafter have by reason of the events more particularly described, set forth and/or elicited in the pleadings and prior proceedings of this claim, with the exception of any and all claims which the State or the Regional Jail and Correctional Authority may now have or in the future may have against Dave Hinkle Electric, Inc. for latent defects or warranty obligations or both.

Upon consideration of all lof which, it is hereby ORDERED that the claimant, Dave Hinkle Electric, Inc., is granted an award in the total amount of one hundred thousand dollars ($100,000.00).

Entered this 24th day of March, 1998.

David M.Baker /s/
PRESIDING JUDGE

OPINION ISSUED APRIL 15, 1998

RICHARD L. KIMBLE AND JANET S. KIMBLE
VS.
DIVISION OF HIGHWAYS
(CC-96-423)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimants brought this action for damage to their 1984 Oldsmobile Cutlass Supreme, which they allege was caused after encountering an oil-slickened section of road in Marion County.

The incident giving rise to this action occurred on June 14, 1996, at approximately 6:00 p.m. The claimant Janet Kimble was driving alone on County Route 11 (Flaggy Meadow Road) from Clarksburg towards Mannington. It had rained recently. Route 11 in this area is a narrow, paved, unstriped road with several sharp curves. The evidence adduced at hearing was that as Ms. Kimble was driving down a hill and around a turn, she lost control of the vehicle, which crossed the center of the road and struck an oncoming vehicle. The claimants' vehicle sustained damage to the driver's side fender and wheel panel assembly. The claimants submitted into evidence a repair estimate in the amount of $1,708.88. They had liability insurance only.

Ms. Kimble testified at hearing that she was traveling approximately 10 miles per hour and that she traveled the road daily to and from work. She stated that her vehicle encountered an oil slick on the road, and that the oil slick was the reason that she lost control of the vehicle. Marion County Sheriff Deputy John Dolog, who investigated the accident, testified that the road was wet due to recent rain, and further, that there was no oil on the road surface. His accident investigation report admitted into evidence stated that factors contributing to the accident were slippery pavement and failure to

maintain control. The report indicated that the claimant's vehicle left skid marks 42 and 65 feet long before coming to rest.

It is well established that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). In order for the respondent to be held liable, the claimant must prove that the respondent had actual or constructive notice of a road defect. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The Court is of the opinion that there is insufficient evidence of any negligence on the part of the respondent and does hereby deny the claim.

Claim disallowed.

OPINION ISSUED APRIL 15, 1998

JAMES PHILLIPS
VS.
DIVISION OF HIGHWAYS
(CC-97-87)

Claimant represents self.

Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his vehicle which occurred after encountering a highway reflector marker on US Route 219 on December 13, 1996.

The claimant's 1987 Dodge was damaged when the reflector marker apparently struck the door and quarter panel. The claimant seeks $217.30 in estimated repair costs. At hearing on October 8, 1997, the respondent stipulated to liability. However, the claimant indicated that he also had full insurance coverage, with no deductible. It is well-established that the Court does not make awards for vehicular damage that is fully covered by claimant's insurance coverage.

The claimant was asked to provide a copy of an insurance abstract to the Court. On or about December 5, 1997, the Court again requested a copy of the claimant's insurance abstract. Receiving none, the Court is constrained by the evidence and the law to deny the claim.

Claim disallowed.

OPINION ISSUED MAY 29, 1998

SUE F. DAVIS
VS.
DIVISION OF HIGHWAYS
(CC-96-61)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

WEBB, JUDGE:

The claimant brought this action for damages she alleges were caused when her vehicle encountered high water on a road maintained by the respondent in Kanawha County. The Court is of the opinion to make an award in this claim as stated more fully below.

The incident giving rise to this claim occurred on January 19, 1996, at approximately 10:30 p.m. The claimant was driving west on Route 25 and turned on Willow Drive (Route 25/16). The weather was dark and cold, and in the days immediately prior to the accident, there had been considerable precipitation. The evidence adduced at hearing was that the claimant encountered high water on Willow Drive and became trapped in her 1991 Oldsmobile Cutlass Calais. The claimant managed to signal for help and rescue vehicles were called. Eventually, the claimant was rescued from her vehicle and taken to Thomas Memorial Hospital, where she was treated for exposure and released early the following morning.

The claimant's vehicle was declared a total loss and was covered by her insurance. The claimant sustained no permanent physical injuries and her medical bills for her hospital treatment were likewise paid by insurance. The claimant has alleged various damages, including emotional trauma and various miscellaneous costs including rental car, lost shoes, and the comparative costs for a new car.

Willow Drive is a single-lane road, approximately 900 feet long, that is low priority in terms of maintenance. The posted speed limit is 25 miles per hour. There is a significant drop of roughly 30 feet between Route 25 on the north end and Haynes Avenue on the south end. At the low point in the road, roughly at the half-way point, there is a culvert pipe that is approximately 48 inches in diameter. There are no 'High Water' signs posted on this road. The change in elevation is noticeably more precipitous from the Haynes Avenue side of the road.

The claimant's evidence established that Willow Drive is prone to flooding and is located partly within a 100-year flood plain. Indeed, the claimant introduced photographs taken after the accident showing that the high-water mark could reach well above the road surface. The claimant testified that she was unable to see the water in time to avoid driving into it. One witness who lived in the area testified that the lighting was insufficient and motorists could not see high water. He testified that there had been at least one prior flood-related accident and that he had complained to the respondent

on several occasions about flooding and lack of warning signs.

It was the respondent's position that it had no prior notice of a flooding hazard on Willow Drive and that it therefore cannot be held liable. The respondent also contended that the claimant assumed the risk of driving through the water, and therefore was contributorily negligent. The evidence further indicated that the respondent did not have a regular practice of installing 'High Water' signs in known flood prone areas.

While the state is neither an insurer nor a guarantor of the safety of motorists upon its roads, it does owe a duty of reasonable care and diligence in maintaining roads and highways. *Jones vs. Dept. of Highways*, 16 Ct. Cl. 36 (1985). The Court, after careful review of the evidence, is of the opinion that the respondent had reason to know of propensity of Willow Drive to flood and that there was insufficient drainage on the road. The Court finds that the respondent failed to take reasonable remedial measures, such as installing 'High Water' signs. Therefore, the Court is of the opinion that the claimant is entitled to an award.

The claimant submitted a number of documents and bills representing her economic losses. The claimant's vehicle was valued at $6,110.50, and she received $5,618.16 in insurance payments. The difference, therefore, was $492.34. Her other bills were as follows:

$479.02 representing repair work on her old vehicle approximately two months prior to this accident;

$231.65 for medical treatment, which was paid by claimant's insurance;

$170.24 for a rental car costs;

$52.00 for shoes;

$19,070.70 for the purchase of a new car.

The Court will disregard all bills paid by insurance and will further disregard the bill for repairs to the claimant's vehicle prior to this incident. The Court is of the opinion that the claimant is entitled to an award for her direct economic losses as follows: $492.34 representing the difference in the value of her old vehicle and the amount she received from her insurance policy; $170.24 for a rental car; and $52.00 for shoes. The Court is of the opinion that the claimant suffered considerable emotional trauma as a result of being trapped in her car and therefore is of the opinion to make an award in the amount of $6,800 to compensate the claimant for her trauma. In view of the foregoing, the Court makes an award in the total amount of $7,514.58.

Award of $7,514.58.

OPINION ISSUED MAY 29, 1998

DANIEL A. DIMMICK AND TAMA DIMMICK
VS.

DIVISION OF HIGHWAYS
(CC-96-561)

James G. Bordas, Jr., Attorney at Law, for the claimants.
Andrew F. Tarr, Attorney at Law, for the respondent.

BAKER, JUDGE:

Claimants brought this action for personal injuries and loss of consortium resulting from an accident which occurred on W.Va. Route 2 in Marshall County. The Court is of the opinion that the respondent has a moral obligation to compensate the claimants in light of the known and serious nature of rock fall hazards along this section of Route 2.

FACTS

The incident giving rise to this claim occurred on January 12, 1995, at approximately 6:34 a.m. Claimant Daniel Dimmick was driving his 1994 Toyota pickup truck southbound on Route 2 in an area known as the "Glen Dale Narrows." Route 2 in this area is a heavily traveled, four-lane road, with two lanes northbound and two lanes southbound. The northbound lanes are bordered on the east by a high wall composed largely of loose shale and sandstone. The southbound lanes are bordered to the west by a two-foot high concrete wall and the Ohio River. The "Narrows" is an approximately one and one-half mile stretch of highway between Glen Dale and McMechen, and is described as an area well-known for rock falls.

The evidence adduced at hearing established that Mr. Dimmick was driving southbound within the speed limit at approximately 50 miles per hour in the far right-hand lane. At the same time, another pickup truck driven by Ronald Kerekes was traveling northbound. It was still dark, and it had been raining the night before. The claimants allege that Mr. Kerekes' vehicle struck a rock, described as being approximately the size of a basketball, causing him to lose control. The Kerekes' vehicle crossed the median into the southbound lanes and struck the claimant's vehicle. Mr. Dimmick's truck went out of control, became airborne, went over the concrete wall and down the embankment, coming to rest against some trees approximately 50 to 60 feet from the road.

Mr. Dimmick was rendered unconscious and sustained a concussion and lacerations to the head, a broken tooth, and multiple broken bones and ligament damage to both feet. He was released from the hospital after three days. He remained confined to a wheelchair for several weeks, and then gradually moved to crutches and then a cane in June 1995. He later had to undergo a second surgery for a subtalar fusion and bone graft on the right foot on December 12, 1996. Mr. Dimmick has required physical therapy on numerous occasions subsequent to his accident, and continues to experience pain and discomfort in his feet.

At hearing, the respondent argued that there was insufficient evidence that a

rock fall was the proximate cause of Mr. Dimmick's accident. Mr. Dimmick's deposition and his testimony at hearing were contradictory and unenlightening. In a statement to police, eyewitness Michael Lee Jenkins, who was driving behind Mr. Kerekes, stated that he saw the Kerekes vehicle strike a rock, and then cross to the southbound lanes and strike Mr. Dimmick's vehicle. In a deposition submitted after hearing, Mr. Jenkins testified that there had been rocks in the road and that these were subsequently removed by the respondent's employees. The Court is satisfied that the preponderance of the evidence establishes that a rock fall was, indeed, the proximate cause of the claimant's accident.

ISSUES

At hearing, the respondent filed a Motion to Dismiss, on the basis that this claim was barred under the doctrine announced in *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947), wherein the West Virginia Supreme Court of Appeals held that liability may not be imposed on the respondent for failing to install a guardrail along a state road. In *Adkins*, the Supreme Court stated that the Court may not intrude upon the respondent's discretionary powers to allocate public moneys for road purposes. The Court added, however, that there may be situations wherein the respondent's negligent conduct in failing to maintain reasonably safe road conditions may give rise to a claim.

We do not mean to say **that situations may not arise where the failure of the road commissioner properly to maintain a highway, and guard against accidents, occasioned by the condition of the road, may not be treated as such positive neglect of duty as to create a moral obligation against the State,** for which the Legislature may appropriate money to pay damages which proximately resulted therefrom. *Adkins*, at 89.

(Emphasis supplied.)

The doctrine that this Court has adopted consistent with *Adkins*, is that liability for a road defect, such as rock fall hazards, will not be imposed unless the claimant establishes, by a preponderance of the evidence, that the respondent had actual or constructive notice of the defect and a reasonable opportunity to take remedial measures. In the case of vehicle damage caused by falling rocks, the Court has held that the unexplained falling of a rock onto a road maintained by the respondent, without a positive showing of negligence by the respondent, is insufficient to justify an award. *Coburn vs. Dept. of Highways*, 16 Ct. Cl. 68 (1986). Indeed, the majority of rock fall claims decided by this Court have been disallowed based upon this doctrine. However, when the claimant produces affirmative evidence that the respondent knew of rock fall hazards and failed to take reasonable remedial action, liability will be imposed. *Barker vs. Division of Highways*, (CC-90-190, unpublished opinion issued January 17, 1992); *Koenig vs. Dept. of Highways*, (CC-87-220, unpublished opinion issued December 20, 1989); *Smith vs. Dept. of Highways*, 11 Ct. Cl. 221 (1977); *Varner vs. State Road Commission*, 8 Ct. Cl. 119 (1970).

The respondent is well aware that the area of Route 2 known as the "Narrows" is a notorious rock fall area, particularly the northern section between Glen Dale and McMechen. One of the respondent's employees described driving through the Narrows as analogous to playing "Russian Roulette." The Court has reviewed a number of its rock fall claims and notes that this is not the first such claim involving the "Narrows". *Dunn vs. Division of Highways*, (CC-92-26, unpublished opinion issued December 11, 1992), award of $882.51. However, the Court notes that the "Narrows" is just one of many areas in West Virginia where incidents of falling rocks commonly occur. Similar rock fall claims arise throughout the State each year resulting in claims being filed with this Court.

Respondent has posted "Falling Rock" signs on both ends of the "Narrows", for northbound and southbound traffic. The respondent has also installed lights in the "Narrows", to enable motorists to see fallen rocks in their path at night. The respondent's employees patrol the road regularly in order to clear rocks from the road, especially during rainy weather and during the winter months when rock fall is more likely to occur due to moisture and freeze and thaw cycles. Finally, the evidence established that the respondent had been patrolling the road throughout the night prior to the claimant's accident. Respondent has investigated several other measures to abate the propensity of rock falls in the "Narrows" as it is well aware of the conditions hazardous to the traveling public. It is apparent to the Court that while additional measures have been considered none has been undertaken by respondent. These measures were discarded as being either too expensive, impractical, or impossible.

In prior cases where the Court found the respondent liable for rock fall damage, the Court stated that the remedial steps taken by the respondent were either inadequate or nonexistent in response to known rock fall hazards. In *Smith*, 11 Ct. Cl. 221 (1977), the Court stated that merely patrolling a road, known for many years to be a hazard, was inadequate. In *Varner*, 8 Ct. Cl. 119 (1970), the Court stated that routine ditch cleaning and rock removal after the fact was insufficient. In *Barker*, (CC-90-190), the Court stated that the respondent had failed to act upon an engineering study undertaken to abate a known rock fall area.

In *Dunn vs. Division of Highways* (CC-92-26), December 11, 1992, the Court noted that the Glen Dale Narrows has been a known rock fall hazard since 1941. The Court held that respondent has elected to clean up rocks after they fall, rather than trying prevent them from falling in the first place, and that as a result, the respondent will be held liable when rock fall damage occurs.

All of these cases, consistent with the Supreme Court's opinion in *Adkins vs. Sims*, *supra*, stand for the proposition that the respondent may not stand idly by when confronted with known rock fall hazards. In the instant claim, the Court is of the opinion that in view of the well-known serious nature of rock fall hazards in the Glen Dale Narrows, respondent has a moral obligation to compensate claimants when rock fall results in personal injury or property damage. See also, *Stollings vs. Gainer*, 170 S.E.2d

817 (W.Va. 1969). Although this Court does not have the authority to dictate to the respondent how to remedy a hazardous condition which in the opinion of the Court poses a continuing threat to the traveling public, the Court can determine from the evidence presented in a claim that respondent has knowledge of the propensity of a highway condition to be hazardous, and the Court may hold respondent liable for failing to take reasonable steps to prevent harm to the traveling public. The Court stresses that its ruling in this claim is limited to the facts and circumstances of this particular claim and to the specific location of the "Narrows" area of W.Va. Route 2. Accordingly, the Court is of the opinion that respondent is liable for the accident which occurred causing injuries to claimant Daniel Dimmick.

DAMAGES

At the time of his accident, Mr. Dimmick was employed as a truck driver for Wheeling Wholesale Grocery. His hourly wage was $12.45. Due to his injuries, he was off work from January 12, 1995, to January 8, 1996, and again from December 12, 1996, to May 27, 1997. He is currently an independent trucker. Mr. Dimmick has alleged lost wages in the amount of $50,278.52, and medical bills in the amount of $28,063.25, most of which appear to have been paid by insurance or through the Workers' Compensation Fund.

Claimant Daniel Dimmick also received an employment benefit of $830 per year. Therefore, the total gross lost earnings for the approximately one year and a half that he was unable to work is the sum of $47,987.66 ($46,742.66 plus $1,245.00). The claimant submitted into evidence income tax records confirming that his average taxable income between 1989 and 1993 ranged from approximately $26,500.00 and $29,300.00. Wheeling Wholesale closed in October of 1997. The claimant is currently an independent trucker. His current average annual income was not available.

The claimant further alleged that he incurred $28,063.25 in medical bills that are still outstanding. However, the claimant has received approximately $150,000.00 in collateral source payments from Mr. Kerekes' automobile insurance, the Workers' Compensation Fund, and health insurance. It is unclear from the evidence exactly how much, if any, of the defendant's medical bills are still outstanding, and the Court will not speculate as to this amount. Finally, the claimant's wife testified that Mr. Dimmick's continued pain in his feet has had a detrimental effect on his personality and on their relationship due to his continued discomfort and resulting decrease in physical activity. Mr. Dimmick was forty-three years of age at the time of this accident. He is unable to take part in many of the family activities which he formerly enjoyed and he continues to experience pain and suffering from his injuries. Not only has his lifestyle changed as a result of this accident, but the quality of his life has been affected. He will continue to suffer both mentally and physically from the injuries that he received in this most unfortunate accident. The Court has taken these facts into consideration as it determined the award made to him in this decision.

In accordance with the finding of facts and conclusions of law as stated herein above, the Court makes an award to claimant Daniel A. Dimmick for pain and suffering, and for the loss of enjoyment of life in the amount of $40,000.00, and an award to claimant Tama Dimmick in the amount of $10,000.00 for loss of consortium.

Award to Daniel A. Dimmick of $40,000.00.

Award to Tama Dimmick of $10,000.00.

OPINION ISSUED JANUARY 23, 1998

ROGER KEEFER AND DEBORAH KEEFER
VS.
DIVISION OF HIGHWAYS
(CC-97-195)

D. Randall Clarke, Attorney at Law, for the claimant.
Andrew F. Tarr, Attorney at Law, for The respondent.

WEBB, JUDGE:

The claimants brought this action for lost wages resulting from a two-vehicle accident in a tunnel maintained by the respondent in Kanawha County. The claimants allege that the respondent was negligent in that a traffic light for the tunnel malfunctioned and gave an improper signal.

The incident giving rise to this claim occurred on August 1, 1993, at approximately 4:10 a.m. The claimants were proceeding on Route 6/06 (Dogwood Road) near St. Albans in a 1986 Pontiac Fiero when they entered a tunnel referred to as the St. Albans tunnel. The tunnel is a converted railroad tunnel. It is 16 feet wide, approximately one-tenth of a mile long, and slightly curved so that there is not a clear line of sight from one end to the other. There are traffic lights on both ends of the tunnel. Roger Keefer was driving. The speed limit was 25 miles per hour.

The evidence adduced at hearing was that approximately half way through the tunnel, the claimants' vehicle was struck head-on by a 1988 Ford Mustang driven by a juvenile. Two other juveniles were also in the second vehicle. The police report admitted into evidence indicated that both drivers stated that they had green lights. Claimant Deborah Keefer sustained severe injuries to her neck and back. In a parallel proceeding, the Circuit Court of Kanawha County settled the claimants' medical bills. The instant claim is for lost wages in the amount of $13,340.00.

The claimants' evidence established that at sometime prior to August 10, 1993, a malfunction occurred with the traffic light system which would permit two drivers to simultaneously enter the tunnel from opposite ends. The traffic light system

has four phases: a green light for traffic on the south end, an all-red signal to clear the traffic from the tunnel, a green light on the north end, and then another all-red clearance. A memorandum from the respondent's Traffic Engineering Division established that the all-red clearance malfunctioned, thereby allowing traffic to enter on a green light from one end when another vehicle might still be in the tunnel.

The malfunction was reported on August 10, 1993, however the evidence does not establish whether this particular malfunction occurred on the date of the accident. Deborah Keefer testified that similar light malfunctions had apparently occurred previously because she had encountered oncoming vehicles in the tunnel on prior occasions.

The respondent's position was that this type of light malfunction was practically unheard of and that the respondent had no notice of the hazard. The signal light was programmed to trigger a flashing red in the event of conflicting simultaneous green lights. However, there was apparently no method in place to pick up a malfunction involving the all-red clearance phase. The evidence indicated that approximately two days prior to the accident, the respondent's employees were performing clearing and maintenance work in the tunnel and no signal malfunctions were noticed at that time. The respondent's testimony further indicated that the most likely cause of the light malfunction was a lightning strike or vandalism.

The claimants' total medical bills were in the approximate amount of $21,000.00. The claimants settled their claim in the Circuit Court of Kanawha County for $12,500.00, which sum was distributed among the claimants' various medical providers. The claimants introduced evidence establishing that Roger Keefer's gross lost wages were in the amount of $1,100.00, and that Deborah Keefer's gross lost wages were in the amount of $12,240.00.

It is well established that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads, and that in order to hold the respondent liable for road hazards the claimant must establish actual or constructive notice of the defect and a reasonable opportunity to take remedial action. *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986), *Jones vs. Dept. of Highways*, 16 Ct. Cl. 36 (1985), *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985). The Court is of the opinion that there is insufficient evidence of negligence on the part of the respondent upon which to justify an award. While sympathetic to the claimants' position, without evidence that the respondent had prior notice of the signal malfunction, the Court is constrained by the evidence to deny the award.

Therefore, in view of the foregoing, the Court does hereby deny the claim.

Claim disallowed.

OPINION ISSUED MAY 29, 1998

MARJORIE MINEAR
VS.
DIVISION OF HIGHWAYS
(CC-9-105)

Richard W. Cardot, Attorney at Law, for the laimant.
Andrew F. Tarr and Daniel C. Cooper, Attorneys at Law, for the respondent.

This 27th day of May, 1998, came the parties by counsel, to be heard upon the Motion of the respondent to dismiss this claim as a claim against the State of West Virginia which can be asserted by the claimant in the courts of the State and which may not be maintained in the Court of Claims.

The incident giving rise to this claim occurred on or about August 31, 1994, in Tucker County, West Virginia, approximately 2.1 miles southeast of the town of Hendricks on W. Va. Route 72. While driving her 1985 Ford Escort, claimant was confronted with a large truck of the respondent occupying most of the traveled portion of the road. She was forced, she alleges, to use the berm of the road which appeared to be freshly graveled, but as she went upon the berm it collapsed, and her car slid over a steep embankment, and overturned several times. She sustained injuries to her person and damage to her motor vehicle.

The Constitution of West Virginia, Article 6, Section 35, provides:

> The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.

This provision of our Constitution is a restatement of the ancient doctrine of the sovereign immunity of a government from suits to receive damages.

As have most legislative bodies in this country, including the Congress of the United States, the Legislature of West Virginia has, by statute, created a forum in which it may be determined whether a claim against the State of West Virginia is a valid claim for which, in the absence of the Constitutional prohibition, the claimant is morally entitled to compensation. The Legislature receives a report of the recommendation of the Court of Claims as to whether the claim should be paid, and, in an appropriate case, the amount which the Court of Claims has recommended for payment; and makes or refuses to make payment, and, if payment is thought to be appropriate, makes an appropriation.

The West Virginia Legislature, has, it should be noted, limited the jurisdiction of the West Virginia Court of Claims, with the enactment of W.Va. Code §14-2-14, providing:

> The Jurisdiction of the court shall not extend to any claim:
> 1. . . .
> 2. . . .
> 3. . . .
> 4. . . .
> 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.

Subparagraph (5), above, must be read in *pari materia* with W.Va. Code §29-12-5(a), and the opinion in *Pittsburgh Elevator Company v. West Virginia Board of Regents*, 310 S.E.2d 675 (1983).

W.Va. Code §29-12-5(a) authorizes the State Board of Insurance of West Virginia to acquire, for the State and its agencies, insurance against damages to their properties, from fire and other causes, and to acquire liability insurance for their benefit and protection. In a case of a loss like the one described by Marjorie Minear in this case, the claimant will file a claim against the State or other proper political entity, and this Court will ascertain whether the described loss falls within the coverage of the State's insurance; if there is coverage, the claim is dismissed, as this Court, under W.Va. Code §29-12-5(a), lacks jurisdiction, and the claimant must file his or her claim in some other court of West Virginia, generally a circuit court, which will hear the claim (the defense of sovereign immunity being barred), and will make findings on the merits of the claim and enter an appropriate judgment of liability or non-liability.

The Supreme Court of Appeals of West Virginia, in the *Pittsburgh Elevator* case, has held that the consideration of an insurance-covered liability claim by a circuit court does not violate West Virginia Constitution Article 6 Section 35, by saying:

> Suits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State's liability insurance coverage, fall outside the constitutional bar to suits against the State.

Since the respondent, the Division of Highways, has insurance coverage for the claim of Marjorie Minear, another forum has jurisdiction of this case, and this Court does not have jurisdiction, and the claim in this Court must be dismissed.

Claim dismissed.

OPINION ISSUED MAY 29, 1998

LEONARD L. PECK AND TRACEY L. PECK
VS.
DIVISION OF HIGHWAYS

(CC-97-164 and CC-97-375)

Claimants represent themselves.
Andrew F Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimants brought this action (CC-97-164) for damage to their 1989 Plymouth Acclaim, which occurred after encountering a rock on road maintained by the respondent in Marshall County. As the instant claim is identical to (CC-97-375), the Court, on its own motion, has consolidated both claims for decision.

The incident giving rise to this action occurred on February 6, 1997, at approximately 11:30 a.m. Claimant Leonard Peck was driving the vehicle northbound on WV Route 2 near Glen Dale in an area known as "The Narrows". Tracey Peck was a passenger. It had recently snowed. Route 2 in this area is a four-lane road with a high wall composed mostly of loose shale on the east side of the northbound lanes. It is a well-known and notorious rock fall area and is posted with rock fall warning signs. The evidence adduced at hearing was that Mr. Peck was traveling approximately 45 miles per hour, closely behind a snow plow, when his vehicle struck a rock that had fallen on the road. The vehicle sustained damage to the oil pan and transmission. Mr. Peck testified that he obtained a repair estimate in the amount of $1,500.00, which was submitted in the companion claim (CC-97-375). The claimants' insurance deductible was $500.00.

The rock was described as slightly larger than a bowling ball and was in the center of the road. Mr. Peck testified that the blade of the plow struck the rock and spun it around before his vehicle struck it. Claimants were both familiar with this area and were aware that there is a propensity for rocks to fall onto the highway from the high wall. The evidence indicates that the claimants were anywhere from 15 feet to 15 yards, to three or four car lengths behind the snow plow when the accident occurred.

The respondent's evidence was that the stretch of Route 2 known as "The Narrows" is posted with "Falling Rock" warning signs for both southbound and northbound traffic. Respondent's evidence also established that the road had been patrolled the day before claimants' accident and there were no reported rock hazards.

It is the general rule of this Court that the unexplained falling of a rock onto a highway, without a positive showing of negligence on the part of the respondent, is insufficient to justify an award for resulting damage. *Coburn vs. Dept. of Highways*, 16 Ct. Cl. 68 (1986). However, the respondent is well aware of the rock fall hazards along the Narrows, and, instead of remedying same, has elected to patrol the road and remove rock fall debris after the fact, instead of devising a permanent solution to this serious and ongoing road hazard. Accordingly, the Court has held that the respondent has a moral obligation to compensate claimants when a rock fall results in personal injury or property damage in the Glen Dale Narrows. *Dimmick vs. Division of Highways*, (CC-

96-561), unpublished opinion, *Dunn vs. Division of Highways*, (CC-92-26, unpublished opinion issued December 11, 1992.)

The Court's rulings with regard to the Glen Dale Narrows, however, does not absolve motorists of their duty to exercise reasonable care, especially in light of the posted warning signs. The evidence indicates that the claimants were traveling at an unreasonably close distance to the snowplow, and had they allowed themselves a sufficient amount of distance from the snowplow, claimant Leonard Peck may very well have been able to avoid the rock in question. Therefore, the Court finds that the claimants' negligence is equal to or greater than any negligence on the part of the respondent. In accordance with the established principles of comparative negligence, the Court does hereby deny the claim.

Claim disallowed.

OPINION ISSUED MAY 29, 1998

JUNE PUGH
VS.
DIVISION OF HIGHWAYS
(CC-97-279)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her vehicle after encountering a blow up on a road maintained by the respondent in Monongalia County.

The incident giving rise to this claim arose on June 8, 1997, at approximately 3:30 p.m. The claimant was driving her 1992 Chrysler Fifth Avenue on the Pierpont Road entrance of Interstate 64 westbound. The evidence adduced at hearing was that the claimant's vehicle encountered an area where the pavement had buckled across the road. The vehicle sustained damage to the right rear tire, rocker panel and wheel covers. The claimant submitted into evidence repair bills in the amount of $431.58. The claimant's insurance deductible was $500.00.

The claimant testified that she was traveling approximately 35 to 40 miles per hour and that a vehicle was in front of her. The driver of the vehicle in front of her swerved his vehicle, and then claimant attempted to swerve around the heaved up portion of the roadway. However, claimant's vehicle apparently struck some of the broken concrete which caused a tire to burst. She had to pull over and stop her vehicle due to the damage to the tire.

The respondent's evidence was that it had no prior notice of the road defect, and that blowup of this type commonly occurs during hot weather. It is well established that the state is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S..E.2d 81 (W.Va. 1947). For the respondent to be held liable for road defects of this nature, the claimant must prove that the respondent had actual or constructive notice. The Court has previously held that thermal expansion and blowups of this type are by their nature unpredictable. *Walton vs. Division of Highways*, (unpublished opinion issued June 30, 1992).

In accordance with the findings of fact and conclusions of law as stated herein above, the Court is of the opinion to and does hereby deny this claim.

Claim disallowed.

OPINION ISSUED MAY 29, 1998

ALICE LILLY SPRINGSTON
VS.
DIVISION OF HIGHWAYS
(CC-96-463)

Claimant represents self.
Jeff Miller, Attorney at Law, for the respondent.

WEBB, JUDGE:

The claimant brought this action for damage to her business which she alleges was caused when the respondent prevented her from erecting outdoor advertising signs along U.S. Route 19 in Nicholas County. The Court, while sympathetic to the claimant's plight, is constrained by the law and the evidence to deny the claim for the reasons stated more fully below.

The sequence of events giving rise to this claim is as follows. Beginning in the early 1980's, the claimant and her then-husband (now deceased) owned and operated a multi-faceted business known as Gauley Landing, Inc., on U.S. Route 19 approximately two miles south of Summersville in Nicholas County. Through the 1980's, the main access to this business was on the old Route 19, which fronted on the approximately 34 acres owned by the claimant and her husband. The business included, at various times, a restaurant, convenience store, service station and campground. The business provided carriage rides to a picnic area as well as camping facilities. Claimant installed a large septic system for the campground, added a laundromat for truckers, created office space, black-topped a parking area, and improved the facilities in general. New Route 19 was constructed along the back of the claimant's property during the late

1980's and early 1990's. The pleadings indicate that approximately six acres were acquired by the State through eminent domain proceedings for which claimant was compensated in the approximate amount of $20,000.00.

During the early 1990's, the claimant alleges that she sustained a substantial loss of business resulting from the highway construction, route relocation, traffic and the inability to advertise her business on new Route 19. Eventually the claimant and her husband filed for bankruptcy protection. Claimant's husband died in 1992, and she became solely responsible for the business. In approximately 1994, old Route 19 was closed and the claimant and her son moved the restaurant business temporarily to the Summersville Motor Inn. However, their plan was to continue to operate the campground, and to return to operate the restaurant and convenience store when construction of the new highway was completed. In September 1994, an application was submitted to the respondent for a permit to put up several outdoor advertising signs on the new four-lane Route 19. The applications were investigated and denied by the respondent, ultimately giving rise to this claim.

WV Code §17-22-1, et seq., lays out the general provisions for signs along federally-funded highways, consistent with 23 USC §§ 131, et seq. and relevant state and federal regulations. These provisions generally prohibit outdoor advertising signs within 660 feet of the edge of a federally-funded highway, except in zoned or unzoned commercial or industrial zoned areas, or for on-premises business activities. Unzoned commercial or industrial activity is defined, in part, as a business in operation for a minimum of six months, with electricity and parking. WV Administrative Regulation 7.02 Definitions. The respondent's evidence established that at the time of the application, an enforcement officer investigated the application and found no ongoing business activity on the claimant's property. Therefore the sign application was denied on the basis that no qualifying unzoned commercial area could be found.

Thereafter, the claimant attempted to locate another sign on the property advertising for antiques. This sign was also on Route 19 near State Route 41. WV Code §17-22-7 and WV Administrative Regulation 7.11 (2) (d) (2), provide that an on-premise advertising sign must be located within 500 feet of the center of the business activity. In July 1995, the respondent again investigated and discovered that the business location was the old restaurant building, which exceeded the 500-feet limit. A violation notice was issued. In order to comply, the claimant's son moved a small building to within 452 feet of the sign. At a meeting with the claimant on or about October 4, 1995, it was determined that this was a valid on premises sign, but that an outdoor advertising sign for other business activities was still not permitted.

The claimant has offered evidence that Nicholas County was zoned for business activity in 1965, thereby bringing her sign application within the exception for zoned commercial areas contemplated by WV Code §17-22-8 and 23 CFR 750.704. The evidence adduced at hearing was that a county-wide zoning plan was, indeed, adopted. However, in 1983, the County Commission repealed the zoning plan, based

upon the advice of the county prosecutor and the Attorney General that the zoning plan had been improperly adopted without a proper public hearing.

The claimant has submitted evidence that the county commission may have been in error. The Court is unable to determine from the evidence whether the 1965 zoning plan was legally adopted, and has further determined that this question is beyond the scope of review for purposes of resolving this claim. The respondent's evidence plainly establishes that there was no applicable business zoning in effect in Nicholas County for the relevant time periods. Therefore, the claimant's position that her sign was within a zoned commercial or industrial area contemplated by the provisions of WV Code §17-22-1 et seq. and the relevant state and federal regulations must fail.

The Court, after careful review of the evidence and the pleadings, is of the opinion that there is no evidence of negligence on the part of the respondent upon which to justify an award. The claimant's plight is indeed regrettable. Experience shows that ongoing business enterprises, such as the claimant's, are often damaged during major highway construction. Such losses would appear to be one of the inexorable consequences of the construction of new highways throughout the State of West Virginia. However, nothing in the record indicates that the respondent was negligent or acted improperly in any way. In view the foregoing, the Court is of opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED JUNE 2, 1998

LABORATORY CORPORATION OF AMERICA HOLDINGS
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-98-113)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant seeks payment of $129,900.00 for laboratory testing in paternity cases for the respondent from 1988 through approximately August 1997. The documentation for these services was not properly processed for payment by the respondent in the appropriate fiscal years; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim, and states that there were sufficient funds

expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $129,900.00.

Award of $129,900.00.

OPINION ISSUE JUNE 2, 1998

GERALDINE WHITMAN
VS.
DIVISION OF HIGHWAYS
(CC-96-288)

Richard A. Robb, Attorney at Law, for the claimant.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her 1985 Chrysler Fifth Avenue, which occurred after a road barrier blew into her vehicle on Corridor G in Logan County. The Court is of the opinion that the respondent failed to exercise reasonable care to ensure the safety of motorists and makes an award as stated below.

The incident giving rise to this action occurred on April 16, 1996, at approximately 5:30 p.m. The claimant was driving her vehicle on an exit ramp from Corridor G into Logan. The weather was dry and extremely windy. The evidence adduced at hearing was that the respondent had erected approximately 60 road barriers along the exit ramp for the purpose of directing traffic during the construction of a shopping mall. At some point one of these barriers blew into the claimant's vehicle on the front driver's side, breaking part of the windshield and damaging the grill, door, fender and wheel cover. The claimant submitted into evidence repair bills in the amount of $3,844.17. The vehicle had approximately 126,000 miles on the odometer. The claimant testified that she had spent approximately $6,000.00 in major repairs several months prior to the accident. The claimant carried liability insurance only.

The evidence at hearing established that Tuesday, April 16, 1996, was an unusually windy day all day long. The metal and wood road barriers in question were described as approximately four feet by six feet in dimension with red and white marker stripes. It was the respondent's practice to place two sandbags on each side to hold them in place. The claimant testified that the barrier that struck her vehicle did not have any sandbags and consequently was blown by the wind into her vehicle.

The respondent was aware that the barriers in this location had been blowing out of place throughout the day due to the unusually heavy winds. The evidence

established that the respondent's employees returned to the area on several occasions throughout the day to reset numerous road barriers that had blown down, or had been blown out of location. No additional safety measures were taken, despite the clear and present risk to motorists. Indeed, at the time of the claimant's accident, the evidence indicated that the respondent's employees were back at district headquarters.

It is well established that the state is neither an insurer nor a guarantor of the safety of motorists on its roads or highways. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). For the respondent to be held liable, the claimant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of the road defect in question. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985), *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The evidence clearly establishes that the respondent was aware that these road barriers were blowing across the road throughout the day on April 16, 1996. The respondent failed to warn motorists or take other reasonable precautionary measures. Therefore the Court is of the opinion to and does hereby make an award in the total amount of $3,844.17.

Award of $3,844.17.

OPINION ISSUED AUGUST 10, 1998

PAMELA S. BURKE
VS.
DIVISION OF HIGHWAYS
(CC-97-257)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her vehicle after it encountered a rock in a road maintained by the respondent in Fayette County.

The incident giving rise to this claim occurred on June 12, 1997. The claimant was driving her 1991 Beretta southbound on WV Route 61 near Montgomery. Route 61 in this area is a paved two-lane road with little or no berm. The evidence adduced at hearing was that the claimant's vehicle struck a rock approximately the size of a bowling ball that was lying in her lane of traffic. The rock damaged the catalytic converter and transmission pan. The claimant submitted repair bills in the amount of $177.54. The claimant's insurance deductible was $250.00.

The claimant testified that there was traffic in the oncoming lane as well as immediately behind her and that therefore she was unable to swerve or stop to avoid the

rock. The respondent's evidence established that there had been rock falls in other areas on Route 61, but that this particular area was not a known rock fall area. The respondent had no notice of a rock fall in the area on the date of the claimant's accident.

It is well established that the respondent is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). The general rule is that the unexplained falling of a rock onto a highway without a positive showing that the respondent knew or should have known of a dangerous condition posing risk of injury or property damage, is insufficient to justify an award. *Coburn vs. Dept. of Highways*, 16 Ct. Cl. 68 (1986). Therefore, in view of the foregoing, the Court is of the opinion to and hereby denies this claim.

Claim disallowed.

OPINION ISSUED AUGUST 10, 1998

ROGER G. CHANEY AND CONNIE G. CHANEY
VS.
DIVISION OF HIGHWAYS
(CC-97-224)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimants brought this action for damage to their 1995 Buick LeSabre after it encountered a large depression on a road maintained by the respondent in Cabell County. The Court on its own motion amended the style to reflect the proper parties. The respondent having stipulated to liability, the Court will now proceed to assess damages.

The incident giving rise to this claim occurred on April 15, 1997. The claimants' vehicle struck a large hole on Route 27/2 (Balls Branch Road), resulting in damage to the alignment, two tires and strut assembly. The claimants submitted into evidence a number of estimates for four new tires, four new struts and an alignment in the total amount of $1,063.59. Information provided by the claimants' insurance carrier established that there was no applicable insurance which would have covered this incident.

At the time of the accident, the claimants' vehicle had approximately 50,000 miles on it. Mr. Chaney testified that he was required to purchase four new tires due to uneven tread wear. The evidence further indicated that the struts on the vehicle were in

need of repair when he purchased the vehicle.

The Court is of the opinion that the claimant is entitled to the price of two tires, a tire balance, and an alignment, and, therefore, makes an award in the amount of $200.00, representing a fair and reasonable amount for these repairs to the claimants' vehicle.

Award of $200.00.

OPINION ISSUED AUGUST 10, 1998

JUSTIN COX
VS.
DIVISION OF HIGHWAYS
(CC-97-179)

David A. Barnette, Attorney at law for the claimant.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his vehicle after he encountered a rock on the side of a road maintained by the respondent in Kanawha County.

The incident giving rise to this claim occurred June 8, 1996, on Poca River Road (County Route 33) near Sissonville. The claimant, Justin Cox, was driving a 1982 Malibu Classic when he proceeded onto the berm area to avoid an oncoming truck. Poca River Road in this area is a narrow unstriped road that is secondary in terms of maintenance priority. The evidence adduced at hearing established that when the claimant proceeded onto the berm his vehicle struck a large boulder that was largely concealed by weeds and foliage. The impact with the rock threw the claimant's vehicle to the side, with the result that the vehicle collided with the passing truck. The claimant's vehicle sustained damage to the right tire, wheel and fender, as well as the left rear bumper area. The claimant submitted into evidence a repair bill in the amount of $2,619.34. The claimant had liability insurance only.

The evidence established that Poca River Road in this area is approximately 12 feet to 16 feet wide and that the claimant was driving approximately 25 miles per hour. The claimant testified that he dropped onto the berm in order to provide a safe passing distance with the oncoming vehicle. He testified that he was familiar with the road and drove it daily to work.

It is the general rule of the Court that when a motorist is required to use the berm that he is entitled to rely on it, and the respondent may be held liable for failing to

maintain the berm in a reasonably safe condition. *Meisenhelder vs. Dept. of Highways*, (CC-88-149, unpublished opinion issued August 10, 1990) However, the Court is of the opinion that the claimant was also at fault for dropping onto the berm when he could not adequately see road conditions, and that claimant could have stopped his vehicle instead of assuming this risk. The Court finds that although the respondent was at fault for failing to provide a safe berm, the negligence of the claimant was equal to or greater than the negligence of the respondent. Accordingly, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED AUGUST 10, 1998

LLOYD GILL AND CHRISTOPHER GILL
VS.
DIVISION OF HIGHWAYS
(CC-97-97)

Claimants represent selves.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimants seek compensation for loss of a camper and numerous items of personal property resulting when a large sink hole opened along WV Route 20 in Hinton, Summers County. The Court is of the opinion that the sink hole was an unforeseeable event and denies the claim as stated more fully below.

The claimants kept a 12-foot, 1973 box shell camper at a relative's home in Hinton, on Route 20 between 12th and 13th avenues. The camper was parked approximately 25 feet from the center of Route 20 in this location. On December 2, 1996, a large sink hole opened along the road when an underground box culvert collapsed. The sinkhole appeared to be approximately 30 feet deep. The trailer was pulled into the hole and destroyed. Numerous items of hunting and camping gear were also lost. The claimants did not carry insurance on the trailer or its contents and seek compensation in the amount of $3,000.00

The evidence adduced at hearing established that the cause of the sink hole was the collapse of a six-foot box culvert running underneath the road. This culvert was approximately 400 feet long and extended underneath portions of Route 20, several private lots and a city street. The respondent's right of way extended for 20 feet on each side of the center line along Route 20. The respondent's position is that the sinkhole was caused by unforeseeable culvert failure just off the respondent's right of way on

private property, and that it should not be held liable.

The evidence established that culverts of this type are common throughout the State and that many of these culverts were built before the respondent assumed responsibility for county roads in 1933. The respondent had no procedure for checking culverts or other subsurface drainage structures that are less than 10 feet in length beneath the road surface. Instead, the respondent's practice was to look for signs of subsurface failure, such as cracking or buckling in the pavement, prior to initiating repairs. The evidence indicates that the sink hole developed suddenly and without warning and that the respondent was unaware that box culvert had collapsed.

It is well established that the state is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (1947). The Court has ruled in numerous contexts that in order to hold the respondent liable for road defects that the claimant must prove that the respondent knew or had reason to know of the road hazard and had a reasonable opportunity to take remedial action. *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986) pothole; *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985) pothole; *Coburn vs. Dept. of Highways*, 16 Ct. Cl. 68 (1986) rock fall; *Basham vs. Dept. of Highways*, 16 Ct. Cl. 113 (1986), ice; *Britton vs. Dept. of Highways*, (CC-89-229) unpublished opinion issued March 26, 1990, expansion joint.

The Court finds that this sink hole was unforeseeable and that the respondent had no actual or constructive notice that a sink hole would occur at this location. Therefore, in accordance with the law established in prior decisions, the Court is of the opinion to and does hereby deny this claim.

Claim disallowed.

OPINION ISSUED AUGUST 10, 1998

PATRICIA J. GRIFFITH
VS.
DIVISION OF HIGHWAYS
(CC-97-264)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her vehicle after it encountered a loose chunk of concrete on a road maintained by the respondent in Boone County.

The incident giving rise to this action occurred in the afternoon hours on or about June 21, 1997. The claimant was driving a 1986 Pontiac Grand Am southbound

between Danville and Chapmanville behind a tractor trailer. The evidence adduced at hearing was that the tractor trailer kicked up a loose chunk of concrete on the road surface, which then struck the claimant's vehicle causing a flat tire. The cost of repairs was $55.56.

The claimant testified that the chunk of concrete was approximately 10 inches in breadth. The respondent's testimony indicated that a blow-up of an expansion joint in the area was discovered the Monday following the accident.

It is well established that the State is neither a guarantor nor an insurer of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947) The general rule of this Court is that in order for the respondent to be held liable for road defects of this nature, the claimant must establish that the respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985), *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). With regard to these kinds of blow-ups, the Court has held that blow-ups which occur on concrete highways are by their nature unforeseeable due to variables in temperature and moisture. Therefore, in view of the foregoing, the Court is of the opinion that the claim must be denied.

Claim disallowed.

OPINION ISSUED AUGUST 10, 1998

RONNIE HATFIELD
VS.
DIVISION OF HIGHWAYS
(CC-97-162)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his truck which occurred after he struck a hazard warning sign on a road maintained by the respondent in Cabell County.

The incident giving rise to this claim occurred in the evening hours of March 30, 1997. The claimant was driving a 1995 F350 crew cab truck on Glenwood Road (County Route 15) near Milton. The weather was dark and it was raining. Route 15 in this area is a two-lane paved road that is secondary in terms of maintenance priority. The road in this area had begun to slip due to flooding, and the respondent had installed a hazard paddle to alert motorists. The evidence adduced at hearing was that the claimant was driving approximately 25 miles per hour when his vehicle struck the hazard

paddle, resulting in damage to the fender and mirror on the passenger side. The claimant submitted into evidence repair estimates ranging from roughly $880.00 to $1,200.00. The repairs have not been done. The claimant carried a $250.00 insurance deductible.

The claimant testified that part of the sign extended across the white line into the traveled portion of the road. The claimant's position was that he was unable to avoid the hazard paddle because the respondent had failed to install additional warning signs prior to the slip. The respondent's evidence indicated that the area had been experiencing severe and widespread flooding at the time, which contributed to the slip.

It is well established that the state is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). The Court is of the opinion that the respondent acted reasonably and properly under the circumstances and that there is insufficient evidence upon which to justify an award. Therefore in view of the foregoing the claim must be denied.

Claim disallowed.

OPINION ISSUED AUGUST 10, 1998

CARLO MARCANTONIO
VS.
DIVISION OF HIGHWAYS
(CC-97-166)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his vehicle which occurred after it encountered a large depression on the respondent's right of way in Wood County. For the reasons stated more fully below, the Court is of the opinion that the claimant is entitled to an award.

The incident giving rise to this claim occurred on September 4, 1996, at approximately 8 a.m. The claimant's wife, Candice Marcantonio, was driving the claimant's 1988 Plymouth Voyager van on Highland Avenue (WV Route 14) in Williamstown to the Farm Fresh market. Highland Avenue in this area is a two-lane paved road. The evidence adduced at hearing was that as Ms. Marcantonio turned left to enter the market, the right front wheel dropped into a large depression on the edge of the pavement by a drain grate. The vehicle sustained damage to the frame, axle and front end. The claimant submitted into evidence repair and towing bills in the amount of $1,262.67. The claimant had liability insurance only.

The drain grate in question was located on a sidewalk area abutting the paved road. Traffic passed over this area in order to access the Farm Fresh market. The evidence indicated that the respondent had recently resurfaced the road with the result that there was a significant drop of approximately six inches between the paved road surface and the grate. Ms. Marcantonio testified that she had driven over the grate on prior occasions before the resurfacing without incident. The respondent's position was that although the grate was located within its right of way, that the Farm Fresh market was contractually responsible for maintaining the grate.

The Court finds this position untenable. The Court is of the opinion that the respondent knew or had reason to know that this depression created a risk of property damage to passing motorists. Notwithstanding the state's contention that there is an indemnity, hold harmless, or other contractual provision absolving it of liability, the evidence established that area in question was located squarely within the respondent's right of way.

Accordingly, the Court finds that respondent was negligent in its maintenance of the right of way on WV Route 14, and, further, the Court is of the opinion to and does make an award to the claimant for the damage to his vehicle.

Award of $1,262.67.

OPINION ISSUED AUGUST 10, 1998

WENDI MORRIS
VS.
DIVISION OF HIGHWAYS
(CC-97-25)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her vehicle after she encountered an area of broken pavement on Interstate 79 in Marion County.

The incident giving rise to this action occurred on December 13, 1996. The claimant was driving her 1995 Mazda Miata southbound on I-79 just north of the Pleasant Valley Road exit near Fairmont at approximately 10:00 p.m. The weather was cold and rainy. The evidence adduced at hearing was that the claimant was driving approximately 65 miles per hour when her vehicle struck a large hole in the traveled portion of the right-hand lane. The claimant's vehicle sustained a flat tire and a cracked rim. The claimant submitted repair bills in the amount of $555.09. The claimant's

insurance deductible was $250.00.

The hole was described as approximately two feet in breadth and width. Another motorist traveling in front of the claimant also struck the hole, but his vehicle sustained no damage. The respondent's evidence established that there was a hole near the 136 mile marker, which was repaired with cold mix on December 14, 1996.

It is well established that the state is neither an insurer nor a guarantor of the safety of motorists on its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (1947). It is the general rule that in order to establish liability for road defects of this type, the claimant must prove that the respondent had actual or constructive notice of the defect. *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The Court is of the opinion that the size of the hole in question is indicative of its presence for a substantial period of time and that the respondent had reason to know of this road hazard. Accordingly, the Court is of the opinion that the State has a moral obligation to compensate the claimant for her loss. It is furthermore the general rule of this Court that moral obligations of the State do not include, or encompass, those losses otherwise covered by the claimant's insurance coverage.

Therefore, in view of the foregoing, the Court is of the opinion to and does hereby make an award in the amount of $250.00, the amount of the claimant's insurance deductible.

Award if $250.00.

OPINION ISSUED AUGUST 10, 1998

ALLEN D. PANCAKE AND SCOTT A. PANCAKE
VS.
DIVISION OF HIGHWAYS
(CC-97-120)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimants brought this action for damage to their vehicle when it encountered an unpaved culvert ditch on a road maintained by the respondent in Cabell County.

The incident giving rise to this claim occurred on March 10, 1997. Claimant Scott Allen Pancake was driving a 1992 Volkswagen Jetta on Spurlock Creek Road (Route 1 and Route 1/1) near Glenwood. The vehicle is titled in his father's name, Allen D. Pancake. It was approximately 7:30 p.m. and the weather was clear. Spurlock Creek

Road in this area is a narrow, paved road with numerous turns. It is a secondary road in terms of maintenance priority. The speed limit is 35 miles per hour. The evidence adduced at hearing was that as Scott Pancake came around a slight turn he encountered a ditch running across the road where a culvert pipe had been installed. Soil and gravel had been placed over the pipe, but there was a significant drop in the road surface elevation. The vehicle sustained two bent wheel rims, broken spoilers and damaged fender flares. The claimant submitted repair estimates in the amount of $764.34. The claimant's insurance deductible was $500.00.

Photographs introduced by the claimant establish that the filled area in question was several feet in breadth and approximately six inches in depth. The claimant testified that there were no warning signs, cones or barrels to warn motorists of the rough road. He further testified that he had traveled on the road approximately one week prior to the accident and the culvert ditch was not present at that time. The respondent's evidence was that the area had been experiencing severe flooding at the time; that many roads had experienced wash-outs; and that all warning signs and traffic control barrels were in use on other roads.

The Court is well aware of the widespread flooding that occurred throughout the state during the time in question. It well established that the state is neither an insurer nor a guarantor of the safety of motorists upon its roads and highways. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). It is the general rule that for the respondent to be held liable for road defects of this nature that the claimant must prove that the respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985), *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The Court is of the opinion that the respondent had reason to know that the road conditions giving rise to this action presented a significant hazard and that respondent should have installed some measure of warning device to alert motorists to the rough road area ahead.

In view of the foregoing, the Court makes an award to the owner of the vehicle, Allen D. Pancake in the amount of $500.00.

Award to Allen D. Pancake of $500.00.

OPINION ISSUED AUGUST 10, 1998

CHARLES F. PARSONS
VS.
DIVISION OF HIGHWAYS
(CC-97-20)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his vehicle which occurred when it struck a loose manhole cover on a road maintained by the respondent in Kanawha County. The respondent having stipulated to liability, the sole issue before the Court is the proper amount of damages.

The incident giving rise to this action occurred on January 3, 1997, at approximately 12:40 p.m. The claimant was driving his 1985 Chevrolet Caprice Classic northbound on Greenbrier Street in Charleston when the vehicle struck a loose manhole cover lid. The transmission and support cross member were torn from the vehicle. The claimant submitted into evidence a repair bill in the amount of $1,279.58, which he paid. The claimant had liability coverage only.

The evidence adduced at hearing established that the claimant purchased the vehicle in approximately 1993 for $500.00, and undertook approximately $600.00 in repairs and overhaul costs prior to this incident. The current value of the vehicle is approximately $1,000.00. The Court, having reviewed the evidence, is of the opinion that the claimant could have gotten at least $100.00 in salvage value for the vehicle after his accident. Therefore, in view of the foregoing, the Court does hereby make an award in the amount of $900.00.

Award of $900.00.

OPINION ISSUED AUGUST 10, 1998

CATHY PECK
VS.
DIVISION OF HIGHWAYS
(CC-97-75)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her 1993 Ford Escort which occurred after she encountered a large hole on Randolph Street in the City of Charleston, Kanawha County, on or about November 30, 1996. The evidence adduced at hearing established that the road in question is the responsibility of the City of Charleston and is not maintained by the respondent. In view of the foregoing, the Court is of the opinion that it lacks jurisdiction to hear this claim and, therefore, the claim must be denied.

Claim disallowed.

OPINION ISSUED AUGUST 10, 1998

CAROLYN E. ROGERS
VS.
DIVISION OF HIGHWAYS
(CC-97-89)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for personal injuries to her ankle which she sustained after stepping into a drain hole on a road maintained by the respondent in Clay County. The Court is of the opinion that the drain in question presented a significant hazard and makes an award for the claimant as stated more fully below.

The incident giving rise to this action occurred on January 24, 1997, at approximately 9:00 p.m. The claimant had driven to the town of Clay and had stopped in the vicinity of School Street and WV Route 16 to purchase a beverage from a vending machine. The evidence adduced at hearing was that upon returning to her vehicle, the claimant stepped from the curb into an open drain on the paved portion of the road. The claimant sustained torn ligaments in her left ankle and missed three weeks of work while recovering.

The claimant introduced into evidence several photographs taken after the fact which established that the open drain hole extended from the curb into the respondent's right of way. Clay municipal officials subsequently covered the hole with a steel plate. It was the respondent's position that the town of Clay is responsible for all storm drains and that therefore the respondent cannot be held liable. The Court finds this position untenable due to the fact that the drain hole in question was located well within the respondent's right of way. *Trail vs. Division of Highways*, (CC-95-138), unpublished opinion issued January 26, 1996. The Court finds that the respondent should have known of the defect and corrected it in a timely manner.

At the time of her injury, the claimant was a waitress working five days a week. Her weekly wage was $130.00, plus approximately $50.00 per day in tips. Therefore her average weekly gross income was approximately $380.00 ($130.00 + $250.00). The claimant testified that she missed three weeks of work due to her injury and that upon her return she worked two weeks at the cashier at a flat $130/week salary before resuming her regular duties as waitress. Therefore the claimant's total gross lost income was $1,640.00, which, when adjusted at a 20 percent tax rate, equates to a net economic loss of $1,312.00. Finally, the claimant testified that her out-of-pocket medical

expenses were in the amount of $10.00. In view of the foregoing, the Court finds that the claimant is entitled to an award representing her total lost earnings and medical costs in the total amount of $1,322.00.

Award of $1,322.00.

OPINION ISSUED AUGUST 10, 1998

OKEY E. RUSSELL
VS.
DIVISION OF HIGHWAYS
(CC-97-246)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his vehicle which occurred after it encountered a hole located on the berm of a secondary road maintained by the respondent in Kanawha County.

The incident giving rise to this action occurred on June 11, 1997, at approximately 1:15 p.m. The claimant was driving a 1995 Oldsmobile on Paint Creek Road near Gallagher. Paint Creek Road in this area is a two-lane paved road with several curves. Each lane of this road is approximately ten to twelve feet wide. The evidence adduced at hearing established that as the claimant came out of a turn, he simultaneously encountered a large hole along the edge of his lane and an oncoming vehicle in the opposite lane. The claimant testified that he was unable to avoid the hole because he would have hit the other vehicle. Both right side tires dropped into the hole, resulting in two bent rims and two flat tires. Claimant submitted into evidence repair bills in the amount of $323.84. The claimant had a $250.00 insurance deductible.

It is the general rule that when a motorist voluntarily drives onto the berm area he takes the berm as he finds it, but when a motorist is forced to use the berm in case of emergency he is entitled to rely upon it and the respondent may be held liable for failing to maintain the berm in a reasonable safe condition. *Meisenhelder vs. Dept. of Highways*, (CC-88-149. Unpublished opinion issued August 10, 1990). The claimant introduced into evidence several photographs showing a hole of significant size and depth on the edge of the pavement. The claimant further testified at hearing that the oncoming vehicle was in its lane of traffic and had not crossed into the claimant's lane.

The Court is of the opinion that the hole in question developed over a considerable period of time and that the respondent knew or should have known of this

road defect. However, the evidence indicates that the claimant was not forced to use the berm and could have avoided the hole had he properly maintained control of his vehicle. The Court is of the opinion that any negligence on the part of the respondent was equal to or greater than any fault of the claimant. Therefore, in accordance with the principles of comparative negligence, the Court denies the claim.

Claim disallowed.

OPINION ISSUED AUGUST 10, 1998

JUANITA SHARP
VS.
DIVISION OF HIGHWAYS
(CC-97-326)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her vehicle which occurred after a tree fell on the vehicle on a road maintained by the respondent in Mason County.

The incident giving rise to this claim occurred on July 30, 1997. The claimant's daughter-in-law, Jessica Sharp, was driving the claimant's 1989 Pontiac Grand Am southbound to work on WV Route 2 near Point Pleasant. It was approximately 2:50 p.m.; the weather was clear and dry. The evidence adduced at hearing was that a dead tree fell on the car, damaging the hood and fenders and shattering the windshield. The claimant submitted into evidence two repair estimates in the respective amounts of $3,011.44 and $3,418.22. The windshield has been replaced, but the rest of the repairs have not been completed. The claimant carried liability insurance only.

The evidence adduced at hearing established that the tree was dead, and it was located well within the respondent's right of way. The evidence further established that the respondent was aware of an ongoing slip in that area that had contributed to a falling tree problem on at least one prior occasion. The Court has previously held that in order to hold the respondent liable for damage caused by falling trees, the claimant must establish that the respondent knew or had reason to know that the tree in question posed a risk of harm to motorists. *Widlan vs. Dept. of Highways*, 11 Ct. Cl. 149 (1976) The Court is of the opinion that the respondent was on notice of the hazard presented by the tree in question and finds that the claimant is entitled to an award. Based upon the repair estimates provided by the claimant, the Court finds that the claimant is entitled to an

award in the amount of $3,011.44.

Award of $3,011.44.

OPINION ISSUED AUGUST 10, 1998

JUDY SHEPPARD AND JASON SHEPPARD
VS.
DIVISION OF HIGHWAYS
CC-97-228)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her 1996 Pontiac Grand Prix which occurred after she encountered a hole on a road maintained by the respondent in Logan County. The Court on its own motion amended the style to reflect the proper parties.

The incident giving rise to this claim occurred on May 16, 1997, in the afternoon. Ms. Sheppard was driving on Trace Fork Road near the Logan-Boone county line. The weather was clear and dry. Trace Fork Road is a paved road, approximately 16 feet wide, that is low priority in terms of maintenance. The evidence adduced at hearing was that as Ms. Sheppard proceeded around a turn, she steered to the right to avoid an oncoming vehicle. Her vehicle then struck a deep hole on the edge of the pavement, resulting in two flat tires, two bent rims, and a damaged strut. The claimants submitted into evidence a repair estimate in the amount of $343.23. Information from the claimant's insurance carrier indicates that the claimant had full coverage with a $500.00 deductible.

Ms. Sheppard testified that she was traveling approximately 25 miles per hour. She was familiar with the road and traveled it frequently. Photographs introduced by the claimant indicated that the hole in question was at least six inches deep and several feet in breadth along the edge of the pavement. It was the respondent's position that the hole was caused by unusually heavy rainfall.

It is the general rule of this Court that where a claimant uses the berm of the road in an emergency situation, he/she may be entitled to recover damages if the berm is not maintained in a reasonably safe condition by the respondent. *Meisenhelder vs. Dept. of Highways* (CC-88-149, unpublished opinion issued August 10, 1990). The Court is of the opinion that the defective condition on the berm in question developed

over a significant period of time and that the respondent therefore had constructive notice of this road defect. Further, in keeping with its general rule regarding berm accidents, the Court finds that the claimant is entitled to an award. Therefore, in view of the foregoing, the Court makes an award in the amount of $343.23.

Award of $343.23.

OPINION ISSUED AUGUST 10, 1998

DINA SMOOT
VS.
DIVISION OF HIGHWAYS
(CC-97-175)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her vehicle after it encountered a hole in a road maintained by the respondent in Boone County.

The incident giving rise to this claim occurred on April 4, 1997. The claimant was driving a 1987 Cutlass Oldsmobile southbound on Lick Creek Road (119/9) when she encountered a hole in the pavement along the berm. The vehicle sustained a flat tire. The claimant submitted into evidence a repair bill in the amount of $67.84. The claimant had liability insurance only.

The hole was described as approximately 10 inches wide, 12 inches long and three inches deep, and extended from the berm into the traveled portion of the road. The claimant testified at hearing that she was driving approximately 20 miles per hour. She stated that as she proceeded around a curve, she encountered oncoming traffic in the other lane and was unable to stop in time to avoid hitting the hole in her lane.

It is well established that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). In order for the respondent to be held liable for defects of this type, the claimant must establish that the respondent had actual or constructive notice. The Court is of the opinion that a hole of this size would have developed over a significant amount of time and that the respondent therefore had reason to know of the road hazard. *Hamon vs. Dept. of Highways* , 16 Ct. Cl. 127 (W.Va. 1986). Therefore, in view of the foregoing, the Court is of the opinion to make an award in the amount of $67.84.

Award of $67.84.

OPINION ISSUED AUGUST 10, 1998

DAVID K. STAPLETON
VS.
DIVISION OF HIGHWAYS
(CC-97-4)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his vehicle which occurred when it encountered a rock highwall on W.Va. Route 10, a road maintained by the respondent in Logan County. The Court is constrained by the evidence and must deny the claim as stated more fully below.

The incident giving rise to this claim occurred on November 17, 1996, at approximately 9 a.m. The claimant and his wife were driving their 1979 Ford pick-up truck northbound on W.Va. Route 10 towards Logan near an area known as "Hanging Rock". They were driving approximately 30 miles per hour and were hauling a 17-foot camper trailer on the back of the truck. Route 10 in this area is a narrow, winding, two-lane paved road with numerous turns and frequent coal truck traffic. The claimant was driving in an area where the road passes beneath a vertical rock cliff with little or no berm. Claimant was familiar with this road and traveled it frequently. He was also aware that trucks traveled the road. The evidence adduced at hearing was that as the claimant proceeded around a curve he was forced to steer to the right to avoid oncoming traffic. At this point the top portion of the camper struck the edge of the rock cliff, caving in the right front corner of the camper. The claimant testified that the 1977 camper could not be repaired due to lack of replacement parts. The claimant carried liability insurance only. He had bought the camper in 1994 for $1,000.00 and spent approximately $3,800.00 reconditioning it prior to this accident.

The claimant introduced several photographs of the road and rock cliff, which clearly establish that Route 10 is unusually narrow and winding due to the mountainous topography of the region. The rock cliff in question is extremely close to the edge of the road and there is little or no margin for error. The claimant testified that he measured the width of the road and that the northbound lane was nine feet wide and the southbound lane was just under ten feet wide. The claimant's position was that the rock cliff overhung into the traveled portion of the road and that the respondent therefore should be held liable for damage to his trailer. The respondent's position was that it had no actual or constructive notice of an ongoing road hazard in the area, and that a

reasonably prudent motorist can navigate the road safely.

It is well established that the state is neither an insurer nor guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). The Court further notes that narrow roads such as W.Va. Route 10, with steep cliffs and highwalls are a common occurrence in West Virginia. The Court has carefully reviewed the testimony and the photographs. While the cliff in question is extremely close to the traveled portion of the road, the Court finds that this condition is due to the unusually mountainous terrain of this region. The Court is of the opinion that this accident was the result of unique circumstances wherein the claimant was forced to steer to the right while hauling a long trailer along an unusually narrow and winding road. While sympathetic to the claimant's position, the Court is unable to justify an award under these circumstances.

In accordance with the findings of fact as stated herein above, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED AUGUST 10, 1998

NELLIE STEPHENSON
VS.
DIVISION OF HIGHWAYS
(CC-96-467)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for water damage to her home, which she alleges was caused by negligent road work on the part of the respondent. The Court is of the opinion that there is insufficient evidence of negligent conduct on the part of the respondent and denies the claim as stated more fully below.

The claimant is the owner of a home located approximately one mile northeast of Clay on WV Route 4 near the Elk River. She alleges that in July and August 1996, the porch and side steps sustained severe damage as a result of heavy water running from a ditch along Route 4 down to and around her dwelling. The claimant introduced into evidence a video tape and numerous photographs showing that one side of the porch was undermined and had to be rebuilt. The claimant submitted a repair estimate in the amount of $1,879.00. She testified that she spent $1,100.00 to repair the porch, but did not repair the steps.

The home is located on an incline, down-slope from Route 4. The evidence adduced at hearing was that the water damage occurred after two unusually heavy rains on or about July 17, 1997, and on or about August 1, 1996. The claimant testified that these rains were torrential and that flooding was widespread along the Elk River. The claimant alleges that the respondent dug the ditch sometime during the winter months of early 1996, and that the water damage had been occurring gradually prior to the two aforementioned rain storms.

The claimant introduced a video tape and several photographs, taken shortly after the damage occurred, indicating what appears to be a shallow ditch line along the shoulder. The respondent had placed gravel along the shoulder in the vicinity of the claimant's home in June 1996. However, there was no evidence establishing that the respondent was responsible for digging a ditch which caused the damage to the claimant's home.

While not unsympathetic to the claimant's position, the Court is of the opinion that there is insufficient evidence of negligence upon which to justify an award. The Court cannot determine what, if any, conduct on the part of the respondent, contributed to the claimant's water damage. The Court concludes that the damage to the claimant's property likely resulted from a combination of factors, primary among these being the heavy rainfall in the region. *Burger vs. Dept. of Highways*, 16 Ct. Cl. 41 (1986) Absent specific evidence of proximate cause on the part of the respondent, the Court is constrained by the evidence to deny the claim.

Claim disallowed.

OPINION ISSUED AUGUST 10, 1998

HAROLD D. SWANN
VS.
DIVISION OF PUBLIC SAFETY
(CC-96-593)

Claimant represents self.
Joy M. Cavallo, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damages resulting from a collision with a State Police cruiser on Interstate-64 near Barboursville, Cabell County. The Court finds that the claimant's negligent failure to maintain control was equal to or greater than any negligence attributable to the respondent and denies the claim as stated more fully below.

The claimant was the owner of a 1986 Ford Ranger pick-up truck. On January 14, 1996, at approximately 4:00 p.m., the claimant entered I-64 near mile marker 22 near Barboursville, and proceeded eastbound at approximately 65 miles per hour. The weather was dry and clear, but there had been heavy snowfall in preceding days and the median was snow-covered. The respondent State Police had responded to a call regarding a disabled vehicle in the median. Trooper M.T. Baylous' cruiser was parked on the right-hand berm of I-64 westbound, and the tow truck was parked on the median side. Trooper William K. Marshall had also responded and his vehicle was parked partially on the traveled portion of the passing lane of I-64 eastbound. Interstate 64 eastbound in this area is on a slight incline and curves gradually uphill and to the right. The record indicates that both cruisers had their emergency blue lights flashing.

The claimant was driving eastbound in the right-hand lane approximately six car lengths behind a tractor trailer. The evidence adduced at hearing was that in the vicinity of the disabled vehicle, the tractor trailer began to reduce speed. The claimant testified that he proceeded into the left lane in order to pass the truck and immediately struck the cruiser in the right rear area. Both vehicles were destroyed. The claimant seeks $5,283.00 representing the value of his vehicle.

The evidence established that Trooper Marshall had parked his cruiser eastbound with his left wheels in the median and the right wheels on, or just past, the yellow line delineating the edge of the passing lane. Photographs and testimony establish that part of the cruiser extended into the traveled portion of the lane, anywhere from several inches to three feet. Trooper Marshall testified that he parked his vehicle there for the purpose of slowing and diverting traffic away from the wrecker and the stranded vehicle. The cruiser was parked in this position for approximately 20 minutes prior to the accident. During part of this time period prior to the accident, Trooper Marshall had been directing traffic to the right-hand slow lane and cleared berm area.

The claimant's position was that Trooper Marshall was negligent for parking on the left side of the highway and that he should have set flares to provide adequate warning. The claimant testified that when he pulled out to pass the tractor trailer he was unable to see the cruiser in time to avoid a collision. However, the claimant conceded that he had been distracted by the accident scene on the westbound side of I-64 and that his attention was not fully on the road in front of him.

The Court, having carefully reviewed the evidence, is of the opinion that location of Trooper Marshall's cruiser was a substantial contributing factor in causing this accident. The cruiser was located on a slight hill, with a gradual curve to the right. A motorist traveling in the slow lane behind a large truck could very well experience difficulty seeing any vehicles in the passing lane. However, the Court finds that the proximate cause of this accident was the claimant's failure to exercise due care and control of his vehicle when he attempted to pass the truck.

Therefore, in view of the foregoing and in accordance with the general principles of comparative negligence, the Court finds that the negligence of the claimant

is equal to or greater than any fault on the part of the respondent. Accordingly, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED SEPTEMBER 29, 1998

DONNA BASS
VS.
DIVISION OF HIGHWAYS
(CC-96-661)

Claimant represents self.

Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her vehicle after encountering an object on Interstate 64 in Greenbrier County.

The incident giving rise to this claim occurred on April 7, 1995, at approximately 6:30 a.m. The claimant was driving her 1992 Subaru Legacy westbound on I-64 between White Sulphur Springs and Lewisburg near mile marker 173. The weather was dry and the claimant was familiar with the road. The evidence adduced at hearing was that as the claimant drove across a bridge, her vehicle struck an unidentified object in the road that cut open the left front tire. The claimant lost control of the vehicle and crashed into a concrete embankment. The claim before the Court is for her $500.00 insurance deductible.

The claimant testified at hearing that she was traveling approximately 65 miles per hour. She said that she believed that she struck a loose manhole cover but was unable to identify the object. Testimony from the respondent indicated that there were no manholes on the bridge, but that there were a number of grates along the berm area near the bridge wall.

It is well established that the respondent is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (1947). The general rule is that for the respondent to be held liable for road hazards of this sort, the claimant must prove that the respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985), *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). While sympathetic to the claimant's position, the Court cannot speculate as to the nature of the object that she encountered. Therefore, in view of the foregoing, the Court is constrained by the evidence and the law to deny the claim.

Claim disallowed.

OPINION ISSUED JANUARY 23, 1998

LAURA BAUER
VS.
DIVISION OF HIGHWAYS
(CC-97-454)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her vehicle after encountering rock on a road maintained by the respondent in Hampshire County. The Court is of the opinion to deny the claim as stated more fully below.

The incident giving rise to this claim occurred on November 21, 1997, at approximately 6:00 p.m. The claimant was driving a 1988 Ford Festiva westbound on U.S. Route 50 just west of Augusta. It was raining and near dark. U.S. Route 50 in this area is a two-lane paved road with a third passing lane. The evidence adduced at hearing was that as the claimant drove around a turn, she encountered rocks falling from an embankment. Her vehicle was struck by the falling rocks and she drove over some of the rocks in the roadway. Claimant's vehicle sustained damage to the wheels, tires and the body of the car. She submitted into evidence a repair estimate in the amount of $815.78. She did not have collision insurance coverage.

The claimant testified that she was driving approximately 40 miles per hour. The respondent's evidence established that there was a "Falling Rock" sign located approximately four-tenths of a mile above the location of the accident. It was the respondent's position that it had no notice of this rock fall hazard prior to the claimant's accident.

It is well established that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads and highways. In order for the Court to find the respondent liable for road defects of this sort, the claimant must prove that the respondent had actual or constructive notice. The general rule with regard to rock fall hazards is that the unexplained falling of a rock onto a road maintained by the respondent, without more, is insufficient evidence upon which to base an award. *Coburn vs. Dept. of Highways*, 16 Ct. Cl.68 (1985). The evidence at hearing established that the respondent had no prior notice of this rock fall and therefore, the Court is constrained by the evidence to deny the claim.

Claim disallowed.

OPINION ISSUED SEPTEMBER 29, 1998

THEODORE BENDER
VS.
DIVISION OF HIGHWAYS
(CC-97-181)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his 1982 Chevrolet pick-up truck, which the claimant alleges occurred because of a slip on a road maintained by the respondent in Braxton County.

The incident giving rise to this claim occurred on March 21, 1997, at approximately 11:30 p.m. The claimant was driving northbound on Copen Road (County Route 2) near Burnsville. The weather was clear and dry. County Route 2 in this area is a narrow second priority road. It is approximately 15 feet wide with shoulders between approximately two to four feet in width. The claimant testified that two vehicles can pass only by dropping onto the shoulder. The claimant was driving approximately 25 miles per hour behind another car, which dropped onto the shoulder apparently with the purpose of allowing another vehicle to pass. When he, too, steered onto the shoulder, it then gave way. When he tried to regain control of his truck, it flipped over and plowed through a fence, rolling approximately 100 feet into a field.

Claimant sustained no permanent physical injuries. The truck was a total loss. He had liability insurance only. Claimant seeks an award in the amount of $3,500.00, representing the loss of the vehicle as well as the cost of repairing the fence.

The claimant introduced several photographs into evidence taken approximately eight days after the accident. These photographs depicted the road as quite narrow and the drop-off into the field quite steep. However, the Court is of the opinion that there is insufficient evidence in the photographs, or in any of the testimony, substantiating that the road slipped from the weight of claimant's truck or that the slip occurred as a result of the integrity of the road or shoulders. Nor does the record reveal any other evidence of negligence on the part of the respondent upon which to justify an award.

While sympathetic to the claimant's position, the Court will not speculate as to what caused the claimant to lose control of his vehicle. In view of the foregoing, the Court is constrained by the evidence to deny the claim.

Claim disallowed.

OPINION ISSUED SEPTEMBER 29, 1998

SHIRLEY A. JONES
VS.
DIVISION OF HIGHWAYS
(CC-97-456)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for personal injuries sustained when she slipped on the berm area of a road maintained by the respondent in Berkeley County.

The incident giving rise to this claim occurred on September 19, 1997, at approximately 12:45 p.m. The claimant had pulled off of Needy Road (County Route 36/1) in order to pick some cattails. The evidence adduced at hearing established that County Route 36/1 in this area is a two-lane paved road with numerous curves. The berm and shoulder area are narrow and drop into a drainage ditch located in close proximity to the edge of the pavement.

The claimant described her actions that day as follows: she cut three cattails located off the edge of the roadway, she returned to her vehicle to open the back door, then she walked back on the berm toward the cattails on the ground with the intention of retrieving them to place them on the back seat of her vehicle when a section of the berm gave way causing her to slip and fall. Claimant suffered compound fractures to her leg. Claimant has alleged numerous damages, including medical bills and lost job benefits.

The respondent's right of way in this area extended 15 feet from the center line. The cattails in question were located just off the respondent's right of way in a privately-owned wetland area. It was the respondent's position that it had no prior notice of a defective berm area in this location.

It is well established that the State of West Virginia is neither an insurer nor a guarantor of the safety of travelers upon its roads and highways. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). The general rule with regard to berm accidents is that when a motorist proceeds onto the berm voluntarily, he takes the berm as he finds it. But when a motorist is forced to use the berm in an emergency, he is entitled to rely upon it and the respondent may be held liable for failure to maintain the berm in a reasonably safe condition. *Meisenhelder vs. Dept. of Highways*, (CC-88-149), unpublished opinion issued August 10, 1990, *Sweda vs. Dept. of Highways*, 13 Ct. Cl.249 (1980). A review of recent decisions reveals that this rule has been applied consistently and the Court sees

no reason to change its reasoning. It is further the general rule of this Court that it will not substitute its judgment for the respondent's with regard to its decisions regarding road design and the adequacy of the berm and shoulder width. Finally, the Court has held that in order to hold the respondent liable for road defects such as potholes or fallen tree hazards, the claimant must prove that the respondent knew or had reason to know of the hazard. *Hamon vs. Dept. of Highways*, 17 Ct. Cl. 127 (1986).

The evidence indicates that the claimant voluntarily proceeded onto the berm where she had her accident. While sympathetic to the claimant's position, the Court is of the opinion that there is insufficient evidence of negligence on the part of the respondent upon which to base an award. Therefore, in view of the foregoing, the Court is constrained to deny the claim.

Claim disallowed.

OPINION ISSUED SEPTEMBER 29, 1998

DAVID A. MOORE
VS.
DIVISION OF HIGHWAYS
(CC-97-329)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for injury to his knee which occurred when he stepped onto a piece of asphalt pavement on a road maintained by the respondent.

The claimant's residence is located on Lay Street (County Route 1/7) off Maple Fork Road, in Bradley, Raleigh County. The incident giving rise to this claim occurred on August 9, 1997, at approximately 4:00 p.m. The claimant testified that when he stepped onto the pavement a piece of the asphalt at the edge of a hole in the pavement gave way, causing him to fall and injure his left knee. Lay Street in this area is 12 feet wide and a low priority road in terms of maintenance priority. The claimant had had prior injuries to his knee requiring surgery. The medical bills arising out of this incident were in the amount of $247.75, all of which were paid on behalf of the claimant by Medicare.

The Court, while sympathetic to the claimant's situation, has determined that the claimant has sustained no compensable loss to date as a result of this incident. Therefore, the Court is constrained by the evidence to deny the claim.

Claim disallowed.

OPINION ISSUED SEPTEMBER 29, 1998

GUY POWELL AND IRENE POWELL
VS.
DIVISION OF HIGHWAYS
(CC-97-19)

John M. Cassell, Attorney at Law, for the claimants.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimants brought this action for personal injuries to claimant Irene Powell which she incurred in an accident on a road maintained by the respondent in Jefferson County. On claimant's motion, the Court bifurcated this claim on the issues of liability and damages. The Court on its own motion dismissed a named claimant, Dale Haller, when it was determined that he was not a party in interest in this claim. The Court will address the issue of liability only.

The incident giving rise to this claim occurred on January 15, 1995. Claimant Irene Powell was driving a 1990 Subaru Loyale station wagon southbound on WV Route 480 near Kearneysville at approximately 7:15 a.m. The weather was dark and it had been raining. Route 480 in this area is a two-lane paved road that is first priority in terms of maintenance priority. The speed limit is 55 miles per hour. The evidence adduced at hearing established that Ms. Powell's vehicle struck a dead tree that had fallen into her lane from the easterly side of the road. As a result of this collision, the vehicle was destroyed and declared a total loss. Ms. Powell sustained personal injuries, including an apparent herniated disc in her neck.

Ms. Powell was driving at approximately 40 miles per hour and, due to the darkness, she stated that she was unable to see the tree across the road in time to avoid it. Her vehicle veered to the left after striking the tree and came to rest on the east roadway edge. A limb of the tree broke through the windshield and came within several inches of her head. Route 480 in this area is fairly straight and level. Ms. Powell telephoned her husband from a nearby home.

Mr. Powell came to the scene of the accident and observed that the tree was approximately 40 feet long and approximately 14 to 18 inches in diameter. He estimated that the stump of the tree was approximately six feet from the edge of the pavement and that it appeared to be rotten. He traveled this portion of Route 480 two to three times a month, but he had never noticed the tree before.

Route 480 north of the accident scene is straight and level for approximately 200 to 300 yards. The Court, on its own motion, took a view of the accident scene and

notes for the record that Route 480 in the area of the tree fall is bordered on both sides by extremely dense vegetation and underbrush. The stump which claimant Guy Powell pointed out to the Court as being from the tree which fell onto Route 480 at the time of the accident was located approximately 13 feet from the edge of the pavement. The respondent had mowed the area approximately eight feet from the pavement as was evident from the mowing line at the edge of the road.

The respondent's position is that it had no prior notice of the dead tree. The tree fell from an area dense with underbrush and various size trees. There is no duty on the part of the respondent to examine areas adjacent to the road for dead trees unless such a tree was obviously a hazard to the traveling public. During respondent's routine maintenance of the berm there was no reason for employees to notice a particular tree in the dense woods along Route 480. Therefore, respondent was not negligent in its maintenance of Route 480 on the date of claimant Irene Powell's accident.

It is well established that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947) It is further the general rule of this Court that in order to hold the respondent liable for defects of this type, the claimant must prove that the respondent knew or should have known of the hazard. *McIe vs. Dept. of Highways*, 16 Ct. Cl. 79 (1986). The Court, upon the basis of testimony at the hearing as well as its own examination of the accident scene, is of the opinion that there is insufficient evidence of negligence on the part of the respondent upon which to justify an award. The tree was located in an area covered by dense underbrush that would have concealed it during any season, summer or winter. It is the opinion of the Court that the respondent had no actual or constructive notice of this hazard.

Although the Court is aware of the serious nature of the accident which occurred on January 15, 1995, the facts and circumstances of this claim are such that negligence on the part of the respondent has not been established by the evidence. In accordance with the findings of fact and conclusions of law as stated herein above, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED SEPTEMBER 29, 1998

ROSE HILL FARMS, INC.
VS.
DIVISION OF HIGHWAYS
(CC-98-42)

Clyde M. See, Jr., Attorney at Law, for claimant.

Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action seeking payment for snow removal services performed at the request of the respondent in Hampshire County, for which the claimant has not been paid.

In early January 1996, West Virginia experienced a severe snow storm resulting in approximately 44 inches of new snow in Hampshire County. Many roads throughout the county were impassable. The respondent's employees were working around the clock in snow removal. A Federal disaster emergency was declared for the county, and the respondent contacted a number of contractors to assist in snow removal.

The claimant herein is a poultry farm located on County Route 50/8 (Heidi Cooper Road.) Heidi Cooper Road is a tar and chip road that is secondary in terms of maintenance priority and intersects with US Route 50 in the vicinity of Shanks. The evidence established that employees of the respondent and Alan R. Timbrook, Vice President of the claimant corporation, engaged in several telephone conversations regarding snow removal operations for opening Heidi Cooper Road. At some point, an agreement was reached whereby the respondent agreed that the claimant would use a bull dozer to re-open Heidi Cooper Road. The claimant now seeks $2,850.00 in compensation for these snow removal services.

The issue before the Court is whether an oral contract for snow-removal services was entered into by the parties. Claimant corporation operates two chicken breeder houses on Heidi Cooper Road. The evidence adduced at hearing established that at the time the claimant had rented a bull-dozer from McCauley Excavating for work on the claimant's property. The respondent or another contractor had previously opened Heidi Cooper Road, but blowing snow had made it impassable within a few hours. Mr. Timbrook contacted the respondent and was eventually given permission to plow the snow in order to re-open the road. Mr. Timbrook testified that he was instructed to submit a bill to the respondent's district headquarters. Approximately two and three-quarter miles of the road was plowed. Mr. Timbrook then submitted a bill in the amount of $2,850.00, representing 19 hours of work over two days, or approximately $150.00/hour for the dozer, fuel and operator costs.

Mr. Timbrook was of the opinion that he was faced with an emergency because he was low on feed for the chickens and he needed to get eggs delivered on behalf of the corporation. The evidence indicates that there are at least three businesses located on this road.

Respondent's normal practice for obtaining emergency snow removal services is to contract with equipment operators at a pre-set rate. McCauley Excavating had previously quoted a snow removal price of $85.00 per hour. The evidence established herein that the parties did not agree on a pay rate during the course of their conversations. The respondent's evidence further established that a number of poultry

houses and coal mines in the area also assisted in snow removal.

The Court is of the opinion that while there appears to be insufficient evidence of an agreement on rate of compensation, that the respondent, nevertheless was the beneficiary of snow removal services performed by the claimant with the understanding that the claimant would be compensated. Therefore the Court is of the opinion that the respondent has a moral obligation to compensate the claimant based upon theory of *quantum meruit*, for the full amount of the claimant's bill.

Award of $2,850.00.

OPINION ISSUED SEPTEMBER 29, 1998

RAY C. STRADER
VS.
DIVISION OF HIGHWAYS
(CC-97-51)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action alleging that the respondent has failed to maintain an access road to his property, thereby resulting in damage to vehicles and lost use of property.

The claimant lives on Roads Run Road, (County Route 1/3) near Orlando, Braxton County. The claimant has alleged that approximately 1/10 of a mile of this road is in a creek bed and that the respondent has failed properly to maintain the road to cure ensuing drainage problems. County Route 1/3 is a third priority rock-based road. The State's right of way is 30 feet wide in this area. The evidence at hearing established that when it rains hard, the road is impassable for three to six hours afterwards. The claimant testified that the water has caused damage to exhaust, brakes, cylinder heads and suspension on his vehicles, and has also prevented full use of some of the houses in the area.

It was the respondent's position that it is responsible for many unpaved roads in the county and that is not uncommon for low priority roads such as this to run through creek beds. The respondent's evidence further indicated that adjacent land-owners have been unwilling to transfer land for purposes of moving the road, but that some improvements were planned for the road in the near future.

It is the well established that the State is neither an insurer nor a guarantor of the safety of motorists on its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947)

Consistent with *Adkins*, the Court has held that it will not dictate road maintenance priorities to the respondent regarding its discretionary responsibilities. In view of the foregoing, the Court is of the opinion that there is insufficient evidence of negligent conduct on the part of the respondent upon which to base an award. Accordingly, the Court does hereby deny the claim.

Claim disallowed.

OPINION ISSUED SEPTEMBER 29, 1998

CINDY TERRY
VS.
DIVISION OF HIGHWAYS
(CC-97-330)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her vehicle after encountering a sunken culvert pipe on a road maintained by the respondent in Fayette County.

The incident giving rise to this claim occurred on August 15, 1997, at approximately 10:00 p.m. The claimant was driving her 1989 Toyota Celica on Gatewood Road (County Route 14) in the vicinity of Wilson Street. The weather was clear and dry. County Route 14 in this area is a two-lane paved road. The evidence adduced at hearing was that as the claimant approached the Wilson Street intersection, a second vehicle pulled out of Wilson Street headed towards Oak Hill. The claimant testified that she had to steer to the right to avoid striking the second vehicle. The claimant's vehicle dropped off the road into a hole where a culvert pipe had been installed. The claimant's vehicle apparently struck the culvert pipe and sustained a flat tire. The claimant submitted into evidence a repair bill in the amount of $63.58. The claimant carried liability coverage only.

The claimant testified that she was traveling approximately 40 miles per hour. Photographs introduced into evidence indicate that there was a culvert pipe in the immediate vicinity, located in a large hole approximately two to three feet from the edge of the road. The evidence also indicated that there were several bad shoulders in the immediate vicinity.

The Court has held that when a motorist proceeds onto the berm voluntarily, he takes the berm as he finds it. However, when a motorist is forced to use the berm in the event of an emergency, then the respondent may be held liable for failure to maintain

the berm in a reasonably safe condition. *Meisenhelder vs. Dept. of Highways*, (CC-88-149), unpublished opinion issued August 10, 1990. The Court is of the opinion that the claimant was forced off the traveled portion of the road in an emergency and that the respondent should be held liable for failure properly to maintain the berm in a reasonably safe condition. Therefore, the Court makes an award to the claimant in the amount of $63.58.

Award of $63.58.

OPINION ISSUED SEPTEMBER 29, 1998

LEE EDWARD WOLFE
VS.
DIVISION OF HIGHWAYS
(CC-97-99)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his 1988 Dodge Lancer, which occurred when the vehicle encountered rough rocks on a road maintained by the respondent in Webster County.

The incident giving rise to this claim occurred on May 21, 1996. The claimant's wife was driving on County Route 26/1 (Bergoo Road) when the vehicle encountered an area where the road had washed out. The vehicle struck one or more large rocks placed in the road by the respondent for purposes of rebuilding the road. The vehicle sustained a broken oil pan, but no engine damage. The claimant submitted into evidence a repair bill in the amount of $76.85. The claimant had a $250.00 insurance deductible.

Route 26/1 in this area is a second priority road in terms of maintenance priority. The evidence adduced at hearing established that the area along the upper Elk River had experienced severe flooding during the winter of 1996, resulting in a washout of the road in several areas. The respondent had been repairing the road in several places with river rock to stabilize it prior to applying crushed aggregate.

It is well established that the respondent is neither an insurer nor a guarantor of the safety of motorists upon its roads and highways. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). The Court is of the opinion that the respondent was working diligently in the course of repairing the road in question and that there is insufficient evidence of negligence upon which to base an award. Therefore, in view of the foregoing, the Court

does hereby deny the claim.

Claim disallowed.

OPINION ISSUED OCTOBER 5, 1998

LOUIS I. BONASSO, DBA COLONIAL VILLAGE
VS.
DEPARTMENT OF ADMINISTRATION
(CC-98-251)

Scot S. Dieringer, Attorney at Law, for claimant.
William J. Charnock, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and a Stipulation agreed to by the parties in an appearance before the Court on the 24th day of September, 1998.

Claimant seeks $14,935.99 for amounts due claimant for utilities in accordance with the terms of a Contract of Lease for space rented for and on behalf of Fairmont State College. The documentation for the portion of the rent in question was not properly processed for payment by the respondent in the appropriate fiscal year. Respondent admits the validity of the claim and further states that respondent expired sufficient funds in the 1998 fiscal year with which to pay the amount at issue herein.

In view of the foregoing, the Court makes an award to the claimant in the amount of $14,935.99.

Award of $14,935.99.

OPINION ISSUED OCTOBER 5, 1998

RONALD R. CLOUD
VS.
DIVISION OF CORRECTIONS
(CC-97-327)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for the respondent.

PER CURIAM:

The claimant brought this action for funds that were misappropriated from his inmate account at the Mt. Olive Correctional Complex, a facility of the respondent.

The claimant states that on or about June 5, 1997, at approximately 12:56 p.m., an unidentified person spent $73.45 from his inmate trustee account to purchase goods from the state commissary.

The respondent's normal practice was to allow inmates to access their accounts by means of an inmate identification card for purchases at the commissary. It was the respondent's position that several inmates had been altering inmate identification cards for the purpose of making illegal purchases at the store. The respondent's position was that this practice arose as a result of inmates allowing their cards to be altered for the purpose of satisfying debts, and that therefore the respondent would not reimburse inmates for mis-appropriation of inmate funds.

The Court is of the opinion that the respondent was in control and custody of the claimant's funds, that a bailment existed, and that the respondent was negligent in exercise of its responsibility to oversee aforesaid moneys. Therefore, in view of the foregoing, the Court makes an award in the amount of $73.45.

OPINION ISSUED OCTOBER 5, 1998

CHARLES FRANKLIN
VS.
DIVISION OF CORRECTIONS
(CC-87-469)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for the respondent.

PER CURIAM:

The claimant brought this action for loss of a 12-inch black and white television, which was lost when the claimant was transferred from the general population to the segregation unit at the former State Penitentiary in Moundsville, a facility of the respondent.

The claimant testified that following a prison disturbance in 1986, a number of inmates were moved to the segregation unit in North Hall. During this move a number of items of personal property were left in the cells to be transferred later. The claimant testified that he never recovered the television. He seeks $75.64 in compensation.

The evidence adduced at hearing indicates that the claimant filed a grievance

concerning several items of personal property which were lost at the time of the move, but a television was not among these. The respondent's position was that it had no record of the claimant owning a television prior to 1995.

The Court, after review of the record, is of the opinion that there is insufficient evidence upon which to justify an award. No television was mentioned in the claimant's grievance form with the respondent. Further, the claimant's brother was also in North Hall and also had a television. The Court cannot speculate as to which if any television was lost or taken. Therefore, in view of the foregoing the Court is constrained by the evidence to deny the claim.

Claim disallowed.

OPINION ISSUED JANUARY 23, 1998

CHARLES RAY GIBSON
VS.
DIVISION OF CORRECTIONS
(CC-97-288)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for the respondent.

PER CURIAM:

The claimant seeks compensation for items of personal property which were lost or stolen while the claimant was in custody of the State Penitentiary at Mt. Olive.

The claimant states that several items of personal property, including a watch, family pictures and legal materials were taken from him over the course of several months in 1997. The claimant testified that the property disappeared on various occasions when he was out of his cell, or had been transferred to medical facilities for treatment and observation. It should be noted that voluntary acts of the claimant were the cause of his absence from the cell.

It was the respondent's position that it was unaware of the missing items and that it has no obligation to the claimant to pay for lost property. The Court, after review of the evidence, is of the opinion that there is insufficient evidence upon which to justify an award. It is unclear why or how the items were lost and there is insufficient evidence of negligent conduct on the part of the respondent sufficient to warrant an award. There is substantial evidence that the conduct of the claimant contributed to his loss, if any.

Claim disallowed.

OPINION ISSUED OCTOBER 5, 1998

VERNON H. JOHNSON AND BETTY J. JOHNSON
VS.
DIVISION OF HIGHWAYS
(CC-96-607)

Claimant represents self.
Julie Meeks, Attorney at Law, for the respondent.

PER CURIAM:

Claimants brought this action for damage to their vehicle after claimant Betty J. Johnson was driving the vehicle and she drove into a hole in a road maintained by the respondent in Braxton County. The Court on its own motion amended the claim to reflect the proper parties.

The incident giving rise to this claim occurred on September 23, 1996, at approximately 4:00 p.m. Claimant Betty Johnson was driving a 1995 Dodge Stratus southbound on WV Route 4 in Flatwoods between a bowling alley and a Go-Mart convenience store. The evidence adduced at hearing established that the claimant encountered a large hole in the road, resulting in a flat tire and a bent wheel rim. The claimant submitted repair bills in the amount of $489.10. Claimant's insurance deductible was in the amount of $500.00.

The hole in question was described as approximately 12 to 14 inches in diameter. At the time, the respondent had hired an outside contractor who was engaged in paving activities in the area at the approximate time of the claimant's accident. Under the terms of this paving contract, the respondent was to be held harmless from any damages that might arise as a result of the performance of the paving work. The evidence is conflicting as to whether the claimant's accident occurred during the performance of this contract or at some earlier time. However, at some point in this general time frame, the respondent received a complaint about the road and completed an examination at which time no large holes were discovered.

It is well established that the respondent is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins. vs. Sims*, 46 S.E.2d 81 (1947). In order to hold the respondent liable for defects of this type, the claimant must prove that the respondent knew or had reason to know of the defect. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The Court, while sympathetic to the claimants' position, is of the opinion that there is insufficient evidence of negligence on the part of the respondent upon which to base an award. Therefore, in view of the foregoing, the Court is constrained by the evidence to deny the claim.

Claim disallowed.

OPINION ISSUED OCTOBER 5, 1998

DEWAINE C. KING
VS.
DIVISION OF CORRECTIONS
(CC-96-562)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for the respondent.

PER CURIAM:

The claimant brought this action seeking compensation for an electronic chess set which was lost when the claimant escaped from Charleston Work and Study Release Center, a facility of the respondent.

The incident giving rise to this claim occurred on April 29, 1996, when the claimant failed to return to the Charleston Work Release Center after expiration of his pass. The respondent immediately conducted an inventory of his personal property which was in two locked storage lockers. The locks were cut, and some time thereafter, the claimant alleges that the chess set was taken.

The claimant testified at hearing that he was forced to go into hiding because of an attempt on his life. The claimant testified that while on a two-hour pass from the Work Release Center, an unidentified individual shot at him, prompting him to flee the Charleston area. The claimant was apprehended within 24 hours. It was the claimant's position that the respondent should have protected his property during his absence. The claimant stated that the value of the missing chess set was $125.00.

An incident report generated by the respondent was admitted into evidence which established that shortly after the claimant's escape, the respondent opened the two storage lockers, but that no chess set was discovered at that time.

The Court, while not unsympathetic to the claimant's position, is of the opinion that there is insufficient evidence upon which to base an award. The Court cannot speculate as to whether the claimant had a chess set in his storage lockers at the time of his escape. Further, it appears to the Court that claimant abandoned his personal property when he elected not to return to the facility. Therefore, in view of the foregoing, the Court is constrained by the evidence to deny the claim.

Claim disallowed.

OPINION ISSUED OCTOBER 5, 1998

NETWORK SIX, INC.
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-98-219)

Paul G. Papadopolous, Attorney at Law, for the claimant.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant seeks $19,175.00 for enhancements to the respondent's child support enforcement system. The documentation for these services was not properly processed for payment by the respondent in the appropriate fiscal year. In its Answer, the respondent admits the validity of the claim and the amount. Respondent further states that there were sufficient funds available during the fiscal year in question with which to pay the claim.

In view of the foregoing, the Court makes an award in the amount of $19,175.00.

Award of $19,175.00.

OPINION ISSUED OCTOBER 5, 1998

JAMES A. NICHOLAS
VS.
DIVISION OF PUBLIC SAFETY
(CC-97-217)

Claimant represents self.
Stephanie Sisson, Assistant Attorney General, for the respondent.

PER CURIAM:

The claimant brought this action for damage to two handguns which occurred when the guns were taken into evidence pursuant to a criminal investigation by the respondent. The Court is of the opinion to deny the claim as stated more fully below.

On or about September 8, 1995, the respondent confiscated two handguns, property of the claimant, in the course of investigating a shootout and hostage incident in Nicholas County. Several shots were fired during this incident, which involved the claimant, his brother-in-law, the claimant's sister, and her 10-month-old baby. The

claimant's brother-in-law, Steve Stout, was taken into custody and subsequently plead guilty to wanton endangerment. The claimant was not charged. As part of their normal procedure, the respondent's investigating State trooper scratched the frame of the handguns with his initials for evidentiary purposes at trial. The initials did not impair the firing mechanism. The claimant seeks $212.00 in compensation representing the lost value of the handguns due to their appearance.

It was the claimant's position that the respondent should have marked the guns with tags, or used the serial number of the firearms, instead of scratching initials on the weapons. However, the respondent's evidence was that normal State police procedure required scratching initials on the weapons for accurate and reliable evidence identification. Therefore, in view of the foregoing, the Court finds that the respondent acted reasonably and that there is insufficient evidence upon which to base an award.

Claim disallowed.

OPINION ISSUED OCTOBER 5, 1998

QUALITY MARKETING, INC.
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY SYSTEM
(CC-96-84)

Larry W. Chafin, Attorney at Law for the claimant.
Gregory S. Skinner, Attorney at Law, for the respondent.

STEPTOE, JUDGE:

The claimant brought this action for damages resulting from an alleged breach of contract for the purchase of coal at the respondent's Morgantown campus. The Court is of the opinion that the respondent acted in a commercially reasonable manner within the provisions of the Uniform Commercial Code, and denies the claim as stated more fully below.

On or about May 26, 1987, the claimant and the respondent (Board of Regents) entered into a contract whereby the claimant agreed to furnish to the respondent the annual coal requirements for West Virginia University's three heating plants in Morgantown. The contract provided that the claimant would provide an estimated 30,000 tons of coal, at the price of $28.94 per ton, from June 1, 1987, to May 31, 1988. The contract was thereafter renewed for a period of one year, beginning June 1, 1988. Under the general conditions of the contract the claimant was to maintain a stock pile of coal at the three named West Virginia University locations as follows:

Medical Center Heating Plant – 800 tons;

Beechurst Heating Plant – 600 tons;
Evansdale Heating Plant – 300 tons.

At some point in late May or June 1988, the respondent notified the claimant that it would no longer accept coal for its heating plants. The evidence adduced at hearing established that the respondent's coal-fired heating plants had been violating particulate emissions standards set by the WV Air Pollution Control Commission, hereinafter the Commission. In order to remedy the situation, the respondent had been converting the boilers in the three heating plants to burn natural gas. Pursuant to the terms of a consent decree with the Commission, the respondent agreed to convert the boilers to natural gas by January 15, 1989. The evidence at hearing established that this natural gas conversion was the primary reason that the respondent declined further coal shipments from the claimant. The last shipment of coal was delivered to the Medical Center plant on or about May 23, 1988.

It was the claimant's position that the respondent breached the renewal contract by declining further coal shipments after June 1, 1988. The claimant alleged damages in the amount of $60,000.00, representing a profit margin of two dollars ($2.00) per ton on the estimated annual coal requirement of 30,000 tons. The respondent's position was that its decision to discontinue coal shipments was made in good faith in accordance with the provisions of the West Virginia Uniform Commercial Code WV Code §46-2-306 and the aforementioned consent decree.

DISCUSSION

The evidence adduced at hearing established that the respondent's coal-fired heating plants had been in violation of WV Pollution Control Commission emissions standards for some time prior to the alleged breach of the renewal contract in late May or June 1988. The claimant was aware of this ongoing problem and during the 1987 and 1988 endeavored to persuade the respondent to install flue gas recirculation systems at its heating plants in order to continue to burn coal with less pollutant emissions. The claimant offered to finance the installation of this new technology, which could have resulted in significant short-term and long-term savings to the respondent. The evidence indicated that during the relevant time period, the cost difference between burning coal and natural gas ranged between approximately $2.00 and $4.00 per million BTU. The savings from burning coal as opposed to natural gas were estimated at up to $968,000.00 per year.

The evidence established that the respondent declined the claimant's offer because the Commission was unable to certify beforehand that the flue gas recirculation system would comply with the air pollution emission standards. Instead the respondent contracted with Hope Gas, Inc., as its primary supplier of natural gas at its heating plants and its principal agent in charge of the natural gas conversion.

At some point in January 1988, a dispute arose between the parties regarding the quality of the coal provided by the claimant. The evidence was that the respondent

conducted on-site tests which revealed, among other things, high ash and sulfur contents. Quality Marketing president Jeff Votaw testified that these problems were remedied by March 1988, when he switched to a different coal supplier. He stated that the alleged damages were limited to lost profits in the amount of $60,000.00, based upon an anticipated 30,000 tons of coal to be delivered on the renewal contract. His testimony indicates that claimant suffered no direct out-of-pocket loss as a result of the respondent's conduct.

Mr. Votaw testified that prior to the 1987-1988 contract period, he had been providing approximately 30,000 tons of coal annually to the respondent under a similar agreement. However, the evidence established that Quality Marketing provided only approximately 11,000 tons of coal during the 1987-88 contract year. The evidence established that in 1987 Mr. Votaw was well aware of the University's emissions problems and had reason to know that the respondent's coal requirements might diminish significantly in the near future. Mr. Votaw testified that he knew in the summer of 1987 that the conversion to natural gas was inevitable.

WV Code §46-2-306(1) of the Uniform Commercial Code governing requirements contracts provides as follows:

A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

The official comment provides that the party who will determine the quantity is required to operate his plant or conduct his business in good faith so that his output or requirements will approximate a reasonably foreseeable figure. The comment also states that reasonable elasticity is envisaged, and good faith variations from prior requirements are permitted even when variation may result in discontinuance. The statute and comments do not clearly distinguish between quantity decreases or increases and the Court finds it unnecessary to speculate on this matter.

After careful review of all the evidence, the Court is of the opinion that the respondent's coal requirements for the period governing the contract renewal diminished to zero as a direct and proximate result of the unlawful emissions from its coal-fired heating plants and the ensuing consent order with the WV Air Pollution Control Commission. The Court finds that the respondent conducted its affairs at all times in good faith and that the claimant knew or had reason to know that the respondent's coal requirements for the 1988-89 contract renewal period would be unpredictable, at best. Therefore, in view of the foregoing, the Court does hereby deny the claim.

Claim disallowed.

OPINION ISSUED OCTOBER 5, 1998

MICHAEL WAYNE RATLIFF
VS.
DIVISION OF CORRECTIONS
(CC-98-6 and CC-96-308)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for the respondent.

PER CURIAM:

The claimant brings this action for compensation for items of property that he alleges were stolen while in the custody at the State Penitentiary at Mt. Olive. On its own motion, the Court consolidated this claim together with CC-96-308, a previous claim alleging improper disbursement from the claimant's Inmate Trustee Account. The Court takes official notice of the proceedings heretofore conducted in CC-96-308 and incorporates those proceedings in this claim.

The chain of events giving rise to these claims is as follows. On or about February 2, 1996, $750.00 was removed from the claimant's inmate account by way of a forged voucher. It was uncontroverted that the neither the signature of the claimant nor the approving correctional officer were valid. The claimant filed a claim for compensation and by order entered March 4, 1997, the Court dismissed the claim without prejudice pending further investigation by respondent. Pursuant to an in-house investigation and administrative hearing, another inmate was ordered to pay restitution in the amount of $500.00, of which only approximately $80.00 has been paid.

On January 12, 1998, the claimant filed a second claim alleging that a color printer and approximately fifteen computer games were taken from his cell on or about January 20, 1996, when the claimant was placed in administrative lock up.

The evidence adduced at hearing established that the claimant filed a grievance with respondent regarding these missing items. The claimant submitted into evidence receipts in the amount of $1,114.96 for the games and further testified that the printer was worth $500.00. The respondent's position was that these items of property were being held as evidence pending a criminal investigation of the claimant relating to activities while incarcerated.

The Court, after review of the record in both claims, finds as follows: Regarding the first claim for the $750.00 forged voucher, the respondent has ordered restitution in the amount of $500.00 and the Court will not substitute its judgment in this matter. The Court makes an award in the amount of $250.00 to the claimant, which amount represents the loss sustained by the claimant.

Regarding the second claim, the Court is of the opinion that the property at issue has been withheld for the purposes of an ongoing criminal investigation.

Respondent's Exhibits Nos. 1 and 2 substantiate the respondent's position. Therefore, the Court is of the opinion that any decision necessarily must be held in abeyance until the investigation is completed. The Court directs the Clerk of the Court to obtain a copy of the report stating the results of the investigation when it is filed with the respondent State agency by the proper authorities.

Award of $250.00.

OPINION ISSUED OCTOBER 5, 1998

SHERI L. SAYRE
VS.
DIVISION OF HIGHWAYS
(CC-97-282)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her 1995 Pontiac Grand Prix, after encountering a hole along the edge of a road maintained by the respondent in Mason County. The Court is of the opinion to make a comparative award to the claimant as stated more fully below.

The incident giving rise to this claim occurred on June 20, 1997, at approximately 9:35 p.m. The claimant, her husband, and their child were traveling southbound on WV Route 2 in the vicinity of Gallipolis Ferry. The claimant's husband, Larry Sayre, was driving. Route 2 in this area is a well-traveled, two-lane, paved road. The weather was dark, but clear. The evidence adduced at hearing was that the claimant's vehicle encountered a large depression on the edge of the pavement along the berm. The vehicle sustained two bent rims and two flat tires on the passenger side. The claimant submitted into evidence repair bills in the amount of $908.80. The claimant carried liability insurance only.

Mr. Sayre testified that he was driving approximately 40 miles per hour and that traffic was normal. The hole in question was located approximately 50 feet past a railroad crossing. The hole was described as running approximately seven feet along the edge of the pavement and extended into part of the outside white line denoting the edge of the travel portion of the lane. The claimant submitted into evidence a number of photographs and a video tape establishing that the hole was of significant length and was approximately six to eight inches in depth. It was the respondent's position that it had no prior notice of the hole in question.

It is well established that in order to hold the respondent liable for road defects of this nature, the claimant must establish that the respondent had actual or constructive notice. *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986) The Court is of the opinion that a defect of this size would have developed over a significant amount of time and that the respondent had reason to know of the hole in question and had a reasonable opportunity to take remedial action. However, the Court also finds that the driver was 40 percent at fault for failing to adequately maintain control. Therefore, in view of the foregoing and in accordance with the established principles of comparative fault, the Court makes a 60 percent award to the claimant in the amount of $545.28 for the damages to her vehicle.

Award of $545.28.

OPINION ISSUED OCTOBER 5, 1998

EARL SAXTON
VS.
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
CC-97-69)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for the respondent.

PER CURIAM:

The claimant brought this action for compensation for items of jewelry which disappeared while the claimant was in custody at the South Central Regional Jail, a facility of the respondent. The respondent, having stipulated to liability, the sole issue remaining for the Court is a reasonable amount of damages.

The claimant was an inmate at the South Central Regional Jail in the summer of 1995. Upon his release on July 22, 1995, he received all his personal property except three gold necklaces and an anchor pendant. The respondent admitted that these items were in the claimant's possession at the time of commitment and that they had disappeared.

The claimant seeks an award of $4,000.00. The respondent in its Answer states that the amount claimed is excessive. The necklaces were described by the claimant as three 10-karat, 22-inch Figaro chains. The claimant testified at hearing that the purchase price for each chain was approximately $1,000.00, and the purchase price for the pendant was approximately $600.00. The claimant introduced into evidence an estimate from the Friedman's jewelry store in Charleston, WV, indicating that each

chain was worth $1,200.00. The claimant had no receipts.

The claimant testified that he purchased these items from Friedman's on an installment basis between 1993 and 1995. The Court is of the opinion that a bailment existed and that the claimant is entitled to an award. The Court has the uncorroborated testimony of the claimant as to the description of the missing items and an estimate from the jewelry store based on such description. Absent further proof of the actual purchase price of the jewelry, or other rebuttal evidence proffered by the respondent, the Court is constrained by the evidence arbitrarily to establish the value and to make an award in the amount of $2,000.00.

Award of $2,000.00.

OPINION ISSUED OCTOBER 5, 1998

DAVID WELCH
VS.
DIVISION OF CORRECTIONS
(CC-97-420)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for the respondent.

PER CURIAM:

The claimant brought this action for $40.00 representing the value of a sweat suit that was lost when the claimant sent his clothes to the laundry facilities at the Mt. Olive Correctional Complex, a facility of the respondent.

The evidence adduced at hearing established that on or about June 3, 1997, the claimant sent his laundry to be washed and when his clothes came back a gray sweat shirt and gray sweat pants were missing. It was the respondent's normal practice to issue sweat suits to inmates in gray or blue. Inmates are also allowed to wear their personal clothing. The respondent's practice is to provide laundry service to inmates, and each inmate is provided a laundry bag marked with a D.O.C. identifying number. The respondent has expressly disclaimed any responsibility for the loss or theft of items of personal clothing from the respondent's laundry room.

The claimant testified that the sweat pants were his personal property and the sweat shirt was provided by the respondent. The evidence indicates that when the claimant was transferred to the Mt. Olive complex, he exchanged a different colored sweatshirt for the state-issued gray sweat shirt that he now claims was lost or stolen.

The Court has previously held that the respondent will not be held liable for items of personal clothing that are lost or stolen in the laundry room. However, the

evidence indicates that the sweat shirt was provided by the respondent, which has custody and control of the claimant. In view of the foregoing, the Court is of the opinion that the respondent should compensate the claimant in the amount of $15.00, representing a fair and reasonable value of a sweat shirt.

Award of $15.00.

OPINION ISSUED NOVEMBER 9, 1998

CABELL COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-98-295)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

The claimant, Cabell County Commission, is responsible for the incarceration of prisoners who have committed crimes in Cabell County, but have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. The claimant brought this action to recover $80,775.00 in costs for providing housing for prisoners who have been sentenced to a state penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the custody of the county for periods of time beyond the date of the commitment order.

The Court previously determined in *County Commission of Mineral County vs. Division of Corrections*, unpublished opinion issued November 21, 1990, CC-89-340, that the respondent is liable to the claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, the respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $80,775.00.

In view of the foregoing, the Court makes an award to the claimant in the amount of $80,775.00.

Award of $80,775.00.

OPINION ISSUED NOVEMBER 9, 1998

MARION COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-98-296)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

The claimant, Marion County Commission, is responsible for the incarceration of prisoners who have committed crimes in Marion County, but have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. The claimant brought this action to recover $54,629.66 in costs for providing medical expenses and housing for prisoners who have been sentenced to a state penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the custody of the county for periods of time beyond the date of the commitment order.

The Court previously determined in *County Commission of Mineral County vs. Division of Corrections*, unpublished opinion issued November 21, 1990, CC-89-340, that the respondent is liable to the claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, the respondent reviewed this claim to determine the amount due for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $54,629.66.

In view of the foregoing, the Court makes an award to the claimant in the amount of $54,629.66.

Award of $54,629.66.

OPINION ISSUED NOVEMBER 9, 1998

MCDOWELL COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-98-294)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

The claimant, McDowell County Commission, is responsible for the incarceration of prisoners who have committed crimes in McDowell County, but have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. The claimant brought this action to recover $65,766.30 in costs for providing housing for prisoners who have been sentenced to a state penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the custody of the county for periods of time beyond the date of the commitment order.

The Court previously determined in *County Commission of Mineral County vs. Division of Corrections*, unpublished opinion issued November 21, 1990, CC-89-340, that the respondent is liable to the claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, the respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $65,766.30.

In view of the foregoing, the Court makes an award to the claimant in the amount of $65,766.30.

Award of $65,766.30.

OPINION ISSUED NOVEMBER 9, 1998

OLYMPIC CENTER-PRESTON, INC.
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-97-308)

Margaret A. Droppleman, Attorney at Law, for the claimant.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer and Amended Answer.

Claimant seeks $39,223.00 in Medicaid reimbursement for substance abuse

treatment for adolescents at the claimant's facility pursuant to court orders. Payment was initially denied on the basis that the claimant did not receive prior authorization for treatment from West Virginia Medical Institute. The respondent's Amended Answer admits the validity of the claim, but states that the proper amount is $19,611.50, to which the claimant is in agreement.

Therefore, the Court is of the opinion to and does hereby make an award in the amount of $19,611.50.

Award of $19,611.50.

OPINION ISSUED NOVEMBER 9, 1998

TAYLOR COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-98-88)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

The claimant, Taylor County Commission, is responsible for the incarceration of prisoners who have committed crimes in Taylor County, but have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. The claimant brought this action to recover $30,000.00 in costs for providing housing for prisoners who have been sentenced to a state penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the custody of the county for periods of time beyond the date of the commitment order.

The Court previously determined in *County Comm'n. of Mineral County vs. Div. of Corrections*, unpublished opinion issued November 21, 1990, CC-89-340, that the respondent is liable to the claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, the respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $30,000.00.

In view of the foregoing, the Court makes an award to claimant in the amount of $30,000.00.

Award of $30,000.00.

OPINION ISSUED NOVEMBER 9, 1998

UNITED STATES DEPARTMENT OF AGRICULTURE
VS.
WV DEPT. OF AGRICULTURE
(CC-98-320)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant seeks $17,453.78 in contractual predator management services rendered in designated counties for the benefit of the respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim and the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $17,453.78.

Award of $17,453.78.

OPINION ISSUED NOVEMBER 9, 1998

UNIVERSITY HEALTH ASSOCIATES
VS.
DIVISION OF CORRECTIONS
(CC-98-300)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment in the amount of $71,530.20 for medical services

rendered to various inmates committed to the custody of the respondent in the Huttonsville and Pruntytown correctional centers, as well as to state inmates in custody in the Monongalia County Jail. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

While the Court believes that this is a claim which in equity and good conscience should be paid, the Court further believes that an award cannot be recommended based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED JANUARY 26, 1994

CHARLES MEADE AND CRYSTAL MEADE
VS.
DIVISION OF HIGHWAYS
(CC-91-170)

ARTHUR MEADE AND CHARLOTTE MEADE
VS.
DIVISION OF HIGHWAYS
(CC-91-171)

NORMA OOTEN AND LON OOTEN
VS.
DIVISION OF HIGHWAYS
(CC-91-172)

John R. Mitchell, Attorney at Law, for claimants.
Glen A. Murphy, Attorney at Law, for respondent.

BAKER, JUDGE;

All of the claimants are residents and property owners in Dingess, Mingo County, who live on the Big Sang Kill Creek, a branch of Twelve Pole Creek. Their claims have been consolidated in accordance with Rule 12 (a) of the Rules of Civile Procedure. Claimants seek awards for property damage sustained when a flood occurred on June 15, 1989.

The claimants allege that the respondent was negligent in replacing a bridge located over Big Sang Kill creek and abutting W.Va. Route 3/5, otherwise known as

Dingess Road, with a culvert which was inadequate to carry the flow of water; thereby causing the creek to overflow onto their property during a storm on June 15, 1989.

The respondent admits that the bridge was replaced with a seventy-two inch culvert a few months prior to June 15, 1989. This was done at the request of a nearby property owner. Apparently, the existing bridge has begun to deteriorate and emergency vehicles were unable to cross the bridge. There is evidence in the record that several of the residents of Dingess informed the respondent during the installation of the culvert that it would not be sufficient to carry the flow of water from the creek. However, the residents were informed by the respondent's crew that there were orders to install the new culvert. The respondent denies the aggregation that it knowingly installed a culvert insufficient to accommodate the flow of water and contends that the area flooding due to an excessive amount of rainfall.

The evidence at the hearing of this claim on February 24, 1993, established that it began to rain at approximately 11:00 a.m. on June 15, 1989, and by approximately 2:00 p.m. the water in Big Sang Kill Creek began to rise. The creek crested at approximately 4:30 or 5:00 p.m. and most of the damage to claimants' properties occurred at that time. Later that evening, the water from the Big Sang Kill Creek began to lower and the water from the Twelve Pole Creek began to rise. It crested at approximately 9:00 p.m.

Witnesses stated that the opening at the mouth of the Big Sang Kill Creek was larger when the bridge was in existence. Later, when the culvert was installed by the respondent, dirt and gravel were filled in around the culvert to hold it in place, thereby creating a smaller area of flow for the water. As the water rose in the Big Sang Kill Creek , it was unable to pass through the culvert fast enough to avoid backing up. Finally, the water began to flow over the top of the culvert creating a waterfall effect on the downstream side of the culvert. Witnesses stated that there was no debris caught in the culvert. The culvert opening simply was not large enough to accommodate the flow of water.

Tahir Qureshi, a design engineer for respondent, testified that the reason for the flood was the fact that Twelve Pole Creek rose to a level that was high enough to back up the water in Big Sang Kill Creek. The size of the culvert did not cause the flood. This testimony appears to be inconsistent with the evidence that Twelve Pole Creek did not begin to rise until the Big Sang Kill Creek had already flooded. Also, Mr. Qureshi stated on cross examination that the culvert was not designed to take all the water from Big Sang Kill Creek and that when the seventy-two inch pipe was installed it choked down the size of the channel considerably.

Norma and Lon Ooten both testified that they live in a mobile home which is located near the mouth of the Big Sang Kill Branch and Twelve Pole Creek and is approximately seventy-five feet from the culvert. They have lived at this location since 1996. Prior to June 15, 1989, their property had never experienced flooding. On June 15, 1989, the flood waters came within one inch of entering their mobile home. As a

result of the water, their property sustained substantial damage. The damage sustained includes, but is not limited to the following: the duct-work of the forced-air heating system was damaged by water and sediment; the insulation under the floor was damaged; the block foundation settled in certain places, causing cracks in the blocks; the mobile home settled unevenly after the flood; the interior trim is misaligned due to uneven settling; the carpets must be replaced due to uneven flooring caused by the flood; and the kitchen ceiling is leaking due to the defects in the foundation.

The Ootens also suffered aggravation from the flooding. They were forced to go without water for ten days due to damage to their water well. They spent a least six hours a day for twenty-one days to clean up their property. Also, Mrs. Ooten experienced psychiatric complications due to the stress of the situation and was a patient in St. Mary's Hospital for twenty-six days. The Ootens received $1,500.00 from an insurance policy for the damage sustained to their water system; however, they received no other benefits for the remainder of the damages or for inconvenience and aggravation.

Charles and Crystal Meade testified that they live in a mobile home near the mouth of the Big Sang Kill Creek and Twelve Pole Creek. The water reached a level even with the floor of their mobile home and caused substantial damage. The damage sustained includes, but is not limited to the following: the particle board flooring was damaged; floor coverings were damaged; the duct-work of the forced-air heating system was damaged by water and sediment; insulation under the floor was damaged; foundation piers settled and the mobile home became tilted and uneven; the rear porch became unattached to the roof, causing it to leak; the floor unit and other materials for a storage building under construction were washed away; and the wells filled with mud. They also suffered physical complications due to the unsanitary conditions. They did not have any insurance coverage for the property damages which their property sustained.

Arthur and Charlotte Meade testified that they also live in a mobile home near the mouth of the Big Sang Kill Creek and Twelve Pole Creek and that they have lived there since 1969. Arthur stated that in 1977 the water entered his yard, but did not enter his mobile home. He also stated that in 1977 the rainfall was much heavier than the rainfall in June of 1989. On June 15, 1989, the water was 10 to 12 inches deep inside their mobile home and caused substantial damage. The damage sustained includes, but is not limited to the following: the particle board flooring was damaged; the floor coverings were damaged; the duct-work of the forced-air heating system were damaged by water and sediment; the insulation under the floor was damaged; the metal skirting was damaged in several places; and the lower part of the interior paneling was damaged. They also lost most of their furniture and had an inch of mud throughout the mobile home. They received $5,000.00 for the damages to their mobile home and its contents from an insurance policy. However, they have not been reimbursed for their excess damages, inconvenience or aggravation.

The Court finds, after reviewing the record, that the claimants have established

negligence on the part of the respondent by a preponderance of the evidence. The Court is of the opinion that the culvert which was installed acted as a dam which disrupted the normal flow of the water from Big Sang Kill Creek into Twelve Pole Creek, thus causing the flooding on claimants' properties. The Court requested documentation from the claimants as to insurance coverage available to them for their damages. This documentation has not been forthcoming. As the amount of damages for claimants Meade has not been established, the Court will render a decision as to liability only. Awards may be granted at a later date when proper documentation has been filed with the Court.

SETTLEMENT ORDER

On this day came the claimants, Charles Meade, Crystal Meade, Arthur Meade, Charlotte Meade, Norma Ooten and Lon Ooten, by counsel, John R. Mitchell, and the respondent, West Virginia Department of Transportation, Division of Highways, by counsel Andrew F. Tarr, and announced to the Clerk of the Court of Claims that ~~both~~ all parties have agreed to a settlement of the damages portion of each of the above-referenced claims. Specifically, respondent agrees to pay the following damages amounts to the claimants:

1. In the claim involving Charles Meade and Crystal Meade (Claim No. CC-91-170), respondent agrees to pay the total sum of $4,500.00 to the claimants in said claim. The parties represent that the sum of $4,500.00 paid by respondent in Claim No. CC-91-170 acts as a full and complete settlement, compromise and resolution of all matters in controversy in said claim and as full and complete satisfaction of any and all past and future claims claimants may have against respondent arising from matters described in said claim.

2. In the claim involving Arthur Meade and Charlotte Meade (Claim No. CC-91-171), respondent agrees to pay the total sum of $2,000.00 to the claimant in said claim. The parties represent that the sum of $2,000.00 paid by respondent in Claim No. CC-91-171 acts as a full and complete settlement, compromise and resolution of all matters in controversy in said claim and as full and complete satisfaction of any and all past and future claims claimants may have against respondent arising from matters described in said claim.

3. In the claim involving Norma Ooten and Lon Ooten (Claim No. CC-91-172), respondent agrees to pay the total sum of $8,000.00 to the claimant in said claim. The parties represent that the sum of $8,000.00 paid by respondent in Claim No. CC-91-172 acts as a full and complete settlement, compromise and resolution of all matters in controversy in said claim and as full and complete satisfaction of any and all past and future claims claimants may have against respondent arising from matters described in said claim.

WHEREFORE, in accordance with the preceding agreements, this Court AWARDS $4,500.00 to the claimants in claim No. CC-91-170; $2,000.00 to the claimants in claim No. CC-91-171; and $8,000.00 to the claimants in claim No. CC-91-172.

ORDER ENTERED NOVEMBER 18, 1998

LISA F. WHITE
VS.
SUPREME COURT OF APPEALS
(CC-98-104)

Claimant represents self.
John M. Hedges, Attorny at Law, for the respondent.

PER CURIAM:

The claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer. The Court, having reviewed the record, is of the opinion that its original order of June 2, 1998, was issued in error, and does hereby issue this REVISED OPINION for reasons stated more fully below.

Claimant seeks $2,401.94 for legal services rendered as guardian ad litem to represent an infant in an appeal before the respondent. In its Answer, the respondent admits the validity of the claim and further states that there is no statutory method or procedure by which to pay the claim. The Court, having reviewed the applicable law, finds that there is no statutory basis upon which to compel payment of the claimant's expenses. *Quesinberry vs. Quesinberry*, 443 S.E.2d 222 (W.Va. 1992).

However, the Court is of the opinion that this is a claim that in equity and good conscience should be paid, and therefore, does hereby make an award in the amount of $2,401.94.

Award of $2,401.94.

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OPINION ISSUED DECEMBER 1, 1998

CABELL COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS

(CC-98-370)

William T. Watson, Attorney at Law, for the claimant.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

The claimant, Cabell County Commission, is responsible for the incarceration of prisoners who have committed crimes in Cabell County, but have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. The claimant brought this action to recover $41,725.00 in costs for providing housing and/or medical care to prisoners who have been sentenced to a state penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the custody of the county for periods of time beyond the date of the commitment order.

The Court previously determined in *County Comm'n. of Mineral County vs. Div. of Corrections*, unpublished opinion issued November 21, 1990, (CC-89-340), that the respondent is liable to the claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, the respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $41,725.00.

In view of the foregoing, the Court makes an award to claimant in the amount of $41,725.00.

Award of $41,725.00.

OPINION ISSUED DECEMBER 1, 1998

CHRISTINE FISHER AND LANDON FISHER
VS.
DIVISION OF HIGHWAYS
(CC-97-111)

Claimants represent themselves.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimants brought this action seeking compensation for personal injury

to claimant Christine Fisher and for property damage to her vehicle which occurred after the she and her son, claimant Landon Fisher, encountered a slip on a road in Monongalia County under the control of the respondent. Claimant Landon Fisher did not suffer any compensable personal injuries and no award to him will be considered by the Court.

The incident giving rise to this claim occurred on June 14, 1996, at approximately 11:00 p.m. when claimant Christine Fisher was driving a Toyota pick-up truck with her son, Landon Fisher, 14 years of age, on County Route 43/3, (John Fox Road). County Route 43/3 is a narrow stone-based road, approximately 1.79 miles long. The lower portion of this road is low priority in terms of maintenance. There are three homes and a trailer in this area. The last half mile of the road, where the claimants' accident occurred, is unimproved, with no regular maintenance.

The evidence adduced at hearing established that as the claimants proceeded up and over an incline, they encountered an area where a large portion of the road had washed out. The claimants submitted into evidence a number of photographs taken before the accident depicting a steep wash-out along an embankment. The claimants testified that their vehicle dropped off the road and rolled down the embankment, flipping approximately three times before coming to rest right-side up. The vehicle was declared a total loss. Ms. Fisher was treated and released from Ruby Memorial Hospital. Ms. Fisher testified that she suffered pain in her back and neck and also experienced memory loss, and that she missed three days of work as a result. She had a $250.00 insurance deductible on her vehicle. Her medical bills were paid by her insurance.

It was the respondent's position that it had no prior notice of the slip and that because this part of the road was classified as unimproved, that it should not be held liable. The Court finds this position untenable. The evidence at hearing established that the respondent knew or should have known of this particular slip. The claimants produced testimony from a neighbor who had complained to the respondent about the dangerous condition of the road several months before the date of the accident. A letter was sent to the respondent on June 7, 1996, also requesting that the road be repaired. The respondent placed great emphasis on the condition of the vehicle, and questioned who was driving. The Court finds these issues to be entirely irrelevant. The road was in obvious disrepair and should have been either maintained in a safe and proper condition or closed.

While the respondent is neither an insurer nor a guarantor of the safety of motorists upon its roads, it has a duty to take reasonable steps to ensure their safety. The respondent had reason to know of this defect and had ample opportunity to take corrective action. The claimant's evidence established that Ms. Fisher missed three days of work because of this accident and that her lost wages were approximately $480.00. She also incurred a $30.25 towing bill, as well as her $250.00 deductible, for a total sum of $760.25. The Court is also of the opinion that claimant Christine Fisher is entitled to compensation in the amount of $1,000.00 for her pain and suffering as a result of her injuries. Therefore, the Court makes an award in the amount of $1,760.25 to Christine

Fisher, claimant herein.

Award of $1,760.25 to Christine Fisher.

OPINION ISSUED DECEMBER 1, 1998

HARRISON COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-98-52)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

The claimant, Harrison County Commission, is responsible for the incarceration of prisoners who have committed crimes in Harrison County, but have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. The claimant brought this action to recover $26,400.00 in costs for providing housing and/or medical care to prisoners who have been sentenced to a state penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the custody of the county for periods of time beyond the date of the commitment order.

The Court previously determined in *County Comm'n. of Mineral County vs. Div. of Corrections*, unpublished opinion issued November 21, 1990, (CC-89-340), that the respondent is liable to the claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, the respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $26,400.00.

In view of the foregoing, the Court makes an award to claimant in the amount of $26,400.00.

Award of $26,400.00.

OPINION ISSUED DECEMBER 1, 1998

JONATHON HOWARD AND CAROL HOWARD
VS.
DIVISION OF HIGHWAYS
(CC-98-90)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to a 1988 Ford Tempo, which occurred when the claimant encountered snow and ice on a road maintained by the respondent in Taylor County.

The incident giving rise to this claim occurred on or about February 4,1998. Mr. Howard was traveling westbound on Route 76 near Rosemont at approximately 11:30 a.m. The weather was snowy. The claimant was traveling approximately 20 miles per hour. Route 76 in this area is a two-lane paved road that is medium priority in terms of maintenance. The claimant testified that the respondent's employees had scraped one lane open down the middle of the road. The evidence adduced at hearing was that as the claimant proceeded around a turn, his vehicle encountered an area where the snow had not been scraped. The claimant lost control of his vehicle, which skidded into a ditch. The claimant submitted into evidence a number of bills for towing, an alignment, and repair of the tie rods. It was the claimant's position that the respondent should be held liable for failing to plow the road in a proper manner.

The respondent's evidence established that on the day in question, snow and ice removal operations had begun at approximately 12:00 a.m. Route 76 was plowed twice, once beginning at 3:00 a.m., and again beginning at 6:05 a.m. It is well established that the respondent is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). The Court, after review of the evidence, is of the opinion that the respondent acted reasonably and properly, and that respondent was making a good faith effort to clear the roads of snow. Therefore, in view of the foregoing, the Court is constrained by the evidence to deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 1, 1998

BRYAN INGHRAM
VS.
DIVISION OF HIGHWAYS

(CC-98-240)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to a 1996 Chevrolet Cavalier, which occurred when a tree limb fell on it.

The incident giving rise to this claim occurred on or about June 1, 1998. The claimant lives on Monumental Road in Fairmont. The evidence adduced at hearing established that a small driveway and parking area was located to the side of the claimant's home. The claimant testified that a limb from a large tree near the driveway and parking area fell onto his vehicle and broke the rear windshield and damaged the trunk. It was the claimant's position that the driveway area is within the State's right of way and that the respondent failed to take care of the tree properly so as to prevent falling limbs. The claimant submitted a repair bill in the amount of $1,199.02. The claimant had a $1,000.00 insurance deductible.

The evidence adduced at hearing was that this drive had been used as a private parking area for some 17 years. The respondent's position was that the driveway area in question was not part of the State road system, that the tree was 30 feet from the road and outside the State's right of way. While sympathetic to the claimant's situation, the Court is of the opinion that the respondent was not responsible for maintaining, trimming or otherwise taking care of this particular tree and/or the driveway area in question. Therefore, the Court is constrained by the evidence to deny this claim.

Claim disallowed.

OPINION ISSUED DECEMBER 1, 1998

JEREMIAH A. JASPER
VS.
DIVISION OF HIGHWAYS
(CC-97-441)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to a 1986 Honda Accord, which occurred when claimant's vehicle struck a large hole on the shoulder of Interstate 79

near the 125 mile marker.

The incident giving rise to this claim occurred on October 10, 1997, at approximately 9:00 p.m. The claimant was driving northbound on I-79 in the passing lane. Another vehicle was in the slow lane. The evidence adduced at hearing was that this vehicle began to move out of the slow lane towards the claimant. The claimant was forced to the left side of his lane where his vehicle struck a large hole along the shoulder. The claimant's vehicle sustained a flat tire. The claimant's repair cost was in the amount of $52.46.

The claimant testified that there were a series of holes in this area and that the hole that his vehicle struck was approximately two feet long and four or five inches wide. The respondent's position was that it had no prior notice and should not be held liable. It is well-established that the respondent is neither an insurer nor a guarantor of the safety of motorists upon its roads. The general rule that this Court has adopted with regard to defective berms is that when a motorists voluntarily proceeds onto the berm, he takes it as he finds it. However, when a motorist is forced to use the berm in an emergency situation, he is entitled to rely on it and the respondent may beheld liable when the berm is not reasonably maintained. *Sweda vs. Dept. of Highways*, 13 Ct. Cl. 249 (1980) In the present case, the Court is of the opinion that the respondent had reason to know of the holes on the Interstate which gave rise to this claim. Therefore, in view of the foregoing, the Court hereby makes an award in the amount of $52.46.

Award of $52.46.

OPINION ISSUED DECEMBER 1, 1998

JAMES B. RAMSEY
VS.
ADJUTANT GENERAL
(CC-98-337)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant, a sergeant with the National Guard, seeks $1,400.00 in tuition and fees for summer school classes in 1998. The application and tuition fees were not processed for payment by the respondent within the appropriate fiscal year; therefore, the claim has not been paid. In its Answer, the respondent admits the validity of the

claim and the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,400.00.

Award of $1,400.00.

OPINION ISSUED DECEMBER 1, 1998

PAMELA J. ROMANO
VS.
DIVISION OF HIGHWAYS
(CC-97-402)

Claimant represents self.

Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to a 1994 Nissan Altima, which occurred when the claimant came upon a hole and broken pavement in a road maintained by the respondent in Harrison County. The Court is of the opinion to deny the claim as stated more fully below.

The incident giving rise to this claim occurred on October 6, 1997, around mid-morning. The claimant was driving westbound on WV Route 76 near Rosemont. Route 76 in this area is a two-lane paved road. The claimant was driving approximately 35 miles per hour behind a truck. The evidence adduced at hearing was that the claimant's vehicle struck a large hole on the side of the pavement, resulting in a flat tire. The claimant submitted a repair bill in the amount of $153.34. Her insurance deductible was $500.00.

The hole was described as approximately three feet in circumference and six inches deep. The respondent had received a call regarding this particular hole that morning and arrived to make repairs shortly after the claimant's accident.

It is well established that the respondent is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). In order to hold the respondent liable for defects of this nature, the claimant must prove that the respondent had actual or constructive notice and failed to take reasonable remedial action. *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The evidence at hearing established that the respondent was informed of the hole on the morning of the claimant's accident and immediately took corrective action. Therefore, the Court is of the opinion that the respondent acted reasonably and diligently, and that there is insufficient evidence of negligence upon which to justify an award.

Claim disallowed.

OPINION ISSUED DECEMBER 1, 1998

REBECCA SALMEN
VS.
DIVISION OF HIGHWAYS
(CC-97-365)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her 1997 Dodge Neon, which occurred when the vehicle struck a large beam that had fallen onto a road maintained by the respondent near Fairmont, Marion County.

The incident giving rise to this claim occurred on May 13, 1997, approximately 6:15 a.m. The claimant was driving northbound on Interstate 79 between Fairmont and the Prickett's Fort
Exit on her way to work. It was raining. The claimant was driving in the slow lane at approximately 60 miles per hour up an incline. The evidence adduced at hearing was that the claimant's vehicle struck a large wooden beam that had fallen on the road and was lying completely across her lane of traffic. The vehicle sustained damage to passenger-side tires and wheels and was knocked out of alignment. The claimant submitted a number of bills in the amount of approximately $500.00, the amount of her insurance deductible.

The beam in question was described as approximately one foot high, with metal bands, and lay across the entire lane of traffic. The claimant testified it was similar in appearance to a railroad tie. The respondent's position was that it had no prior notice of this road hazard.

It is well established that the respondent is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). In order to hold the respondent liable for road defects of this type, the claimant must prove that the respondent had actual or constructive notice. *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). Accordingly, the unexplained presence of debris on the road, without a positive showing of negligence on the part of the respondent, is insufficient to justify an award.

In view of the foregoing, and the Court is of the opinion that there is insufficient evidence on the part of the respondent upon which to justify an award.

Accordingly, the Court does hereby deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 1, 1998

DAVID M. STARKEY
VS.
DIVISION OF MOTOR VEHICLES
(CC-98-80)

Claimant represents self.

Joy M. Cavallo, Assistant Attorney General, for the respondent.

PER CURIAM:

The claimant brought this action seeking compensation for damages he incurred as a result of the respondent's alleged wrongful revocation of the claimant's driver's license.

The chain of events giving rise to this claim are as follows. The claimant surrendered his West Virginia driver's license for the purpose of obtaining his commercial driver's license (CDL) in the State of Indiana. He subsequently returned to West Virginia and obtained his CDL here, as well. On or about February 25, 1998, the claimant was arrested by Fairmont City Police on a charge of driving on the surrendered West Virginia license. The claimant contested the charge, and obtained a copy of his CDL permit and driving record from the respondent. The charge was dropped. However, the claimant's car was impounded and he incurred a $60.00 towing bill. He lost three days of work, a total of $284.07; and he had to reimburse a neighbor for providing transportation in the amount of $60.00. Total out-of-pocket expenses incurred by the claimant were therefore in the amount of $404.07.

The respondent did not introduce evidence contesting the claimant's case. The Court, after review of the evidence, is of the opinion that the State has a moral obligation in equity and good conscience to compensate the claimant for his costs and inconvenience. Therefore, the Court hereby makes an award to the claimant in the amount of $554.07, representing the claimant's out-of-pocket costs and $150.00 for his inconvenience.

Award of $554.07.

OPINION ISSUED DECEMBER 1, 1998

WEST VIRGINIA UNIVERSITY HOSPITALS
VS.
DIVISION OF CORRECTIONS
(CC-98-376)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment in the amount of $119,102.58 for medical services rendered to two inmates committed to the Huttonsville Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

While the Court believes that this is a claim which in equity and good conscience should be paid, the Court further believes that an award cannot be recommended based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED DECEMBER 1, 1998

WOOD COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-98-358)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

The claimant, Wood County Commission, is responsible for the incarceration of prisoners who have committed crimes in Wood County, but have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. The claimant brought this action to recover $38,275.00 in costs for providing housing and/or medical care to prisoners who have been sentenced to a state penal institution, but due

to circumstances beyond the control of the county, these prisoners have had to remain in the custody of the county for periods of time beyond the date of the commitment order.

The Court previously determined in *County Comm'n. of Mineral County vs. Div. of Corrections*, unpublished opinion issued November 21, 1990, (CC-89-340), that the respondent is liable to the claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, the respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $38,275.00.

In view of the foregoing, the Court makes an award to claimant in the amount of $38,275.00.

Award of $38,275.00.

OPINION ISSUED DECEMBER 9, 1998

MICHAEL L. ACREE AND CHERYL . ACREE
VS.
DIVISION OF HIGHWAYS
(CC-98-162)

Claimants represent themselves.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimants brought this action for damage to their 1996 Dodge Avenger, which occurred when the vehicle encountered a number of holes and broken pavement on US Route 19 in Braxton County.

The incident giving rise to this claim occurred on December 19, 1997, at approximately 8:30 p.m. The claimants and their daughter were proceeding southbound on US Route 19, approximately four miles below the Sutton exit. Mr. Acree was driving. The weather was rainy. Route 19 in this area is a two-lane, high priority road. The evidence adduced at hearing established that the claimant's vehicle encountered a number of holes and broken pavement in the southbound lane. The claimant's vehicle sustained damage to two wheels and tires on the driver's side. The claimants alleged that their repair costs were in the approximate amount of $968.96. They submitted into evidence a repair bill in the amount of $968.96, of which they paid $654.69. The claimant's insurance deductible was $500.00, but for reasons not relevant to this decision, the claimant's insurance carrier apparently did not cover all the remaining

costs.

The claimants introduced into evidence a number of photographs depicting a large section of broken pavement in the southbound lane of Route 19. At the time of this accident, US Route 19 was under construction from just north of Summersville to Interstate 79. The contractor was Geupel Construction Company. Under the provisions of this contract, the contractor was obligated to hold the respondent harmless for property damage claims occurring during the course of construction activities. The respondent had received a number of complaints about poor road conditions and engaged in road patching work as late as three days prior to the claimants' accident. During the course of the contract, the respondent regularly referred complaints about the road conditions to the contractor, and eventually stopped performing road repairs as these were obligations of the contractor.

This Court has previously held that the respondent cannot be held liable for the negligence, if any, of an independent contractor. *Paul vs. Dept. of Highways*, 14 Ct. Cl. 479 (1983); *Harper vs. Dept. of Highways*, 13 Ct. Cl. 274 (1980); *Safeco vs. Dept. of Highways*, 9 Ct. CL. 28 (1971). The underlying foundation of these cases is the custom and practice whereby independent contractors routinely agree to hold harmless or to indemnify the respondent State agency for claims arising during the course of, and resulting from, the performance of the contract. However, the Court has also held that the respondent does have a duty to take reasonable steps to ensure that its independent contractors complete their work in such a manner that travelers will not be put in a position of unreasonable danger. *Tolley vs. Division of Highways*, (CC-96-342), unpublished opinion issued August 4, 1997. The evidence clearly establishes that the respondent knew, or had reason to know, that Route 19 in this area was in a state of disrepair during construction activities. Therefore, in view of the foregoing, the Court does hereby make an award in the amount of $500.00.

Award of $500.00.

OPINION ISSUED DECEMBER 9, 1998

PAUL A. ATKINS
VS.
DIVISION OF HIGHWAYS
(CC-98-46)

ANGELA D. HINES
VS.
DIVISION OF HIGHWAYS
(CC-98-65)

RICHARD W. FIETE
VS.
DIVISION OF HIGHWAYS
(CC-98-99)

Claimants represent themselves.
Andrew F. Tarr, Attorney at Law, for the respondent.

PERCURIAM:

the claimants brought these consolidated claims for damage to their vehicles which occurred as a result of falling rocks on a road maintained by the respondent in Morgantown, Monongalia County. The Court is of the opinion to deny these claims for the reasons stated more fully below.

The chain of events giving rise to these claims occurred on January 28, 1998, beginning at approximately 7:00 a.m. on Monongahela Boulevard (Route 19) in the northwest-bound lanes, just below the Engineering Building on the campus of West Virginia University. Route 19 northwest-bound has two lanes. There is a steep high wall on the north side of the road. It is a known rock fall area and the respondent has installed a Falling Rock warning sigh.

On the day in question, the weather was dark and there was light rain. All three accidents occurred at approximately the same time. Claimant Paul Atkins was driving a 1991 Mazda in the passing lane at around 7:00 a.m., when his vehicle struck a large rock that had fallen from the hillside into the road. Mr. Atkins testified that the rock was on or near the line dividing the two lanes of traffic. Another vehicle was in the slow lane. He testified that the did not see the rock in time to avoid it. His vehicle sustained a flat tire and bent rim and was knocked out of alignment. He submitted into evidence repair bills in the amount of $220.64. He had a $250.00 insurance deductible.

Claimant Angela Hines was driving a 1991 Pontiac Grand Am in the passing lane at approximately 45 miles per hour. She testified that she encountered a number of rocks in the road which caused a flat tire and bent rim. She described the rock that she hit as being approximately 12 to 18 inches in diameter. Her out-of-pocket repair costs were $325.56, which included car rental.

Finally, claimant Richard Fiete was driving a 1991 Toyota Camry north on Route 19 in the slow lane when he, too, struck a large rock on the road, resulting in a flat tire and bent wheel on the left front tire. He submitted repair and towing bills in the amount of $463.22. His insurance deductible was $250.00.

The evidence adduced at hearing established that this area was a known rock fall area. At some time in 1997, the respondent had hired a contractor to clean and re-slope the benches along the high wall. Concrete barriers had also been placed along the shoulder in some areas to prevent rocks from rolling into the traveled lanes.

It is well established that the State is neither an insurer nor a guarantor of the

safety of motorists upon its roads. *Adkin vs. Sim*, 46 S.E.2d 81 (W.Va. 1947). In order to hold the respondent liable for road defects, this Court has held that claimants must prove that the respondent had actual or constructive notice and an opportunity to take reasonable remedial steps. *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). IN KEEPING WITH THE FOREGOING, THE GENERAL RULE THAT HIS Court has adopted is that the unexplained falling of a rock onto a road, without an affirmative showing of negligence on the part of the respondent, is insufficient evidence upon which to justify an award. *Coburn vs. Dept. of Highway*, 16 Ct. Cl 68 (1985). In the rare decisions where the Court has found the respondent liable for rock fall damage, the Court found that the remedial steps taken by the respondent were either inadequate or nonexistent in response to known rock fall hazards.

In the present case, the evidence established that the respondent had contracted to clean the benches on the hillside in question, had placed barriers in some areas along the road, and had installed a warning sign. The evidence further established that the respondent sent its employees to remove the rocks within minutes of receiving notification of the January 28, 1998, rock fall. While sympathetic to the claimants' situation, the Court is of the opinion that the respondent took reasonable steps to ensure the safety of traveling motorists and that there is insufficient evidence of negligence upon which to justify an award.

Therefore, in view of the foregoing, the Court does hereby deny these consolidated claims.

Claims disallowed.

OPINION ISSUED DECEMBER 9, 1998

RYAN BARRETT
VS.
DIVISION OF HIGHWAYS
(CC-98-269)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his 1989 Ford half ton pick-up truck, which occurred when a portion of a road maintained by the respondent gave way. The Court, on its own motion, amended the style of the claim to reflect the proper party.

The incident giving rise to this claim occurred on May 17, 1998, at approximately 10:45 p.m. The claimant and a companion, Tonya Kelley, were driving

on County Route 14/4 (Bull Run Road), near Masontown, Preston County. Tonya Kelley was driving. Ryan Barrett, the owner of the truck, was a passenger. They were hauling a four-wheeler ATV in the back. Route 14/4 is a narrow rock-based, single-lane road that is low priority in terms of maintenance and climbs gradually from a valley up a hill. In the area of the accident, the road is approximately 11 feet wide. There is a steep drop-off on the right-hand side of the road.

The claimant's testimony at hearing was that as the vehicle proceeded up this hill, the edge of the road on the right-hand side gave way, causing the vehicle to slip over the edge. The truck rolled several times and came to rest right-side-up on a rock. The ATV was tossed out. The next day, the claimant returned to the scene and discovered that the ATV had been stolen. The claimant sustained minor injuries to his hand and neck. His medical costs were in the amount of $258.50. The truck sustained extensive damage. The claimant submitted into evidence a repair estimate in the amount of $8,236.20. The claimant had liability insurance only and subsequently sold his truck for $250.00.

The claimant and respondent submitted into evidence a number of photographs and a video tape depicting the road and accident scene. The evidence established that County Route 14/4 is an extremely narrow and windy road that carries little traffic in the summer and no traffic in winter. The respondent's normal maintenance routine was to grade the road once a year. The Court, after careful review of the entire record, is of the opinion that the conditions of the road in the area in question are not indicative of a slip, and that there is insufficient evidence of negligence on the part of the respondent upon which to base an award.

It is well established that the State is neither a guarantor nor an insurer of the safety of motorists upon its highways. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). It is not clear why Ms. Kelley lost control of the claimant's vehicle, and the Court will not speculate as to what caused the incident giving rise to this claim. However, from the evidence the road appears not to have sustained a slip or washout in the area of the accident. The Court finds it unnecessary to make a ruling on the admission of Respondent's Exhibits 6-12, as these add little to the evidence already submitted. In view of the foregoing, the Court does hereby deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 9, 1998

JANET W. BOLE
VS.
DIVISION OF HIGHWAYS
(CC-98-105)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her 1992 Oldsmobile Cutlass, which occurred after the vehicle encountered broken pavement along the edge of a road maintained by the respondent in Ohio County.

The incident giving rise to this claim occurred on January 30, 1998, at approximately 9 p.m. The claimant was driving on Dixon's Run Road (County Route 29) near US Route 40 in the vicinity of Valley Grove. Route 29 in this area is a narrow two-lane paved road that is low priority in terms of maintenance. The evidence adduced at hearing established that the claimant allowed her vehicle to drop off the pavement onto the shoulder, resulting in a flat tire and bent wheel rim. The claimant submitted into evidence repair bills in the amount of $127.42. The claimant had a $250.00 insurance deductible.

The claimant submitted into evidence a number of photographs establishing that the shoulder and berm area in the vicinity of her accident were in obvious need of repair. The photographs depicted jagged and broken pavement and a significant drop off along the berm area. The claimant testified that there was no oncoming traffic and there was apparently no other reason for the claimant to proceed onto the berm.

The general rule established by this Court is that when a motorist voluntarily proceeds onto the berm, he takes the berm as he finds it. However, when a motorist is forced to use the berm in the event of an emergency, he is entitled to rely upon it and the respondent may be held liable for failure to maintain the berm and shoulder area in reasonably safe condition. *Meisenhelder vs. Dept. of Highways*, (CC-88-149), unpublished opinion issued August 10, 1990. The evidence clearly establishes that the berm in question was in disrepair. However the Court is of the opinion that claimant's negligence in failing to properly maintain control of her vehicle was equal or greater to any negligence on the part of the respondent. Therefore, in accordance with the principles of comparative negligence, the Court does hereby deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 9, 1998

CHARLES BURKIEVICZ
VS.
DIVISION OF HIGHWAYS
(CC-98-256)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his 1983 Chevrolet pick-up truck, which occurred after the vehicle struck a small tree limb on a road maintained by the respondent in Marshall County.

The incident giving rise to this claim occurred on July 7, 1998, at approximately 9:45 p.m. The claimant was driving on Rosby's Rock Hill Road near Moundsville. The evidence adduced at hearing established that the claimant's vehicle struck a small tree or tree limb that was leaning from an embankment into the traveled portion of the road. The tree was described as approximately four to five inches in diameter. The claimant testified that the tree struck his passenger side rear-view mirror, bent it down, and knocked the glass out. The claimant testified that the repair costs were in the approximate amount of $80.00. The claimant carried liability insurance only.

The claimant testified that the tree was leaning about three feet into the road and was approximately six feet off the pavement. He testified that there was oncoming traffic, but that it was not in his lane. It was the respondent's position that it had no prior notice of the tree. The respondent was not engaged in any trimming or other work in the area at the time of the accident.

It is well established that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). It is the general rule that in order to hold the respondent liable for defects of this type, the claimant must prove that the respondent knew or should have known of the defect giving rise to the claim. The Court, after review of the record, is of the opinion that there is insufficient evidence of negligence upon which to justify an award. While sympathetic to the claimant's position, the Court is constrained by the evidence to deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 9, 1998

BRENNICE COLE
VS.
DIVISION OF HIGHWAYS
(CC-97-459)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for water damage to her property which she alleges occurred as a result of a culvert maintained by the respondent in Harrison County.

The claimant owns a home on Turkey Run (Route 50/2), approximately one half mile from US Route 50 near Salem. Route 50/2 in this area is a narrow paved road that is secondary in terms of maintenance priority. The claimant's property consists of a house and a number of outbuildings. A private dirt road runs between the claimant's main residence and a garage, back towards the rear of the property. During wet weather, a creek runs down from the rear of the property, across a creek crossing in the private road, under a foot bridge, and through the respondent's culvert which crosses under Route 50/2.

On or about May 17, 1996, Harrison County experienced heavy rainfall and widespread flooding. It was the claimant's position that the culvert under Route 50/2 was not large enough to handle the amount of water, and caused the flood water to wash out the asphalt drive of her garage. The claimant submitted a paving estimate of $2,300.00. The claimant had no flood insurance.

The culvert in question was a 24-inch pipe at the time of this flood. Under normal circumstances, the claimant's creek crossing channeled water down towards the respondent's culvert. The respondent's evidence indicated that water running across Route 50/2 during this flood was quite deep, indicating severe flood conditions. The respondent's position was that the water took the path of least resistance and overflowed the creek crossing in the claimant's dirt road above the culvert, and therefore washed out the drive immediately below.

The Court, after careful review of the evidence, is of the opinion that the damage to the claimant's property occurred from a combination of circumstances, including the lay of the land and the watershed behind the claimant's home, the location of the creek crossing and the extremely heavy rainfall which occurred at the time in question. While not unsympathetic to the claimant's situation, the Court is of the opinion that there is insufficient evidence of negligence on the part of the respondent upon which to justify an award. Therefore, the Court does hereby deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 9, 1998

VICKI COPLEY
VS.
DIVISION OF HIGHWAYS
(CC-97-335)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her 1995 Lexus which occurred after the vehicle encountered a hole in a road maintained by the respondent in Mingo County. The Court is of the opinion to deny the claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on April 24, 1997, at approximately 6:00 p.m. The claimant was traveling southbound on County Route 14 (Buffalo Creek Road) in the vicinity of Chattaroy. It was raining. The speed limit is 35 miles per hour. Route 14 in this area is a narrow, two-lane paved road, that is second priority in terms of maintenance. The evidence adduced at hearing was that the claimant struck a large hole on the side of her lane. The claimant's vehicle sustained a damaged tire on the front passenger side and was knocked out of alignment. The claimant submitted a repair bill in the amount of $226.17. The claimant had a $500.00 insurance deductible.

The hole in question was described as approximately three feet long, two feet wide and eight inches deep. Photographs introduced into evidence established that the hole was located along the edge of the pavement. The claimant testified that there was an oncoming vehicle in the other lane of traffic, but that it had not crossed into her lane. She testified that she was unable to swerve around the hole due to this oncoming vehicle. The respondent was aware that the area in question had ongoing problems with holes due to poor drainage.

It is well established that the respondent is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). In order to hold the respondent liable for defects of this type, the claimant must prove the respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985), *Hamon vs. Dept. of Highways*,1 6 Ct. Cl. 127 (1986). The Court is of the opinion that a hole of this size would have developed over a significant period of time and that the respondent had constructive, if not actual, notice of this road defect. However, the claimant is also charged with a duty to use reasonable care in the exercise of her driving privileges. The Court is of the opinion that had the claimant exercised due care, she would have been able to stop in time to avoid this accident, and that the claimant's negligence was equal to or greater than any negligence of the respondent. Therefore, in accordance with the established principles of comparative negligence, the Court does hereby deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 9, 1998

JANICE S. HENSLEY
VS.
DIVISION OF HIGHWAYS
(CC-97-348)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for water damage to her home in Huntington, Cabell County. The Court is of the opinion to deny the claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on or about June 25, 1997. The claimant is the owner of a home located at 1013 W. 17th Street, Huntington. The home is located directly below the Interstate 64 on ramp at 17th Street. A drainage ditch is located between the claimant's home and the bottom of the embankment of the on ramp. On the day in question, Huntington experienced an unusually heavy rainfall. The evidence adduced at hearing established that the drainage ditch overflowed and carried water across the claimant's back yard and into her home. The claimant testified that the water rose to approximately five inches in depth in her home and caused extensive damage to furniture, walls, heater and the carpet. The claimant submitted a number of repair estimates in the total amount of $6,204.73. The claimant had no applicable flood insurance.

The drainage ditch in question was described as approximately two and a half feet deep. It was the claimant's position that the drainage ditch was clogged with debris and that the respondent's failure to clear the ditch line caused it to overflow and flood her home. The respondent's evidence was there was an unusually heavy rainfall and that flooding occurred throughout Huntington as a result.

The Court, after careful review of the record as well as photographs submitted by the claimant, is of the opinion that the proximate cause of the claimant's damages was an unusually heavy rainfall which caused flooding throughout Huntington. The Court is of the opinion that there is insufficient evidence of negligent conduct on the part of the respondent and therefore does hereby deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 9, 1998

NICK HUNTER
VS.
BOARD OF TRUSTEES OF
THE UNIVERSITY SYSTEM
(CC-98-20)

Claimant represents self.
Michael L. Glasser and Samuel R. Spatafore, Assistant Attorneys General, for the respondent.

PER CURIAM:

The claimant brought this action for water damage to personal property which occurred in a dormitory facility owned and maintained by the respondent.

The incident giving rise to this action occurred on or about December 11, 1997. The claimant was a freshman student at West Virginia University and resided at Boreman Hall. On the day in question, a plumbing fixture in the ceiling above the claimant's dorm room broke. Water dripped through the ceiling onto the claimant's 19-inch television, which was destroyed. The claimant now seeks $200.00 in compensation.

It was the respondent's position that it should not be held liable for these damages because the claimant signed a housing contract in which he agreed to abide by the terms and policies contained in the respondent's student handbooks, which expressly disclaimed responsibility and liability for theft or damage to student-residents' personal property, and recommended that all students purchase renter's insurance. The respondent also contended that the broken plumbing fixture was an unforeseeable event.

The Court has reviewed its prior decisions involving water, electric, or other damage to personal property in university housing facilities. Many of these claims involved students and were uncontested by the respondent. See: *Matthew vs. Board of Trustees*, (CC-97-178), unpublished opinion issued June 11, 1997; *Rowsey vs. Board of Directors of the State College System*, (CC-96-25), unpublished opinion issued May 1, 1995; *Li vs. Board of Trustees* (CC-96-13), unpublished opinion issued October 25, 1996; *Dimmick vs. Board of Trustees*, (C-94-520), unpublished opinion issued October 24, 1995.

W.Va. Code §37-6-30 (1996) states generally that a landlord is required to deliver and maintain premises in a habitable condition, and is required to make all repairs necessary thereto. This policy was also expressed in *Teller vs. McCoy*, 253 S.E.2d 114 (W.Va. 1978), where the West Virginia Supreme Court stated:

> There is, in a written or oral lease of residential premises, an implied warranty that the landlord shall at the commencement of a tenancy deliver the dwelling unit and surrounding premises in a fit and habitable condition and shall thereafter maintain the leased property in such condition. *Syllbaus No. 1.*

Teller, at 128, further states that the determination of whether a landlord has breached the warranty of habitability is a factual question to be determined by the circumstances of each case.

In two recent cases, the Court denied an award for water damage to university faculty members whose property was damaged due to flooding. In *Sardinia vs. Board of Trustees*, (CC-97-82) and *Akladios vs. Board of Trustees*, (CC-96-528), unpublished opinions issued March 10, 1998, the Court rejected the claimants' argument that the respondent's disclaimers violate the stated public policy requiring that premises be maintained in a fit and habitable condition. The Court noted that the faculty claimants were not required to live on the campus facilities of the respondent, while first-year students normally are required to live on campus. Consistent with *Teller, supra*, the Court found that there was widespread flooding throughout the county and held that there was insufficient evidence of negligence on the part of the respondent upon which to justify an award.

In the present case, the claimant was required to live on campus and was required to sign a housing contract with the respondent. In these circumstances, the Court is of the opinion that the respondent should be held to the normal and accepted standards of care imposed upon landlords with respect to student-tenants required to live on campus, and may not contract away this responsibility through liability disclaimers. The Court therefore holds that the respondent's disclaimer of liability for property damage, in this particular instance, contravenes the public policy of West Virginia that landlords deliver and maintain premises in fit and habitable condition.

Consistent with *Teller, supra*, the Court now must examine the factual circumstances giving rise to this claim. The claimant lived on the third floor of Boreman Hall. The evidence established that a plumbing fixture on the fourth floor broke and flooded the room above the claimant's room, ultimately leaking through the ceiling. The respondent's position was that this was unforeseeable, and that it therefore should not be held liable.

In *Foster vs. City of Keyser*, 501 S.E.2d 165 (W.Va. 1997), a case involving a natural gas explosion, the West Virginia Supreme Court modified the evidentiary rule of *res ipsa loquitur* as follows:

> (I)t may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff. *Syllabus No. 4.*

The Court is of the opinion that the water damage giving rise to this claim was clearly within the control and scope of the respondent's duty to provide a fit and habitable premises to the claimant. The Court recognizes that breaks in plumbing fixtures, electric lines, and the like, are unforeseeable events that occur randomly and unpredictably without any causally-related negligent act or omission on the part of the respondent. However, the Court is of the opinion nevertheless that the respondent has an obligation, in equity and good conscience, to compensate student-tenants required to

live on campus when water breaks and similar events cause property damage. In view of the foregoing, the Court does hereby make an award in the amount of $200.00.

Award of $200.00.

OPINION ISSUED DECEMBER 9, 1998

RICHARD M. KLUG AND BARBARA KLUG
VS.
DIVISION OF HIGHWAYS
(CC-98-13)
and
ELIZABETH MATHENY
VS.
DIVISION OF HIGHWAYS
(CC-98-15)

Claimants represents themselves.

Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimants brought these separate actions for damage to their vehicles which they allege occurred as a result of a large hole on a road maintained by the respondent in Marshall County. The Court, on its own motion, consolidated these claims as they involve the same underlying facts and circumstances.

In *Klug*, (CC-98-13), claimant Barbara Klug was driving a 1997 Honda Accord on WV Route 2 northbound in the vicinity of Glendale on January 7, 1998, at approximately 7:45 p.m. The weather was dark and it was raining heavily. Ms. Klug was driving approximately 30 miles per hour. The evidence at hearing established that her vehicle struck a large hold on the right side of the traveled portion of the slow lane. The vehicle sustained two flat tires on the passenger side. Ms. Klug submitted into evidence a repair bill in the amount of $266.39 and a towing bill in the amount of $35.00. Claimant's insurance deductible was $250.00.

In *Matheny*, (CC-98-15), claimant Elizabeth Matheny was driving in the same area the following morning, January 8, 1998, at approximately 8:10 a.m. when her vehicle struck the same hole on the edge of the traveled portion of the lane. Her vehicle sustained a flat tire. The claimant's cost for repair was $48.74. She had a $100.00 deductible.

WV Route 2 in this area is a heavily-traveled, high-priority road in terms of maintenance. The hole in question was described as approximately one and a half feet

to two feet long and six inches deep, and was located on the right side of the slow lane northbound. Ms. Matheny introduced into evidence a number of photographs indicating that a number of vehicles had struck this hole and had lost their hubcaps as a result. The respondent was informed about the hole at approximately 8:45 p.m., the evening of January 7, 1998. The respondent repaired the hold that night with cold mix patch. However, it was raining heavily on both days and the cold mix patch apparently washed out thereby creating a hazard again by the morning of January 8, 1998.

It is well established that the state is neither and insurer nor a guarantor of the safety of motorists upon its roads. In order for the respondent to be held liable for road hazards of this type, the claimant must prove that the respondent knew or had reason to know of the defect. *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986), *Pritt vs. Dept of Highways*, 16 Ct. Cl. 8 (1985). It is the opinion of the Court that a road defect of this type would have developed over a significant amount of time and the respondent, at a minimum, had constructive notice. Furthermore, while not material to the question of liability, the Court notes that the respondent was able to make adequate and permanent repairs to this hole with rapid setting concrete mix despite the inclement weather. In view of the foregoing, the Court does hereby make awards as set out below.

Richard Klug and Barbara Klug.....$250.00
Elizabeth Matheny..... $48.74.

OPINION ISSUED DECEMBER 9, 1998

RICKY LYNN LEWIS
VS.
DIVISION OF MOTOR VEHICLES
(CC-98-135)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for the respondent.

PER CURIAM:

The claimant brought this action seeking compensation for damages he alleges as the result of an unjust arrest on a charge of driving on a revoked license.

The incident giving rise to this claim occurred on or about February 27, 1995, in Clarksburg. The claimant was involved in a two-vehicle accident and had parked his vehicle on Washington Avenue in a parking lot. When police investigated, they discovered that the claimant's driver's license had been suspended as a result of a speeding charge in Ritchie County. The claimant was arrested, released on bond, and subsequently paid a fine to get his license reinstated. It was the claimant's position that

he never received notice that his license had been suspended and that therefore, the respondent should be held liable for his arrest, humiliation, and other unspecified damages.

The respondent's evidence established that the routine method for notifying residents of license suspension was through certified mail. The respondent introduced a certified letter dated January 23, 1997, addressed to the claimant informing him of his license suspension. The letter was returned unclaimed. The Court, after review of the record, is of the opinion that the respondent acted reasonably and in accordance with its normal procedure and that there is insufficient evidence of negligence upon which to base an award of damages. Therefore, the Court does hereby deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 9, 1998

MARTHA MCCARDLE
VS.
DIVISION OF HIGHWAYS
(CC-98-9)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her 1988 Chrysler LeBaron which occurred when the vehicle encountered icy pavement on a road maintained by the respondent in Ohio County. The Court is of the opinion to deny the claim as stated more fully below.

The incident giving rise to this claim occurred on December 27, 1997, at approximately 7:35 a.m. The claimant was driving on Cherry Hill Road (County Route 3) near Warwood in the vicinity of Highland Avenue. The evidence adduced at hearing established that the claimant's vehicle encountered a patch of ice, causing the claimant to lose control and slide into a hillside. The vehicle sustained damage to the oil pan, bumper, grill and paint. The claimant submitted into evidence repair estimates in the total amount of $601.86. The claimant carried liability insurance only.

Route 3 in this area is a secondary road in terms of maintenance priority. The speed limit was 35 miles per hour. The claimant was traveling approximately 30 miles per hour. The respondent had been engaged in snow and ice removal since early that morning. The evidence established that it was the respondent's normal practice to treat primary roads first, before moving on to the low priority roads. The respondent's

employees reached Route 3 approximately one hour after the claimant's accident.

It is well established that the respondent is neither an insurer nor a guarantor of the safety of motorists upon its roads and highways. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). The Court is of the opinion that the respondent was acting diligently to remove snow and ice hazards on the morning of the claimant's accident and that there is insufficient evidence of negligence on which to justify in award. Therefore, in view of the foregoing, the Court is constrained by the evidence to deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 9, 1998

DONALD L. MILLER
VS.
DIVISION OF HIGHWAYS
(CC-98-280)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his 1985 Pontiac which occurred after the vehicle struck a rock on WV Route 2 in Marshall County.

The incident giving rise to this claim occurred on July 30, 1998, at approximately 4:30 p.m. The claimant was driving northbound on Route 2 just north of Consolidated Coal Company. The weather was rainy. Route 2 in this area is a heavily traveled two lane road with a steep embankment bordering the northbound lane. It is a known rock fall area and there are "Falling Rock" warning signs in the area for northbound and southbound traffic. The evidence adduced at hearing established that a number of rocks fell from the hillside, one of which struck the claimant's vehicle on the driver's front side. The claimant introduced a repair estimate in the amount of $2,428.24. The claimant had liability insurance only. He seeks an award of $1,500.00, representing the approximate fair market value of the vehicle.

Photographs introduced by the claimant established that the rock in question was quite large, approximately the size of a tire. The respondent's evidence established that there were three rock fall warning signs in the area, including one for northbound traffic in the vicinity of the coal company's office. It is well established that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (1947). It has been the rule of this Court that in order to hold the respondent liable for road defects of this sort, the claimant must prove that the

respondent had actual or constructive notice, and that generally, the unexplained falling of a rock, without more, is insufficient evidence upon which to justify an award. *Coburn vs. Dept. of Highways*, 16 Ct. Cl. 68 (1986). Therefore, in view of the foregoing, the Court is constrained by the evidence to deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 9, 1998

DORIS PHILLIPS
VS.
DIVISION OF HIGHWAYS
(CC-97-355)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her 1989 Oldsmobile Cutlass, which occurred after the vehicle struck a drain inlet on MacCorkle Avenue in Charleston, Kanawha County. The Court is of the opinion to deny the claim as stated more fully below.

The incident giving rise to this claim occurred on August 27, 1997. The claimant was traveling westbound on Route 61 (MacCorkle Avenue) in Kanawha City. The evidence adduced at hearing was that the claimant turned right off Route 61 at the 35th Street Bridge to access a farmer's market. Whereupon, the claimant's vehicle struck a piece of metal embedded in a drain inlet, resulting in two flat tires on the passenger side. The claimant submitted into evidence repair and towing $315.91. The claimant's insurance deductible was $500.00.

The claimant testified at hearing that she had just turned off the 35th Street Bridge westbound on MacCorkle Avenue and made an immediate turn into the market's parking lot. The metal was described as square, without any asphalt or concrete apron or buffer, and was embedded in the drain inlet.

The evidence established that the respondent was not responsible for maintenance of the curb in question, and that the City of Charleston was responsible for curbs and sidewalks. The evidence further indicated that the defect complained of would have been part of the sidewalk area and would not have been within the regularly traveled portion of the highway. Therefore, in view of the foregoing, the Court finds that there is insufficient evidence of negligence on the part of the respondent upon which to

justify an award.

Claim disallowed.

OPINION ISSUED DECEMBER 9, 1998

PHYLLIS K. ROMEO
VS.
DIVISION OF HIGHWAYS
(CC-97-278)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to her vehicle which occurred upon striking a curb in Charleston, Kanawha County.

The incident giving rise to this claim occurred on June 2, 1997, at approximately 1:00 p.m. The claimant was driving a westbound on Lee Street at the intersection of Brooks Street. The weather was clear and dry. Lee Street westbound in this area stops at Brooks Street. Westbound traffic must turn right onto Brooks Street. The evidence adduced at hearing was that as the claimant was turning right onto Brooks Street, her vehicle struck a storm drain inlet on the curb, resulting in a flat tire on the rear passenger side. The claimant submitted into evidence a repair bill in the amount of $75.27.

The claimant submitted into evidence a number of photographs indicating that the drain inlet in question was made of steel or iron and concrete with two wheelchair ramps onto each street. The inlet did not appear to be in disrepair, however, the photographs depicted an area where part of the steel plating appeared to have been worn off along the edge. The edge of the inlet itself appeared to be very close to the regularly traveled portion of the intersection.

There are three lanes of traffic on Brooks Street northbound from this intersection. The claimant testified that she attempted to maintain her vehicle in her lane of traffic on the extreme right-hand side. The claimant first filed her claim with the City of Charleston. The claim was denied on the basis that this intersection was maintained by the respondent. The respondent's position at hearing, however, was that while it was responsible for the traveled portion of the road from curb to curb, that the City of Charleston was responsible for all curbs and sidewalks.

This is an extremely unfortunate situation, and the Court is of the opinion that the claimant has been done a disservice by unwarranted delay through no fault of her

own. However, the Court is unable to grant an award against the respondent when the respondent was not responsible for the curb and drain in question. Therefore, in view of the foregoing, the Court is constrained by the evidence to deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 9, 1998

WV REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
VS.
DIVISION OF CORRECTIONS
(CC-98-409)

Chad Cardinal, Assistant Attorney General, for claimant.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant, Regional Jail and Correctional Facility Authority, provides and maintains the Eastern Regional Jail, the Central Regional Jail, the South Central Regional Jail, the Southern Regional Jail, and the Northern Regional Jail as facilities for the incarceration of prisoners who have committed crimes in various counties. Some of the prisoners held in these regional jails have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. Claimant brought this action in the amount of $1,968,970.00, to recover the costs of housing and providing associated services to prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the claimant, these prisoners have had to remain in the regional jails for periods of time beyond the dates of the commitment orders.

Respondent filed an Answer admitting the validity of the claim and that the amount of $1,968,970.00 has been agreed to by the parties as a fair and reasonable settlement for the housing costs and associated services provided by claimant in this claim.

This Court has determined in prior claims by claimant for the cost of housing inmates that respondent is liable to claimant for these costs, and the Court has made the appropriate awards. This issue was considered by the Court previously in the claim of *County Comm'n. of Mineral County v. Div. of Corrections*, an unpublished opinion of the Court of Claims issued November 21, 1990, wherein the Court held that the respondent is liable for the cost of housing inmates.

In view of the foregoing, the Court makes an award to claimant in the amount of $1,968,970.00.

Award of $1,968,970.00.

OPINION ISSUED JANUARY 11, 1998

CHARLESTON AREA MEDICAL CENTER
VS.
DIVISION OF CORRECTIONS
(CC-98-27)

Claimant represents self.

Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment of $16,885.61 for medical services provided to an inmate at Mt. Olive Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim and the amount, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the invoice.

While the Court believes that this is a claim which in equity and good conscience should be paid, the Court further believes that an award cannot be recommended based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED JANUARY 11, 1999

WEXFORD HEALTH SOURCES
VS.
DIVISION OF CORRECTIONS
(CC-98-47)

Matt Polka, Attorney at Law, for claimant.

Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment of $26,731.46 for medical services provided to inmates in Mt. Olive Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the invoice.

While the Court believes that this is a claim which in equity and good conscience should be paid, the Court further believes that an award cannot be recommended based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED JANUARY 22, 1999

S. SCHWAB COMPANY, INC.
VS.
WEST VIRGINIA DEVELOPMENT OFFICE
(CC-99-10)

Claimant represents self.

Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant seeks $39,601.00 in compensation for road grading costs which it incurred in connection with construction of a 187,000 square-foot warehouse and distribution facility in Martinsburg, Berkeley County. Pursuant to a Memorandum of Understanding between the claimant and the respondent, another division of the State, namely the Division of Highways, was to construct and pay for a permanent public road on the eastern boundary of the property. As a result of a misunderstanding between the Division of Highways and the claimant, the claimant performed the grading work for this road. Claimant now seeks reimbursement of these resulting costs in the amount of $39,601.00.

In its Answer, the respondent admits the validity of the claim and the amount, and states that there were sufficient funds expired in the prior fiscal year from which the claim could have been paid. These funds are available to pay this claim during the current 1999 fiscal year if the Court determines that the claim is valid. Further, the

Division of Highways has reviewed the documentation for the damages requested herein and has determined that the work performed has a value of $45,000.00 to $50,000.00. This agency also has stated that it will reimburse the respondent for the amount awarded to the claimant based upon an opinion of this Court.

In view of the foregoing, the Court makes an award in the amount of $39,601.00, and the Court directs that respondent make payment of the award to the claimant from current fiscal year funds available for this purpose as soon as may be practical.

Award of $39,601.00

OPINION ISSUED JANUARY 22, 1999

THE WEST VIRGINIA DEVELOPMENT OFFICE
VS.
DIVISION OF HIGHWAYS
(CC-99-31)

Claimant represents self.

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

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant seeks $39,601.00 in compensation for road grading costs which it incurred in connection with construction of a 187,000 square-foot warehouse and distribution facility in Martinsburg, Berkeley County. Pursuant to a Memorandum of Understanding between the claimant and the S. Schwab Company, Inc., the respondent was to construct and pay for a permanent public road on the eastern boundary of the property. As a result of a misunderstanding between respondent and the company, the company performed the grading work for this road. Claimant now seeks reimbursement of these resulting costs in the amount of $39,601.00 as it was required to compensate the S. Schwab Company, Inc., pursuant to an opinion issued by this Court in Claim No. CC-99-10.

In its Answer, the respondent admits the validity of the claim and the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the claim could have been paid. Further, the respondent has reviewed the documentation for the damages requested herein and has determined that the work performed has a value of $45,000.00 to $50,000.00.

In view of the foregoing, the Court makes an award in the amount of

$39,601.00 to the claimant.

Award of $39,601.00

OPINION ISSUED JANUARY 25, 1999

DELORIS PERRY AND SHIRLEY PERRY
VS.
DIVISION OF HIGHWAYS
(CC-96-329)

W. Dale Greene, Attorney at Law, for th claimant.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimants brought this action for vehicle damage and personal injuries which occurred as a result of an accident on a road maintained by the respondent in Lincoln County. The Court is of the opinion to make a comparative award as stated more fully below.

The incident giving rise to this claim occurred on June 22, 1996, at approximately 11:30 p.m. Claimant Deloris Perry was driving a 1991 Pontiac Grand Am, owned by her daughter Shirley Perry, in a westerly direction on Four Mile Road (County Route 11), approximately six and a half miles west of the intersection with Route 10. Route 11 in this area is a narrow, winding two-lane paved road that is high priority in terms of maintenance. The road is 16 feet, six inches wide; each lane is eight feet, three inches wide. There are yellow center stripes but no outside white lines denoting the edge of the pavement. There is a steep drop-off to a creek on one side of the road.

The weather was dark and rainy. The speed limit is 30 miles per hour, and there is a posted speed limit sign for westbound traffic located approximately two miles from the accident site. The evidence adduced at hearing established that the claimant steered to the right to avoid an oncoming truck, whereupon her vehicle struck a depression on the edge of her lane. Ms. Perry lost control of the vehicle, which crossed the road and flipped onto its roof against an embankment.

The evidence established that the depression in question had been in this location for some time. Wendell Williamson, a school bus driver who lived nearby and witnessed the accident, testified that he had struck the hole three to six months prior to the claimant's accident and that he had advised the respondent of the hazard at that time. Mr. Williamson further testified that the claimant's vehicle appeared to be traveling at a normal rate of speed at the time of the accident. The respondent's position was that

this depression was caused by base failure and a washout along the creek and that the respondent had no prior actual or constructive notice.

Claimant Deloris Perry experienced continued pain in her back, right leg and left knee following the accident. She received chiropractic treatment in 1996 and 1997 for lumbar sprain and nerve impingement, however x-rays and a lumbar MRI were normal. Her out-of-pocket medical costs, after insurance, is in the amount of $760.69. The vehicle was a reconstructed vehicle with a book value of $6,900.00. Owner Shirley Perry seeks an award of $4,630.00, representing the book value less 30 percent deduction and a $200.00 trade value. The claimants had liability insurance only.

It is well established that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). In order to hold the respondent liable for road defects of this type, the claimant must prove that the respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985), *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The Court is of the opinion that the respondent had, at a minimum, constructive notice of this hazard and had ample opportunity to make repairs. Therefore the claimants are entitled to an award for their out-of-pocket expenses.

Deloris Perry testified that she was traveling approximately 25 to 30 miles per hour. However, the evidence indicates that her vehicle traveled some distance beyond the depression in question, struck an embankment and flipped onto its roof. While the evidence is not conclusive, it is the opinion of the Court that Ms. Perry, more likely than not, was driving in excess of reasonable speed under the conditions, and is 30 percent at fault for failing to exercise due care. Therefore, in accordance with established principles of comparative negligence the Court is of the opinion to reduce the awards to Deloris Perry by 30 percent. The Court furthermore is of the opinion that Ms. Perry is entitled to a comparative award for pain and suffering and inconvenience arising from this accident in the amount of $1,000.00, reduced by her comparative fault to $700.00.

In view of the foregoing, the Court does hereby make an award as follows:

Award to Deloris Perry of $1,232.48.

Award to Shirley Perry of $4,630.00.

OPINION ISSUED JANUARY 25, 1999

WILLIAM ESTES HARRIS, III
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-98-336)

Claimant represents self.

Joy M. Cavallo, Assistant Attorney General, for the respondent.

PER CURIAM:

The claimant brought this action for the value of a money order that he received while he was at the South Central Regional Jail, a facility of the respondent.

The claimant states that on or about September 5, 1998, he received a money order in the amount of $50.00 which was opened in front of an officer of the facility, signed by the claimant, and given back to the officer for the money order to be cashed. When claimant made an inquiry about the money order later that same day, he was told that it had been lost or stolen. Claimant alleges that respondent had control of the money order and is responsible for its subsequent loss.

In its Answer the respondent admitted the validity and the amount of the claim; however, respondent may not pay a claim of this nature from its regular accounts.

The Court is of the opinion that the respondent was in control and custody of the claimant's money order, that a bailment existed, and that the respondent was negligent in exercise of its responsibility to oversee the moneys represented by the money order. Therefore, in view of the foregoing, the Court makes an award in the amount of $50.00.

Award of $50.00.

OPINION ISSUED JANUARY 25, 1998

CORRECTIONAL MEDICAL SERVICES, INC.
VS.
DIVISION OF CORRECTIONS
(CC-98-437)

Claimant represents self.

Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment in the amount of $222,789.88 for medical services provided to inmates of the Mount Olive Correctional Center, Huttonsville Correctional Center, Pruntytown Correctional Center, and Denmar Correctional Center, facilities of the respondent. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay for these medical expenses.

While the Court believes that this is a claim which in equity and good conscience should be paid, the Court further believes that an award cannot be recommended based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED JANUARY 25, 1999

CORRECTIONAL MEDICAL SERVICES, INC.
VS.
DIVISION OF CORRECTIONS
(CC-99-30)

Claimant represents self.

Joy M. Cavallo, Assistant General Counsel, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment in the amount of $51,514.70 for medical services rendered to inmates at Denmar, Pruntytown, Huttonsville, and Mt. Olive Correctional Centers, all facilities of the respondent. Respondent, in its Answer, admits the validity of the claim and the amount, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

While the Court believes that this is a claim which in equity and good conscience should be paid, the Court further believes that an award cannot be recommended based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED JANUARY 25, 1999

CHARLESTON AREA MEDICAL CENTER, INC.
VS.
DIVISION OF CORRECTIONS
(CC-98-448)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment of $70,000.00 for medical services provided to an inmate at Mt. Olive Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim and the amount, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the invoice.

While the Court believes that this is a claim which in equity and good conscience should be paid, the Court further believes that an award cannot be recommended based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED JANUARY 25, 1999

CHARLESTON AREA MEDICAL CENTER, INC.
VS.
DIVISION OF CORRECTIONS
(CC-98-446)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment of $30,225.97 for medical services provided to an inmate at Mt. Olive Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim and the amount, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the invoice.

While the Court believes that this is a claim which in equity and good conscience should be paid, the Court further believes that an award cannot be recommended based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED JANUARY 25, 1999

AARON W. STOVER
VS.
DIVISION OF HIGHWAYS
(CC-98-307)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to a 1994 Chevrolet S-10 pickup truck, which occurred after the vehicle encountered loose gravel on a road maintained by the respondent in Greenbrier County.

The incident giving rise to this claim occurred on or about July 17, 1998, at approximately 2:30 a.m., on Brownstown Road. The claimant, a cross-country truck driver, had left his truck in Mt. Airy, NC, and was driving his personal vehicle to his home in Renick. The claimant had driven approximately nine hours on a shift and four hours on the way home. Brownstown Road in this area is a one-lane, tar-and-chip road that is second priority in terms of maintenance. The weather was clear, warm and dry. The evidence adduced at hearing was that as the claimant proceeded around a turn, he encountered an area where the respondent had spread an amount of gravel on the road where tar had been oozing up onto the road surface. The claimant lost control of the vehicle, which slid into a ditch and hit a rock. The vehicle sustained damage to the front driver's side bumper, fender, grille and wheel well. The Court took a view of the vehicle, and notes that the damage was extensive. The claimant submitted into evidence a repair estimate in the amount of $1,573.15. The claimant had liability insurance only.

The claimant testified that he was traveling at approximately 30 miles per hour and that there were no signs warning of loose gravel. The evidence established that the respondent had been engaged in shoulder work on the road and had installed signs warning of loose gravel. This work was completed on or about June 30, 1998. The respondent's evidence was that the warning signs had been stolen. At some time thereafter, the respondent spread gravel on the area of the road in question in response to a complaint that tar had been oozing up on the surface during hot weather. The evidence indicates that no "Loose Gravel" signs were put up at that time.

It is well established that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947) In order

to hold the respondent liable for road defects of this nature, the claimant must prove that the respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985), *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986).

The Court, after review of the record, is of the opinion that the respondent had reason to know that loose gravel on this road without any warning signs presented a significant risk of harm to traveling motorists. Therefore, the Court finds that the claimant is entitled to an award. However, the Court is also of the opinion that the claimant's failure properly to maintain control of his vehicle was a contributing factor and that the claimant was 33 percent at fault. Therefore, in accordance with the established principles of comparative negligence, the Court does hereby make an award in the amount of $1,054.01.

Award of $1,054.01.

OPINION ISSUED JANUARY 25, 1999

JAMES R. TOOTHMAN
VS.
DIVISION OF HIGHWAYS
(CC-98-187)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his 1992 Eagle Talon, which occurred when the vehicle encountered a large hole on a road maintained by the respondent in Marion County.

The incident giving rise to this claim occurred on May 24, 1998, at approximately 6:45 a.m. The claimant was driving southeast on WV Route 17 between Fairview and Barrackville. Route 17 in this area is a two-lane paved road that is second priority in terms of maintenance. The road curves to the left in this area and there is a rock cliff on the left side and a drop off to a creek on the right. The evidence at hearing established that as the claimant proceeded around this turn, his vehicle struck a large hole, resulting in two damaged aluminum wheel rims on the passenger side. The claimant submitted a number of repair estimates in the approximate amount of $884.00. The claimant's insurance deductible was $1,000.00.

Route 17 in this area is 20 feet wide, with 10-foot lanes. The hole in question was described as approximately 14 inches wide and eight inches long, located approximately in the middle of the claimant's lane. The claimant was familiar with the

road. He testified that he was driving approximately 40 miles per hour, the posted speed limit, and that he did not see the hole in time to avoid it. The claimant indicated that school children often walk on the edge of his lane, and that his vehicle was closer to the center line for safety. It was the respondent's position that it had no prior notice of this road defect.

In order to hold the respondent liable for road defects of this sort, the claimant must prove that the respondent knew or should have known of the defect giving rise to the claim. The evidence establishes that the hole in question was of significant breadth. The Court is of the opinion that a hole of this size would have developed over some time, and that the respondent had reason to know of this road defect. *Hamon vs. Dept. of Highways*, 16 Ct.Cl. 127 (1986). However, the Court is also of the opinion that the claimant is one third at fault for failing to exercise due care given the poor visibility and design and location of the road in this area. Therefore, in view of the foregoing, and in accordance with the principles of comparative negligence, the Court does hereby make a comparative award in the amount $583.44 ($884 x .66 percent = 583.44.)

Award of $583.44.

OPINION ISSUED JANUARY 25, 1999

FLEASE ANNESE, JR. AND MARY VIRGINIA ANNESE
VS.
DIVISION OF HIGHWAYS
(CC-98-151)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

Claimant Mary Virginia Annese brought this action for damage to her 1995 Volkswagen, which occurred when the vehicle struck a piece of blacktop lying in a road maintained by the respondent in Clarksburg, Harrison County. The Court, on its own motion, amended the style of the claim to reflect the proper parties.

The incident giving rise to this claim occurred on April 14, 1998, at approximately 1:00 p.m. Ms. Annese was driving in the right-hand lane on old US Route 50 westbound towards Clarksburg at approximately 55 miles per hour. Route 50 in this area is a paved, four-lane heavily traveled road. The evidence adduced at hearing established that Ms. Annese' vehicle struck a piece of asphalt that was lying roughly in the center of her lane. The vehicle sustained damage to both wheels and tires on the driver's side. The claimant submitted into evidence a number of repair bills in the

amount of $514.37. The claimants' insurance deductible was $250.00.

The piece of blacktop was described as approximately three inches by 12 inches and rectangular in shape. Ms. Annese testified that she did not see it in time to avoid it. She testified that she was unable to swerve because of traffic next to her in the left-hand lane. The respondent's normal practice was to patrol this road once a day. It was the respondent's position that it had no prior notice of this particular road defect.

It is well established that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). The general rule is that the respondent will not be held liable for defects of this type unless the claimant can show that the respondent had actual or constructive notice. Accordingly, the Court has held that the unexplained presence of debris on a road, without a positive showing of negligence, is insufficient evidence upon which to base an award. The Court is not unsympathetic to the claimant's position. However, in view of the foregoing, the Court is constrained by the evidence to deny the claim.

Claim disallowed.

OPINION ISSUED JANUARY 27, 1999

CHARLES ANTHONY
VS.
DIVISION OF HIGHWAYS
(CC-98-11)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to his 1991 Ford pickup truck, which occurred when the vehicle struck a rock on a road maintained by the respondent in Mercer County.

The incident giving rise to this claim occurred on or about December 21, 1997, at approximately 11:00 a.m. The claimant and an acquaintance were driving northbound on US Route 19. Route 19 in this area is a two-lane paved road that is fairly straight. The evidence adduced at hearing was that a large rock tumbled from an embankment. The claimant's vehicle struck this rock, resulting in serious damage to the undercarriage. The truck was declared a total loss. The claimant had a $250.00 insurance deductible.

The rock was described as approximately 12 inches to 18 inches in diameter. The claimant testified that he was talking with his passenger, and that the rock fell onto

the road without warning. The respondent's position was that this is not a known rock fall area and that there had not been a rock fall in the area in recent memory.

It is well established that the respondent is neither an insurer nor a guarantor of the safety of motorists upon its roads and that in order to hold the respondent liable for road hazards the claimant must prove that the respondent had actual or constructive notice. The general rule that this Court has adopted with regard to rock falls is that the unexplained falling of a rock onto a road maintained by the respondent, without a positive showing that the respondent knew or should have known of the hazard, is insufficient evidence upon which to justify an award. *Coburn vs. Dept. of Highways,* 16 Ct. Cl 68 (1986). The record reveals that the respondent had no notice of a rock fall hazard. Therefore, in view of the foregoing, the Court is constrained by the evidence to deny the claim.

Claim disallowed.

OPINION ISSUED JANUARY 27, 1999

CHRISTY LYNN BAYLE
VS.
DIVISION OF HIGHWAYS
(CC-98-223)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to a 1993 Mazda, which occurred when the vehicle encountered a large hole on the edge of a road maintained by the respondent in Mercer County.

The incident giving rise to this claim occurred on June 13, 1998, at approximately 2:45 p.m. The claimant was driving northbound on Brickyard/Gardener Road (County Route16) at approximately 35 miles per hour. Route 16 in this area is a two-lane paved road that is low priority in terms of maintenance. Each lane is 10 feet wide. The evidence adduced at hearing was that as the claimant proceeded around a corner, she encountered another vehicle in the oncoming lane. The claimant steered toward the outside edge of her lane, whereupon her vehicle struck a large hole on the edge of the pavement. The claimant's vehicle sustained two flat tires and two bent rims and was knocked out of alignment. The claimant submitted a number of repair bills in the total amount of $575.29. She carried a $500.00 insurance deductible.

The hole was described as roughly the size of a basketball. Part of it was in

the traveled portion of the lane and the other part was on the outside edge of the pavement. The claimant testified that she was familiar with the road and drove it every day. The respondent had been patching the road in this area on three occasions in April and May 1998.

It is well established that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads. In order to hold the respondent liable for defects of this nature, the claimant must prove that the respondent had actual or constructive notice and failed to take reasonable and timely remedial action. *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The record indicates that the claimant was aware of the road conditions in question and that the respondent had taken reasonable steps to keep this low priority road in passable condition. Therefore, in view of the foregoing, the Court is constrained by the evidence to deny the claim.

Claim disallowed.

OPINION ISSUED JANUARY 27, 1999

CLIFFORD E. BICKERTON
VS.
DIVISION OF HIGHWAYS
(CC-98-218)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to a 1997 Mercedes, which occurred when the vehicle encountered a blow-up in a highway maintained by the respondent.

The incident giving rise to this claim occurred on May 20, 1998, at approximately 7:40 p.m. The claimant was driving southbound on Interstate 79 between the 104 and 105 mile markers near the Jane Lew exit. The weather was clear and dry. The evidence adduced at hearing established that the claimant's vehicle struck an expansion joint between the road and a bridge where the concrete in the pavement had blown up. The vehicle sustained damage to three wheels and tires.
The claimant's insurance deductible was $250.00.

The claimant was driving at approximately 70 miles per hour in the right hand lane. He testified that it was still daylight and that he did not need his headlights. He testified that he did not see the blow-up in time to avoid it.

It is well established that the State is neither an insurer nor a guarantor of the

safety of motorists upon its roads and that in order to hold the respondent liable for road defects of this nature, the claimant must prove that the respondent had actual or constructive notice. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947), *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985), *Hamon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The evidence established that concrete blow ups of this nature are caused by heat expansion and are by their nature unpredictable. The respondent's regular practice was to inspect bridges every two years for defects. It was the respondent's position that it had no prior notice of this blow up and should not be held liable. The Court, while sympathetic to the claimant's position, is of the opinion that there is insufficient evidence of negligence on the part of the respondent upon which to base an award.

Claim disallowed.

OPINION ISSUED JANUARY 27, 1999

PAULINE CLEVENGER
VS.
DIVISION OF HIGHWAYS
(CC-98-264)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for water damage to her property which she alleges was caused by negligent road and ditch maintenance on behalf of the respondent in Marion County.

The claimant is the owner of a home in the Sanford Housing addition on Norwood Road (Route 72/5) in the Winfield District, outside Fairmont. The incident giving rise to this claim occurred on June 28, 1998, at approximately 10:00 p.m. The weather had been rainy all evening. The claimant's home is located below Norwood Road near the intersection with Hoult Road. The evidence adduced at hearing established that on the night in question a large amount of water flowed down from Hoult Road, to Norwood Road and down into the claimant's basement.

It was the claimant's position that the respondent failed adequately to maintain and clean the ditch line opposite her home, and that the respondent's negligence caused the flood damage to her home. The claimant submitted an itemized list of property damage to the basement and repair costs in the amount of $1,539.00. The claimant received a FEMA flood damage payment in the amount of $573.04, leaving her with a net out-of-pocket loss in the approximate amount of $966.00. The claimant's

homeowner's insurance did not cover any of her loss.

Norwood Road in this location is a low priority in terms of maintenance. The respondent's normal routine was to complete ditch work on low priority roads once a year. The evidence at the hearing established that flooding was widespread throughout Marion County on the day in question due to unusually heavy rains, and that numerous bridges and culverts washed out. The respondent was in an emergency flood repair status for approximately six weeks thereafter.

The evidence indicates that the road indeed may have been in need of ditching in the location of the claimant's home. However, there was widespread flooding throughout the county and it appears from the evidence that the heavy rains in the area were the primary cause of the flood damage to the claimant's home. Even if there had been a ditch which was clear and free-running for water, it does not appear that it would have been able to handle the abundance of water from this particular storm. While sympathetic to the claimant's position, the Court is of the opinion that there is insufficient evidence of negligence on the part of the respondent which had a proximate causal relationship to the claimant's damages. Therefore, in view of the foregoing, the Court does hereby deny the claim.

Claim disallowed.

OPINION ISSUED JANUARY 27, 1999

JOHN E. GILL
VS.
DIVISION OF HIGHWAYS
(CC-98-276)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for damage to a 1986 AMC Eagle, which occurred when the vehicle encountered a mud slick on a road maintained by the respondent in Summers County.

The incident giving rise to this claim occurred on Sunday, July 19, 1998, at approximately 9:20 a.m. The claimant was driving on Route 9 east of Hinton on his way to church. The weather was dry, but it had rained the night before. Route 9 in this area is a narrow, two-lane, paved road with numerous curves. The claimant was driving down a hill and as he proceeded around a sharp turn he suddenly encountered an area where mud had washed across the road. The claimant lost control of his vehicle and it

slid into a ditch causing damage to the front end. The claimant submitted into evidence a repair estimate in the amount of $1,831.31. He had liability insurance only.

The evidence adduced at hearing conclusively established that the proximate cause of the claimant's accident was the mud slick. The respondent had been engaged in cleaning out ditches along Route 9 for several days immediately prior to the claimant's accident. In the immediate area of the accident, there is an ongoing slip area adjacent to the road. The respondent had cleaned the ditch line in this area and had swept dirt off the road twice before quitting for the weekend. The evidence established that at approximately 8:30 a.m. on the morning of the claimant's accident, the respondent had received a telephone call advising of the mud slick. The respondent arrived on the scene approximately 10 minutes after the claimant's accident and applied gravel in the area.

It is well established that the respondent is neither and insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). In order to hold the respondent liable for road defects, the claimant must prove that the respondent had actual or constructive knowledge and failed to take reasonable remedial steps. In the present case, the evidence indicates that the respondent was taking diligent steps to clean out the ditches and remove dirt from the road surface. Furthermore, the respondent responded immediately when advised of the mud slick on the morning of the accident.

It appears from the evidence that the principal reason that the mud slick developed was that there was a slip in the immediate vicinity which deposited mud onto the road when it rained. While not unsympathetic to the claimant's position, the Court is of the opinion that there is insufficient evidence of negligent conduct on the part of the respondent upon which to justify an award. Therefore, in view of the foregoing, the Court does hereby deny the claim.

Claim disallowed.

OPINION ISSUED JANUARY 27, 1999

GENE D. LESLIE
VS.
DIVISION OF HIGHWAYS
(CC-98-285)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for flood damage to his home, which he alleges occurred due to the respondent's failure to properly maintain a drain on the road above his property.

The incident giving rise to this claim occurred on March 21, 1998. The claimant's home is located on Rural Route 8 in McDowell County. The home is located close to the road but below the surface of the pavement. There is a retaining wall on one side between the road and the house, as well as a channel for water runoff. There is a steep hillside on the opposite side of the road. McDowell County had been experiencing rain and snow for a number of days prior to the date in question. The evidence adduced at hearing established that on the day in question a large amount of water flowed down across the road and washed out part of the retaining wall and part of the foundation of the claimant's home. The claimant submitted into evidence a repair estimate in the amount of $2,850.00. The claimant had no flood insurance.

The claimant submitted into evidence a video-tape showing flood damage inside his basement. The video-tape depicted water flowing across the road and down around the claimant's home. It was the claimant's position that one or more drains under the road had become clogged with debris and that the flooding to his home was caused by the respondent's failure to adequately maintain and clean the drains. It was the respondent's position that it had no prior notice of a clogged drain and that flood damage occurred throughout the county during the time in question due to the saturated ground and heavy precipitation. The respondent was primarily engaged in snow and ice removal operations at the time.

The Court, after review of the record, is of the opinion that the proximate cause of the claimant's damages was a combination of the unusually wet weather that occurred during the time in question, as well as the lay of the land and the location of the claimant's home. While sympathetic to the claimant's plight, the Court is of the opinion that there is insufficient evidence of negligence on the part of the respondent upon which to justify an award.

Claim disallowed.

OPINION ISSUED JANUARY 27, 1999

JANET DARLENE LOUGH
VS.
DIVISION OF HIGHWAYS
(CC-98-153)

Forrest A. Bowen, Attorney at Law, for the claimant.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for personal injuries, wage loss and damage to her vehicle which she alleges occurred as a result of a rock fall on a road maintained by the respondent in Harrison County. While sympathetic to the claimant's situation, the Court is constrained by the law and the evidence to deny the claim as stated more fully below

The incident giving rise to this claim occurred on December 27, 1996, at approximately 10:40 p.m. The claimant was driving a 1987 Pontiac Grand Am southbound on US Route 19 near Clarksburg just south of West Fork Road. US Route 19 southbound in this vicinity is a winding, two-lane paved road that curves to the right. The speed limit is 45 miles per hour. There is a steep high wall on the west side of the road, adjacent to the claimant's lane. It is a known rock fall area, and there is a Falling Rock warning sign for southbound traffic approximately 890 feet before the accident site.

The evidence adduced at hearing was that as the claimant proceeded around the curve, she simultaneously encountered a large boulder in the middle of her lane of traffic and an oncoming vehicle in the northbound lane of traffic. The claimant's vehicle struck the rock and flipped over onto its roof. The vehicle was declared a total loss. The claimant suffered pain in her neck, shoulder and left arm. She had to wear a neck brace and could not use her left arm for approximately five days, but she apparently did not sustain permanent injuries. She has alleged medical costs in the approximate amount of $1,500.00. The claimant, a private duty nurse, also alleged wage loss in the amount of approximately $262.52.

The rock in question was described as approximately the size of a small desk. The respondent's right of way extends 20 feet on each side of the center line. Each lane of traffic is 11 feet wide. The rock fell from the high wall, just outside the respondent's right of way. This high wall had been maintained by CSX railroad, which has a rail line running along the top of the high wall. The claimant testified that she was driving between 35 and 40 miles per hour and was unable to see the rock in time to prevent the collision. It was the claimant's position that the respondent failed to take adequate measures to warn motorists of the rock fall hazard, or to prevent rocks from falling into the road.

The evidence indicated that there had been a debris slide in the area in June 1996. The respondent's position was that such slides tended to accumulate in the berm. The "Falling Rock" warning sign had been in this location since at least 1994. The respondent was not informed of this particular rock fall until approximately 11:00 p.m., after the claimant's accident.

It is well established that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (W.Va. 1947). The doctrine that this Court has adopted consistent with *Adkins* is that liability for road defects will not be imposed unless the claimant establishes that the respondent had actual

or constructive notice. With regard to falling rocks, the Court has held that the unexplained falling of a rock onto a road, without a positive showing of negligence on the part of the respondent, is insufficient to justify an award. *Coburn vs. Dept. of Highways*, 16 Ct. Cl. 68 (1986). The vast majority of rock fall claims decided by this Court have been disallowed based upon this doctrine. *Dimmick vs. Division of Highways*, (CC-96-561), unpublished opinion issued May 29, 1998.

The Court, after review of the evidence, is of the opinion that there is insufficient evidence of negligence upon which to justify an award. The respondent installed a sign warning of rock fall hazards. The respondent had no prior notice of this particular rock fall, and there does not appear from the evidence to be a pattern of multiple repeated rock fall incidents posing immediate danger to the traveling public. Mountainous terrain, narrow winding roads, and rock fall hazards are common in West Virginia. The Court is of the opinion that the respondent took reasonable steps to advise motorists of the potential for rock falls in this area. In view of the foregoing, the Court does hereby deny the claim.

Claim disallowed.

OPINION ISSUED JANUARY 27, 1999

DANIEL PHILLIPS
VS.
DIVISION OF HIGHWAYS
(CC-97-452)

Claimant represents self.
Julie M. Meeks, Attorney at Law, for the respondent.

PER CURIAM:

The claimant brought this action for a flat tire, which occurred when a sharp rock punctured the tire on a road maintained by the respondent.

The incident giving rise to this claim occurred on December 4, 1997. The claimant was driving on Mt. View-Talman Village Road (W.V. Route 103 and U.S. Route 52). Part of this road is stone-based and part of it is paved. The evidence adduced at hearing established that the claimant encountered an area where the respondent had laid down fresh gravel. One of these stones punctured his tire, resulting in out-of-pocket repair costs in the amount of $75.00.

The claimant submitted into evidence the stone that punctured his tire. The stone was roughly one inch long and pointed on one end. The respondent had been engaged in road stabilization in the area the previous day and conceded that the stone

appeared to be of the type commonly used on stone-based roads such as this. The respondent contracts for crushed gravel of this sort by the ton. A sample is taken to ensure that it is the proper size.

It is well established that the State is neither an insurer nor a guarantor of the safety o f motorists upon its roads. *Adkins vs. Sims*, 46 S.E.2d 81 (1947). In order to hold the respondent liable for road hazards, the general rule is that the claimant must prove that the respondent had actual or constructive notice and a reasonably opportunity to take corrective measures. The Court is of the opinion that the respondent cannot be expected to inspect every stone that it purchases for the purpose of road stabilization work and that there is insufficient evidence of negligence upon which to justify an award. Therefore, in view of the foregoing, the Court does hereby deny the claim.

Claim disallowed.

OPINION ISSUED JANUARY 27, 1999

GARY WILES AND SANDY WILES
VS.
DIVISION OF HIGHWAYS
(CC-98-275)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for the respondent.

PER CURIAM:

The claimants brought this action for damage to their property which they alleged occurred when a tree fell from a right of way maintained by the respondent in Monongalia County.

The claimants own a mobile home and an outbuilding on WV Route 7 (Rogers Avenue) in Morgantown, West Virginia. The area in question is heavily wooded. A steep bank runs along one side of the claimant's property near the road. On or about June 16, 1998, a heavy windstorm occurred throughout Monongalia County. The evidence adduced at hearing established that a large tree fell on the claimants' outbuilding, damaging the roof as well as the back porch of the claimant's trailer. The claimants' homeowners insurance covered the cost for repairs. The claimants now seek an award in the amount of $250.00, representing their insurance deductible.

The evidence adduced at hearing established that the area around the claimants' home was heavily wooded. The tree appears to have fallen from an embankment on or near the respondent's right of way. The tree in question was large and healthy. The respondent's evidence established that the wind damage from this

storm was widespread throughout Monongalia County. A small tornado occurred in the southern part of the county, which uprooted a number of trees.

The general rule of this Court is that in order to hold the respondent liable for property damage caused by negligent maintenance of its roads and right of ways, the claimant must prove that the respondent had actual or constructive notice. With regard to tree fall claims, the general rule this Court has adopted is that if a tree is dead and poses an apparent risk, then the respondent may be held liable. However, when a healthy tree falls and causes property damage as a result of a storm, the Court has held that there is insufficient evidence of negligence upon which to justify an award. *Gerritsen vs. Dept. of Highways*, 16 Ct. Cl. 85 (1986).

The evidence indicates that the tree in question was healthy and that the damage was the result of unusually severe winds. Therefore, in accordance with the foregoing, the Court is constrained by the evidence to deny the claim.

Claim disallowed.

OPINION ISSUED JUNE 7, 1999

CORRECTIONAL FOODSERVICE MANAGEMENT
VS.
DIVISION OF CORRECTIONS
(CC-99-69)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant seeks $69,289.25 for providing food services in May 1998 to Mt. Olive Correctional Center, a facility of the respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim and the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $69,289.25.

Award of $69,289.25.

OPINION ISSUED JUNE 7, 1999

ANTHONY KEITH LEONARD
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-98-389)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant seeks $234.90 for personal glasses which he lost during a chase of an inmate at the South-Central Regional Jail on or about October 23, 1998. The documentation for these glasses was provided to respondent, however, respondent does not have a fiscal method for reimbursing its employees for losses such as that experienced by the claimant. Therefore, the claimant has not been reimbursed for this loss. In its Answer, the respondent admits the validity of the claim and that the amount claimed is fair and reasonable, but respondent further states that it is unable to reimburse the claimant.

The Court has determined that claimant is entitled to an award as this claim is a moral obligation of the State in accordance with the provisions of WV Code §14-2-1 et.seq. In view of the foregoing, the Court makes an award in the amount of $234.90.

Award of $234.90.

OPINION ISSUED JUNE 7, 1999

CHARLES E. MCELFISH, DDS
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-99-17)

Claimant represents self.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant seeks $23,637.12 for rent escalation payments for fiscal years 1994, 1995, and 1996, to which it is entitled in accordance with the terms of its contract for the lease for a facility to the respondent. The documentation for these services was not processed for payment within the appropriate fiscal years; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim but states that the amount owed for the rent escalation payments is $20,564.59. The claimant included $3,072.53 for interest which is not provided in the Contract of Lease. Respondent further states that it expired sufficient funds in the appropriate fiscal years from which the rent escalation payments could have been paid.

This Court has held that the payment of interest may be considered if the terms of the

ontract provide for such payment; otherwise, the Court denies interest in accordance with WV Code §14-2-12. The terms of claimant's Contract of Lease does not provide for interest; therefore, the Court denies that portion of the claim which represents interest.

In view of the foregoing, the Court makes an award in the amount of $20,564.59.

Award of $20,564.59.

OPINION ISSUED JUNE 7, 1999

SGT. JOSEPH M. MENENDEZ
VS.
WEST VIRGINIA STATE POLICE
(CC-99-27)

Claimant represents self.

Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimant, a sergeant in of the West Virginia State Police, seeks $159.98 for the loss of his eye glasses which occurred during a high speed chase on Interstate-79. He was attempting to lean out of the State Police vehicle to motion the driver of the motor cycle to pull over when his glasses were blown by the wind. A search for the glasses was futile. In its Answer, the respondent admits the validity of the claim and the amount, but states that it does not have a fiscal account from which to reimburse its employees for property losses such as that experienced by the claimant.

In view of the foregoing, the Court makes an award in the amount of $159.98.
Award of $159.98.

REFERENCES

- **BERMS – See also Comparative Negligence and Negligence**
- **BRIDGES**
- **CONTRACTS**
- **COMPARATIVE NEGLIGENCE – See also Berms; Falling Rocks and Rocks; Negligence & Streets and Highways**
- **DAMAGES**
- **DRAINS and SEWERS**
- **FALLING ROCKS AND ROCKS – See also Comparative Negligence and Negligence**
- **JURISDICTION**
- **LEASES**
- **MOTOR VEHICLES**
- **NEGLIGENCE – See also Berms; Falling Rocks and Rocks & Streets and Highways**
- **NOTICE**
- **PEDESTRIANS**
- **PRISONS AND PRISONERS**
- **PUBLIC EMPLOYEES**
- **STATE AGENCIES**
- **STREETS & HIGHWAYS – See also Comparative Negligence and Negligence**
- **TREES and TIMBER**
- **VENDOR**
- **VENDOR – Denied because of insufficient funds**

Volume 22 Headnotes

The following is a compilation of headnotes representing decisions from July 1, 1997 to June 30, 1999. Because of time and space constraints, the Court has decided to exclude certain decisions, most of which involve vendors, typical road hazard claims and expense reimbursements.

BERMS – See also Comparative Negligence and Negligence

BALDWIN VS. DIVISION OF HIGHWAYS (CC-96-261)

In West Virginia, respondent has a duty to maintain road berms 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. *Sweda vs. Dept. of Highways*, 13 Ct. Cl. 249 (1980). The Court made an award of $194.03. . . . . p. 20

BROWN VS. DIVISION OF HIGHWAYS (CC-96-609)

Claimant's vehicle struck a hole on the shoulder of Route 857 in Monongalia County. The Court held that respondent had constructive notice of the hole. Award of $438.30. p. 29 . . . . . .

GIBSON VS. DIVISION OF HIGHWAYS (CC-96-557)

Claimant's vehicle struck a concrete head wall on the berm of County Route 17 in Summers County. The Court held that respondent failed to maintain properly the head wall. Award of $158.50. . . . . p. 42

GILMAN VS. DIVISION OF HIGHWAYS (CC-96-587)

Claimant's vehicle struck broken pavement along the berm area of a road in Ohio County. The Court held that respondent failed to maintain the berm in a reasonably safe condition for use. Award of $250.00 . . . . . p. 43

JASPER VS. DIVISION OF HIGHWAYS (CC-97-441)

Claimant's vehicle struck holes on the shoulder of I-79. The Court held that respondent had reason to know of the holes and made an award of $52.46. . . p.132

RIGGS VS. DIVISION OF HIGHWAYS (CC-96-536)

Claimant's vehicle was damaged when he struck a depression in the berm area of Route 34 in Lincoln County after pulling over to make room for oncoming traffic.

The Court held that since respondent recently had been engaged in bridge construction in the area prior to the incident, it should have known about the depression in the berm area. An award was granted. . . . . p. 10

SHEPPARD VS. DIVISION OF HIGHWAYS (CC-97-228)

Where claimant sustained vehicle damage as a result of being forced to strike a hole on the edge of the pavement on Trace Fork Road in Logan County, the Court held that respondent knew or should have known of the road defect and made an award. *Meisenhelder vs. Dept. of Highways*, 18 Ct. Cl. 80 (1990). . . . . p. 95

TERRY VS. DIVISION OF HIGHWAYS (CC-97-330)

Where claimant's vehicle struck a sunken culvert pipe on County Route 14 in Fayette County, the Court held that claimant was forced off of the road and that respondent failed to maintain properly the berm area in a reasonably safe condition. Award of $63.58.

Meisenhelder . . . . . p. 107

BRIDGES

COLEMAN VS. DIVISION OF HIGHWAYS (CC-96-522)

Where claimant's vehicle was damaged when a steel plate covering a hole in a bridge on Route 4/5 in Clay County had moved, the Court made an award . . . . . p. 6

MYERS VS. DIVISION OF HIGHWAYS (CC-94-172)

Where the front tire of claimant's bicycle became lodged in a crack in the Zion Church Bridge on Route 3/5 in Mingo County, causing her to lose control of the bicycle and fall through a gap between the bridge deck and the girder, the Court made an award of $26,590.25. . . . . p. 3

CONTRACTS

KENHILL CONSTRUCTION COMPANY, INC. VS. WEST VIRGINIA REGIONAL JAIL AND FACILITY AUTHORITY (CC-95-137)

The issue of notice to the owner for delay on a project becomes a matter of importance only when the delay of a project becomes a reality to the parties to the contract. Therefore, where claimant contractor alleges extra costs due to delay, notice in writing to the respondent owner will not be a bar to the claim where the parties were both aware that the delay was going to impact the planned completion date for the project. . . . . p. 46

KENHILL CONSTRUCTION COMPANY, INC. VS. WEST VIRGINIA REGIONAL JAIL AND FACILITY AUTHORITY (CC-95-137)

This Court will grant an award for liquidated damages assessed by respondent upon a claimant contractor where the delay upon which the liquidated damages were assessed was determined by the Court to be attributable to actions of other contractors and other factors not solely in the control of the claimant. . . . . p. 46

KENHILL CONSTRUCTION COMPANY, INC. VS. WEST VIRGINIA REGIONAL JAIL AND FACILITY AUTHORITY (CC-95-137) . . . . . p. 46

Damages put forth by a claimant contractor based upon inefficiencies on the project and determined through a formula not seen by the Court in previous claims presents a theory that may not be ascertained with any degree of certainty. This Court will not base an award upon such theory and that portion of the claim will be denied. . p. 46

KENHILL CONSTRUCTION COMPANY, INC. VS. WEST VIRGINIA REGIONAL JAIL AND FACILITY AUTHORITY (CC-95-137)

Where claimant contractor based its claim upon unforeseen subsurface conditions on the project, the Court looks to the facts in the claim in determining the issue of notice to the owner. This is of particular importance when the damages to the claimant are based upon delay on the project which directly impacted the costs on the project. . . . . p. 46

QUALITY MARKETING, INC. VS. BOARD OF TRUSTEES OF THE UNIVERSITY SYSTEM (CC-96-84)

Claimant brought the action for damages resulting from an alleged breach of contract for the purchase of coal at West Virginia University in Monongalia County. The Court held that respondent acted in good faith and that claimant knew or had reason to know of respondent's coal requirements. Claim disallowed.. . . . . p. 115

WEST VIRGINIA ASSOCIATION OF REHABILITATION FACILITIES VS. DIVISION OF REHABILITATION SERVICES (CC-97-397)

The Court made a stipulated award of $19,197.41 for contracted services provided to respondent for which claimant has not received payment. . . . . p. 61

COMPARATIVE NEGLIGENCE – See also Berms; Falling Rocks and Rocks; Negligence & Streets and Highways

BOLE VS. DIVISION OF HIGHWAYS (CC-98-105)

Where claimant sustained vehicle damage as a result of striking broken pavement on the shoulder of County Route 29 in Ohio County, the Court held that

respondent was negligent for failing to provide a safe berm, but the negligence of claimant was equal to or greater than the negligence of respondent and disallowed the claim. *Meisenhelder vs. Dept. of Highways*, 18 Ct. Cl. 80 (1990). . . . . p. 141

BOLYARD VS. DIVISION OF HIGHWAYS (CC-97-36)

Claimant's vehicle struck a hole on Route 27/4 in Marion County. The Court held that respondent had constructive notice of the hole but that claimant failed to exercise due care and made a reduced award. . . . . p. 28

BUCKY'S LIMITED AUTO BODY, INC. VS. DIVISION OF HIGHWAYS (CC-96-585)

Where respondent was aware of a road defect on U.S. Route 11 in Berkeley County and where claimant failed to maintain control of its vehicle, the Court made a reduced
award. . . . . p. 39

COPLEY VS. DIVISION OF HIGHWAYS (CC-97-335)

Where claimant's vehicle sustained damage as a result of striking a hole on County Route 14 in Mingo County, the Court held that claimant's negligent failure to maintain control of her vehicle was equal to or greater than any negligence attributable to respondent and disallowed the claim. . . . . p. 143

COX VS. DIVISION OF HIGHWAYS (CC-97-179)

Where claimant sustained vehicle damage as a result of striking a rock on the berm of County Route 33 in Kanawha County, the Court held that respondent was negligent for failing to provide a safe berm, but the negligence of claimant was equal to or greater than the negligence of respondent and disallowed the claim. . . . . p. 85

DILLOW VS. DIVISION OF HIGHWAYS (CC-97-5)

Where respondent failed to properly maintain a drain on Route 857 in Monongalia County, creating a pool of water on the road surface and where claimant failed to exercise due caution, the Court made a reduced award. . . . . p. 27

GIVENS VS. DIVISION OF HIGHWAYS (CC-96-465)

Where respondent had notice of the possibility of a rockfall on Route 27 in Kanawha County and where claimant also was aware of the possibility of rockfall, the Court held that both parties were at fault and made a reduced award of $701.12.p. 14

HADEN VS. DIVISION OF HIGHWAYS (CC-96-230)

Where respondent failed to take adequate remedial measures to repair the berm

of County Route 24 in Randolph County and where claimant was 20 percent at fault for failing to exercise due caution, the Court made an 80 percent award of $1,612.00. p. 21

MELOY VS. DIVISION OF HIGHWAYS (CC-97-121)

Where respondent allowed the berm on U.S. Route 219 in Randolph County to fall into a state of disrepair and where claimant failed to maintain control of her vehicle, the Court made a reduced award. . . . . p. 24

PECK VS. DIVISION OF HIGHWAYS (CC-97-164 & CC-97-375)

Claimants brought this action for vehicle damage sustained as a result of a rock fall while traveling on U. S. 250 in Marshall County. The Court held that claimants' negligence is equal to or greater than any negligence on the part of respondent. Claim disallowed. . . . . p. 78

PERRY VS. DIVISION OF HIGHWAYS (CC-96-329)

Claimant's vehicle struck a depression on the edge of County Route 11 in Lincoln County. The Court held that respondent had constructive notice of the hole but that claimant failed to exercise due care and made a reduced award.. . . . . p. 155

RUSSELL VS. DIVISION OF HIGHWAYS (CC-97-246)

Where claimant sustained vehicle damage as a result of striking a hole on the berm of Paint Creek Road in Kanawha County, the Court held that respondent knew or should have known of the road defect, but claimant was not forced to the berm of the road and his negligence was equal to or greater than the negligence of respondent and disallowed the claim. . . . . p. 93

SAYRE VS. DIVISION OF HIGHWAYS (CC-97-282)

Where respondent was aware of a road defect on W.Va. Route 2 in Mason County and where claimant failed to maintain control of its vehicle, the Court made a reduced award of $545.28. . . . . p. 118

STOVER VS. DIVISION OF HIGHWAYS (CC-98-307)

Claimant's vehicle slid into a ditch and struck a rock as a result of loose gravel on Brownstown Road in Greenbrier County, where tar had been oozing up onto the road surface. The Court held that respondent had reason to know that the loose gravel without any warning signs presented a significant risk of harm to motorists, but that claimant's failure to maintain properly control his vehicle was a contributing factor and made a reduced award of $1,054.01. . . . . p. 160

SWANN VS. DIVISION OF PUBLIC SAFETY (CC-96-593)

Where claimant's vehicle sustained damage as a result of a collision with a State Police cruiser on I-64 in Cabell County, the Court held that claimant's negligent failure to maintain control of his vehicle was equal to or greater than any negligence attributable to respondent and disallowed the claim. . . . . p. 99

TOOTHMAN VS. DIVISION OF HIGHWAYS (CC-98-187)

Claimant's vehicle struck a hole on W.Va. Route 17 in Marion County. The Court held that respondent had reason to know of the hole but that claimant failed to exercise due care and made a reduced award of $583.44. . . . . p. 161

DAMAGES

CHANEY VS. DIVISION OF HIGHWAYS (CC-97-224)

In a claim which respondent stipulated liability for vehicle damage sustained as a result of striking a depression on Route 27/2 in Cabell County, the Court made a fair and reasonable award for vehicle repairs.. . . . . p. 84

MOORE VS. DIVISION OF HIGHWAYS (CC-97-329)

Where claimant stepped onto a piece of asphalt pavement on County Route 1/7 in Raleigh County, sustaining personal injuries which were paid by Medicare, the Court determined that there was no compensable loss and disallowed the claim. . . p. 103

PARSONS VS. DIVISION OF HIGHWAYS (CC-97-20)

In a claim which respondent stipulated liability for vehicle damage sustained as a result of striking a loose manhole cover on Green Street in Kanawha County, the Court made a fair and reasonable award for the value of the vehicle. . . . . p. 91

PHILLIPS VS. DIVISION OF HIGHWAYS (CC-97-87)

The Court disallowed the claim when claimant failed to provide a copy of his motor vehicle insurance abstract to the Court. . . . . p. 69

DRAINS, SEWERS and WATER DAMAGE

COLE VS. DIVISION OF HIGHWAYS (CC-97-459)

Where claimant experienced real property damage as a result of flooding from a drain on Route 50/2 in Harrison County, that was alleged to have been maintained negligently, the Court held that the damage was a result of a combination of circumstances, but not the negligence of respondent. Claim disallowed. . . . p. 142

CLEVENGER VS. DIVISION OF HIGHWAYS (CC-98-264)

Where claimant experienced property damage as a result of flooding from a ditch on Route 72/5 in Marion County, that was alleged to have been maintained negligently, the Court held that the damage was a result heavy rains in the area, but not the negligence of respondent. Claim disallowed. . . . . p. 165

DAVIS VS. DIVISION OF HIGHWAYS (CC-96-61)

Where respondent knew of the propensity of Route 25/16 in Kanawha County to flood and where it failed to take remedial measures, the Court made an award. p. 70

EAST VS. DIVISION OF HIGHWAYS (CC-97-65)

Where claimant's vehicle struck a loose drain cover on Alternate U.S. Route 52 in McDowell County, the Court held that the situation constituted a trap and made an award. . . . . p. 42

HENSLEY VS. DIVISION OF HIGHWAYS (CC-97-348)

Where claimant experienced damage to her residence as a result of flooding from a drain on 17th Street in Cabell County, that was alleged to have been maintained negligently, the Court held that the damage was a result of unusually heavy rainfall, but not the negligence of respondent. Claim disallowed. . . . . p. 144

LESLIE VS. DIVISION OF HIGHWAYS (CC-98-285)

Where claimant experienced damage to his residence as a result of flooding from a drain on Rural Route 8 in McDowell County that was alleged to have been maintained negligently, the Court held that the damage was a result of a combination of circumstances, but not the negligence of respondent. Claim disallowed. . . . p. 167

NORTH HILL COAL COMPANY VS. DIVISION OF HIGHWAYS (CC-96-292)

Where respondent was substantially involved in the negligent installation of a metal sign post directly through the four-inch sewer feeder line in Mt. Hope, Fayette County, causing sewage backup in claimant's apartment building, the Court made an award. p. 15

PANCAKE VS. DIVISION OF HIGHWAYS (CC-97-120)

Where claimant encountered an unpaved culvert ditch on Route 1 in Cabell County, the Court held that respondent had reason to know that the road conditions presented a significant hazard and respondent should have installed some measure of warning device to alert motorists. Award of $500.00. . . . . p. 90

STEPHENSON VS. DIVISION OF HIGHWAYS (CC-96-467)

Where claimant sustained water damage to her home from alleged negligent

work by respondent on W.Va. Route 4 in Clay County, the Court held that there was insufficient evidence of negligent conduct on the part of respondent and disallowed the claim. p. 98

FALLING ROCKS AND ROCKS – See also Comparative Negligence and Negligence

ANTHONY VS. DIVISION OF HIGHWAYS (CC-98-11)

Where claimant's vehicle was struck by a rock on U.S. Route 19 in Mercer County, the Court held that the unexplained falling of a rock, without more, is insufficient evidence to justify and award and disallowed the claim. *Coburn vs. Dept. of Highways*, 16 Ct. Cl. 68 (1986). . . . . p. 162

ATKINS ET AL. VS. DIVISION OF HIGHWAYS (CC-98-46; CC-98-65 & CC-98-99)

Where claimants' vehicles were struck by falling rock on Route 19 in Monongalia County, the Court held that respondent took reasonable steps to ensure the safety of motorists and disallowed the claims. . . . . p. 138

BAUER VS. DIVISION OF HIGHWAYS (CC-97-454)

Where claimant vehicle struck a rock on the surface of U.S. Route 50 in Hampshire County, the Court held that respondent did not have prior notice of the rock and disallowed the claim. p. 101

BURKE VS. DIVISION OF HIGHWAYS (CC-97-257)

Where claimant sustained vehicle damage after encountering a rock on W.Va. Route 61 in Fayette County, the Court held that respondent is neither an insurer nor a guarantor of the safety of motorists upon its highways and that was insufficient evidence of negligence on the part of respondent. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). Claim disallowed. . . . . p. 83

DIMMICK VS. DIVISION OF HIGHWAYS (CC-96-561)

Claimants brought this action for personal injuries and loss of consortium as a result of a rock fall while traveling on U. S. 250 in Marshall County. The Court held

that in view of the well known serious nature of rock fall hazards in this area, respondent had a moral obligation to compensate claimants and made awards. . . . . p. 71

LOUGH VS. DIVISION OF HIGHWAYS (CC-98-153)

Where claimant's vehicle struck a rock on U.S. Route 19 in Harrison County, the Court held that the unexplained falling of a rock, without more, is insufficient evidence to justify and award and disallowed the claim.. . . . . p. 168

MILLER VS. DIVISION OF HIGHWAYS (CC-98-280)

Where claimant's vehicle was struck by a rock on W.Va. Route 2 in Marshall County, the Court held that the unexplained falling of a rock, without more, is insufficient evidence to justify and award and disallowed the claim. . . . . p. 150

WOLFE VS. DIVISION OF HIGHWAYS (CC-97-99)

Where claimant's vehicle struck rocks on County Route 26/1 in Webster County, the Court held that respondent was working diligently on repairing the road and there was insufficient evidence of negligence on the part of respondent. Claim disallowed. . . . . p. 108

JURISDICTION

MINEAR VS. DIVISION OF HIGHWAYS (CC-96-105)

Where claimant brought an action to recover vehicle damages sustained from an incident on W.Va. Route 72 in Tucker County that was covered by respondent's insurance. The Court held that it did not have jurisdiction over the claim and disallowed the claim. . . . . p. 76

PECK VS. DIVISION OF HIGHWAYS (CC-97-75)

Where the road in question was not maintained by respondent, the Court held it lacked jurisdiction to hear the claim. . . . . p. 92

PHILLIPS VS. DIVISION OF HIGHWAYS (CC-97-355)

Where claimant's vehicle struck a drain inlet on Route 61 in Kanawha County, the Court held that the defect was not within the responsibility of respondent nor was it in the regularly traveled portion of highway. The claim was disallowed. . . . p. 151

ROMEO VS. DIVISION OF HIGHWAYS (CC-97-278)

Where claimant's vehicle struck a storm drain inlet on the curb of Brooks Street in Kanawha County, the Court held that respondent was not responsible for the curb and drain in question. Claim disallowed. . . . . p. 151

INDEPENDENT CONTRACTORS

TOLLEY VS. DIVISION OF HIGHWAYS (CC-96-342)

Claimant's vehicle was damaged by an exposed expansion joint on I-77 in Kanawha County where an independent contractor for respondent had removed the top surface of I-77 prior to repaving. The Court held that respondent has a duty to ensure that an independent contractor completes work in such a manner that travelers will not be put in a position of unreasonable danger and made an award. . . . . p. 12

ACREE VS. DIVISION OF HIGHWAYS (CC-98-162)

Claimant's vehicle was damaged after striking several holes and broken pavement on U.S. Route 19 in Braxton county where an independent contractor had been working on the road. The Court held that respondent has a duty to ensure that an independent contractor completes work in such a manner that travelers will not be put in a position of unreasonable danger and made an award. . . . . p. 137

LEASES

AKLADIOS VS. BOARD OF TRUSTEES OF THE UNIVERSITY SYSTEM (CC-96-528)

Claimant lessee brought action for flood damage to personal property stored in a faculty housing complex owned and maintained by respondent lessor at West Virginia University in Monongalia County. The Court held that a lease disclaimer in respondent's apartment handbook did not present a clear abrogation of the State's public policy of implied warranty of habitability and found insufficient evidence of negligence upon which to base an award. . . . . p. 64

HUNTER VS. BOARD OF TRUSTEES OF THE UNIVERSITY SYSTEM (CC-98-20)

Claimant lessee brought action for water damage to personal property which occurred in a dormitory at West Virginia University in Monongalia County. The Court held that the damage was clearly within the control and scope of respondent's duty to provide a fit and habitable premises and respondent has an obligation, in equity and good conscience, to compensate student-tenants required to live on campus when water breaks and similar events cause property damage. . . . . p. 145

LOUIS I. BONASSO, DBA COLONIAL VILLAGE VS. DEPARTMENT OF ADMINISTRATION (CC-98-251)

The Court made an award of $14,935.99 for utilities in accordance with the terms of a Contract of Lease for space rented for and on behalf of Fairmont State

College. The documentation was not processed for payment in the proper fiscal year; sufficient funds expired. . . . . p. 109

McELFISH, DDS VS. DEPARTMENT OF HEALTH AND HUMAN RESOURCES (CC-99-17)

Award of $23,637.12 for rent escalation payments. The documentation was not processed for payment in the proper fiscal year; sufficient funds expired. Also, the Court disallowed a claim for interest as it was not provided for in the Contract of Lease. . . . . p. 172

RANDOLPH COUNTY COMMISSION VS. WEST VIRGINIA SUPREME COURT OF APPEALS (CC-97-227)

The Court made an award of $1,463.31 for rent payment owed to claimant by a family law master. The documentation was not processed for payment in the proper fiscal year; sufficient funds expired. . . . . p. 9

SARDINIA VS. BOARD OF TRUSTEES OF THE UNIVERSITY SYSTEM (CC-97-82)

Claimant lessee brought action for flood damage to personal property stored in a basement storage area of a faculty housing complex owned and maintained by respondent lessor at West Virginia University in Monongalia County. The Court held that a lease disclaimer in respondent's apartment handbook did not present a clear abrogation of the State's public policy of implied warranty of habitability and found insufficient evidence of negligence upon which to base an award. . . . . p. 66

MOTOR VEHICLES

GOEDDEL VS. DIVISION OF MOTOR VEHICLES (CC-96-626)

Where respondent assessed sales tax on a properly rejected a purchased vehicle, unjustly enriching the State, the Court made an award of $599.75. . . p. 44

HEPNER VS. DIVISION OF MOTOR VEHICLES (CC-97-299)

Where respondent assessed road privilege tax incorrectly, unjustly enriching the State, the Court made an award. *T. H. Compton, Inc. vs. Dept. of Motor Vehicles,* 18 Ct. Cl. 1 (1989). . . . . p. 30

LEWIS VS. DIVISION OF MOTOR VEHICLES (CC-98-135)

Claimant brought action for damages as a result of an unjust arrest on a charge of driving on a revoked license. The Court held that respondent acted reasonably, in accordance with its normal procedure, and that there was insufficient evidence of

negligence on the part of respondent. Claim disallowed. . . . . p. 148

STARKEY VS. DIVISION OF MOTOR VEHICLES (CC-98-80)

Where claimant sustained damages as a result of respondent wrongfully revoking his driver's licence, the Court held that the State had a moral obligation in equity and good conscience to compensate claimant for his loss. Award of $554.07. . . . . p. 135

NEGLIGENCE – See also Berms; Falling Rocks and Rocks & Streets and Highways

ADKINS VS. DIVISION OF HIGHWAYS (CC-96-454)

Claimant's vehicle struck a hole on Route 49 in Cabell County. The Court held that respondent had constructive notice of the hole and made an award. . . . . p. 5

ARMSTRONG VS. DIVISION OF HIGHWAYS (CC-97-242)

Claimant's vehicle struck a hole on Route 29 in Ohio County. The Court held that respondent had constructive notice of the hole and made an award. . . . . p. 36

BAYLE VS. DIVISION OF HIGHWAYS (CC-98-223)

Where claimant's vehicle struck a hole on County Route 16, a low priority road in Mercer County, the Court held that claimant was aware of the road conditions and that respondent had taken reasonable steps to keep the low priority road in a passable condition. Claim disallowed. . . . . p. 163

BENNETT VS. DIVISION OF HIGHWAYS (CC-97-222)

Claimant's vehicle struck a hole on Route 64 in Marion County. The Court held that respondent had constructive notice of the hole. . . . . p. 26

BLEVINS VS. DIVISION OF HIGHWAYS (CC-97-298)

Claimant's vehicle struck a hole on County Route 15 in Fayette County. The Court held that respondent had reason to know of the defect in the pavement. Award of $250.00. . . . . p. 37

BOWERS VS. DIVISION OF HIGHWAYS (CC-97-117)

Claimant's vehicle struck a hole on Route 23/10 in Hardy County. The Court held that respondent had reason to know of the defect in the pavement and failed to make adequate repairs to the road surface. Award of $123.00. . . . . p. 38

COLEMAN VS. DIVISION OF HIGHWAYS (CC-96-522)

Claimant's vehicle struck a hole on Route 49 in Cabell County. The Court held

that respondent had constructive notice of the hole. Award of $100.00. . . . . p. 6

GRESHAM VS. DIVISION OF HIGHWAYS (CC-96-466)
Where respondent's equipment operator in charge of maintenance on I-77 in Kanawha County testified that the center lane reflectors frequently become dislodged as a result of heavy traffic on the highways causing deterioration in the pavement, the Court made an
award. . . . . p. 7

JOHNSON VS. DIVISION OF HIGHWAYS (CC-96-607)
Where claimant's vehicle struck a hole on W.Va. Route 4 in Braxton County, the Court held that there was insufficient evidence of negligence on the part of respondent and disallowed the claim. . . . . p. 111

KLUG ET AL. VS. DIVISION OF HIGHWAYS (CC-98-13 & CC-98-15)
Claimants' vehicles struck a hole on W.Va. Route 2 in Marshall County. The Court held that respondent had constructive notice of the hole. Awards were made in both claims. . . . . p. 147

LACY VS. DIVISION OF HIGHWAYS (CC-96-615)
Claimant's vehicle struck a hole on County Route 18 in Raleigh County. The Court held that respondent had reason to know of the defect in the
pavement.. . . . . p. 56

MARCANTONIO VS. DIVISION OF HIGHWAYS (CC-97-166)
Where claimant encountered a large depression on respondent's right of way on W.Va. Route 14 in Wood County, the Court held that respondent knew or had reason to know that the depression created a risk to motorists and made an
award. . . . . p. 88

McCORD VS. DIVISION OF HIGHWAYS (CC-96-170)
Claimant's vehicle sustained damage when it struck a washed out section of W.Va. Route 7 in Monongalia County. The Court held that the washed out portion of road had developed over some period of time, giving respondent reason to know of the particular road condition and made an award. . . . . p. 23

McDANIEL VS. DIVISION OF HIGHWAYS (CC-94-320)
Claimant's vehicle struck a hole on U.S. Route 11 in Berkeley County. The Court held that respondent had reason to know of the defect in the
pavement. . . . . p. 57

MEADE ET AL., VS. DIVISION OF HIGHWAYS (CC-91-170; CC-91-171 & CC-91-172)

The Court, in accordance with a settlement order, made an award of $4,500.00 to claimants in CC-91-170; an award of $2,000.00 to claimants in CC-91-171 and an award of $8,000.00 to claimants in CC-91-172. . . . . p. 124

MORRIS VS. DIVISION OF HIGHWAYS (CC-97-25)

Where claimant encountered an area of broken pavement on I-79 in Marion County, the Court held that the size of the hole was indicative of its presence for a substantial period of time and respondent had reason to know of the hazard. . . . . p. 89

NICHOLAS VS. DIVISION OF PUBLIC SAFETY (CC-97-217)

Claimant brought this action for damage to two handguns which occurred when the guns were taken into evidence pursuant to a criminal investigation. The Court held respondent acted reasonably according to normal State police procedure and there was insufficient evidence of negligence on the part of respondent. Claim disallowed. p. 114

PALUMBO VS. DIVISION OF HIGHWAYS (CC-96-586)

Claimant's vehicle struck a hole on W.Va. Route 88 in Ohio County. The Court held that respondent had constructive notice of the hole. Award of $351.79. . . . . p. 59

ROMANO VS. DIVISION OF HIGHWAYS (CC-97-402)

Where claimant's vehicle struck a hole on the side of W.Va. Route 76 in Harrison County, the Court held that respondent acted reasonably after receiving notice of the hole and disallowed the claim. . . . . p. 133

RORRER VS. DIVISION OF HIGHWAYS (CC-96-323)

Where respondent had been engaged in road patching operations on W.Va. Route 31 in Cabell County prior to claimant's incident, the Court held that respondent had actual or constructive notice of the hole in the road surface and made an award. . . . . p. 11

SALMEN VS. DIVISION OF HIGHWAYS (CC-97-365)

Claimant's vehicle struck a beam that had fallen onto I-79 in Marion County. The Court held that the unexplained presence of debris on the road, without a positive showing of negligence on the part of respondent, is insufficient to justify an award. Claim disallowed. . . . . p. 134

SKEENS VS. DIVISION OF HIGHWAYS (CC-96-360)

Where claimant's vehicle struck a hole on W.Va. Route 1 in Boone County, the Court held that the hole must have existed for an extended period of time amounting to constructive notice and made an award. . . . . p. 17

SMOOT VS. DIVISION OF HIGHWAYS (CC-97-175)

Claimant's vehicle struck a hole on County Route 119/9 in Boone County. The Court held that respondent had constructive notice of the hole. . . . . p. 96

SPRINGSTON VS. DIVISION OF HIGHWAYS (CC-96-463)

Claimant brought this action for loss of business revenues when respondent prevented her from erecting outdoor advertising signs along U.S. Route 19 in Nicholas County. The Court held that claimant failed to meet the requirements of W.Va. Code § 17-22-1 et seq. and that such losses are one of inexorable consequences of highway construction. Claim disallowed. . . . . p. 80

STULL VS. DIVISION OF HIGHWAYS (CC-97-156)

Claimant's vehicle struck a hole on U.S. Route 250 in Monongalia County. The Court held that respondent had constructive notice of the hole. . . . . p. 31

NOTICE

GILL VS. DIVISION OF HIGHWAYS (CC-97-97)

Where claimant's personal property was destroyed after a large sink hole opened along W.Va. Route 20 in Summers County, the Court held that the sink hole was an unforeseeable event and disallowed the claim. . . . . p. 86

LEWIS VS. DIVISION OF HIGHWAYS (CC-96-306)

Respondent failed to provide claimant with adequate warning of a slip on Route 8 in Kanawha County. . . . . p. 8

PEDESTRIANS

JONES VS. DIVISION OF HIGHWAYS (CC-97-456)

Where claimant slipped on the berm area of County Route 36/1 in Berkeley County, the Court held that there was insufficient evidence of negligence on the part of respondent and denied the claim. . . . . p. 102

ROGERS VS. DIVISION OF HIGHWAYS (CC-97-89)

Where claimant stepped into a drain hole on W.Va. Route 16 in Clay County, the Court held that the drain presented a significant hazard and made an award of $1,322.00 for lost earnings and medical costs. . . . . p. 92

PRISONS and PRISONERS

BOHRER VS. DIVISION OF CORRECTIONS (CC-95-204)

The Court made an award of $100,000.00 to Barbara S. Bohrer and an award of $25,496.33 to Lane S. Bohrer for damages sustained as a result of an escaped prisoner from the West Virginia Penitentiary in Moundsville, Marshall County. Liability was stipulated by the parties. . . . . p. 18

CABELL COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-98-295)

Claimant brought an action to recover costs for housing prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant. Award of $80,775.00. *County Comm'n of Mineral County vs. Division of Corrections*, 18 Ct. Cl. 88 (1990). . . . . p. 120

CABELL COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-98-370)

Claimant brought an action to recover costs for housing prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant. Award of $41,725.00. *Mineral County*. . . . . p. 128

CLOUD VS. DIVISION OF CORRECTIONS (CC-97-327)

Claimant, an inmate at the Mt. Olive Correctional Complex, brought the action for funds that were misappropriated from his inmate account. The Court held that a bailment situation had occurred and made an award. . . . . p. 110

FRANKLIN VS. DIVISION OF CORRECTIONS (CC-87-469)

Claimant, an inmate at the former State Penitentiary in Moundsville, brought this action for loss of a television, which was lost allegedly when he was transferred from the general population to the segregation unit. The Court held that there was insufficient evidence of negligence on the part of respondent and disallowed the claim. p. 110

GIBSON VS. DIVISION OF CORRECTIONS (CC-97-288)

Claimant, an inmate at the Mt. Olive Correctional Complex, brought this action for loss of personal property, which was lost allegedly when he removed from his cell. The Court held that there was insufficient evidence of negligence on the part of respondent and disallowed the claim. . . . . p. 111

HARRIS VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-98-336)

Claimant, an inmate at the South Central Regional Jail, brought the action for a missing money order that was stolen after being given to an employee of respondent.

The Court held that a bailment situation had occurred and made an award of $73.45. p. 157

HARRISON COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-98-52)

Claimant brought an action to recover costs for housing prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant. Award of $26,400.00. *Mineral County*. . . . . p. 130

KING VS. DIVISION OF CORRECTIONS (CC-96-562)

Claimant, an inmate at the Charleston Work and Study Release Center, brought this action for loss of personal property which occurred when he escaped from the facility. The Court held that there was insufficient evidence of negligence on the part of respondent and disallowed the claim . . . . . p. 112

MARION COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-97-394)

Claimant brought an action to recover costs for housing prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant. Award of $44,700.00. *Mineral County*. . . . . p. 58

MARION COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-98-296)

Claimant brought an action to recover costs for housing prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant. Award of $54,629.66. *Mineral County*. . . . . p. 121

McDOWELL COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-98-294)

Claimant brought an action to recover costs for housing prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant. Award of $65,766.30. *Mineral County*. . . . . p. 121

RATLIFF VS. DIVISION OF CORRECTIONS (CC-98-6 & CC-96-308)

Claimant, an inmate at the Mt. Olive Correctional Complex, brought an action for the loss of money and personal property. The Court held that claimant was only entitled to an award of $250.00 as other administrative remedies had already been provided to him. . . . . p. 117

SAXTON VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-97-69)

In a claim which respondent stipulated liability for claimant's missing jewelry while in the custody at the South Central Regional Jail in Kanawha County, the Court determined a fair and reasonable award for the value of the jewelry. . . . . p. 119

TAYLOR COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-98-288)

Claimant brought an action to recover costs for housing prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant. Award of $30,000.00. *Mineral County*. . . . . p. 123

WELCH VS. DIVISION OF CORRECTIONS (CC-97-420)

Claimant, an inmate at the Mt. Olive Correctional Complex, brought an action for the loss of a sweat suit that was lost when he sent his clothes to the laundry facility. The Court held the sweat shirt was provided by respondent, which has custody and control of claimant. . . . . p. 119

WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY VS. DIVISION OF CORRECTIONS (CC-98-409)

Claimant brought an action to recover costs for housing prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant. Award of $1,968,970.00. *Mineral County*. . . . . p. 152

WOOD COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-98-358)

Claimant brought an action to recover costs for housing prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant. Award of $38,275.00. *Mineral County*. . . . . p. 136

PUBLIC EMPLOYEES

JONES VS. DIVISION OF NATURAL RESOURCES (CC-97-328)

Where claimants were required to live at Watoga State Park in Pocahontas County as a condition of employment as superintendent, respondent has a moral obligation, in equity and good conscience, to compensate claimants for the loss of their property due to flooding. *Hammack vs. Div. of Highways*, 20 Ct. Cl. 38 (1993). . . p. 45

LEONARD VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-98-389)

Claimant brought this action for personal glasses which he lost during a chase of an inmate at the South central Regional Jail. The Court held that the claim was a moral obligation of the State in accordance with the provisions of W.Va. Code § 14-2-1

et. seq. and made an award of $234.90. . . . . p. 171

MENENDEZ VS. WEST VIRGINIA STATE POLICE (CC-99-27)

Claimant, a sergeant in the West Virginia State Police, made a claim for eyeglasses which were lost during a high speed chase on I-79. Respondent did not have a fiscal account from which to reimburse its employees for property losses such as that experienced by claimant and the Court made an award of $159.98. . . . . p. 172

RAMSEY VS. ADJUTANT GENERAL (CC-98-337)

The Court made an award of $1,400.00 to claimant, a sergeant with the National Guard, for tuition and fees for summer school courses. . . . . p. 133

WHITE VS. SUPREME COURT OF APPEALS (CC-98-104)

Award of $2,401.94 for legal services rendered as guardian ad litem to represent an infant in an appeal before respondent. The Court held that in equity and good conscience the claim should be paid. *Quesinberry vs. Quesinberry*, 191 W.Va. 65; 443 S.E.2d 222 (1994). . . . . p. 128

STATE AGENCIES

DIVISION OF HIGHWAYS VS. DEPARTMENT OF ADMINISTRATION (CC-97-400)

The Court denied a claim for $337.09 for gasoline provided to the Revolving Fund, as there were insufficient funds expired in the proper fiscal year. *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct. Cl. 180 (1971). . . . . p. 35

DIVISION OF NATURAL RESOURCES VS. DIVISION OF FORESTRY (CC-97-404)

Award of 1,900.80 for rent payment, where there were sufficient funds expired in the proper fiscal year from which the bill could have been paid. . . . . p. 35

THE WEST VIRGINIA DEVELOPMENT OFFICE VS. DIVISION OF HIGHWAYS (CC-99-31)

Award of $39,601.00 for road grading costs which it incurred in connection with construction of a facility in Berkeley County, and there were sufficient funds expired in the proper fiscal year from which the bill could have been paid. . . . . p. 155

STREETS AND HIGHWAYS – See also Comparative Negligence and Negligence

ANNESE VS. DIVISION OF HIGHWAYS (CC-98-151)

Where claimant's vehicle struck a piece of blacktop lying on U.S. Route 50 in Harrison County, the Court held that the unexplained presence of debris on a road, without a positive showing of negligence, is insufficient evidence to base an award and disallowed the claim. . . . . p. 162

BARRETT VS. DIVISION OF HIGHWAYS (CC-98-269)

Where claimant's vehicle sustained damage as a result of a side on County Route 14/4 in Preston County giving way, the Court would not speculate as to what caused the incident and disallowed the claim. . . . . p. 140

BASS VS. DIVISION OF HIGHWAYS (CC-96-661)

Where claimant's vehicle struck an object on I-64 in Greenbrier County, the Court would not speculate on the nature of the object encountered and disallowed the claim. . . . . p. 100

BICKERTON VS. DIVISION OF HIGHWAYS (CC-98-218)

Where claimant sustained vehicle damage as a result of a blow up on a I-79 bridge, the Court held that thermal expansion and blow ups of this type are by their nature unpredictable and disallowed the claim. . . . . p. 164

DAVIS VS. DIVISION OF HIGHWAYS (CC-96-499)

Where a traffic sign under the control of respondent fell onto claimant's vehicle, the Court held that under the doctrine of *res ipsa loquitur*, the sign would not have fallen had it been properly maintained and made an award of $104.97. . . . . p. 41

FANARY VS. DIVISION OF HIGHWAYS (CC-96-343)

The Court made a stipulated award of $73.14 in a claim arising when claimant's vehicle struck a broken metal reflector post that was protruding from the ground on the shoulder portion of I-64 in Summers County. . . . . p. 7

FISHER VS. DIVISION OF HIGHWAYS (CC-97-111)

Claimant's vehicle encountered a slip on County Route 43/3 in Monongalia County. The Court held that respondent had reason to know of the defect but failed to take corrective action.. . . . . p. 129

GILL VS. DIVISION OF HIGHWAYS (CC-98-276)

Where claimant's vehicle sustained damage as a result of a slip on Route 9 in Summers County, the Court held that respondent diligently responded when advised of the mud slick on the morning of the incident and disallowed the

claim. . . . . p. 166

GRIFFITH DIVISION OF HIGHWAYS (CC-97-264)

Where claimant sustained vehicle damage as a result of a blow up on a road in Boone County, the Court held that thermal expansion and blow ups of this type are by their nature unpredictable and disallowed the claim. . . . . p. 87

HATFIELD VS. DIVISION OF HIGHWAYS (CC-97-162)

Where claimant struck a hazard warning sign on County Route 15 in Cabell County, the Court held that respondent acted reasonably and properly under the circumstances and disallowed the claim. . . . . p. 88

HOWARD VS. DIVISION OF HIGHWAYS (CC-98-90)

Where claimant's vehicle skidded into a ditch due to snow and ice on Route 76 in Taylor County, the Court held respondent acted reasonably while making a good faith effort to clear the roads and disallowed the claim. . . . . p. 131

KEEFER VS. DIVISION OF HIGHWAYS (CC-97-195)

Claimants brought action for lost wages as a result of a vehicular accident in a tunnel on Route 6/6 in Kanawha County from a malfunctioning traffic signal. The Court held that there was insufficient evidence of negligence on the part of respondent to justify an award. Claim disallowed. . . . . p. 75

KIMBLE VS. DIVISION OF HIGHWAYS (CC-96-423)

Where claimant's vehicle sustained damage from an oil-slickened portion of County Route 11 in Marion County, the Court held that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads and denied the claim. See *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). . . . . p. 68

McCCARDLE VS. DIVISION OF HIGHWAYS (CC-98-9)

Where claimant's vehicle slid into a hillside due to ice on County Route 3 in Ohio County, the Court held respondent acted diligently to clear the roads and disallowed the claim. . . . . p. 149

O'CONNOR VS. DIVISION OF HIGHWAYS (CC-96-565)

Where respondent knew or should have known of the hazard presented by a manhole cover on W.Va. Route 20 in Harrison County and failed to take precautionary measures, the Court made an award.. . . . . p. 25

PHILLIPS VS. DIVISION OF HIGHWAYS (CC-97-452)

Where claimant's vehicle tire was punctured by a sharp rock on a stone-based

portion of W.Va. Route 103 / U.S. Route 52, the Court held that respondent can not be expected to inspect every stone that it purchases for the purpose of road stabilization work and that there was insufficient evidence of negligence on the part of respondent to base an award. Claim disallowed. . . . . p. 169

PUGH VS. DIVISION OF HIGHWAYS (CC-97-279)

Where claimant sustained vehicle damage as a result of a blow up on the Pierpont Road entrance to I-64, the Court held that thermal expansion and blow ups of this type are by their nature unpredictable and disallowed the claim. *See Walton vs. Div. of Highways*, 19 Ct. Cl. 121 (1992). . . . . p. 79

STAPLETON VS. DIVISION OF HIGHWAYS (CC-97-4)

Where a camper being hauled by claimant's vehicle struck a rock highwall on W.Va. Route 10 in Logan County, the Court held that the incident was a result of unique circumstances and it is unable to justify an award. Claim disallowed. . . . . p. 97

STRADER VS. DIVISION OF HIGHWAYS (CC-97-51)

Where claimant alleged that respondent failed to maintain County Route 1/3 in Braxton County, the Court held that it would not dictate road maintenance priorities to respondent regarding its discretionary responsibilities and disallowed the claim. p. 107

WHITMAN VS. DIVISION OF HIGHWAYS (CC-96-288)

Where claimant sustained vehicle damage as a result a road barrier that blew onto Corridor G in Logan County, the Court held that respondent knew of the problem and failed to exercise reasonable care to ensure the safety of motorists. . . . . p. 82

TREES AND TIMBER

BURKIEVICZ VS. DIVISION OF HIGHWAYS (CC-98-256)

Where claimant's vehicle struck a tree limb on Rock Hill Road in Marshall County, the Court held that there was insufficient evidence on the part of respondent and disallowed the claim. . . . . p. 142

INGHRAM VS. DIVISION OF HIGHWAYS (CC-98-240)

Where claimant's vehicle was struck by a tree limb on Monumental Road in Marion County, the Court held that respondent was not responsible for the tree and disallowed the claim. . . . . p. 132

POWELL VS. DIVISION OF HIGHWAYS (CC-97-19)

Where claimant's vehicle struck a dead tree on W.Va. Route 480 in Jefferson County, the Court held that respondent had no actual or constructive notice of the hazard and disallowed the claim. . . . . p. 104

ROBINSON VS. DIVISION OF HIGHWAYS (CC-97-362)

Where claimant's vehicle struck a tree limb that had been cut and lying on the side of the road near the guardrail of Route 13 in Ohio County along with other brush, the Court held that respondent had constructive notice of the tree hazard and made an award. p. 60

SHARP VS. DIVISION OF HIGHWAYS (CC-97-326)

Where claimant's vehicle was struck by a tree on W.Va. Route 2 in Mason County, the Court held that respondent was aware of an ongoing slip in the area and it had notice of the hazard presented by the tree. . . . . p. 94

WILES VS. DIVISION OF HIGHWAYS (CC-98-275)

Where a tree struck claimant's property on W.Va. Route 7 in Monongalia County, the Court held that the damage was the result of unusually severe winds and disallowed the claim. . . . . p. 170

VENDOR

AMERICAN DECAL & MFG. COMPANY VS. DEPARTMENT OF TAX AND REVENUE (CC-97-403)

Award of $22,657.50 for proving respondent with cigarette stamps, where there were sufficient funds expired in the proper fiscal year from which the bill could have been paid. . . . . p. 36

AT&T VS. STATE OF WEST VIRGINIA (CC-95-55; CC-95-57; CC-95-58; CC-95-59; CC-95-60 and CC-95-62)

Final order approving settlement in the amount of $179,892.93 for telecommunications services provided to respondent by claimant. . . . . p. 32

CORRECTIONAL FOODSERVICE MANAGEMENT VS. DIVISION OF CORRECTIONS (CC-99-69)

Award of $69,289.25 for providing respondent with food services at the Mount Olive Correctional Complex, where there were sufficient funds expired in the proper fiscal year from which the bill could have been paid. . . . . p. 171

DAVE HINKLE ELECTRIC, INC. VS. REGIONAL JAIL AND CORRECTIONAL

AUTHORITY (CC-95-134)
Final order approving settlement in the amount of $100,000.00. . . . . p. 68

LABORATORY CORPORATION OF AMERICA HOLDINGS VS. DEPARTMENT OF HEALTH AND HUMAN RESOURCES (CC-98-113)
Award of $129,900.00 for laboratory testing in paternity cases for respondent. The invoice for service was not processed in the proper fiscal year; sufficient funds expired. p. 82

NETWORK SIX, INC. VS. DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-98-219)
Award of $19,175.00 for enhancements to respondent's child support enforcement system. The invoice for service was not processed in the proper fiscal year; sufficient funds expired. . . . . p. 113

OLYMPIC CENTER-PRESTON, INC. VS. DEPARTMENT OF HEALTH AND HUMAN RESOURCES (CC-97-308)
Award of $19,611.50 in Medicaid reimbursement for substance abuse treatment for adolescents at claimant's facility pursuant to Court orders. . . . . p. 122

OWEN HEALTHCARE, INC. VS. DEPT. OF HEALTH & HUMAN RESOURCES (CC-97-26)
Award of $25,298.42 for pharmacy services provided to respondent at Welch Emergency Hospital, where there were sufficient funds expired in the proper fiscal year from which the bill could have been paid. . . . . p. 1

ROBERT M. VINCENT FUNERAL HOME VS. DEPT. OF HEALTH AND HUMAN RESOURCES (CC-97-208)
An award of $400.00 for burial services provided pursuant to the indigent burial fund. . . . . p. 1

ROSE HILL FARMS, INC. VS. DIVISION OF HIGHWAYS (CC-98-42)
Award of $2,850.00, based on *quantum meruit*, for snow removal services performed on County Route 50/8 at the request of respondent in Hampshire County. p. 105

S. SCHWAB COMPANY, INC. WEST VIRGINIA DEVELOPMENT OFFICE (CC-99-10)
Award of $39,601.00 for road grading costs which it incurred in connection with construction of a facility in Berkeley County, and there were sufficient funds

expired in the proper fiscal year from which the bill could have been paid. . . . . p. 154

WV AMERICAN WATER COMPANY VS. DIVISION OF LABOR (CC-97-198)
Award of $108.69 for water service provided to respondent. The invoice for service was not processed in the proper fiscal year; sufficient funds expired. . . p. 2

WEST VIRGINIA ASSOCIATION OF REHABILITATION FACILITIES, INC. VS. DEPARTMENT OF ADMINISTRATION (CC-97-466)
Award of $303,595.91 for janitorial services provided to respondent. The invoice for service was not processed in the proper fiscal year; sufficient funds expired. p. 62

WILLIAMS VS. SUPREME COURT OF APPEALS (CC-97-360)
Award of $1,319.00 for examining a defendant and providing expert witness testimony per as subpoena from the Ohio County Circuit Court. . . . . p. 63

UNITED STATES DEPARTMENT OF AGRICULTURE VS. WV DEPT. OF AGRICULTURE (CC-98-320)
Award of $17,453.78 for contractual predator management services rendered in designated counties for the benefit of respondent. The invoice for service was not processed in the proper fiscal year; sufficient funds expired. . . . . p. 123

VENDORS – Denied because of insufficient funds

CASEY VS. SUPREME COURT OF APPEALS (CC-97-188)
The Court disallowed a claim for $297.00 for serving as a Special Family Law Master in Mason County, as there were insufficient funds expired in the proper fiscal year. *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct. Cl. 180 (1971). p. 34

CHARLESTON AREA MEDICAL CENTER VS. DIVISION OF CORRECTIONS (CC-98-27)
The Court disallowed a claim for $16,885.61 for medical services provided to an inmate in the custody of respondent, as there were insufficient funds expired in the appropriate fiscal year. . . . . p. 153

CHARLESTON AREA MEDICAL CENTER, INC. VS. DIVISION OF CORRECTIONS
(CC-98-448)
The Court disallowed a claim for $70,000.00 for medical services provided to

an inmate in the custody of respondent, as there were insufficient funds expired in the appropriate fiscal year. . . . . p. 159

CHARLESTON AREA MEDICAL CENTER, INC. VS. DIVISION OF CORRECTIONS
(CC-98-446)

The Court disallowed a claim for $30,225.97 for medical services provided to an inmate in the custody of respondent, as there were insufficient funds expired in the appropriate fiscal year. . . . . p. 159

CORRECTIONAL MEDICAL SERVICES, INC. VS. DIVISION OF CORRECTIONS (CC-98-437)

The Court disallowed a claim for $222,789.88 for medical services provided to several inmates in the custody of respondent at Huttonsville Correctional Center, Pruntytown Correctional Center, and Denmar Correctional Center, as there were insufficient funds expired in the appropriate fiscal year. . . . . p. 158

CORRECTIONAL MEDICAL SERVICES, INC. VS. DIVISION OF CORRECTIONS (CC-98-457)

The Court disallowed a claim for $222,789.88 for medical services provided to several inmates in the custody of respondent at Huttonsville Correctional Center, Pruntytown Correctional Center, and Denmar Correctional Center, as there were insufficient funds expired in the appropriate fiscal year. . . . . p. 40

CORRECTIONAL MEDICAL SERVICES, INC. VS. DIVISION OF CORRECTIONS (CC-99-30)

The Court disallowed a claim for $51,514.70 for medical services provided to several inmates in the custody of respondent at Huttonsville Correctional Center, Pruntytown Correctional Center, and Denmar Correctional Center, as there were insufficient funds expired in the appropriate fiscal year. . . . . p. 158

UNITED HOSPITAL CENTER VS. DIVISION OF CORRECTIONS (CC-97-230)

The Court disallowed a claim for $1,630.40 for medical services provided to an inmate in the custody of respondent, as there were insufficient funds expired in the appropriate fiscal year. . . . . p. 2

UNIVERSITY HEALTH ASSOCIATES VS. DIVISION OF CORRECTIONS (CC-97-416)

The Court disallowed a claim for $33,436.10 for medical services provided to inmates in the custody of respondent, as there were insufficient funds expired in the appropriate fiscal year. . . . . p. 61

UNIVERSITY HEALTH ASSOCIATES VS. DIVISION OF CORRECTIONS (CC-98-300)

The Court disallowed a claim for $71,530.20 for medical services provided to inmates in the custody of respondent, as there were insufficient funds expired in the appropriate fiscal year. . . . . p. 124

WEST VIRGINIA UNIVERSITY HOSPITALS VS. DIVISION OF CORRECTIONS (CC-98-376)

The Court disallowed a claim for $119,102.58 for medical services provided to two inmates in the custody of respondent at the Huttonsville Correctional Center, as there were insufficient funds expired in the appropriate fiscal year. . . . . p. 136

WEXFORD HEALTH SOURCES, INC. VS. DIVISION OF CORRECTIONS (CC-97-262)

The Court disallowed a claim for $16,328.75 for medical services provided to an inmate in the custody of respondent at the Mount Olive Correctional Center in Fayette County, as there were insufficient funds expired in the appropriate fiscal year. . . . . p. 13

WEXFORD HEALTH SOURCES, INC. VS. DIVISION OF CORRECTIONS (CC-97-367)

The Court disallowed a claim for $35,363.32 for medical services provided to several inmates in the custody of respondent at the Mount Olive Correctional Center in Fayette County, as there were insufficient funds expired in the appropriate fiscal year. p. 26

WEXFORD HEALTH SOURCES, INC. VS. DIVISION OF CORRECTIONS (CC-98-47)

The Court disallowed a claim for $26,731.46 for medical services provided to several inmates in the custody of respondent at the Mount Olive Correctional Center in Fayette County, as there were insufficient funds expired in the appropriate fiscal year. p. 153