STATE OF WEST VIRGINIA

Report

of the

Court of Claims

1969-1971

Volume

8

STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the period from May 1, 1969,
to July 1, 1971

By
CHERYLE M. HALL
Clerk

VOLUME VIII

(Published by authority. Code 14-2-25).

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

TABLE OF CONTENTS

Claims reported, table of XLIII
Claims classified according to statute, list of XXVIII
Court of Claims Law VII
Letter of transmittal V
Opinions of the Court XLI
Personnel of the Court IV
References 267
Rules of practice and procedure XIX
Terms of Court VI

PERSONNEL

OF THE

STATE COURT OF CLAIMS

HONORABLE HENRY LAKIN DUCKER ..... Presiding Judge

HONORABLE W. LYLE JONES ..... Judge

HONORABLE A. W. PETROPLUS ..... Judge

CHERYLE M. HALL ..... Court Clerk

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

Letter of Transmittal

To His Excellency

The Honorable Arch Alfred Moore, Jr.

Governor of West Virginia

Sir:

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

Respectfully submitted,

CHERYLE M. HALL,

Clerk

TERMS OF COURT

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

STATE COURT OF CLAIMS LAW

CHAPTER 14 CODE

Article 2. Claims Against the State.

§14-2-1. Purpose.
§14-2-3. Definitions.
§14-2-4. Creation of court of claims; appointment and terms of judges; vacancies.
§14-2-5. Court clerk and other personnel.
§14-2-6. Terms of court.
§14-2-7. Meeting place of the court.
§14-2-8. Compensation of judges; expenses.
§14-2-9. Oath of office.
§14-2-10. Qualifications of judges.
§14-2-11. Attorney general to represent State.
§14-2-12. General powers of the court.
§14-2-13. Jurisdiction of the court.
§14-2-14. Claims excluded.
§14-2-15. Rules of practice and procedure.
§14-2-16. Regular procedure.
§14-2-17. Shortened procedure.
§14-2-18. Advisory determination procedure.
§14-2-19. Claims under existing appropriations.
§14-2-20. Claims under special appropriations.
§14-2-21. Periods of limitation made applicable.
§14-2-22. Compulsory process.
§14-2-23. Inclusion of awards in budget.
§14-2-24. Records to be preserved.
§14-2-25. Reports of the court.
§14-2-26. Fraudulent claims.
§14-2-27. Conclusiveness of determination.
§14-2-28. Award as condition precedent to appropriation.
§14-2-29. Severability.

§14-2-1. Purpose.

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

§14-2-3. Definitions.

For the purpose of this article:

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

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

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

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

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

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

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

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

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

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

The court shall have the authority to appoint a clerk. The clerk's salary shall be fixed by the joint committee on government and finance, and shall be paid out of the regular

appropriation for the court. The clerk shall have custody of all records and proceedings of the court, shall attend meetings and hearings of the court, shall administer oaths and affirmations, and shall issue all official summonses, subpoenas, orders, statements and awards.

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

§14-2-6. Terms of court.

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

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

§14-2-7. Meeting place of the court.

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

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

Each judge of the court shall receive one hundred dollars for each day actually served, and actual expenses incurred in the performance of his duties. The number of days served by each judge shall not exceed one hundred in any fiscal year, except by authority of the joint committee on government and finance. Requisitions for compensation and expenses shall be accompanied by sworn and itemized statements, which shall be filed with the auditor and preserved as public

records. For the purpose of this section, time served shall include time spent in the hearing of claims, in the consideration of the record, in the preparation of opinions, and in necessary travel.

§14-2-9. Oath of office.

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

§14-2-10. Qualifications of judges.

Each judge appointed to the court of claims shall be an attorney at law, licensed to practice in this State, and shall have been so licensed to practice law for a period of not less than ten years prior to his appointment as judge. A judge shall not be an officer or an employee of any branch of State government, except in his capacity as a member of the court and shall receive no other compensation from the State or any of its political subdivisions. A judge shall not hear or participate in the consideration of any claim in which he is interested personally, either directly or indirectly.

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

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

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

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

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

§14-2-13. Jurisdiction of the court.

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

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

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

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

§14-2-14. Claims excluded.

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

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

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

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

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

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

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

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

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

§14-2-16. Regular procedure.

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

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

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

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

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

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

§14-2-17. Shortened procedure.

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

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

2. The State agency concerned concurs in the claim.

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

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

The State agency concerned shall prepare the record of the claim consisting of all papers, stipulations and evidential documents required by the rules of the court and file the same with the clerk. The court shall consider the claim informally upon the record submitted. If the court determines that the claim should be entered as an approved claim and an award made, it shall so order and shall file its statement

with the clerk. If the court finds that the record is inadequate, or that the claim should not be paid, it shall reject the claim. The rejection of a claim under this section shall not bar its resubmission under the regular procedure.

§14-2-18. Advisory determination procedure.

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

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

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

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

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

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

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

A claim arising under an appropriation made by the legislature during the fiscal year to which the appropriation

applies, and falling within the jurisdiction of the court, may be submitted by:

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

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

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

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

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

Whenever the legislature makes an appropriation for the payment of claims against the State, then accrued or arising during the ensuing fiscal year, the determination of claims and the payment thereof may be made in accordance with this section. However, this section shall apply only if the legislature in making its appropriation specifically so provides.

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

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

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

§14-2-22. Compulsory process.

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

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

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

§14-2-24. Records to be preserved.

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

§14-2-25. Reports of the court.

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

Claims and awards shall be separately classified as follows:

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

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

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

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

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

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

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

§14-2-26. Fraudulent claims.

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

§14-2-27. Conclusiveness of determination.

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

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

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

§14-2-29. Severability.

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

Rules of Practice and Procedure

OF THE

STATE COURT OF CLAIMS

(Adopted by the Court
September 11, 1967.

Amended February 18, 1970.)

TABLE OF RULES

Rules of Practice and Procedure

RULE

1. Clerk, Custodian of Papers, etc.
2. Filing Papers.
3. Records.
4. Form of Claims.
5. Copy of Notice of Claims to Attorney General and State Agency.
6. Preparation of Hearing Docket.
7. Proof and Rules Governing Procedure.
8. Appearances.
9. Briefs.
10. Continuances: Dismissal For Failure To Prosecute.
11. Original Papers Not To Be Withdrawn: Exceptions.
12. Withdrawal of Claim.
13. Witnesses.
14. Depositions.
15. Re-Hearings.
16. Records of Shortened Procedure Claims Submitted by State Agencies.
17. Application of Rules of Civil Procedure.

Rules of Practice and Procedure

OF THE

Court of Claims
State of West Virginia

RULE 1. CLERK, CUSTODIAN OF PAPERS, ETC.

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

RULE 2. FILING PAPERS.

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

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

RULE 3. RECORDS.

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

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

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

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

RULE 4. FORM OF CLAIMS.

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

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

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

RULE 6. PREPARATION OF HEARING DOCKET.

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

RULE 7. PROOF AND RULES GOVERNING PROCEDURE.

(a) Claims asserted against the State, including all the allegations in a notice of claim, are treated as denied, and must be established by the claimant with satisfactory proof,

or proper stipulation as hereinafter provided before an award can be made.

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

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

(d) It shall be the duty of the claimant or his counsel in claims under the regular procedure to negotiate with the Office of the Attorney General so that the claimant and the State Agency and the Attorney General may be ready at the beginning of the hearing of a claim to read, if reduced to writing, or to dictate orally, if not reduced to writing, into the record such stipulations, if any, as the parties may have been able to agree upon.

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

RULE 8. APPEARANCES.

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

RULE 9. BRIEFS.

(a) Claimants or their counsel, and the Attorney General, may file with the Court for its consideration a brief on

any question involved, provided a copy of said brief is also presented to and furnished the opposing party or counsel. Reply briefs shall be filed within fifteen days.

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

RULE 10. CONTINUANCES: DISMISSAL FOR FAILURE TO PROSECUTE.

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

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

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

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

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

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

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

RULE 12. WITHDRAWAL OF CLAIM.

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

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

RULE 13. WITNESSES.

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

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

(c) The payment of witness fees, and mileage where transportation is not furnished to any witness subpoenaed by or at the instance of either the claimant or the respondent state

agency, shall be the responsibility of the party by whom or at whose instance such witness is subpoenaed.

RULE 14. DEPOSITIONS.

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

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

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

RULE 15. RE-HEARINGS.

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

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

When a claim is submitted under the provisions of Chapter 14, Article 2, Paragraph 17 of the Code of West Virginia, concurred in by the head of the department and approved for payment by the Attorney General, the record thereof, in addition to copies of correspondence, bills, invoices, photographs, sketches or other exhibits, should contain a full, clear

and accurate statement, in narrative form, of the facts upon which the claim is based. The facts in such record among other things which may be peculiar to the particular claim, should show as definitely as possible that:

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

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

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

RULE 17. APPLICATION OF RULES OF CIVIL PROCEDURE.

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

Adopted by Order of the Court of Claims, September 11, 1967. Amended February 18, 1970.

CHERYLE M. HALL,
Clerk.

REPORT OF THE COURT OF CLAIMS

For the Period January 1, 1971, to June 30, 1971

(1) Approved claims and awards not satisfied but to be referred to the Legislature, 1972, for final consideration and appropriation, for the period January 1, 1971, to June 30, 1971:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-324	C & D Equipment Co.	State Building Commission	$ 48,340.36	$ 29,907.68	April 5, 1971
D-453	Gates, L. M., Estate of, by Florence C. Gates, Executrix	Department of Highways	89.25	89.25	June 15, 1971
D-330	Keeley Brothers, Inc.	State Tax Department	420.00	420.00	June 15, 1971
D-356	Retreading Research Associates, Inc.	Department of Finance and Administration	5,400.00	5,400.00	June 15, 1971
D-441	Safeco Insurance Co.	Department of Highways	166.86	166.86	June 30, 1971
D-440	Shanabarger, Andy and Lora	Adjutant General	193.50	89.00	June 30, 1971
D-414	State Farm Mutual Automobile Insurance Co., as subrogee for Damaris O. Wilson	Board of Regents	97.56	97.56	June 15, 1971
D-318	Whitehair, Frank and Arnold	Department of Highways	40.00	107.08	June 30, 1971

For the Period May 1, 1969, to June 30, 1971

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period May 1, 1969, to June 30, 1971:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-275	Allergy Rehabilitation Foundation, Inc.	Dept. of Mental Health	$ 1,703.87	$ 1,703.87	January 14, 1970
D-209	Allstate Plumbing Service	State Road Commission	1,236.00	1,200.00	January 20, 1970
D-101	Arbogast, Howard	State Road Commission	1,513.80	300.00	July 21, 1969

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period May 1, 1969, to June 30, 1971:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-288	Ayers, Joyce J. Droddy	Department of Highways	50,000.00	10,000.00	February 15, 1971
D-126	Bates & Rogers Construction Company	State Road Commission	7,770.35	2,500.00	June 23, 1969
D-248	Beranak, R. L.	State Road Commission	149.51	149.51	January 28, 1970
D-404	Betsy Ross Bakeries, Inc.	Dept. of Mental Health	841.10	841.10	February 15, 1971
D-214	Bice, Ray	State Road Commission	958.61	760.29	December 8, 1969
D-196	Caldwell, J. N. and A. M. Caldwell, d/b/a Caldwell's Hardware	State Road Commission	581.24	581.24	January 14, 1970
D-194	Caldwell, Jerry K. and Anne B.	Department of Highways	2,000.00	1,497.00	December 29, 1970
D-223	Catsos, Michael and Evangeline	State Road Commission	101.41	101.41	January 14, 1970
D-322	Charleston Concrete Floor Co., Inc.	Department of Highways	299.93	299.93	February 15, 1971
D-150	Chesapeake & Ohio Railway	Department of Highways	1,297.20	1,297.20	September 15, 1970
D-46	City of Morgantown	Board of Governors of W. Va. University	40,886.22	40,886.22	October 23, 1969
D-207	Connon, Warren N.	State Road Commission	8.24	8.24	January 14, 1970
D-204	Davidson, S. P., H. H. Davidson and A. L. Davidson, d/b/a Davidson Brothers	State Road Commission	567.56	567.88	January 20, 1970
D-173	Equitable Gas Company	Department of Highways	254.90	254.90	April 6, 1970
D-289	Fedorka, Frank	Department of Highways	76.00	76.00	November 19, 1970
D-130	Frederick Engineering Company	State Road Commission	21,720.00	21,720.00	June 23, 1969
D-238	Grubbs, Carl W. and Ellen	State Road Commission	159.59	159.59	December 8, 1969
D-106	Hall, Harlan	Department of Welfare	228.00	226.00	April 15, 1969

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period May 1, 1969, to June 30, 1971:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-175	Harmarville Rehabilitation Center	Vocational Rehabilitation Division	411.00	411.00	December 8, 1969
D-260	Heilman, Anderson and Abplanalp, Drs.	Vocational Rehabilitation Division	116.50	116.50	January 14, 1970
D-111	Hendricks, Fred and Ruth	State Road Commission	498.00	498.00	January 26, 1970
D-235	Hibbard, O'Connor & Weeks, Inc.	Board of Education	57,450.00	57,450.00	January 14, 1970
D-144	Hicks, M. C., Committee for Lucy K. Hicks	Dept. of Mental Health	203.00	201.00	January 14, 1970
D-351	Holley, Robert Lee	Department of Highways	56.14	56.14	February 15, 1971
D-277	Humphrey, Olaf	Department of Highways	128.24	128.24	September 15, 1970
D-23	Interstate Lumber Company	Adjutant General	2,011.00	2,011.00	June 23, 1969
D-182	Johnson Welders Supply, Inc.	State Road Commission	2,060.20	788.33	January 14, 1970
D-216	King's Jewelry	State Road Commission	577.24	437.24	January 14, 1970
D-245	Kroger Company, The	State Road Commission	226.33	226.33	January 14, 1970
D-120	C. J. Langenfelder & Son, Inc.	Department of Highways	528,729.69	191,701.42	June 3, 1970
D-256	Lewis, Mr. & Mrs. H. B.	Department of Highways	50.00	50.00	April 6, 1970
D-353	McClintic, W. M.	Dept. of Natural Resources	46.77	46.77	February 15, 1971
D-299	M & M Construction Co.	Department of Highways	83,244.96	27,095.75	September 14, 1970
D-116	Mathison, Raymond	Dept. of Mental Health	247.50	247.50	April 15, 1969
D-257	Melvin, Sam	Department of Highways	11.00	11.00	April 6, 1970
D-286	Miller, Everett and Betty	Department of Highways	986.00	936.25	December 14, 1970
D-139	Monk, Gene R.	State Road Commission	69.79	69.79	September 8, 1969
D-252	Monongahela Power Company	Department of Highways	189.67	189.67	September 14, 1970
D-99	Mountain State Construction Company	State Road Commission	135,201.07	53,966.95	January 14, 1970

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period May 1, 1969, to June 30, 1971:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-28	Mountaineer Highway Abrasives, Inc.	State Road Commission	16,976.28	16,976.28	January 14, 1970
B-382	Ralph Myers Construction Corporation	State Road Commission	113,840.28	33,979.32	January 13, 1970
D-180	S. J. Neathawk Lumber, Inc.	State Road Commission	315.94	315.94	January 14, 1970
D-290	Olive, Dale E.	Department of Highways	1,071.27	1,071.27	September 23, 1970
D-255	Pitney-Bowes, Inc.	Office of the Governor	90.05	90.05	September 14, 1970
D-243	Price, Harold E.	Department of Highways	81.24	81.24	July 20, 1970
D-92	Price, Paul and R. C. Wetherall, Jr.	State Road Commission	20,847.75	20,847.75	March 28, 1969
D-151	Randall, Mrs. Jessie P.	Department of Highways	139.88	139.88	September 23, 1970
D-237	Rolfe, John L., a subrogation assigned to Harleysville Ins. Co.	Adjutant General	275.67	275.67	January 19, 1970
D-187	Samples, Creed, Administrator of the Estate of Fonda Ann Samples, Deceased	State Road Commission	11,065.49	11,065.49	January 22, 1970
D-188	Samples, Creed L.	State Road Commission	10,000.00	699.84	January 22, 1970
D-189	Samples, Jo Anna	State Road Commission	20,000.00	3,861.43	January 22, 1970
D-191	Samples, Leta, a minor who sues by Creed Samples, her father and next friend	State Road Commission	2,500.00	1,250.00	January 22, 1970
D-190	Samples, Penny, a minor who sues by Creed Samples, her father and next friend	State Road Commission	10,000.00	5,434.00	January 22, 1970
D-102	Shepherdstown Register, Inc.	State Board of Education	922.50	922.50	July 21, 1969
D-254	Shinn, Lowell C.	Department of Highways	409.87	409.87	November 30, 1970
D-301	Smith, Cecil, Jr.	Dept. of Public Institutions	10,500.00	3,000.00	February 15, 1971

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period May 1, 1969, to June 30, 1971:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-125	Smith, Joe L., d/b/a Biggs-Johnston-Withrow	State Board of Education	727.30	727.30	July 21, 1969
D-218	Smith, Joe L., d/b/a Biggs-Johnston-Withrow	Alcohol Beverage Control Commission	4,907.70	4,907.70	January 28, 1970
D-148	Squire, Francke and Goodwin, Drs.	Vocational Rehabilitation Division	134.50	134.50	November 14, 1969
D-285	State Farm Mutual Automobile Ins. Co., assignee to Sarah G. Romans	Department of Highways	168.83	168.83	November 19, 1970
D-327	State Farm Mutual Automobile Insurance Co.	Department of Highways	105.46	105.46	February 15, 1971
D-303	Swiger, Gerald S.	Department of Highways	423.49	423.49	December 7, 1970
D-348	Talbert, Charles E.	Department of Highways	40.17	40.17	February 15, 1971
D-118	Thomas Company	State Road Commission	55,000.00	18,956.23	January 28, 1970
D-246	Twigger, William J., d/b/a R. L. Swearer Company	Office of Federal-State Relations	1,128.89	1,128.89	January 23, 1970
D-185	Varner, John C., Administrator of the Estate of Julia M. Varner, Deceased	State Road Commission	104,551.30	8,201.30	January 16, 1970
D-195	Warden, Lemuel L. and Estelle	Department of Highways	11,500.00	3,000.00	December 29, 1970
D-382	West Virginia Business Forms, Inc.	Dept. of Motor Vehicles	249.97	249.97	February 15, 1971
D-92	Wetherall, R. C., Jr. and Paul Price	State Road Commission	20,847.75	20,847.75	March 28, 1969
D-294	Wotkiewicz, Helen I.	Board of Regents	1,258.00	1,258.00	October 14, 1970
D-272	Yost, Esdel B. and Sylvia J.	Department of Highways	825.00	355.00	February 15, 1971
D-208	Young, Lawrence H., Jr.	State Road Commission	249.26	249.26	January 14, 1970

REPORT OF THE COURT OF CLAIMS (Continued)

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

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-221	Affolter, Herman D.	Department of Highways	$ 103.02	Disallowed	September 23, 1970
D-321	Aguilar, E. Belden and Nationwide Insurance Company	Department of Highways	1,360.66	Disallowed	June 30, 1971
D-297	Boothe, Carl P.	Department of Highways	400.00	Disallowed	November 16, 1970
D-296	Bradley, John Stanford	Department of Highways	350.00	Disallowed	November 16, 1970
D-108	Cassel, Peter P.	Department of Highways	500,000.00	Disallowed	June 15, 1971
D-170	Christner, Alfred H.	Department of Mines	99.00	Disallowed	December 8, 1969
D-166	Cooper, Velma	Department of Highways	494.77	Disallowed	December 7, 1970
D-40	Creamer, John L., Adm. of the Estate of Muriel Creamer	Dept. of Mental Health	111,500.00	Disallowed	June 23, 1969
D-137	Criss, Paul and Pearl	Department of Highways	150,000.00	Disallowed	December 1, 1970
D-308	Dolin, Larry and Emma Lou	Department of Highways	10,000.00	Disallowed	June 15, 1971
D-129	Dubisse, Herbert J.	Dept. of Natural Resources	9,000.00	Disallowed	June 23, 1969
D-320	Ellison, Douglas T.	Department of Highways	100,000.00	Disallowed	June 30, 1971
C-32	Elswick, Dorothy	State Road Commission	50,000.00	Disallowed	March 29, 1971
D-329	Esposito, James A.	Board of Regents	1,950.00	Disallowed	March 29, 1971
D-310	Evans, Charles E. and Lillie F.	Department of Highways	1,201.54	Disallowed	March 29, 1971
D-298	Freeman, Edward C.	Dept. of Natural Resources	500.00	Disallowed	November 16, 1970
D-224	William Garlick & Sons, Inc.	State Auditor	1,690.00	Disallowed	July 20, 1970
D-152	Gilliam, H. L.	Department of Highways	144.66	Disallowed	February 10, 1970
D-197	Green, Archie and Fosie	Dept. of Public Institutions	60,000.00	Disallowed	February 9, 1970
D-169	Hall, Layman M.	Department of Mines	134.17	Disallowed	December 8, 1969
D-140	Halstead, Luther	State Road Commission	472.46	Disallowed	June 23, 1969
D-186	Hanson, Earl T.	State Road Commission	363.38	Disallowed	February 9, 1970
D-154	Highway Engineers, Inc.	State Road Commission	11,774.81	Disallowed	January 14, 1970
D-123	C. J. Hughes Construction Company	State Tax Commission	8,688.80	Disallowed	September 8, 1969

REPORT OF THE COURT OF CLAIMS (Continued)

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-159	Huntington Steel and Supply Company	State Tax Commissioner	12,215.65	Disallowed	March 16, 1970
D-181	Johnson Welders Supply, Inc.	Dept. of Mental Health	157.39	Disallowed	February 4, 1970
D-198	Jones Esso Service Station	Department of Highways	370.35	Disallowed	February 10, 1970
C-19	Lowe, Harold D. and Daisy	Department of Highways	10,000.00	Disallowed	February 15, 1971
D-281	McCoy, Rhea Rae	Dept. of Public Institutions	165.00	Disallowed	February 15, 1971
D-142	Massey, Florence, Widow of William Clifton Massey	Department of Welfare	695.71	Disallowed	January 14, 1970
D-274	Matz Department Store, Inc.	Department of Highways	195.70	Disallowed	April 6, 1970
D-149	Miller, Sylvia, Adm. of the Estate of Helen Louise Miller	Dept. of Public Institutions	110,000.00	Disallowed	January 15, 1970
D-225	Monongahela Power Company	Adjutant General	89.87	Disallowed	November 14, 1969
D-168	Mullenax, Hershel H.	Department of Mines	120.20	Disallowed	December 8, 1969
D-107	Mullins, Richard, d/b/a Morgantown Ambulance Services	Board of Governors, W. Va. University	399.13	Disallowed	September 8, 1969
D-112	Parsons, Etta A.	State Road Commission	5,000.00	Dismissed	September 8, 1969
D-226	Peters Fuel Corporation	State Tax Commissioner	8,297.52	Disallowed	November 16, 1970
C-6	Pettinger, Nancy Ann	Board of Education	500,000.00	Disallowed	April 24, 1970
D-202	Securro, Joseph P.	Department of Mines	108.00	Disallowed	February 9, 1970
D-300	Smith, Cecil, Jr.	Dept. of Mental Health	10,500.00	Disallowed	February 15, 1971
D-206	Southern Hardware Company	Department of Highways	1,500.00	Disallowed	November 30, 1970
D-165	Spencer, Kenneth	Adjutant General	592.79	Disallowed	January 14, 1970
D-251	State Farm Mutual Automobile Insurance Company	Department of Highways and Howard R. White	840.00	Disallowed	September 23, 1970
D-354B	Stonewall Casualty Company	Department of Highways	1,909.00	Disallowed	June 15, 1971
D-164	Thomas, Dan, Sr.	Department of Mines	119.22	Disallowed	December 8, 1969
D-274	Travelers Insurance Company	State Road Commission	195.70	Disallowed	November 19, 1970

REPORT OF THE COURT OF CLAIMS (Continued)

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-354A	Vandergrift, Roy	Department of Highways	4,178.45	Disallowed	June 15, 1971
D-192	Vogt-Ivers & Associates	Dept. of Natural Resources	16,275.00	Disallowed	February 16, 1971
D-193	Vogt-Ivers & Associates	State Tax Commissioner	15,813.90	Disallowed	March 29, 1971
D-177	Whiting, Clay	Board of Education	7,500.00	Disallowed	November 14, 1969
D-312	Whittington, Charles G.	Department of Highways	1,500.00	Disallowed	March 29, 1971
D-311	Whittington, Martha V.	Department of Highways	5,000.00	Disallowed	March 29, 1971

(5) Advisory determinations made at the request of the Governor or the head of a state agency: (None.)

(6) Claims rejected by the Court but payments made by special appropriation by the Legislature in the 1971 legislative session:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-397	A. B. Dick Products Co.	Dept. of Mental Health	$ 332.15	$ 332.15	January 19, 1971
D-406	A. B. Dick Products Co.	Dept. of Mental Health	211.60	211.60	January 29, 1971
D-367j	Acct. Supplies & Systems, Inc.	Dept. of Mental Health	25.95	25.95	January 19, 1971
D-391e	Ace Exterminators, Inc.	Dept. of Mental Health	160.00	160.00	January 29, 1971
D-371	Acme Cotton Products Co., Inc.	Dept. of Mental Health	533.12	533.12	January 19, 1971
D-333*	Airkem Sales and Service	Dept. of Mental Health	630.00	630.00	January 19, 1971
D-369	Appalachian Power Company	Board of Regents	34,979.13	34,979.13	January 19, 1971
D-367c	Appalantic Corporation	Dept. of Mental Health	12,252.72	12,252.72	January 19, 1971
D-379	Armour and Company	Dept. of Mental Health	865.54	865.54	January 19, 1971
D-367k	Bell Lines, Inc.	Dept. of Mental Health	64.75	64.75	January 19, 1971
D-415	Capitol Paper Supply, Inc.	Dept. of Mental Health	382.80	382.80	February 15, 1971

*The Opinion issued in the claim of Airkem Sales and Service, et al vs. the Department of Mental Health was applied through per curiae to all of the claims listed in Section (6).

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriation by the Legislature in the 1971 legislative session:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-341	Copco Papers, Inc.	Dept. of Mental Health	299.52	299.52	January 19, 1971
D-342	Copco Papers, Inc.	Dept. of Mental Health	224.64	224.64	January 19, 1971
D-367s	Crocker-Fels Co., The	Dept. of Mental Health	182.66	182.66	January 19, 1971
D-381	Crook's Wholesale Food Company	Dept. of Public Institutions	1,657.90	1,657.90	January 19, 1971
D-422	Dowling Pool Company	Dept. of Mental Health	33.80	33.80	January 28, 1971
D-367p	DuBois Chemicals	Dept. of Mental Health	809.06	809.06	January 19, 1971
D-367q	Eaton Laboratories	Dept. of Mental Health	85.50	85.50	January 19, 1971
D-367l	Economic Laboratories	Dept. of Mental Health	29.82	29.82	January 19, 1971
D-386	Empire Foods, Inc.	Dept. of Mental Health	494.70	494.70	January 29, 1971
D-391b	Fairmont Foods Co.	Dept. of Mental Health	1,310.34	1,310.34	January 29, 1971
D-343	Fry Brothers Company	Dept. of Mental Health	168.00	168.00	January 19, 1971
D-344	Fry Brothers Company	Dept. of Mental Health	605.00	605.00	January 19, 1971
D-387	General Electric Company	Dept. of Mental Health	2,594.82	2,594.82	January 29, 1971
D-435	Genuine Parts Company of West Virginia	Dept. of Mental Health	94.39	94.39	February 22, 1971
D-359	Goldsmit-Black, Inc.	Dept. of Mental Health	269.04	269.04	January 19, 1971
D-360	Goldsmit-Black, Inc.	Dept. of Mental Health	136.60	136.60	January 19, 1971
D-361	Goldsmit-Black, Inc.	Dept. of Mental Health	48.00	48.00	January 19, 1971
D-338	Guthrie-Morris-Campbell Company	Dept. of Mental Health	1,813.40	1,813.40	January 19, 1971
D-367m	Harry W. Higgins General Store	Dept. of Mental Health	49.20	49.20	January 19, 1971
D-367b	Industrious Blind Enterprise	Dept. of Mental Health	269.40	269.40	January 19, 1971
D-391a	James Produce Company	Dept. of Mental Health	572.97	572.97	January 29, 1971
D-410	Karoll's, Inc.	Dept. of Mental Health	1,796.48	1,796.48	January 19, 1971
D-389	Kellogg Sales Company	Dept. of Mental Health	547.70	547.70	January 29, 1971

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriation by the Legislature in the 1971 legislative session:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-337	Laird Office Equipment Company	Dept. of Mental Health	98.83	98.83	January 19, 1971
D-419	Lance, Granville H.	Dept. of Mental Health	500.00	500.00	January 28, 1971
D-373	Lederle Laboratories	Dept. of Mental Health	264.00	264.00	January 19, 1971
D-335	McCormick Office Supplies, Inc.	Dept. of Mental Health	77.10	77.10	January 19, 1971
D-358	McCormick Office Supplies, Inc.	Dept. of Mental Health	183.52	183.52	January 19, 1971
D-449	McGlothlin Printing Company	Dept. of Mental Health	546.76	546.76	February 26, 1971
D-367a	Mallinckrodt Chemical Works	Dept. of Mental Health	673.20	673.20	January 19, 1971
D-393	Martini Packing Co.	Dept. of Mental Health	745.53	745.53	January 19, 1971
D-367g	Medical Arts Supply Co., Inc., The	Dept. of Mental Health	94.96	94.96	January 19, 1971
D-367n	Merck Sharp & Dohme	Dept. of Mental Health	26.46	26.46	January 19, 1971
D-421	Mt. Clare Provision Company	Dept. of Mental Health	2,116.00	2,116.00	January 28, 1971
D-367f	Noe Office Equipment	Dept. of Mental Health	15.55	15.55	January 19, 1971
D-443	Noe Office Equipment	Dept. of Mental Health	281.68	281.68	February 24, 1971
D-334	Odorite Service and Supply Company	Dept. of Mental Health	1,673.40	1,673.40	January 19, 1971
D-380	Odorite Service and Supply Company	Dept. of Mental Health	112.90	112.90	January 19, 1971
D-367d	Ohio Valley Office Equipment	Dept. of Mental Health	500.55	500.55	January 19, 1971
D-376	Oxford Chemicals	Dept. of Mental Health	1,555.75	1,555.75	January 19, 1971
D-420	K. V. Pathology, Inc.	Dept. of Mental Health	1,500.00	1,500.00	January 28, 1971
D-385	Picker X-Ray	Dept. of Mental Health	347.16	347.16	January 29, 1971
D-403	Potomac Edison Co. of West Virginia	Board of Regents	5,170.24	5,170.24	January 19, 1971

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriation by the Legislature in the 1971 legislative session:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-367i	Raybestos-Manhattan, Inc.-Revolite Div.	Dept. of Mental Health	390.00	390.00	January 19, 1971
D-430	Red Head Oil Company, The	Dept. of Mental Health	52.75	52.75	January 28, 1971
D-336	Riverside Paper Company, Inc.	Dept. of Mental Health	178.07	178.07	January 19, 1971
D-367h	Roche Laboratories	Dept. of Mental Health	1,466.80	1,466.80	January 19, 1971
D-372	William H. Rorer, Inc.	Dept. of Mental Health	109.96	109.96	January 19, 1971
D-367e	Will Ross, Inc.	Dept. of Mental Health	126.70	126.70	January 19, 1971
D-367r	Sandoz-Wander, Inc.	Dept. of Mental Health	146.85	146.85	January 19, 1971
D-374	Scientific Products	Dept. of Mental Health	345.89	345.89	January 19, 1971
D-418	Selby, Charles V., Jr.	Dept. of Mental Health	200.00	200.00	January 28, 1971
D-367o	Shouldis Department Store	Dept. of Mental Health	472.86	472.86	January 19, 1971
D-394	Smith, Kline & French Company	Dept. of Mental Health	261.32	261.32	January 19, 1971
D-339	Southern Chemical Company	Dept. of Mental Health	1,217.80	1,217.80	January 19, 1971
D-377	Spencer Business Forms Co., Inc.	Dept. of Mental Health	175.03	175.03	January 19, 1971
D-423	St. Joseph's Hospital	Dept. of Mental Health	13.50	13.50	January 28, 1971
D-424	St. Joseph's Hospital	Dept. of Mental Health	88.70	88.70	January 28, 1971
D-425	St. Joseph's Hospital	Dept. of Mental Health	527.64	527.64	January 28, 1971
D-426	St. Joseph's Hospital	Dept. of Mental Health	9.25	9.25	January 28, 1971
D-427	St. Joseph's Hospital	Dept. of Mental Health	15.00	15.00	January 28, 1971
D-428	St. Joseph's Hospital	Dept. of Mental Health	1,160.38	1,160.38	January 28, 1971
D-429	St. Joseph's Hospital	Dept. of Mental Health	28.00	28.00	January 28, 1971
D-391d	Standard Brands Sales Company	Dept. of Mental Health	1,290.40	1,290.40	January 29, 1971
D-383	Willard C. Starcher, Inc.	Dept. of Mental Health	70.20	70.20	January 19, 1971
D-401	Storck Baking Company	Dept. of Mental Health	247.60	247.60	January 19, 1971
D-417	Swearingen, Wm. J.	Dept. of Mental Health	500.00	500.00	January 28, 1971

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriation by the Legislature in the 1971 legislative session:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-340	Tri-State Drug Company	Dept. of Mental Health	166.36	166.36	January 19, 1971
D-345	Union 76-Pure Oil Division	Dept. of Mental Health	824.94	824.94	January 19, 1971
D-391c	Union Oil Company of California	Dept. of Mental Health	302.24	302.24	January 29, 1971
D-447	Universal Supply Company, The	Dept. of Mental Health	172.14	172.14	February 25, 1971
D-364	Utilities, Inc.	Board of Regents	4,915.82	4,915.82	January 19, 1971
D-346	Vaughan's Termite Control Company	Dept. of Mental Health	290.00	290.00	January 19, 1971
D-347	S. B. Wallace and Company	Dept. of Mental Health	120.00	120.00	January 19, 1971

OPINIONS

TABLE OF CASES REPORTED

Affolter, Herman D. v. Department of Highways 150
Aguilar, E. Belden and Nationwide Insurance Company v. Department of Highways 264
Airkem Sales and Service, et al v. Department of Mental Health 180
Allergy Rehabilitation Foundation, Inc. v. Department of Mental Health 87
Allstate Plumbing Service v. State Road Commission 78
Arbogast, Howard v. State Road Commission 28
Ayers, Joyce J. Droddy v. Department of Highways 217

Bates & Rogers Construction Company v. State Road Commission 17
Beranak, R. L. v. State Road Commission 108
Betsy Ross Bakeries, Inc. v. Department of Mental Health 260
Bice, Ray v. State Road Commission 51
Boothe, Carl P. v. Department of Highways 163
Bradley, John Stanford v. Department of Highways 163

C & D Equipment Company v. State Building Commission 237
Caldwell, J. N. and A. M. Caldwell, d/b/a Caldwell's Hardware v. State Road Commission 90
Caldwell, Jerry K. and Anne B. v. Department of Highways 216
Cassel, Peter P. v. State Road Commission 254
Catsos, Michael and Evangeline v. State Road Commission 107
Charleston Concrete Floor Company, Inc. v. Department of Highways 221
Chesapeake & Ohio Railway v. Department of Highways 140
Christner, Alfred H. v. Department of Mines 54
City of Morgantown v. Board of Governors of West Virginia University 41
Connon, Warren N. v. State Road Commission 105
Cooper, Velma v. Department of Highways 178
Creamer, John L., Administrator of the Estate of Muriel Creamer v. Department of Mental Health 13
Criss, Paul and Pearl v. Department of Highways 175

Davidson, S. P., H. H. Davidson and A. L. Davidson d/b/a Davidson Brothers v. State Road Commission 76
Dolin, Larry and Emma Lou v. Department of Highways 252
Dubisse, Herbert J. v. Department of Natural Resources 21

Ellison, Douglas T. v. Department of Highways 264
Elswick, Dorothy v. State Road Commission 229
Equitable Gas Company v. Department of Highways 131
Esposito, James A. v. Board of Regents 223
Evans, Charles E. and Lillie F. v. Department of Highways 227

Fedorka, Frank v. Department of Highways 171
Frederick Engineering Company v. State Road Commission 26
Freeman, Edward C. v. Department of Natural Resources 165

William Garlick & Sons, Inc. v. State Auditor 137
Gates, L. M., Estate of, by Florence C. Gates, Executrix v. Department of Highways 243
Gilliam, H. L. v. Department of Highways 115
Green, Archie and Fosie v. Department of Public Institutions 101
Grubbs, Carl W. and Ellen v. State Road Commission 50

Hall, Harlan v. Department of Welfare 10
Hall, Layman M. v. Department of Mines 54
Halstead, Luther v. State Road Commission 24
Hanson, Earl T. v. State Road Commission 100
Harmarville Rehabilitation Center v. Vocational Rehabilitation Division 53
Heilman, Anderson and Abplanalp, Drs. v. Vocational Rehabilitation Division 88
Hendricks, Fred and Ruth v. State Road Commission 85
Hibbard, O'Connor & Weeks, Inc. v. Board of Education 109
Hicks, M. C., Committee for Lucy K. Hicks v. Department of Mental Health 98
Highway Engineers, Inc. v. State Road Commission 68
Holley, Robert Lee v. Department of Highways 242
C. J. Hughes Construction Company v. State Tax Commission 38
Huntington Steel and Supply Company v. State Tax Commissioner 123
Humphrey, Olaf v. Department of Highways 142

Interstate Lumber Company v. Adjutant General 12

Johnson Welders Supply, Inc. v. Department of Mental Health (D-181) 95
Johnson Welders Supply, Inc. v. State Road Commission (D-182) .. 96
Jones Esso Service Station v. Department of Highways 117

Keeley Brothers, Inc. v. State Tax Department 250
King's Jewelry v. State Road Commission 92
Kroger Company, The v. State Road Commission 94

C. J. Langenfelder & Son, Inc. v. Department of Highways 193
Lewis, Mr. and Mrs. H. B. v. Department of Highways 132
Lowe, Harold D. and Daisy v. Department of Highways 210

McClintic, W. M. v. Department of Natural Resources 218
McCoy, Rhea Rae v. Department of Public Institutions 209

M & M Construction Company v. Department of Highways 145
Massey, Florence, Widow of William Clifton Massey v. Department of Welfare 59
Mathison, Raymond v. Department of Mental Health 9
Matz Department Store, Inc. v. Department of Highways 129
Melvin, Sam v. Department of Highways 133
Miller, Everett and Betty v. Department of Highways 191
Miller, Sylvia, Adm. of the Estate of Helen Louise Miller, Deceased v. Department of Public Institutions 62
Monk, Gene R. v. State Road Commission 32
Monongahela Power Company v. Adjutant General (D-225) 49
Monongahela Power Company v. Department of Highways (D-252) 143
Mountain State Construction Company v. State Road Commission 89
Mountaineer Highway Abrasives, Inc. v. State Road Commission 91
Mullenax, Hershel H. v. Department of Mines 54
Mullins, Richard, d/b/a Morgantown Ambulance Services v. Board of Governors, West Virginia University 33
Ralph Myers Construction Corporation v. State Road Commission 56

S. J. Neathawk Lumber, Inc. v. State Road Commission 99

Olive, Dale E. v. Department of Highways 148

Parsons, Etta A. v. State Road Commission 35
Peters Fuel Corporation v. State Tax Commissioner 158
Pettinger, Nancy Ann v. Board of Education 134
Pitney-Bowes, Inc. v. Office of the Governor 144
Price, Harold E. v. Department of Highways 139
Price, Paul and R. C. Wetherall, Jr. v. State Road Commission 1

Randall, Mrs. Jessie P. v. Department of Highways 147
Retreading Research Associates, Inc. v. Department of Finance and Administration 245
Rolfe, John L., a subrogation assigned to Harleysville Insurance Company v. Adjutant General 75

Safeco Insurance Company v. Department of Highways 262
Samples, Creed, Administrator of the Estate of Fonda Ann Samples, Deceased v. State Road Commission 80
Samples, Creed L. v. State Road Commission 80
Samples, Jo Anna v. State Road Commission 80
Samples, Leta, a minor who sues by Creed Samples, her father and next friend v. State Road Commission 80
Samples, Penny, a minor who sues by Creed Samples, her father and next friend v. State Road Commission 80
Securro, Joseph P. v. Department of Mines 103
Shanabarger, Andy and Lora v. Adjutant General 261
Shepherdstown Register, Inc. v. State Board of Education 30
Shinn, Lowell C. v. Department of Highways 174
Smith, Cecil, Jr. v. Department of Mental Health (D-300) 202
Smith, Cecil, Jr. v. Department of Public Institutions (D-301) 202
Smith, Joe L., d/b/a Biggs-Johnston-Withrow v. State Board of Education (D-125) 31
Smith, Joe L., d/b/a Biggs-Johnston-Withrow v. Alcohol Beverage Control Commission (D-218) 127
Southern Hardware Company v. Department of Highways 172
Spencer, Kenneth v. Adjutant General 74
Squire, Francke and Goodwin, Drs. v. Vocational Rehabilitation Division 44
State Farm Mutual Automobile Insurance Company v. Department of Highways and Howard R. White (D-251) 151
State Farm Mutual Automobile Insurance Company, assignee to Sarah G. Romans v. Department of Highways (D-285) 169
State Farm Mutual Automobile Insurance Company v. Department of Highways (D-327) 219
State Farm Mutual Automobile Insurance Company, as subrogee for Damaris O. Wilson v. Board of Regents (D-414) 244
Stonewall Casualty Company v. Department of Highways 248
Swiger, Gerald S. v. Department of Highways 192

Talbert, Charles E. v. Department of Highways 241
Thomas Company v. State Road Commission 112
Thomas, Dan, Sr. v. Department of Mines 54

Travelers Insurance Company v. State Road Commission 168
Twigger, William J., d/b/a R. L. Swearer Company v. Office of Federal-State Relations 84

Vandergrift, Roy v. Department of Highways 248
Varner, John C., Administrator of the Estate of Julia M. Varner, Deceased v. State Road Commission 119
Vogt-Ivers & Associates v. Department of Natural Resources (D-192) 214
Vogt-Ivers & Associates v. State Tax Commissioner (D-193) 233

Warden, Lemuel L. and Estelle v. Department of Highways 190
West Virginia Business Forms, Inc. v. Department of Motor Vehicles 208
Wetherall, R. C., Jr. and Paul Price v. State Road Commission 1
Whitehair, Frank and Arnold v. Department of Highways 263
Whiting, Clay v. Board of Education 45
Whittington, Martha V. v. Department of Highways (D-311) 231
Whittington, Charles G. v. Department of Highways (D-312) 231
Wotkiewicz, Helen I. v. Board of Regents 155

Yost, Esdel B. and Sylvia J. v. Department of Highways 220
Young, Lawrence H., Jr. v. State Road Commission 106

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

Opinion issued March 28, 1969

R. C. WETHERALL, JR. and PAUL PRICE, Claimants,

vs.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, and the STATE OF WEST VIRGINIA, Respondents.

(No. D-92)

Carney M. Layne, Esq., and *Charles W. Yeager,* for the Claimant, R. C. Wetherall, Jr.

James W. St. Clair, Esq., for the Claimant, Paul Price.

Thomas P. O'Brien, Jr., Assistant Attorney General and *Theodore L. Shreve,* Esq., for the Respondents.

PETROPLUS, JUDGE:

Claimants, R. C. Wetherall, Jr., and Paul Price, of Huntington, West Virginia, filed a claim in the amount of $20,847.75 on July 16, 1968, representing a balance alleged to be due on a dam and highway construction contract with The State Road Commission of West Virginia dated October 28, 1960, covering a project designated as Castleman Run Road in the Counties of Brooke and Ohio, being Project No. 5824 and 7645. The contract was awarded to Paul Price on the basis of unit bid prices for quantities estimated by The State Road Commission and the Conservation Commission of West Virginia, respectively, for each phase of the project (1) highway construction and (2) dam construction, which quantities are subject to be increased or decreased according to the requirements of the Project. Earth material for the dam was to come from suitable material excavated from the roadway on the Road Commis-

sion's right-of-way and was to be hauled to the dam site on a recreational area furnished by the Conservation Commission. The work in controversy is listed on the Bid Proposal under the title "DAM AND CAUSEWAY" as Item 3, Borrow Pit Excavation, for an estimated quantity of 42,700 cubic yards at a unit bid price of 50¢ per CY. The estimate for this item was made by the Conservation Commission, which by agreement with State Road Commission undertook the work through the facilities of the Road Commission, as provided by Chapter 20, Article 5, Part II, of the West Virginia Code, relating to the construction of slack-water dams in connection with the construction of public highways so as to create reservoirs, ponds, lakes or other incidental works to conserve the water supply of the State. The Director of the Conservation Commission, in cooperation with the State Road Commissioner, was charged by Statute with the preparation of plans, specifications and estimates for the construction of such dams. Although the State Road Commissioner was to award the contract for the combined project, the Statute contemplated that the cost of the dam would be apportioned and paid from available funds of the Conservation Commission. It is undisputed that the Conservation Commission, now the Department of Natural Resources, paid an allocated share for the dam project to the State Road Commission in the amount of $52,200.00. The Court considers this quite significant in deciding the controversy giving rise to this claim.

The contract between the contractor, Paul Price, and the State Road Commission consisted of the proposal upon the Commission's form, the contract instrument, the Special Provisions to said contract designated as "Technical Specifications", the plans and drawings, consisting of two separate sets prepared by the Engineers of the respective Departments, and the "Standard Specifications, Roads and Bridges, of the State Road Commission of West Virginia, Adopted 1952". The latter is a bound volume which has no specifications for the construction of dams. The two projects, although combined in one contract awarded by competitive bid, are designated separately in the contract and the estimated quantities of work, services, labor and material at agreed unit prices appear in separate classifications for each project. The total esti-

mated contract price was in the amount of $134,895.50, and Item 3, Borrow Pit Excavation, under the Dam and Causeway title was $21,350.00 for an estimated quantity of 42,700 cubic yards at the unit bid price of 50¢ per cubic yard. Contractor Price on November 29, 1960, entered into a written Agreement with R. C. Wetherall, Jr., employing the latter to supervise, direct and oversee the performance of the requirements of the principal contract, for a formalized compensation for each of them after payment for labor, material, equipment and other expenses.

A note appears in the Contractor's Proposal under the dam project stating that the dam and causeway are to be constructed of *selected borrow material* obtained from the *roadway excavation,* core trench excavation, and spillway excavation (emphasis supplied). The material, according to this note, was to meet the specifications of the Conservation Commission of West Virginia, Item 3 (designated Borrow Pit Excavation in the Technical Specifications of the Conservation Commission), and the cost of selecting and segregating the material, hauling, placing, compacting, and all work necessary in completing the dam and causeway fill was to be included in the unit cost bid for Item 3 (Borrow Pit Excavation) and Item 6 (Causeway Embankment Fill).

The item of "Unclassified Excavation" appears only under the roadway portion of the proposal and is estimated at 56,600 cubic yards at a bid price of 60¢ per cubic yard.

The contract covered (1) highway construction for the Road Commission on its right-of-way, and (2) the slack-water dam and causeway on the recreational area property of the Conservation Commission adjoining the Road Commission's right-of-way.

During the progress of the construction work, monthly estimates were prepared and furnished by the Respondent, and payment was made progressively for the dam embankment work under the item designated "Borrow Pit Excavation" and for the highway construction under the item designated "Unclassified Excavation". In the Sixteenth and Final Estimate (revised) 41,695.50 cubic yards carried to dam construction at 50¢ per cubic yard was deleted and added to "Unclassified

Excavation", Item 2 of the Road project, increasing that item from a planned quantity of 56,600 cubic yards to 115,373.2 cubic yards or an overrun of 58,773.2 cubic yards, at 60¢ per cubic yard. This back-charge of amounts previously paid on monthly estimates for the construction of the dam embankment to amounts acknowledgedly due on highway construction gives rise to this claim, it being contended that by deleting the item of Borrow Pit Excavation the Road Commission abolished the contractor's payment for all his work in building the dam, and paid for yardage under Unclassified Excavation which the Contractor was entitled to receive under that item even though no dam had been built. It is the contention of the claimants that if they are to be paid for the building of the dam they must be paid under some item other than Unclassified Excavation, and that item is Borrow Pit Excavation.

The Respondent Road Commission answers: First: Claimant Wetherall has no contract with the Road Commission, and admittedly was an employee of Claimant Price by virtue of a private agreement between them, and therefore is not a proper party to this proceeding. Second: The Claimant Contractor has been paid for the 41,695.5 cubic yards of borrow pit excavation under the bid item of Unclassified Excavation at 60¢ per cubic yard, rather than 50¢ per cubic yard under the item of Borrow Pit Excavation. Further that at the time the contract was awarded, it was indicated that the Contractor would take his borrow excavation from a borrow pit area above the anticipated dam, but instead secured all of his material which he placed on the dam embankment from the roadway excavation and from a slide which had occurred on the highway right-of-way. A letter of Claimant Price to the Road Commission (Respondent's Exhibit 2) dated July 5, 1961, is assigned as the reason for revising the Sixteenth and Final Estimate in August, 1963, deleting the item of Borrow Pit Excavation. The letter stated:

> "I feel that the dirt that is taken out of the roadway slide should be paid for by unclassified excavation at .60 per C.Y. instead of Borrow Pit Excavation at .50 per C.Y. It was my understanding that anything that was taken out of the slide on the roadway was to be paid for by unclassified excavation at .60 per C.Y."

This Court was created by the Legislature to consider claims which, but for the constitutional immunity of the State from suit, could be maintained in the regular Courts of the State. Jurisdiction is extended to claims which the State as a soverign commonwealth should in equity and good conscience discharge and pay. The Court is not bound by the usual common law or statutory rules of evidence. Inasmuch as the contractor Price is a proper party claimant, it is difficult for us to see how the Respondent may be prejudiced by permitting the Claimant Wetherall to be joined as a party in the Notice of Claim filed herein, even though he is not a recognized subcontractor by the State Road Commissioner. He has a substantial beneficial interest in this claim by virtue of his contract of employment with Price, and justice would not be accomplished by dismissing him on technical grounds. He is the person who performed the work that benefitted the State, and to whom the State is "morally" obligated. All of the work covered by the contract has been accepted and approved by the Road Commission, and the dam has been accepted and approved by the Conservation Commission.

After a careful consideration of the contract documents, the pleadings, exhibits and evidence adduced, we are of the opinion to award the Claimants the sum of $20,847.75 for the measured quantity of 41,695.5 cubic yards of Borrow Pit Excavation at 50¢ per cubic yard for the construction of the dam embankment and the services, operations and work involved in selecting, segregating, hauling, placing and compacting the material which went into the building of the dam in accordance with the technical specifications of the Conservation Commission. In our opinion, the excavation of material from the highway construction is an additional pay item under the item of Unclassified Excavation, and would have been a compensable item even though no dam had been built as a part of the project. The Road Commission's own witness, John W. Chamberlain, Supervisor of the Project, testified that the Contractor would have been paid for the same amount of Unclassified Excavation (115, 373.2 CY at the bid price of 60¢ per cubic yard) if the project had been limited to the roadway construction.

It persuasively appears from the evidence and the technical specifications, as well as the Bid Proposal, that it was contemplated by the parties that the material from the roadway excavation would be available and used for the dam construction. Insofar as the specifications and plans of the Conservation Commission were concerned, borrow pit excavation was all material borrowed from the site of the road project or from borrow pits in adjacent areas. The Plans of the Conservation Commission (Claimants' Exhibit No. 6) clearly set forth by note:

> "Dam and causeway are to be constructed of selected borrow material from the roadway excavation, core trench excavation, and spillway excavation. This material shall meet the specifications of the Conservation Commission of West Virginia Item 3 and shall be placed in accordance to their specifications. The cost of selecting, and segregating the material, hauling, placing, compacting, and all work necessary in completing the dam and causeway fill shall be included in the unit cost bid for Item 3 and Item 6."

The same language appears in the Bid Proposal of the Contractor. Plans govern over specifications where there may be discrepancies, and special provisions have precedence over both plans and specifications.

We construe the contract to cover separate projects combined in one contract by virtue of the statutory law of the State (Chapter 20, Article 5, Part II, Official Code of West Virginia) relating to the construction of slack-water dams together with public highways as a conservation measure. The economies of a unified and integrated project are apparent, and are taken into consideration by the competitive bidders, but basically they are severable projects, separately engineered and separate specifications apply to each. The earth moving features of each project differ, and the work, operations and services performed for each project in placing or removing material from place to place certainly differ.

The rule on severable contracts is stated in *Vol. 17, Am. Jur.2d, Sec. 325,* as:

> "No formula has been devised which furnishes a test for determining in all cases what contracts are severable and what are entire. The primary criterion for determining

> the question is the intention of the parties as determined by a fair construction of the terms and provisions of the contract itself, by the subject matter to which it has reference, and by the circumstances of the particular transaction giving rise to the question."

In this same connection, *Michie's Jurisprudence, Vol. 4, Sec. 4,* states the rule:

> "A contract is entire and not severable when, by its terms, nature and purposes, it contemplates and intends that each and all of its parts, material provisions and the consideration are common each to the other and interdependent."

The West Virginia Supreme Court of Appeals in *Parkersburg and Marietta Sand Co., v. Smith,* 76 W. Va. 246, 85 S.E. 516, (1915) held that a contract was severable in a case involving a project to drive certain piling at a stipulated price per pile, to make an excavation for a cofferdam, and afterwards to remove an embankment at a stipulated price per cubic yard, and to provide a pump at a stipulated price per day.

We conclude that the contract in this case is severable and encompassed two divisible projects, payment for which was to be received on the basis of unit prices assigned to each project.

Under 1.7.13 of the Standard Specifications for Roads and Bridges, the Road Commission concededly is not precluded or estopped by any measurement, estimate or certificate made before or after the completion and acceptance of the work from showing the true amount and character of the work. But Specification 1.4.2. of the same Standard does not permit the complete deletion of a major item, defining a major item as one whose total cost is equal to or greater than 10% of the total original contract. This item of Borrow Pit Excavation was much more than 10% of the total contract price.

It appears unconscionable for the State Road Commission to collect from the Conservation Commission the sum of $52,200.00, as its apportioned cost of the combined project, and pay to the contractor a sum substantially less as the apportioned cost of the dam and causeway, by deleting a major item of the contract. This case illustrates the inherent risks in combining projects to effect economies when the projects are separately

treated in the specifications, and costs are calculated for different work and services under unit bid items that may overlap in whole or in part. Borrow material is ordinarily material brought on to the project site for the completion of the project, when material excavated from the project is insufficient to accomplish the purpose. If we treat this contract as severable, and the specifications certainly constrain us to do so, the material that went into the dam was borrowed from the roadway excavation and slide, which were beyond the project site of the dam construction.

The letter of Price, on which the Road Commission placed great reliance for its position, is subject to variable interpretations, and did not activate the Road Commission to make a change in its monthly estimates until two years later. The letter did not say that the material excavated from the roadway and processed for use in the dam construction should not be compensable as Borrow Pit Excavation.

Harlan Dahmer, Engineer for the Department of Natural Resources, whose duty it was to see that Conservation Commission's plans and specifications were followed, testified that the dam was constructed entirely out of unclassified excavation material derived from the right-of-way, and that the material had to be graded, cleared of rock, moisture controlled, compacted and otherwise handled to meet specifications. We cannot ignore his uncontradicted statement that the pay item for this work was Item 3, Borrow Pit Excavation.

Accordingly, for the foregoing reasons, we are of opinion to allow this claim, and accordingly make an award of $20,847.75.

Award of $20,847.75.

Opinion issued April 15, 1969

RAYMOND MATHISON

vs.

DEPARTMENT OF MENTAL HEALTH

(No. D-116)

Claimant appearing in person.

Thomas P. O'Brien, Jr., Assistant Attorney General, for the State.

DUCKER, JUDGE:

Claimant is an employee of the Department of Mental Health of the State of West Virginia, in the Division of Alcoholism of said Department, with his headquarters in Huntington until early in December 1966 when the Department of Mental Health assigned him to permanent duty in Charleston. In complying with the assignment the claimant incurred expenses in moving his household furniture and effects from Huntington to Charleston in the sum of $247.50 to the Myers Transfer and Storage Company of Huntington.

When claimant presented his claim to Department of Finance and Administration payment thereof was denied because said Department concluded that any payment thereof would constitute a gratuity and therefore not legal.

The facts are not disputed, and the only question for this Court to determine is whether the facts justify a finding that there is a moral obligation in this instance on the State to pay.

The claimant's work with the Department was sufficiently stationary for him to maintain his residence in Huntington and while doing so, he was required by his assignment to move to Charleston on a permanent assignment. The Supervisor of the Division of Purchases of the Department of Finance and Administration and the Director of such Division signed the requisition to the Myers Transfer and Storage Company to render such services in an amount not to exceed $300.00. There was an apparent lack of knowledge on the part of such

official that such a service would be considered a gratuity. Naturally, the claimant had no knowledge of any lack of authority on the part of those who ordered the move. Had he known that, he could very well have declined the assignment, probably even at the cost of his job, and the necessity to obtain other employment. These thoughts may be conjectural, but at least they should be given consideration when the claimant was given no choice in the matter.

Under all the circumstances, we think that the claimant should not be penalized by a mistake which was more of his superiors' making than his own. If the State were an individual or a corporation, we think it could legally be held liable for this claim. So in equity and good conscience we conclude that it should be paid, and we therefore award the claimant the sum of $247.50.

Award of $247.50.

Opinion issued April 15, 1969

HARLAN HALL

vs.

DEPARTMENT OF WELFARE

(No. D-106)

Claimant appearing in person.

Thomas P. O'Brien, Jr., Assistant Attorney General, for the State.

DUCKER, JUDGE:

The claimant, Harlan Hall, a resident of Mount Gay, Logan County, West Virginia, alleges that the Department of Welfare owes him $228.00 for services rendered in connection with the care and maintenance of one Jackie Jeffrey, a sixteen year old boy, from May 7, 1968 until August 13, 1968, in accordance with an order from the Circuit Court of Logan County, West Virginia.

The evidence consists only of the testimony of the claimant and his wife, who referred to a court order or directive of the Circuit Judge through one Clyde White, an employee of the Welfare Department in Logan, but which order could not be found either by the claimant or the Attorney General, there being some confusion as to who signed such an order, whether the regular Circuit Judge, C. C. Chambers, or Special Judge Naaman Aldredge. The employee Clyde White is no longer employed by the Welfare Department and was not available to testify. As documentary evidence is not submitted, the case turns entirely upon the credibility of the evidence of the claimant and his wife.

Claimant and his wife testified as follows:

That the Jeffrey boy, after the death of his grandmother, had been living with his aunt until for some unclear reason he was placed in the custody of the County Welfare authorities; that the said Clyde White brought the boy to the claimant's home, knowing that the boy knew the claimant's family only as a long time former neighbor and that said White told claimant the Court had placed the boy in the custody of claimant and his wife, and that claimant and his wife would be paid $58.00 for their services for the month of May and $68.00 a month for June and July of 1968; that claimant and his wife were required to take medical examinations in order to qualify as guardians and that the expense for that was $25 for each of them, and that claimant gave him $22 for clothing and $10 traveling expense money when Jeffrey left for the Job Corps. These expense items total up to $276.00, but inasmuch as claimant's evidence as to the medical examination expense is hardly satisfactory and the claimant has not included such expense within the total amount of his claim, we cannot allow that item.

The State has not denied the claim and has admitted the lack of a proper handling of the matter by the Welfare Department. As the honesty of the claimant and his wife is apparent and the services unquestionably rendered for the good of the infant and the State, we are of the opinion to, and do hereby award the claimant the sum of $226.00.

Award of $226.00.

Opinion issued June 23, 1969

INTERSTATE LUMBER COMPANY

vs.

ADJUTANT GENERAL

(No. D-23)

Charles V. Wehner, for the claimant.

Thomas P. O'Brien, Jr., and *George H. Samuels,* Assistant Attorneys General, for the respondent.

JONES, JUDGE:

This claim was originally filed before this Court on October 10, 1967. The claimant, Interstate Lumber Company, alleged that on July 6, 1967, at Camp Dawson, West Virginia, a parachutist member of the West Virginia National Guard made a regularly scheduled jump and during the course of the drop, he struck and broke a power line of the Monongahela Power Company providing electrical service to the claimant's sawmill, and caused a power failure which "burned out" twelve motors then being owned and operated by the claimant. The unquestioned cost of repairing the damaged motors was $2,011.00. No claim was made for loss of use of the motors and the resulting shutdown.

On April 8, 1968, this claim came on for hearing and was dismissed for non-appearance of the claimant, counsel advising the Court that the claimant had been informed by the Assistant Adjutant General of West Virginia that the claim was cognizable by the United States Army Claims Service and would be paid from federal funds. Thereupon, the claim was duly filed with the United States Army Claims Service and upon consideration was denied on the ground that military and civilian personnel of the National Guard are to be treated for purposes of the Federal Tort Claims Act as employees of the State and not of the federal government (citing Maryland v. United States, 85 S. Ct. 1293 [1965] and 86 S. Ct. 305 [1965]).

On October 8, 1968, the claimant moved this Court that the order dismissing the claim be vacated and that the claim be

reinstated. Whereupon, the Court reinstated the claim and a hearing thereon was held on April 15, 1969.

Upon consideration of the evidence adduced at the hearing and certain admissions made on behalf of the Adjutant General, the Court finds that the proximate cause of the damage to the claimant's property was the power failure precipitated by the negligence of the National Guard parachutist, that the guardsman was in the employ of the State of West Virginia and acting within the scope of his employment, that the amount of the claim is fair and reasonable, and that in equity and good conscience, the claimant should recover.

Therefore, the Court is of opinion to and does hereby award the claimant, Interstate Lumber Company, the sum of $2,011.00.

Opinion issued June 23, 1969

JOHN L. CREAMER, ADMINISTRATOR
of the Estate of Muriel Creamer

vs.

DEPARTMENT OF MENTAL HEALTH

(No. D-40)

William C. Weaver, Esq. for the Claimant.

George E. Lantz, Assistant Attorney General for the State.

DUCKER, JUDGE:

Claimant, John L. Creamer, Administrator of the Estate of Muriel Creamer, deceased, claims damages for death by wrongful act occasioned by the negligence of the staff and employees of the Weston State Hospital in placing, on May 25, 1963, one Wanda Maxine Janes, a mentally ill person, in the same room with said Muriel Creamer, resulting in the homicide of the latter by the said Wanda Maxine Janes. The claim is alleged to be in such amount allowable under the statute not to exceed $111,500.00, but which on hearing was stipulated to be limited

in the statute then in force to $10,000.00 for wrongful death and $15,000.00 for pecuniary loss. There was no proof of pecuniary loss.

The claimant rests his case entirely upon the reports of the physicians as to the mental and physical condition of Wanda Maxine Janes just previous to and upon her admission to the hospital, and the testimony and cross examination of Respondent's witnesses, Dr. Neil M. McFadyen, Superintendent of the hospital, and of Wanda Jacqueline Reed, a psychiatric aide who was on duty at the hospital at the time of the death of Muriel Creamer.

There is no conflict in the evidence relating to the place, time or cause of the death of Muriel Creamer. She died about nine o'clock on the evening of May 25, 1963 in a room in the Weston State Hospital in which Wanda Maxine Janes was also confined, the cause of death being the result of anoxia of the brain caused by strangulation. Muriel Creamer had been strapped in her bed by the hospital attendants, bound at her waist and feet to prevent her from leaving her bed, and when found dead she had a piece of muslin cloth about her neck. The evidence shows that Wanda Maxine Janes was admitted to the hospital at 10:00 A.M. on that same day and had been in seclusion in a room adjoining that in which Muriel Creamer was confined. At 8:30 P.M. of that day Wanda Janes was moved to the room occupied by Muriel Creamer, and about a half hour later, at 9:00 P.M., the latter was found dead with Wanda Janes standing near or over her. A regular "bed check" was made prior thereto at 8:00 P.M. and apparently all was well. There was never any sound of violence or other evidence of a struggle in the room of the homicide, but it was apparent that Wanda Maxine Janes had committed the act causing the death.

The question presented in this case is whether or not the Department of Mental Health has been negligent in its handling of the confinement of Wanda Maxine Janes, a decision of which rests either on specific alleged negligence on the part of the hospital staff or on a failure of the State to provide adequate quarters and care for a mentally ill person such as Wanda Janes.

From the exhibits introduced in evidence by the claimant, it appears that Wanda Janes was committed as a mentally ill person to Weston State Hospital by the Mental Hygiene Commission of Marion County upon the examination of said person by Drs. H. L. Criss and J. R. Tuckwiller, who, from affidavits of witnesses that although she was friendly she was irrational, considered herself as mistreated by everybody, suffering from a depression complex and ideas of persecution, recommended that she be admitted to a state hospital for treatment. Upon admission to the hospital, Dr. H. S. Chu said that on the admission interview Wanda Janes was extremely hostile and argumentative, that she tried to run out of doors, that her behavior became wild as she was quite irritable and resistive, irrational in her speech, her ideas were manifested with persecution and delusion that someone was trying to kill her, but as the interview proceeded she seemed to become relaxed; and that upon physical examination she strongly refused to go to the admission ward, behaved wildly and was given medication. The impression diagnosis was "Schizophrenic Reaction, Paranoid Type." The report of Dr. Neil M. McFadyen, Superintendent of the Hospital, to Prosecuting Attorney of Lewis County is substantially similiar to that of Dr. Chu that Wanda Janes was suffering from a severe mental illness manifested by delusional ideas to such a degree that she was unable to know the difference between right and wrong in relation to her alleged acts, and that she would be considered insane.

The testimony of Dr. McFadyen is exceptionally clear and uncontradicted, and was not in denial of the opinions expressed on the admission or commitment reports. He explained that Wanda Janes came within the usual classification of persons of a schizophrenic-paranoid and that her diagnosis was "not any different than anyone with a similar classification." He also specifically answered in the negative the question as to whether from her diagnosis or from other information available to Dr. Chu, he had any knowledge of any fact that would have put Dr. Chu on notice that Wanda Janes "might have had some violent homicidal tendency." There is no testimony or other evidence in the case which shows that the hospital authorities knew or should have known within a

period of less than twelve hours confinement that Wanda Janes had any violent homicidal tendency. We believe that the evidence to such effect must be positive, which it was not in this case, to charge the hospital authorities with any duty beyond that which was performed by them in the matter.

Solitary confinement of Wanda Janes did not seem reasonably necessary. The lack of solitary confinement can hardly be considered a proximate cause of homicide by a friendly inmate, although she may be irrational or even wild at times.

From the evidence it appears that the hospital was built to accommodate six hundred inmates, that at the time in question there were twenty-two hundred to twenty-three hundred inmates, and that they handled 1500 admissions per year with a large number of them being schizophrenic paranoids. Some 40 to 45 patients were in the section in which the parties here were confined and the door to the room was only 20 feet from the desk of the aide in charge on the floor. Because of the congestion and inability of the hospital to otherwise provide for her, Wanda Janes was removed from a room in which two others were quartered into a room in which there was only Muriel Creamer. From the evidence it appears that there had never before been such a result of such action by the hospital, and such fact makes it more unreasonable to conclude that a homicide by such a person could be anticipated under such circumstances.

In a sense it might be thought that the State has been negligent in not providing more hospital facilities for the mentally ill, but we cannot determine either the moral or financial responsibility or capability of the government in that phase of welfare. The authorities and the public have to accept what the State provides, as there is no legal duty in the matter, and in the absence of a clear legal duty we cannot place liability on the State simply on an alleged moral obligation without negligence on the part of its agents or some contractual obligation applicable to the matter.

For this Court to base a claim on a moral obligation we are limited in our consideration of moral obligations of the State. The statute, in our opinion, waives the constitutional immunity of the State in cases where the claimant would otherwise have

a legal claim. In view of the facts, we find no negligence which would be the basis for a judgment.

We are, therefore, of the opinion to and do disallow the claim of the claimant in this case.

Claim Disallowed.

Opinion issued June 23, 1969

BATES & ROGERS CONSTRUCTION CORPORATION

vs.

STATE ROAD COMMISSION

(No. D-126)

Frank Taylor, Jr., Esq. *Kay, Casto & Chaney* for the Claimant.

George H. Samuels, Assistant Attorney General, and *Theodore L. Shreve, Esq.* for the State.

DUCKER, JUDGE:

The claimant, Bates & Rogers Construction Corporation, was awarded a contract on May 26, 1966 designated as Bridge #2070-9, Project No. 1-70-1(13) 2, Contract 3 and F0234(15), amounting to an estimated total of $594,281.50 for the relocation of the Baltimore & Ohio tracks so as to bring State Route 2 through the City of Wheeling, and involving a temporary trustle and relocating temporary tracks while the contractor built a new bridge for said purpose. The claim herein is for damages in the sum of $7,532.35 occasioned by delays of the State Road Commission in the latter's direction of the work.

The contract provided for the work to be done within 240 working days and the contract was completed on March 3, 1967 in 232 working days, 8 days less than the allowed working days time. The claim is based on three delays which claimant alleges compelled it to take 47 more working days than was necessary to complete the project. The amount of such claim is stated in the petition as $7,770.35, but upon the hearing it was reduced by the sum of $238.00, leaving the net claim

$7,532.35, but according to our calculations from the testimony the total claim amounts to $7,324.85.

The first delay amounted to a total of 16 days, which the claimant alleges cost it a total of $2,400 in salary and overhead, and is based upon the failure of the Baltimore & Ohio Railroad, with whom the Road Commission had a separate contract, to begin the work necessary for it to do at the expiration of a 15 days' notice by the claimant to the Railroad Company that the work was ready for the railroad work. It appears that the notice was given as provided in the specifications or the work schedule on August 14 that claimant would be ready for the Railroad Company to begin its work on August 28, but the Railroad Company resident engineer replied that the Railroad Company was experiencing material and manpower problems and that it could not begin its work until September 25. The contractor claims that it was the duty of the Railroad Company to so commence its work and that the claimant suffered such loss on that account.

The second delay is in connection with a change in the drawings for the crib wall construction required by the contract, alleging that the crib wall drawings were submitted for approval to the State Road Commission on September 19, 1966, but were returned by the Road Commission to the contractor on October 3d specifying needed corrections. Corrected drawings were submitted by the claimant on October 26, 1966, and while numerous inquiries were made by the claimant to the Road Commission between October 26, 1966 and January 3, 1967, the corrected drawings were not approved by the Road Commission until March 3, 1967, causing, allegedly, the claimant to suffer both on this account and on account of the third delay item hereinafter specified, a total delay of 31 working days, or six weeks, in the prosecution of its work under the contract. The record, however, shows that the claimant was able to proceed with some of the crib wall work in the meantime, but claimant alleges it could not be done efficiently and, consequently, suffered a loss of $590 a week for 6 weeks in wages, plus a 30% fringe benefit cost, which makes a total of $4,602.00 to which is added $293.50 plus 10%, or $322.85 as the rental cost of a crane, making the grand total $4,924.83.

The third delay, the claimant alleges, was due to the relocation of a water hydrant at Eleventh and Baltimore Streets in the City of Wheeling and the work necessary to take care of an unexpected underdrain just behind the existing west curb of Baltimore Street and running the full length of the crib wall. This underdrain was not shown on the plans and specifications of the contract, and when it was discovered the matter was taken up with the Road Commission and it was agreed that instead of paying for the work therefor on the bid price of $1,000, the work should be done on a force account basis, and so the claimant was paid therefor the sum of $1,733.00. The claimant claims that on account of the lack of the decision of the Road Commission as to where to place the hydrant and what to do about the drain a delay of 13 days was involved, which time loss was included in the six weeks specified in the foregoing second delay period of 31 days.

The Road Commission contends that inasmuch as the work was completed within the time provision of 240 working days, delays within that period which did not prevent the claimant from timely completing the work under the contract cannot be the basis for any claim for damages. While there is some merit to that proposition as it does show what was contemplated by the parties as the proper time for the completion of the work, considering reasonable delays which must be expected from time to time during the work, especially from a governmental agency with all its rules and regulations which cannot be expected to function as a person or a private corporation, yet it is not the controlling factor if delays have been caused by neglectful conduct on the part of those in charge. So we are of the opinion that each delay should be considered also in view of all the circumstances relating to it.

As to the first item of delay, namely 16 days because of the failure of the Baltimore & Ohio Railroad to commence its work immediately after the 15 days' notice from the claimant, the claimant knew this work was dependent upon the performance by the Railroad Company under a separate agreement with the Road Commission, and there was no guaranty on the part of the Road Commission to the claimant that there would be no breach of that contract. We are of the opinion that claimant with the large contract which it had should have

anticipated the possibility of such delay and managed its work so as to prevent any loss on that account; so we hold that the delay was not unreasonable and we deny claimant his claim as to that charge.

As to the second item of delay, namely 31 working days, because of the crib wall drawings which were at first returned for corrections and finally approved, it appears that there were delays from September 19 to October 3, 1966 when the Road Commission considered the first plans; from October 26, 1966 to March 3, 1967, when the Road Commission considered and finally approved the second plans. In this connection it is well to observe that claimant took from October 3 to October 26 for its correction period. The pattern seemed to be set for two to three weeks as the periods for correction and approval, although that cannot be considered a positive basis for such action. The only period which to this Court seems unreasonable is that which elapsed between October 26 and March 3, a period of approximately four months. The evidence shows that although claimant could not proceed as efficiently in its work on the crib wall, it could work in the middle part of that work, and it is not clear what percentage of that work was done during the period in question. We do think the delay did have some damaging effect, and if we allow a reasonable time for the consideration by the Commission of the corrected plans and allow approximately fifty percent of the delay time claimed in this second item, we believe we will be doing equity in the matter, and in doing so we will allow claimant the sum of Two Thousand, Five Hundred Dollars ($2,500.00).

As to the third item of delay, namely the relocation of the water hydrant and the work on the underdrain, we are of the opinion that the following specification which was applicable to this situation controls our decision as to this part of the claim:

> "It is the Contractor's responsibility to verify the location of each facility when performing work which may affect these utilities including probing, excavation or any other precaution required to confirm location. The Contractor will be responsible for any damage or disruption to the utility lines which are now in operation."

Although the matter of the drain was unknown to both the Road Commission and the claimant, it was their joint responsibility to determine such a matter. It was not of such magnitude as to materially change the work of the contract to such an extent as to exceed the extra compensation which was allowed on account of such change. A reasonable degree of change in these matters must be contemplated in a contract of this magnitude and we are of the opinion that this was within such reasonable degree and has been compensated for by the State.

We are of the opinion to, and do, hold that the claimant is entitled to an award of $2,500.00.

Award of $2,500.00.

Opinion issued June 23, 1969

HERBERT J. DUBISSE

vs.

DEPARTMENT OF NATURAL RESOURCES

(No. D-129)

Clark B. Frame and *Thomas Patrick Maroney,* for Claimant.

Thomas P. O'Brien, Jr. and *George H. Samuels,* Assistant Attorneys General, for the respondent.

JONES, JUDGE:

On July 18, 1967, the claimant, Herbert J. Dubisse, of Philadelphia, Pennsylvania, along with his family, was a guest at the Lodge at Cacapon State Park in Morgan County. He had rented the accommodations for one week and this was the second day of his vacation. He went to the swimming area in the Park's 6-acre lake, climbed upon one of the three diving boards, and as he walked to the end of the board he slipped, lost his balance, the board struck the heel of his left foot, and he fell into the water. The claimant did not immediately

realize the extent of his injury, but the pain was severe and on the following morning he went to Berkeley Springs where a physician advised that he had sustained a torn Achilles tendon. The claimant did not go back to Cacapon but returned to Philadelphia where he later underwent surgery and as a result of the accident he lost substantial time from his job as a City Fireman and incurred considerable hospital and medical expense. The claimant prays damages in the sum of $9,000.00, including questionable permanent disability.

The substance of the claimant's case, or lack of it, is shown by excerpts from his direct testimony, as follows:

"Q Would you please tell us what happened when you arrived there?

A I went to the lake and I went out on the diving board. I got near the end of the diving board and took a few steps to bounce before I dove and my foot slipped. In order to gain my balance. I brought my left foot back and the board had hit me and I went into the water.

* * * *

"Q Now, as you walked out onto the board, what appearance, if any, did you notice about it?

A It was just a diving board.

Q Did you have traction as you walked out?

A Yes, I did.

Q Before you took your spring, had you had any difficulty walking as far as slipperiness was concerned?

A No, I did not.

Q So at what part of the board did you experience the slipperiness?

A At the part where I slipped. I don't know of any slipperiness that I felt actually. I just took a step and when I took the step, the foot seemed to slip out from under me so that I lost my balance.

Q So as you walked out on the board, did you notice anything which would cause you to become alarmed or to care for your safety until you slipped?

A No, the diving board was no different from any other."

The claimant testified that he never examined the diving board after the accident, nor did anyone for him. He did not report the accident to anyone at the Park.

The Superintendent at Cacapon State Park, with ten years' employment at that location, testified that there were at least two lifeguards on duty at the time of the accident, that no complaint or report was made to either of them or to anyone else at the Park, and that his first knowledge of the occurrence was about a year later. He further testified that the diving boards are taken down at the end of each season on Labor Day, and, before the beginning of the following season on Memorial Day, they are refinished and resurfaced with a "battleship safety tread", consisting of a primer and then a second coat of paint containing a gritty material, to give the surface of the board a rough finish. The Superintendent further gave evidence that it is possible for the boards to become worn and slippery but that with one exception, in 1968, the reconditioning process was never required before the end of a season. He testified that the boards are regularly inspected at least once every ten days; and that there were no complaints of a slick board at any time during the year 1967.

The Court does not question the injury to the claimant but we are of opinion that he has failed to make a case against the Department of Natural Resources. The evidence shows only an unfortunate accident, without the proof of any negligence or fault on the part of the Department. Accordingly, this claim is disallowed.

Opinion issued June 23, 1969

LUTHER HALSTEAD
and
CALVERT FIRE INSURANCE COMPANY

vs.

STATE ROAD COMMISSION

(No. D-140)

Pat R. Hamilton, Esq., for the Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Robert R. Harpold, Jr.,* Esq. for the State.

DUCKER, JUDGE:

This is a claim of Luther Halstead and the Calvert Fire Insurance Company, a corporation, the latter being subrogee under its contract with Luther Halstead, against the State Road Commission for damages in the sum of $472.46 done to claimant's automobile in a collision of it on December 24, 1966 with a State Road Commission truck on that part of State Route No. 21 known as North South Highway south of Oak Hill, West Virginia.

The State moved that the claim be dismissed because the State carried liability insurance to protect the employees of the State Road Commission from liability against claims of this nature and that consequently the claimant could not maintain the case in this Court because he had a remedy in other Courts by reason of such insurance. While the insurance is primarily to protect the employee personally, the State which waives its immunity in this Court should be considered as also having the protection of such insurance, but inasmuch as the factual situation here, on the merits, shows no liability in the matter, we deem it unnecessary to render herein a decision of the question raised by the motion.

The witness, Betty Halstead, ex-wife of Luther Halstead, owner of the 1964 Ford automobile, was driving said automobile south on Route 21, on the afternoon of December 24, 1966, and when she attempted to pass a State Road Commis-

sion truck which had a snow plow or blade on the front end, her car collided with the blade part of the truck damaging the right front and fender of her car just behind the wheel area. She testified that the road was covered with snow and she was driving in a "snow blizzard" and that it was "snowing very hard," and that she was traveling at about 20 to 25 miles an hour. She further said the truck was at the extreme right in the right hand lane of a four lane highway and that the truck turned to the left into the left lane.

John K. Learmonth, the driver of the State Road Commission truck, testified that the road was a two lane road with an additional turn lane at the point of collision, and that he was traveling at a speed of 10 miles an hour as he was entering the turn lane and that when he saw the Halstead car he quickly turned back to the right lane in order to avoid striking the car with the snow plow blade. Although Betty Halstead said there was no signal light on at the rear of the truck, the driver of the truck said it was on but went off automatically when he turned back to the right to avoid the collision. There is a direct conflict in the testimony as to whether it is a four lane road or a two lane with a turn lane. As the road was covered with snow, no road lane markings were visible. It appears that the testimony of the truck driver who was accustomed to work this road, cindering the road and removing the snow, is more credible on this point.

It appears to this Court that while in the evidence there are some points of direct conflict, the driver of claimant's car did not use good judgment in attempting to pass the snow removal truck on a snow covered highway in a snow blizzard at a speed ranging according to the testimony from 20 to 25 miles per hour, and while the truck was proceeding at a rate of ten miles an hour. We are of the opinion that the driver of claimant's car was guilty of contributory negligence to such an extent as to deny claimant's recovery on the claim.

Claim Disallowed.

Opinion issued June 23, 1969

FREDERICK ENGINEERING COMPANY

vs.

STATE ROAD COMMISSION

(No. D-130)

C. F. Bagley, Esq. and *Milton T. Herndon,* Esq. for the Claimant.

Theodore L. Shreve and *George H. Samuels,* Assistant Attorney General, for the State.

DUCKER, JUDGE:

The claimant, Frederick Engineering Company, a corporation, alleges that the State Road Commission owes it $21,720.00 as money withheld by the Road Commission as liquidated damages for 181 days at $120 per day for claimant's failure to complete within the specified time its work on the contract which was awarded to claimant on May 8, 1961, for the construction of approximately 7,381 feet of Interstate Highway 77 in Wood County, West Virginia, just south of Parkersburg, and being known as Project I-77(28) Contract No. 1.

The contract specified that it was to be completed in 225 working days, which, according to the actual number of working days which the Road Commission calculated, expired May 23, 1963. The period of the liquidated damages assessment for 181 days was from May 23, 1963 to November 21, 1963.

The claimant says that it completed its work under the contract on November 30, 1962, and with the payment made at that time had received all but five percent of the total amount due it, and that it requested then and many times thereafter the Road Commission make its survey to determine whether the work had been done satisfactorily and according to specifications, but nothing was done until it was notified by a so-called "punch list" in June 1963 that a number of things needed correction, all of which claimant says were largely if not almost entirely due to erosion, settling of the fill and washout and drainage due to a severe winter, and the failure

of the Road Commission to accept the work when it was finished rather than delay for five or six months the Road Commission's survey of the work done by claimant.

The testimony in the case showed quite a few causes of delay which were not the fault of the claimant. Among such causes were the unfinished culvert work of the contractor on the adjoining section of the road, the delay in acquiring right of way which involved the removal of gas and utility lines, and a shutdown for approximately six months of the work pending a decision of the Road Commission as to fulfilling a specification requiring granular material for the base of the road, and during which latter delay the claimant could not do otherwise than to keep at great expense his equipment on the job. Although the time for the completion of the contract was extended on account of the delay caused by the granular material indecision, the contract time was not extended on account of the failure of State Road Commission to act promptly after the notification to the Road Commission by the claimant on November 30, 1962 that it had completed the job. Then after the claimant was given the "punch" lists in June 1963, the additional work was completed in November 1963, the additional time required being the basis of the 181 days liquidated damages assessment.

The contract in this case amounted to over eight hundred thousand dollars on which a claimant's witness testified claimant had suffered a loss of approximately two hundred thousand dollars, which fact while not strictly relevant as the State does not guarantee against loss, it does to some degree substantiate the claim that the delays and difficulties suffered by claimant could have materially contributed to such result.

This court is not unmindful of the propriety of liquidated damage clauses in these contracts because the Road Commission must require contractors to fulfill their obligations. Beyond that, a liquidated damage clause is considerably a penalty provision and should not be enforced unless real damage is sustained or where there are no circumstances which give the contractor equitable reasons for his failure to complete his work. In this case, it is apparent that the officials of the Road Commission have attempted to do their conscientious duty in

applying the liquidated damages provision, but this Court feels that the equities are more in favor of the claimant than in favor of the State, especially so, where it does not appear that the State has suffered financially in the matter.

The evidence in this case as testified to by claimant's witness is more positive and impressive than that of the State, to the effect that the delays claimed by the claimant furnished a reasonable basis for claimant's inability to complete the contract within the period required. In other words, it appears to us that the claimant's evidence preponderates and that in all equity claimant should not have been assessed under the liquidated damage provision of the contract.

In accordance with the above, we are of the opinion to, and do hereby award the claimant the amount of the assessment withheld, namely, the sum of $21,720.00.

Award of $21,720.00.

Opinion issued July 21, 1969

HOWARD ARBOGAST

vs.

STATE ROAD COMMISSION

(No. D-101)

William R. Talbott, for the Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Robert R. Harpold, Jr.,* for the respondent.

JONES, JUDGE:

Nothing is very certain about this claim, including the date of the occurrence giving rise to it. Some time in December 1967 or January 1968, the State Road Commission caused several railroad cars, perhaps five, loaded with gravel, to be placed on a sidetrack in front of the claimant's residence. The dwelling house was set back about twelve feet from the closest rail of the siding. Unloading gravel from cars on this siding was a customary procedure, but on this occasion, the

gravel was frozen and in trying to thaw the material, fires were started under the cars in buckets containing sticks and oil. The claimant contends that the fires produced a great quantity of heavy black smoke which soiled the outside of his house, killed a pine tree and three rose bushes, filled the interior of the house and permeated everything in it, leaving a greasy substance on clothing, furnishings, appliances and equipment.

According to the testimony of the claimant, he did not point out any specific damage to any of the State Road Commission personnel on the job, but on the same day he went to Webster Springs and complained to his attorney. Photographs showing the exterior of the claimant's dwelling were introduced in evidence by the State Road Commission, but apparently no other investigation of the claim or appraisal of the alleged damages was made. Only one State Road Commission employee testified and while he confirmed the setting of the fires and the fact that smoke did enter the house, he was extremely vague as to damages, although he visited with the claimant inside the house during the time in question. This witness testified that there was "some smoke" in the house but he could not remember any specific evidence of damages.

The claimant listed items of damages totaling $1,513.80, including fifteen pairs of pants, valued by him at $60.00, thirty men's shirts at $119.40, sheetrock in three rooms at $150.00, two living room suites at $300.00, rugs, curtains, mattresses, blankets, labor in cleaning the house, two television sets and other furniture, and other miscellaneous items. More often than not, the claimant improperly claimed replacement values as the measure of his damages, and by any measure many of his figures appeared to be exaggerated.

The Court is of opinion that the State Road Commission employees were negligent in setting these fires so close to the claimant's residence and that the claimant is entitled to some compensation. The proof of damages is very unsatisfactory and a precise judgment in that regard is impossible. However, the Court has endeavored to reach a fair result and accordingly finds that the claimant is entitled to recover; and the claimant, Howard Arbogast, is hereby awarded the sum of $300.00.

Opinion issued July 21, 1969

SHEPHERDSTOWN REGISTER, INC., Claimant,

vs.

STATE BOARD OF EDUCATION, Respondent.

(No. D-102)

No one appeared for the Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, for the Respondent.

PETROPLUS, JUDGE:

The Notice of Claim is in the amount of $922.50, for printing 4500 copies of a campus newspaper called the "Picket" published by Shepherd College, which is under the control, supervision and management of the State Board of Education. The State admits that a valid contract was entered into by the President of the College and the Claimant for the printing, and no reason is assigned for the failure of the State to make payment of the invoices submitted. The attorney general recommends that the claim should be paid in equity and good conscience, and but for governmental immunity the Claimant could recover in a court of law on a meritorious claim.

The Court is of opinion to allow the claim, and an award of $922.50 is made to the Claimant.

Award of $922.50.

Opinion issued July 21, 1969

JOE L. SMITH, d/b/a Biggs-Johnston-Withrow,

vs.

STATE BOARD OF EDUCATION

(No. D-125)

No one appeared for the Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, for the State.

PETROPLUS, JUDGE:

This claim was submitted on the pleadings and undisputed facts. A decision was deferred until a ruling of the Supreme Court of Appeals of West Virginia in the mandamus proceeding instituted against this Court in the case of State of West Virginia ex rel. The City of Morgantown, a Municipal Corporation, vs. Henry Lakin Ducker, et al, was received clarifying and defining the jurisdiction of this Court with reference to corporate state agencies which are empowered by statute to sue and be sued. On June 17, 1969, the Supreme Court of Appeals ordered this court to take jurisdiction of a claim against the Board of Governors of West Virginia University, and the Court's opinion makes it clear that the Court of Claims has jurisdiction to hear a claim against the State Board of Education, a corporate agency of the State of West Virginia.

The claimant at the request of the respondent shipped 590,000 Data Cards to the respondent on or about December 5, 1966, and although repeatedly invoiced the respondent failed to make payment in the amount of $727.30. The order was placed by authorized personnel of Marshall University, and immediate delivery was made under a valid contract. The cards were used for registration purposes at the school.

The Court is of opinion to and does hereby award the claimant the sum of $727.30.

Award of $727.30.

Opinion issued September 8, 1969

GENE R. MONK, Claimant,

vs.

STATE ROAD COMMISSION, Respondent.

(No. D-139)

No appearance for Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Robert R. Harpold, Jr.,* Esq., for Respondent.

PETROPLUS, JUDGE:

A Notice of Claim was filed in the amount of $69.79 for damages to Claimant's automobile. On the evening of October 14, 1968, at about 6:50 o'clock P.M., Claimant was driving his automobile on State Local Service Road 15 in Kanawha County, and as he crossed a State Road Bridge near Berry Hills Country Club, his left rear wheel dropped into a hole in the floor of the Bridge. The hole resulted from two missing boards in the traveled portion of the Bridge and was two feet wide and four feet long. The State Road personnel were immediately notified and the hole was promptly repaired. It appears to the Court that a person exercising ordinary care for his safety would not reasonably have anticipated that the floor boards on the Bridge would be missing, and that the Claimant cannot be charged with contributory negligence or assumption of risk. The damages to the muffler and wheels of the automobile which dropped into the hole are the basis for the claim.

The case was submitted on a Stipulation of Facts, and it appearing that a hazardous and highly dangerous condition existed on the Bridge which directly and proximately caused damage to Claimant's automobile, and that the Claimant was free from contributory negligence, the Court is of the opinion that the claim should be allowed.

Award of $69.79.

Opinion issued September 8, 1969

RICHARD MULLINS,
d/b/a MORGANTOWN AMBULANCE SERVICE,

vs.

BOARD OF GOVERNORS OF
WEST VIRGINIA UNIVERSITY

(No. D-107)

The claimant present in person.

Thomas P. O'Brien, Jr., Assistant Attorney General, for the Respondent.

JONES, JUDGE:

This claim was heard by the Court on January 27, 1969, but consideration thereof was withheld pending the decision of the Supreme Court of Appeals of West Virginia in the mandamus proceeding instituted by the City of Morgantown against the Judges of this Court. Pursuant to the opinion in that case, which was filed on June 17, 1969, this Court finds that it does have jurisdiction of this claim.

On August 21, 1968, the claimant drove his ambulance to the West Virginia University Medical Center to remove a body from the morgue area. His eighteen year old son accompanied him and upon arrival, the son entered the University building through a side door for the purpose of raising an electrically operated overhead door which is controlled by "up", "down" and "stop" buttons. The door raised and the claimant backed his ambulance under it. Then the door reactivated and came down upon the vehicle, damaging the top, siren and bullet lights. The amount of the claim is $399.13, and that figure is uncontested by the respondent.

The claimant was the only witness in support of his claim. His son was not called as a witness. The claimant testified that the overhead door reactivated itself after his son had left the door controls, the door crashing onto the ambulance without any fault on his part; and he contends that the mechanism of the door must have been defective. On the other

hand, witnesses for the respondent testified that the door was regularly inspected, was in good working order, and that a simulation of the incident showed that the condition of the door after the accident was entirely the result of the collision of the door and the ambulance.

There being no factual showing of negligence on the part of the respondent, the only possible basis for recovery by the claimant would involve the doctrine of *res ipsa loquitur*. This doctrine has been defined by the Supreme Court of West Virginia in the case of Wright vs. Valan, 130 W. Va. 466, as follows: "The doctrine is that when a person, who is without fault, is injured by an instrumentality at the time within the exclusive control of another person and the injury is such as in the ordinary course of events does not occur if the person who has such control uses due care, the injury is charged to the failure of such other person to exercise due care."

We do not believe the doctrine of *res ipsa loquitur* is applicable in this case. At the time of the injury, it cannot be said that the respondent had exclusive control of the instrumentality as none of its agents was in the area and the door was being operated by the claimant's son. There is no evidence of negligence of the respondent, and there is some evidence of a lack of such negligence as the Superintendent of Maintenance of the Medical Center testified that the door was regularly inspected, and was in good working order. *Res ipsa loquitur* will not be invoked when the existence of negligence is wholly a matter of conjecture. The circumstances surrounding this claim are speculative, and do not establish any negligent conduct on the part of the respondent. Accordingly, this claim is disallowed.

Opinion issued September 8, 1969

ETTA A. PARSONS, Claimant,

vs.

STATE ROAD COMMISSION, Respondent.

(No. D-112)

T. E. Myles, Esq., for the Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General and *Robert Harpold, Jr.,* Esq., for the Respondent.

PETROPLUS, JUDGE:

Claimant presented her claim by Petition alleging that on May 5, 1968, at about 4:00 o'clock P.M., while driving her automobile in a southerly direction along State Route 39, near the community of Brownsville, Falls District, Fayette County, West Virginia, at which time and place it was raining, she lost control of her vehicle causing her to veer across both lanes of the highway and strike two other automobiles, sustaining damages to her automobile as well as personal injuries and medical expenses. Statements aggregating $424.25 were submitted as Exhibits for medical expenses, and an unsworn statement of Clarence Kennison, Mechanic for Hatcher Motor Company, was filed stating the motor vehicle was a total loss, and had a value of $1875.00 immediately before the accident, and a value of $675.00 immediately after the accident. As a result of the accident Claimant stated she had been injured about her abdomen and other parts of her body, suffering extreme pain, suffering, mental anguish and permanent injuries.

The negligence alleged was the dangerous condition of an asphalt highway, existing for a long period of time and known to the State Road Commission, and particularly that the western edge of the highway had become eroded away so as to create a hole of approximately 8 inches deep, one inch to 1½ feet in width, and approximately 6 feet in length, as shown by photographs attached to the Petition. No photographs have been attached to the Petition.

The Answer of the Respondent indicates that it is without knowledge or information sufficient to form a belief as to the truth of the allegations, and, therefore, the allegations are denied. It does not appear that the circumstances of the accident were investigated by anyone on behalf of the Respondent. The case was submitted upon a Stipulation of Facts that follows the general language of the Petition, describes the road defect in the language of the Petition, and states that the

> "defective condition in the highway was known to the State Road Commissioner but was permitted to remain defective for a long period of time. Petitioner, without negligence on her part, drove her automobile in and to said hole, thereby causing her to lose control of her vehicle and as a result her vehicle veered abruptly across the highway in an easterly direction and struck two other automobiles, damaging plaintiff's automobile to the extent of $1200.00, and as a result of said accident petitioner sustained a broken nose and injuries to her chest and other parts of her body . . ."

The West Virginia Court of Claims is a fact finding body created by the Legislature and is an instrumentality of the Legislature to determine which claims the State of West Virginia, as a Sovereign Commonwealth, should pay out of public funds because of equity and good conscience. Damages may be awarded which result from wrongful conduct of the State or any of its agencies, which would be judicially recognized as wrongful conduct.

Negligence of a State Agency or any of its employees must be fully shown to justify an award, and it must be further shown that the Claimant did not know the existence of a danger, or as a reasonable person under the conditions then existing the Claimant could not have discovered the danger. This accident occurred in the daytime. If she voluntarily and unnecessarily exposed herself to a risk, she is barred from recovery by the doctrine of assumption of risk. If she was driving in an imprudent manner considering the road conditions, visibility, weather, traffic, road surface, and other surrounding circumstances, she is barred by contributory negligence. A mere recital of a road defect is not sufficient to sustain a recovery in her favor. We must also know whether

she was operating her car in a careful and prudent manner under all the circumstances, whether the road defect would have been visible to a person exercising ordinary care for his own safety, whether it was a latent or hidden defect which could not reasonably have been anticipated. A material fact bearing on contributory negligence would be her familiarity with the condition of the road and whether she had traversed it before. Other silent facts in this record are the length of time the defect existed, whether the Road Commissioner had received proper notice of it, and whether he had a reasonable opportunity to remedy the condition, considering the limitations of his budget and the needs of our roads for maintenance.

This Court has many times held that the State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. The case of *Adkins v. Sims,* 130 W. Va. 645, 46 S.E. (2d) 81, decided in 1947, holds that the user of the highway travels at his own risk, and that the State does not and cannot assure him a safe journey. The maintenance of highways is a governmental function and funds available for road improvements are necessarily limited.

On the sparse record before it, a one-page Stipulation of Facts consisting mainly of conclusions rather than evidentiary facts, this Court cannot make an award merely on a finding of negligent and wrongful conduct on the part of the Respondent. We must also find that the Claimant was free from fault, and that her conduct did not contribute proximately to the accident.

To allow the claim would require this Court to make inferences and implied findings not warranted by the Stipulation. The missing photograph showing the condition of the highway and the location of the defect would have been helpful but not necessarily determinative of the Court's ruling. In the present state of the record before us, we are of opinion to deny the claim.

Claim dismissed. No award.

Opinion issued September 8, 1969

C. J. HUGHES CONSTRUCTION COMPANY, Claimant,

vs.

STATE TAX COMMISSIONER, Respondent.

(No. D-123)

J. W. St. Clair, Esq., for the Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General and *George H. Samuels,* Assistant Attorney General for the Respondent.

PETROPLUS, JUDGE:

The Claimant, C. J. Hughes Construction Company, a corporation, filed a claim in this Court on October 23, 1968, for the refund of business and occupation taxes allegedly overpaid for the years 1960 and 1961 under a misconception of the proper tax classification of business activity in which Claimant was engaged. A refund of $5,572.68 is claimed for the year 1960, and a refund of $3,116.12 is claimed for the year 1961, or the aggregate for both years in the sum of $8,688.80, resulting from the reclassification of a portion of the gross income for the respective years from a contractor status to service business, the tax rate for the latter type of business activity being lower than that of a contractor. A Field Auditor of the State Tax Commissioner's Office apparently discovered the error in classification, and called it to the attention of the taxpayer for the years in question as well as for three subsequent years, 1962, 1963 and 1964. The Claimant ultimately received reimbursement for the subsequent years and they are not involved in this hearing.

The Audit Report filed as Claimant's Exhibit No. 1, adjusting and recomputing the tax is dated January 13, 1966, and states on its face that no adjustment is made for the years 1960 and 1961 because they are barred by the Statute of Limitations. On January 22, 1966, Claimant filed Amended Business and Occupation Tax Returns for all calendar years, 1960 to 1964, inclusive, and was advised by the State Tax Commissioner

that the proper procedure was to file a Petition for Refund, which was accordingly done. Upon a hearing on the Petition, the State Tax Commissioner by Ruling dated June 1, 1967, disallowed all claims for refunds, assigning as a reason for the denial of refunds for the years 1960 and 1961, the bar of the Statute of Limitations, and for the subsequent years the refund claims were denied apparently because the Tax Commissioner disagreed with the adjustments made by his own Auditor.

Thereafter the Claimant instituted a Declaratory Judgment proceeding in the Circuit Court of Cabell County, where it was sustained in its position for the years 1962, 1963 and 1964, but again denied recovery for the years 1960 and 1961 on the ground that refunds were barred by the Statute of Limitations.

Claimant's contention is that inasmuch as a Court of Record has found its position on reclassification tenable for the subsequent years (1962, 1963, 1964) that the State of West Virginia has a moral obligation to make refund for the two prior years (1960, 1961) notwithstanding the Statute of Limitations has barred the refund proceedings, and a Court of Record has denied the refunds. With this contention we cannot agree.

There being no factual dispute, a decision must be based on the law applicable to the case.

The Claimant has overlooked entirely a provision in the law establishing this Court and defining its jurisdiction, Chapter 14, Article 2, Section 14, "The jurisdiction of the court shall not extend to any claim: .....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." A procedure for aggrieved taxpayers seeking refunds of taxes erroneously collected is set forth in Chapter 11, Article 1, Section 2a of the Code, and requires the taxpayer to file a written Petition for Refund within three years from the date of payment with the official or department through which the tax was paid; and if, on such Petition, and the proofs filed in support thereof, the official collecting the same shall be of the opinion that the payment of the tax was improperly required, he shall refund the same to the taxpayer by the issuance of a Warrant on the Treasury through the Auditor. If the collecting official is in

doubt as to whether the tax was unlawfully collected, or if he be of the opinion that the payment of the tax was lawful, on his own initiative or on demand of the aggrieved taxpayer within thirty days of written Notice, said official must promptly institute a Declaratory Judgment proceeding in a Court of competent jurisdiction.

The Claimant had a remedy in the Courts and availed itself of this remedy, and did recover by Declaratory Judgment the overpayment of taxes for the subsequent years of 1962 to 1964, inclusive. Having exhausted its legal remedy for the years of 1960 and 1961, it now invokes the jurisdiction of the Court of Claims because of a moral obligation and this alone. To assume jurisdiction would ignore the prohibition placed on this Court and the exclusion imposed by Chapter 14, Article 2, Section 14 of the Code. The latter Statute excludes certain classes of claims from consideration. Code, 11-1-2a originally was purely an administrative remedy for collecting taxes erroneously paid. Later by Legislative Amendment redress was afforded judicially by requiring the tax official to go into a Court of Record promptly on demand of the taxpayer. It would appear that the Statute now as amended affords a complete remedy in tax refund cases with appellate review. We are not unmindful of the Ruling in a Mandamus suit of the West Virginia Supreme Court of Appeals in the case of *Raleigh County Bank v. Sims*, 137 W. Va. 599, 73 S.E. (2d) 526, decided in 1952, which held that the administrative remedy afforded by this Statute was not the exclusive method of recovery for taxes erroneously overpaid. The case was decided before the Declaratory Judgment feature was added by Amendment to the Statute, and also in that case the Legislature had enacted an appropriation Statute declaring the debt to be a moral obligation of the State after a favorable award by the former Court of Claims.

As we interpret the Statute creating this Court of Claims, it is not all claims which the State should in equity and good conscience pay that we are required to consider, but only those that come within the purview of our circumscribed jurisdiction. We are constrained to consider those claims, which but for the Constitutional immunity, could be maintained in the regular Courts of this State. This claim obviously cannot

be maintained in the regular Courts of the State, and if civil action were filed there could be no recovery even though sovereign immunity was not pleaded as a defense.

The Judgment of the Cabell County Circuit Court entered on September 23, 1968, admittedly disallowed recovery for the taxes in question by stating they were barred by the Statute of Limitations, although allowing recovery for the subsequent years. This in our opinion is res adjudicata. We do not feel that this Court has been empowered to overrule a Final Judgment of a Court of Record based on findings or defenses other than sovereign immunity.

Accordingly, for the foregoing reasons, we are of opinion to disallow the claim and make no award.

Claim disallowed.

Opinion issued October 23, 1969

CITY OF MORGANTOWN

vs.

BOARD OF GOVERNORS OF
WEST VIRGINIA UNIVERSITY

(No. D-46)

Mike Magro, Jr., Esq., City Attorney, for the Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General and *Robert R. Harpold, Jr.,* Esq., for the State.

DUCKER, JUDGE:

The claimant, The City of Morgantown, a municipal corporation, alleges that West Virginia University is indebted to it for fire service fees assessed against the buildings and property of the University within said City in the amount of $40,886.22 for the fiscal year 1966-67, one-half of which was due November 1, 1966 and one-half May 1, 1967. The unpaid charges represent amounts which the Council of said City, as previously constituted as to its membership, gave the Uni-

versity credit on total charges of $52,945.11 and $52,943.11 respectively, for the two halves of such charges or assessments. The present or later council alleges that the former council had no authority to authorize such credits and herein claims that the amount of such credits is still due. The facts alleged in the complaint are stipulated by the parties as true; the validity of the claim is solely one of law.

Under the prior submission of this claim this Court held that West Virginia University was not such an agency of the State as to give this Court jurisdiction, and consequently dismissed the case, but notwithstanding the fact that the statute creating West Virginia University provided that the University may sue and be sued, the Supreme Court of Appeals of West Virginia held that the University is such an agency as has constitutional immunity from suit and that this Court has jurisdiction. Accordingly, this Court has now taken jurisdiction of the case for a decision on its merits according to the law and the facts.

We find no specific provision in the Charter of the City of Morgantown authorizing the enactment by the Council of a fire service charge, but Chapter 8, Article 4, Section 20 of the Code of West Virginia gives the governing authority of every municipal corporation that furnishes such service to provide for the same by ordinance, and according to Article 1, Section 2 of said Chapter of the Code all municipal corporations, except where otherwise provided in the Code or by special charter, are subject to the provisions of said Chapter. So the authority to make such charges for fire service is thus given to the Claimant. There is no question as to legality of the adoption by the City of Morgantown of the ordinance to such effect. The sole question is whether such ordinance could be effectually repealed or rescinded by a simple resolution which attempted to give the University the credit and releasing the liability to such extent, that is whether in order to do so it was necessary that a repealing ordinance be adopted, such adoption having been possible only after publication in accordance with the provisions of Section 10, Article 4, Chapter 8, of the Code in effect at that time, which provisions required publication of notice of such action for at least five days before the meeting at which it was to be submitted for adoption.

The law on this point is stated in the following authorities:

In Corpus Juris Secundum, page 836, section 435(3) it is said—

> "The act which repeals an ordinance must be of equal dignity with the act which establishes it, and must be enacted in the manner required for passing a valid ordinance. Accordingly, an ordinance or by-law can be repealed only by another ordinance or by-law, and not by a mere resolution, order, or motion, or by a void ordinance."

In *Hukle* v. *City of Huntington*, 134 W. Va. 249, 58 S.E. 2d, 780, the Court said—

> "It is a general rule that the ordinance of a municipal corporation may not be repealed by a mere motion or resolution, nor can the operation of the ordinance be suspended by a resolution or by the acts of municipal officers. 2 McQuillin, Municipal Corporations, 2d Ed. page 161, Section 885."

So according to this clear principle we are of the opinion to conclude that the Council of the City of Morgantown could not legally revoke and in such manner alone repeal the binding effect of the ordinance in question.

Another aspect of the case is also apparent in the equitable situation that exists in this matter. West Virginia University is not simply property or assets within or of the City of Morgantown but is and are property and assets of the State as a whole, and it occurs to us that it is not equitable for the City of Morgantown to be charged entirely with the cost of fire protection, which would be the result if the University were held to be exempt or relieved of its share of the cost of such service. By requiring the State as a whole to bear the fire service fee, equity will be better served regardless of any strict interpretation or application of the law. However, be that as it may, the legal reason hereinbefore expressed is adequate for our decision in this case.

For the reasons stated, we are of the opinion to and do hold that claimant is entitled to an award in the total amount of its claim.

Award of $40,886.22.

Opinion issued November 14, 1969

DRS. SQUIRE, FRANCKE AND GOODWIN, Claimants,

vs.

WEST VIRGINIA VOCATIONAL REHABILITATION DIVISION, Respondent

(No. D-148)

No appearance for the Claimants.

George E. Lantz, Assistant Attorney General for the Respondent.

PETROPLUS, JUDGE:

This claim was presented under Chapter 14, Article 2, Section 17 of the Code of West Virginia, authorizing a shortened procedure for claims under $1,000.00 possessing certain characteristics. It appearing to the Court that the State Agency concerned has concurred in the claim, and that the claim has been approved by the Attorney General's office as one that should be paid, and it further appearing that the claim does not arise under an appropriation for the current fiscal year, and that the records of the claim consisting of all papers, stipulations and evidential documents are adequate and reveal that the Claimants rendered certain medical services for which they have not been paid, and that Claimants' charges were overlooked because of a change in hospital procedures, the Court is of opinion to approve the claim and make an award in the amount of $134.50.

Claim allowed in the amount of $134.50.

Opinion issued November 14, 1969

CLAY WHITING, Claimant,

vs.

REX SMITH, Superintendent, and STATE BOARD OF EDUCATION, Charleston, and D. BANKS WILBURN, President of Glenville State College, Glenville, West Virginia, Respondents.

(No. D-177)

Louis G. Craig, Esq., for the Claimant.

George E. Lantz, Assistant Attorney General, for the Respondents.

PETROPLUS, JUDGE:

In this case Petitioner seeks damages in the amount of $7,500.00 for trespass to his property, charging Respondents with negligence in the construction and maintenance of a storm sewer or drain on the property of Glenville State College directly opposite Petitioner's property. It is alleged that the sewer collected and diverted a flow of water toward Petitioner's property with such volume and intensity as to erode the earth and wash away a portion of a City Street between the properties and cause movement of soil, land and debris to flow towards and on to Petitioner's property, thereby causing it to become depreciated in value. The Petitioner was the owner of contiguous Lots 19, 20 and 21 in the Linn Addition to the Town of Glenville, Gilmer County, West Virginia, which were situated on a hillside on a substantially lower elevation than the College property, which was situated directly across and above the Petitioner's property with a 40 foot public street known as Linn Street separating the respective properties. For many years before Petitioner purchased his property the area was beset with drainage problems, and slides had intermittently occurred. A portion of street between the properties became undermined, settled and broke away, the slip causing mud, soil and debris to push against and jeopardize a dwelling house situate on Lot 19, which house was moved at the expense of the Petitioner to higher and trouble free ground about 100 feet away from the original location.

Respondents filed a Motion to Dismiss, assigning as a ground that the applicable Statute of Limitations under West Virginia law for this type of action was two years, and inasmuch as the damage occurred in March, 1962, and the claim was not filed until April 3, 1969, more than two years after the alleged cause of action, the claim should be dismissed. A general denial of the allegations of the Petition was also filed denying any moral or legal responsibility for the damages sustained by the Petitioner. The hearing revealed that the damages were of a continuing and recurrent nature. The Court is of the opinion that the Statute of Limitations does not run where there is a continual and intermittent trespass to real estate, and the Motion to Dismiss is accordingly overruled.

According to the testimony presented at the hearing, the Court finds that Petitioner's property was on a low level with relation to the surrounding land of the College; that it was located in a natural drainage area, confronted with slips and drainage problems for many years before he purchased it; that the steeped-sloped side of the hill was composed of loosely compacted earth and porous sandstone highly susceptible to erosion by rain and surface waters. The Court is constrained to find that the natural flow of surface water, resulting from rainfall, contributed substantially to the breakage of the soil to which Petitioner's property was subjected. The damage to Petitioner's property was the result of a combination of conditions, and to hold that a leaking drain or inadequate sewer line on the College property was the direct and proximate cause of the damages sustained by the Petitioner would be an untenable finding of fact, unwarranted by the evidence in the case. Assuming that a leaking or defective drain existed on the Respondents' property, it is difficult for us to conclude that the leakage or diversion of surface waters contributed significantly and effectively to Petitioner's damages. Water accumulated in this area from several directions, forming an impassable pool on Linn Street, and seeking a lower level naturally caused mud and debris to flow upon Petitioner's lot below and jeopardized the safety of his home.

The Claimant testified that he purchased his property for $3,500.00 on September 1, 1960, including the lots and house, and subsequently filed suit against the Town of Glenville for

failure to install a culvert and provide adequate drainage of Linn Street, and that his claim was settled out of Court by payment of $1,500.00. The issue must have been the City's share of responsibility for damage to his property. Claimant also stated that an eminent domain proceeding was pending against him by the State Road Commission, and that he had been offered $3,700.00 for his property in its present condition in said proceeding. It was not clearly established that he owned the property at the time of this hearing.

The only witness for the State was the Superintendent of the College buildings and grounds, who testified that the land above had been gradually slipping for about ten years before Petitioner acquired his property, and that Linn Street, then maintained by the City, had been gradually sinking at its low point opposite Lot 19, requiring a gravel fill from time to time. He further stated the site was a natural drainage area for the steep hillside behind Petitioner's property, and that the water was washing out the land. Ditches and drains were installed to alleviate the condition but apparently were ineffective in diverting the flow of water. He further stated the land would have slipped whether there was any pipe or not, and that the difficulty may have been remedied by an expenditure of $2,000.00 or more by the College. His testimony stands uncontradicted.

It is well established law that land at lower levels is subject to the servitude of receiving waters that flow naturally upon it from adjoining higher land levels, and that unless a property owner diverts the natural flow of surface water in such a manner as to damage the property of another, there is no liability on the owner of the higher property. Unless a landowner collects surface water into an artificial channel, and precipitates it with greatly increased or unnatural quantities upon his neighbor's land, causing damage, the law affords no redress. If no more water is collected on the property than would naturally have flowed upon it in a diffused manner, the dominant tenement cannot be held liable for damage to land subject to the servitude of flowing waters. The evidence in this case does not reveal that the flow was increased in volume or changed in its character to the substantial damage of the Petitioner. Nor was it shown by evidence that the flow accelerated or was artifically channeled so as to increase the servitude

upon Petitioner's lot as was shown in *Manley v. Brown,* 90 W. Va. 564, 111 S.E. 505, cited by Petitioner.

To constitute a moral obligation of the State justifying the appropriation of public funds, it is necessary that an obligation or duty be imposed on the State, by Statute or Contract, or that wrongful conduct be shown, which would be judicially recognized as legal or equitable in cases between private persons. *State ex. rel. Cashman v. Sims,* 130 W. Va. 430, 43 S.E.2d 805. In the recent decision of *State ex. rel. Vincent v. Gainer,* 151 W. Va. 1002, (1967), our Supreme Court of Appeals affirmed prior decisions holding that whether such moral obligation exists is a judicial question, and proof of negligence by the State Road Commission was required to be shown.

The common law rule that surface water is considered a common enemy, and that each landowner may fight it off as best he can prevails in Virginia and West Virginia, with the modification that an owner of higher ground may not inflict injury on the owner of lower ground beyond what is necessary. *Norfolk & W. R. Co. v. Carter,* 91 Va. 587, 22 S.E. 517. *Jordan v. Benwood,* 42 W. Va. 312, 26 S.E. 266, and *Lindamood v. Board of Education,* 92 W. Va. 387, 114 S. E. 800.

We conclude that because of the many intervening factors and causes of the Petitioner's damages, operating independently of any leakage from a defective sewer or drain tile on the College property, and all contributing to the extensive slides and soil erosion in the area of Petitioner's land, and the further fact that Petitioner sought and received damages from the Town of Glenville for its responsibility in the subsidence and drainage of Linn Street, the Petitioner has not proved a claim which in equity and good conscience should be paid by the State of West Virginia. An allowance must be predicated on proof disclosing more than a mere basis for conjecture or speculation that the leaking sewer caused the damage of which the Petitioner complains.

For the foregoing reasons, the Court disallows the claim.

Claim disallowed.

Opinion issued November 14, 1969

MONONGAHELA POWER COMPANY, a corporation,

vs.

ADJUTANT GENERAL OF THE STATE OF WEST VIRGINIA

(No. D-225)

Richard H. Talbott, Jr., Esq., for the Claimant.

George E. Lantz, Deputy Attorney General, for the State.

DUCKER, JUDGE:

This claim in the amount of $89.87 arose out of parachute exercises at Camp Dawson in Preston County, West Virginia, by personnel of Company F, 19th Special Forces Group of the West Virginia National Guard, on July 5, 1967, the parachute of one of the officers having drifted across open electric wire causing conductors between poles to burn necessitating immediate repairs, costing the amount alleged in the claim.

There is no dispute or denial of the alleged facts, but the claim was not filed in this Court until October 3, 1969, which was more than two years after the alleged cause of action arose. The cause of the delay in filing the claim in this court is explained in correspondence between claimant's attorney and the Attorney General, which shows what may be considered at least an implied waiver, if not an express waiver, by the Attorney General of the statute of limitations.

It is fortunate that the amount of the claim is small, but that is not relevant to the question of law involved which is whether the statute of limitations can be waived so far as the jurisdiction of this Court is concerned.

The statute on this point, as set forth in Chapter 14, Article 2, Section 21 of the Code is in the following language:

> "The court shall not take jurisdiction of any claim, whether accruing before or after the effective date of this article, unless notice of such claim be filed with the clerk within such period of limitation as would be applicable under article two, chapter fifty-five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, if the claim were against a private person, firm or

corporation and the constitutional immunity of the state from suit were not involved."

From the wording of this statute, this court is of the opinion that it does not have jurisdiction because of the application of the two year statute of limitations, and that without any special exception in the statute there is no express or implied right on the part of any department of the state through its agents or attorneys to waive this jurisdictional restriction, for otherwise this Court's jurisdiction could become unlimited and expanded at the will and discretion of any state agency. Of course, it is regrettable that there could have been any understanding between counsel to the effect that the statute was or could be waived, but this Court cannot change the law to honor anything contrary to the law. This provision is not unlike many other provisions of law fixing time limits for various procedures or proceedings. Consequently, this Court concludes that it must and does hereby dismiss the claim for lack of jurisdiction.

Case dismissed.

Opinion issued December 8, 1969

CARL W. GRUBBS and ELLEN GRUBBS, Claimants,

vs.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, a corporation Respondent.

(No. D-238)

No appearance for the Claimants.

Robert R. Harpold, Jr., Esq., for the Respondent.

PETROPLUS, JUDGE:

One of the Petitioners, Ellen Grubbs, is an employee of the State Road Commission of West Virginia, and as such had been given permission to park her automobile in the State Road Commission Motor Pool parking lot. While reporting for work on October 17, 1969, she stopped her car at the entrance to the lot, where the attendant, also an employee of the State Road Commission, entered the car and proceeded to park

the vehicle. A sign posted at the entrance stated that all vehicles were to be parked by the attendant. While in the process of parking the car the attendant struck another motor vehicle, resulting in damages to Claimants' car in the agreed amount of $159.59. The attendant was later discharged for being under the influence of alcohol while performing his duties.

The above facts were submitted to the Court by stipulation of the parties, including damages, which appear to be reasonable according to the estimate thereof prepared by a reliable repair shop, which was filed as an exhibit. No evidence was taken in the case. It also appeared from the exhibits that the Respondent, through its Safety and Claims Division, made a thorough investigation of the claim.

It is the finding of the Court that a duly authorized agent of the State Road Commission, acting within the scope of his employment, failed to exercise the ordinary care that a reasonably prudent person would exercise under the circumstances in the performance of his duties, and the Claimants being free from any fault on their part, the Court finds that the damages complained of were directly attributable to the negligence of a state employee. An award is made to the Claimants in the amount of $159.59.

Claim allowed in the amount of $159.59.

Opinion issued December 8, 1969

RAY BICE, Claimant,

vs.

STATE ROAD COMMISSION, Respondent.

(No. D-214)

Claimant appeared in person without counsel.

Robert R. Harpold, Jr., Esq., for the Respondent.

PETROPLUS, JUDGE:

The claimant was retired as an employee of the State Road Commission on February 4, 1967, when he attained the age of

70 years by virtue of the requirements of the Compulsory Retirement Age Act passed by the Legislature in 1965, (Code, Chapter 5, Article 14). The repeal of the Act, effective on February 1, 1968, has no relevancy to the issue before the Court. Section 5 of said Act provided that upon submission of a payroll to the State Auditor for payment, the individual submitting the payroll should certify that no person whose name was listed thereon was 70 years of age or older, and if it was brought to the attention of the State Auditor that a listed employee had reached retirement age, no warrant could be issued for payment of said employee's services.

At the time of the Claimant's retirement, he had accrued to his credit 289 hours of what is termed as compensatory leave time. In an official memorandum dated March 18, 1965, the State Road Commissioner defined compensatory time as time worked by salaried employees after regular working hours to meet emergency situations or designated work schedules of contractors for the State Road Commission. The District Engineer of a designated project was required to approve work hours beyond the regular work schedule, and no employee was permitted by regulation to accumulate more than 20 hours of compensatory time in any one week, nor more than 200 hours of compensatory time to his credit at any one time. Any compensatory time accumulation in excess of the regulation was declared unauthorized.

The accounting practices of the State Road Commission carried a retired employee on the payroll until the amount of extra time accumulated and to which the employee was entitled was paid. When the claimant was retired by compulsion upon reaching the age of 70 years, the requirement of certification and the prohibition placed upon the Auditor heretofore mentioned prevented the claimant from receiving compensation for his extra work.

The Respondent stipulated that on the basis of the maximum credit allowed, namely 200 hours, the Claimant was entitled to $760.29. The additional 89 hours claimed, being in excess of the allowable credit, are not compensable.

It appearing to the Court that the Claimant rendered services of value to the State beyond his regular working hours

pursuant to a requirement of the State Road Commission, and that in equity and good conscience the State should pay him for these services, the Court is of opinion to allow this claim in the amount of $760.29, notwithstanding that the payroll procedural problems created by the Compulsory Retirement Act because of the certification requirement prevented the State Auditor from issuing a warrant for payment. The services were rendered while the Claimant was an eligible employee of the State, and were duly authorized by the State. A contrary holding would work a manifest injustice.

Claim allowed in the amount of $760.29.

Opinion issued December 8, 1969

HARMARVILLE REHABILITATION CENTER

vs.

DIVISION OF VOCATIONAL REHABILITATION

(No. D-175)

No appearance for the Claimant.

George E. Lantz, Assistant Attorney General, for the Respondent.

JONES, JUDGE:

On April 16, 1968, the claimant, Harmarville Rehabilitation Center, mailed an invoice for $49.00 to the respondent, Division of Vocational Rehabilitation, for services rendered, which was paid in due course. Thereafter, by letter dated January 6, 1969, the claimant informed the respondent that a review of its records revealed that for services rendered for a period of ten days, from May 1, 1968 to May 11, 1968, the claimant had inadvertently billed for only one day, leaving a balance owing of $411.00. The respondent readily conceded the error, but it was unable to pay the invoice for the balance due for the reason that it was submitted after funds available to pay for services rendered during the fiscal year ending June 30, 1968, had been exhausted.

The respondent's answer admits the allegations of the claimant's petition, and says that the claim should be allowed. The claim was submitted on the petition and answer.

The Court is of opinion that this is a valid claim which in equity and good conscience should be paid, and, accordingly, an award is hereby made to Harmarville Rehabilitation Center in the sum of $411.00.

Opinion issued December 8, 1969

DAN THOMAS, SR.

vs.

DEPARTMENT OF MINES

(No. D-164)

HERSHEL H. MULLENAX

vs.

DEPARTMENT OF MINES

(No. D-168)

LAYMAN M. HALL

vs.

DEPARTMENT OF MINES

(No. D-169)

ALFRED H. CHRISTNER

vs.

DEPARTMENT OF MINES

(No. D-170)

No appearance for the Claimants.

George E. Lantz, Assistant Attorney General, for the Respondent.

JONES, JUDGE:

Each of the claimants appeared at a hearing at the Federal Building in Fairmont on December 5, 6 and 7, 1968, at the

request of the respondent, and gave testimony, relating to the Farmington Mine Disaster. Their claims are for lost wages, travel and other expenses incurred by reason of their attendance at the hearings. Their respective claims are in the following amounts: Dan Thomas, Sr.—$119.22; Hershel H. Mullenax—$120.20; Layman M. Hall—$137.17; and Alfred H. Christner—$99.00. The claims were submitted on the records, and have been consolidated for the purpose of this opinion.

The respondent admits that it requested the appearance of the claimants as witnesses at the hearings, but answers that it has no authority to reimburse these claimants for the loss of earnings and expenses incurred by them. No legal responsibility upon the respondent is shown by the claimants, and the Court is unable to find any authority which would support the payment of these claims.

It goes without saying that the claimants have performed a meritorious service for their fellow workers, their industry and the State of West Virginia, by cooperating with the Department of Mines in its endeavor to determine the cause of a tragic mining accident and to prevent such disasters in the future. However, the Court of Claims Act does not contemplate the invocation of the State's conscience without a showing of legal responsibility. There being no legal basis for recovery, the Court must, and does hereby, disallow each of said claims.

Opinion issued January 13, 1970

RALPH MYERS CONTRACTING CORPORATION,
a corporation, Claimant,

vs.

THE STATE ROAD COMMISSION
OF WEST VIRGINIA, Respondent.

(No. B-382)

George P. Sovick, Jr., for the Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Theodore L. Shreve,* for the Respondent.

PER CURIAM:

This claim was filed December 21, 1966, with the Attorney General of West Virginia. No hearings thereon were held by the Attorney General and the claim was transferred, with others, to this Court upon its creation by the West Virginia Legislature, effective July 1, 1967. The case was originally set for hearing on November 2, 1967, but was continued at the request of the claimant because of the unavailability of certain witnesses who were out of the country, the respondent not objecting to the motion for continuance. Testimony in this case was taken, and other evidence submitted on May 24 and May 28, 1968.

Claimant entered into a written contract with the State Road Commission of West Virginia, dated September 8, 1958, calling for the grading and draining of 33,538 lineal feet of construction on Interstate Route 64, designated as Project No. I-64-1 (9) 13.

This claim embraces four separate items, described briefly as follows:

(1) $47,532.45 as payment for 32,781 cubic yards of special rock fill at the contract unit price of $1.45 per cubic yard. It is the respondent's contention that this rock fill was not actually put in place, based upon core drilling or boring conducted by the State;

(2) $36,360.96 as payment for 35,648 cubic yards of unclassified excavation, at the contract unit price of $1.02 per cubic yard. It is the respondent's contention that this excavation was not in fact done or this material removed inasmuch as the rock fill referred to above was not placed;

(3) $22,032.00 as payment for the removal of 21,600 cubic yards of material as unclassified excavation, at the contract unit price of $1.02 per cubic yard. Respondent agrees this amount of material was removed but contends the claimant is not entitled to payment because it accumulated as a result of "overblasting" on the part of the claimant and not as a result of sluffing or slides as alleged by claimant;

(4) $11,947.32 representing the difference claimant was to be paid for additional work in relation to culvert installation and excavation per a written contract entered into by claimant, the respondent's project Engineer Fryer, and claimant's subcontractor Turman after the problem arose during construction. Respondent contends Fryer had no authority to bind the State in any regard and claimant was paid for the work in accordance with the project contract rate ($1.02) and that the agreement rate ($3.00) is void.

Claimant and respondent agree this project was governed by the "Standard Specifications, Roads and Bridges, Adopted 1952," commonly called "Blue Book."

Respondent further agrees that the sum of $20,213.34 is owed to claimant in accordance with the final estimate on this project, and that this sum is in addition to, and not involved in, the claim here considered.

As to items (1) and (2) of this claim, this project required the installation of an underwater "keyway" of stone to stabilize the filled roadbed upon which Interstate 64 was to be constructed. Installation of this special stone fill keyway required underwater excavation by the claimant. No cross sections relating to quantities of excavation or fill were made as this work was done. The claimant's evidence was that 264,000 cubic yards of stone were delivered by its hauling contractors to this project, the quantity being based on a "truck count" admittedly not generally acceptable for payment purposes. Respondent, to obtain records to substantiate final estimate payment, conducted core borings and drillings in the "keyway" area in question, and paid the claimant where the drilling

indicated "fill material . . . boulders or rock." Transcript, Volume II, page 105. Respondent offered claimant the opportunity to conduct similar tests but it declined. Claimant has been paid for 226,990 cubic yards of rock fill and its attendant excavations based upon the corings and while these tests may not have been perfect, no evidence of similar nature was offered to refute these findings. It is our opinion the claimant has failed to establish its claim for items (1) and (2) by a preponderance of the evidence.

As to item (3), it is agreed this 21,600 cubic yards of material was removed by claimant. While the respondent offered some evidence that this material resulted from "overblasting," it is our opinion claimant's evidence preponderates in this regard in its contention that this was more likely to be slides and sluffing due to the soil conditions, the winter exposure, poor slope design, and the fact that "overblasting" results in rather immediate falls and there is no considerable delay in effect. We find that $22,032.00 should be allowed for this item.

As to item (4), it is our opinion the Blue Book specifications governing this job (Section 1.1.4) authorized the State Project Engineer Fryer to enter into this agreement for the work to be performed. Respondent admits it was work beyond the scope of the contract that was not anticipated, that claimant did the work, and that in doing it in the manner agreed upon was economically beneficial to the State. We find that $11,947.32 should be allowed on this item.

To conclude, the Court hereby awards the claimant the sum of $33,979.32.

Claim allowed in the amount of $33,979.32.

Opinion issued January 14, 1970

FLORENCE MASSEY, Widow of
William Clifton Massey, Claimant,

vs.

L. L. VINCENT, West Virginia Department of Welfare,
Kanawha County Department of Welfare,
State of West Virginia, Respondent.

(No. D-142)

Ronald Pearson, Esq., for the Claimant.

George E. Lantz, Assistant Attorney General for the Respondent.

PETROPLUS, JUDGE:

Florence Massey, the Claimant, was a widow receiving benefits from the West Virginia Department of Welfare since 1950 under the Aid to Families with Dependent Children Program. Although a mother of 15 children, only 3, who were attending school, were living with her at the time this claim arose. In addition to Social Security and her allotment from a son in the Armed Service, she was receiving approximately $75.00 a month from the State Welfare Department for her basic needs. In the month of May, 1966, she applied for an additional claim to meet what is termed "Special Needs" in order that she would be provided with funds to meet the installment payments on a loan made from the Montgomery National Bank in the amount of $842.04, to cover an improvement to her living quarters. The improvement consisted of the construction of an additional room and bathroom for her home, which had been suggested by the Social Worker assigned to her case. There was some discussion about this special grant between her, the representatives of the Department of Welfare, the Bank and the Company that supplied the materials for the improvement. On the basis of the commitment of the Department of Welfare to make a special grant of approximately $70.00 a month in order to enable the claimant to repay her loans, credit was extended by both the Bank and the materialman.

The Department of Welfare did not directly negotiate these loans and incurred no legal obligation by way of guarantee to the Bank or the materialman. Approximately 5 months after the special grant was made, upon a routine examination that she possessed an automobile and controlled and operated the same, she was advised by the Respondent that under the Rules and Regulations of the Department, she would become ineligible for benefits unless she disposed of the car. The title to the car was in a married daughter's name, who had departed to join her husband in New Mexico and left the car to be used by her mother. Although warned that her benefits would be terminated if she did not dispose of the car, the Claimant elected to continue using the car and both her basic and special benefits were terminated in April, 1967, on the ground that she became ineligible for benefits under the Rules and Regulations of the Department of Welfare. The Notice of Claim is in the amount of $987.79, representing the aggregate amount owing to the Montgomery National Bank and Lowe's Building Materials.

After consideration of the evidence submitted on behalf of the Claimant at the hearing, it is the Opinion of the Court that the Claimant, although warned, elected to pursue a course of conduct that disqualified her under the Rules and Regulations of the Department of Welfare from receiving assistance and by refusing to give up possession and use of the car, she voluntarily forfeited her benefits. The fact that the car was titled in the name of her daughter does not excuse her from making a disposition of the car and, in fact, the record is silent on any effort on her part to contact her daughter regarding a sale or disposition of the automobile. Claimant's counsel contends that she was not advised of her rights of appeal, but we fail to see where she was prejudiced, even though she was not so advised. She was clearly in violation of the rules of eligibility and had she taken an appeal to a Board of Review, the decision of the Department would undoubtedly have been sustained. A second contention of the Claimant is that the conduct of the representatives of the Department of Welfare constitutes an estoppel against terminating her benefits until sufficient funds were paid to enable her to satisfy the loans which were made to finance her home improvement. No

authority has been cited by counsel for the Claimant that the doctrine of estoppel applies to a State Agency under the circumstances of this case. The Court has grave doubt that estoppel can be applied to a Governmental Agency that operates under limited statutory authority and Rules and Regulations proscribed by law. A State or one of its political subdivisions is not bound by the legally unauthorized acts of its officers; and all persons must take note of the legal limitations upon their power and authority. The West Virginia Court has stated many times that equitable estoppel cannot be applied against the State. *Cunningham v. County Court,* 148 W. Va. 303, 134 S.E. (2d) 725.

The Department of Welfare has no legal authority to underwrite loans or make guarantees for their repayment on behalf of Welfare recipients. All parties concerned are charged with notice that benefits which are payable directly to a recipient may be terminated at any time that the recipient becomes ineligible for assistance. Notwithstanding that the Claimant placed herself in a position of jeopardy by getting involved with creditors on the assurance that she would receive a special grant to pay those creditors, by her own conduct she voluntarily made herself ineligible for public assistance.

For the foregoing reasons, the Court is of the opinion to and does hereby disallow the claim.

Claim disallowed.

Opinion issued January 15, 1970

SYLVIA MILLER, ADMINISTRATRIX OF THE ESTATE OF HELEN LOUISE MILLER, DECEASED,

vs.

WEST VIRGINIA DIVISION OF CORRECTION; CREATED AND EXISTING UNDER THE AUTHORITY OF THE COMMSSIONER OF PUBLIC INSTITUTIONS AND THE STATE OF WEST VIRGINIA.

(No. D-149)

Chester Lovett, Esq., for the Claimant.

George E. Lantz, Assistant Attorney General, for the State.

DUCKER, JUDGE:

The claimant, Sylvia Miller, Administratrix of the Estate of Helen Louise Miller, deceased, seeks damages in the original amount of $110,000.00, later amended to $10,000.00 limit of the amount allowed by law at the time of act complained of, against the West Virginia Division of Correction existing under the authority of the Commissioner of Public Institutions of the State of West Virginia, on account of the alleged murder of Helen Louise Miller, an infant nine years of age, on the 27th day of December, 1967, by one Charles Gratton Plantz, a parolee from the West Virginia Penitentiary.

The more important facts disclosed from the evidence are as hereinafter enumerated. Charles G. Plantz, according to a report made to the West Virginia Board of Probation and Parole on December 26, 1963, was born on May 19, 1945 to Owen Plantz, age 45, and Betty Plantz, age 37, who were separated in 1945, and from 1955 Plantz was boarded out in private homes with little success in education. He was a ward of the Welfare Department from 1955-1960, placed in foster homes in the Charleston area, twice committed to Pruntytown, once to Forestry Camp, and Spencer State Hospital, and he escaped from all three institutions and was returned. From 1956 to March 1963, he was repeatedly guilty of breaking and entering and of larceny in one form or

another, which resulted in his conviction and confinement in the several institutions. From this record the subject was considered the product of a broken home and a deserting father, and due to his misfortunes he became a misplaced person. On March 2, 1963, Plantz was sentenced to serve one to ten years in the State penitentiary for breaking and entering, and he immediately began serving his term which, with credit for good behaviour, would have terminated in April, 1968. On January 25, 1967, Plantz was released on parole from the penitentiary. On April 24, 1967, Bob E. Willis, Probation and Parole Officer, made a Parole Violation Report on Plantz to John W. Mastin, Deputy Director of the Division of Corrections, in which he listed four violations by Plantz of his parole and suggested that Plantz's parole be revoked, saying the "subject was not considered mentally ill but he doesn't have the ability to live under the simplest form of regulations" and that subject "be returned to an 'outline' institution as a trusty." This report had at its bottom a notation, "No! See about Voc. Rehab. Program and await grand jury action. S". This notation was made by Charles Robert Sarver, then Director of the Division of Corrections. The parole violations cited by Willis were (1) for associating with persons with criminal record or bad reputation, (2) drinking intoxicating beverages, beer, (3) driving a car without operator's license, and (4) being arrested for auto larceny. The first three of these were considered by the state as technical violations and the fourth as a felony violation. For the fourth violation Plantz was arrested on April 11, 1967 and incarcerated in the Kanawha County jail. Two terms of grand jury action passed and on August 31, 1967, Parole Officer Willis reported to John W. Mastin, Deputy Director, that Plantz had not been indicted and that a motion of Plantz's attorney for Plantz's release had not been opposed by Prosecuting Attorney Spencer and that the Prosecuting Attorney did not have any objection to releasing Plantz from jail, and that he (Willis) considering the time Plantz had already spent in jail recommended that the Parole Board withdraw their "hold" on subject until he was indicted for the alleged offense, to which recommendation Director Sarver agreed, whereupon Plantz was released from jail.

Sarver testified that the first three technical parole violations were not considered sufficient to revoke Plantz's parole and that without a conviction of Plantz on the alleged felony violation, Plantz could not be considered guilty or subject to revocation on that alleged violation. So while free on his original parole Plantz committed the alleged murder of Helen Louise Miller, and this claim is based on the theory that the state has been negligent in not revoking Plantz's parole and not returning him to the penitentiary or other custody which would have confined him and would not have allowed him to have been free and able to commit the alleged murder in question, and that legally such negligence was the cause of the death of Helen Louise Miller, to which claim the state responds by denying there was any negligence and that its action or inaction in not revoking Plantz parole was not in any legal sense the proximate or any cause of the alleged murder committed by Plantz. So the issues in this matter are, first, whether there was actionable negligence on the part of the state officers, and, secondly, whether if there was negligence it was the proximate cause of the tragedy.

Considerable evidence was introduced by the claimant showing the history of Plantz from the time he was eleven years old until he was sent to the penitentiary in 1963, most of which showed he was an incorrigible youth, the result of a broken home with no disciplined course of conduct or restraint, and after many arrests mostly for crimes involving theft in one form or another resulting eventually in his conviction and incarceration in the penitentiary in 1963 for a one to ten year term. In some reports it was stated he was accused of being a homosexual, but we find no positive proof of such allegations, and even if true violence can not be inferred from such a fact. In November, 1963, Bob E. Willis, Probation and Parole Officer, recommended to the Parole Board that Plantz serve eighteen months before being considered for parole. Plantz, who sometime after 1963 served time in the Medium Security Prison at Huttonsville, was returned to the penitentiary in Moundsville in May, 1966 as being totally undesirable for the Huttonsville institution. Two exhibits filed by the respondent show Plantz had excellent general conduct records in the penitentiary for the two months period covered by such

records. Plantz's application for parole in January, 1967 was approved, Robert E. Kuhn, Chairman of the Parole Board having participated in the decision granting the parole. In view of the action of the Board in this matter, it seems reasonable to conclude that all the history of Plantz prior to his incarceration in 1963 has been to a large degree overcome by Plantz's record being good enough to obtain his release on parole in January, 1967. Of course, it is argued that all the history of Plantz shows that he should not have been released on parole and that once released his parole should have been revoked. If there had beeen proof that Plantz had violent tendencies which in the foreseeable future could result in murderous conduct on the part of the parolee, then such argument would be more tenable, but we see nothing in the evidence in this case which would justify such a conclusion. The Parole Board exercised its discretion and judgment in granting the parole and we see no reason in this case to imply that there was any abuse in the exercise of that discretion.

The foregoing analysis brings us to the question of the parole not being revoked on the recommendation of parole officer Willis. As has been stated, the report of Willis specified four parole violations by Plantz, three so-called technical and one felony. There seems to be no contradiction in the evidence that the felony violation was the only one in which parole revocation was always considered mandatory under the Parole Board's regulations or procedure. Claimant lays great stress on the procedure followed in case by the Department of Corrections, particularly its Director Sarver. There is no dispute as to the fact that the matter of Plantz's parole revocation was never presented to or heard by the Parole Board. Nor is it disputed that Parole Officer Willis and Director Sarver handled the practically entire matter instead of there being a hearing and decision by the Parole Board. This now presents the question of negligence.

Parole Officer Willis in 1964 recommended that Plantz should serve eighteen months before being granted a parole and in April, 1967 made a report to Deputy Director John W. Mastin citing the four violations by Plantz and recommending that Plantz be returned to an outline (outlying) institution, on which later report Director Sarver penned the words "No!

See about Voc. Rehab. program and await grand jury action." The latter notation was apparently made after Plantz was placed in the Kanawha County jail pending proceedings on the charge of the auto theft. Willis, in his report of August 31, 1967, stated that Plantz had been in jail since April 11, 1967, without action on the charge and recommended that the Parole Board withdraw its "hold" on the subject until he is indicted. Sarver stated that he considered the period of time Plantz spent in jail as sufficient punishment for the technical violations suggested by Willis and then ordered the withdrawal of the "hold" order and Plantz was released. Apparently no further proceedings were had on the auto theft charge. On November 22, 1967, Willis gave Plantz permission to purchase and operate a motor vehicle for general purposes. Sarver testified that as there was no conviction or apparent intention to indict Plantz on the auto theft, he could not assume Plantz guilty, and all that then remained on the recommendation to revoke the parole were the three technical charges. Evidently Willis thought the technical charges were not sufficient to revoke when he several months later gave Plantz the privilege of buying and operating a motor vehicle. There is no evidence showing any parole violations between the August, 1967 report and the January, 1968 alleged murder. Claimant contends that the failure of Sarver in not having the Parole Board meet and decide the question of revocation of Plantz's parole constitutes actionable negligence.

Sarver testified that his duties involved supervision of approximately twelve hundred parolees a year, that it was his duty to consider in each instance whether a recommendation of revocation should be submitted to the Parole Board, and that in this instance he did not consider the violation charges sufficient for consideration by the Board. The Director's position is one of discretionary powers and we have not been shown and we do not find any requirement that either his or all recommendations of his subordinate officers have to be submitted to the Board for hearing and decision. Boards such as the Parole Board are necessarily dependent upon the officers of the state for their services both administrative and discretionary. Sarver recommended and directed the parole officer to see if a vocational rehabilitation program could be provided

for Plantz which, to us, in view of the facts and of Plantz's history, seems reasonable, and certainly wise and worth a try. Rehabilitation, if possible, of a person who does not have violent tendencies is today a most highly recommended procedure for dealing with persons of Plantz's type. We are of the opinion that Sarver acted within his authorized authority and that the evidence does not warrant a finding that he was either negligent or guilty of abuse in the exercise of his discretion.

If, however, we should have concluded that Director Sarver was guilty of negligence, then the question is whether such negligence was the proximate cause of the death of Helen Louise Miller. The respondent has cited numerous cases of our Supreme Court holding that our law is abundantly clear to the effect that negligence, no matter of what it consists, cannot create a cause of action unless it is the proximate cause of the injury complained of, and that negligence to be actionable must be such as might have been reasonably expected to produce an injury, and that the cause of an injury must be the last negligent act contributing thereto, without which such injury would not have resulted. *McCoy* v. *Cohen,* 149 W.Va. 197, 140 S.E.2d 427, *Griffith* v. *Wood,* 150 W.Va. 678, 149 S.E.2d 205, 13 Michie's Jurisprudence, Negligence Sec. 22, at page 531, and cases cited. The recent case of *John L. Creamer, Adm.* v. *Department of Mental Health,* Case No. D-40 in this court, is analogous to this case and supports this same in principle.

We are of the opinion, considering all the facts, very few of which, if any, are in dispute, that the failure of the Director of the Division of Corrections and any failure on the part of the Parole Board to revoke Plantz's parole and to allow him to remain free on parole were not the proximate cause of the death of Helen Louise Miller. To say it must be anticipated by the authorities that a parolee who has shown no violent tendencies is or will become a potential murderer and a menace to society is not, in our opinion, reasonable. The matter of reasonableness in such a matter is one of discretion and there must be a clear case of abuse of discretion to warrant a decision of proximate cause of subsequent events.

Of course, it is indeed unfortunate when anyone is murdered, and sympathy for those affected is natural, but to say that

the action or the inaction of the officers of the state was the cause, much less the proximate cause, of the murder, is neither reasonable nor factual. While the public is entitled to the utmost protection from the criminal element of its society, it cannot restrain the freedom of individuals who are legally free and whose reputations do not show violent tendencies. Such a claim could be made when anyone being charged with a crime is free on bail. The state cannot control or be responsible for the illegal acts of its citizens, and it can only act according to the reasonable discretion of its officers and it should not be held liable for injuries or damages which are caused by an act which is not the foreseeable proximate cause of such injuries or damages. This court is not established to make awards on any sympathy basis, but only to hear and determine the question of legal liability as though there was no constitutional immunity to the state, and unless a claim is such as would be valid against one other than the state, we must deny relief.

For the reasons herein stated, we are of the opinion to, and do disallow the claim of the claimant in this case.

Claim Disallowed.

Opinion issued January 14, 1970

HIGHWAY ENGINEERS, INC., Claimant,

vs.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, Respondent.

(No. D-154)

Richard J. Schoenfeld, Esq., for the Claimant.

George E. Lantz, Assistant Attorney General, and *Claude H. Vencill,* Esq., for the Respondent.

PETROPLUS, JUDGE:

This matter came on for hearing on September 10, 1969, upon a Petition filed by Highway Engineers, Inc., Claimant, against

the State Road Commission of West Virginia, Respondent, giving notice of a claim in the amount of $11,774.81. The claim is based on a Contract between the Claimant and the State Road Commission dated March 2, 1965, wherein the Commission employed the Claimant as Consulting Engineers to provide certain professional services and furnish all labor, materials and equipment necessary to supply information and data that would be required in the preparation of a Preliminary Engineering Report for the consideration of the Respondent in determining the most feasible and economical location of a roadway between the City of Williamson in Mingo County to the vicinity of the intersection of U. S. Route 119 with West Virginia Route 3 near Danville, Logan County, a total distance of approximately 77 miles. The Contract, after the project description, provided that the service to be rendered by the Claimant was to be divided into two separate and independent phases. Phase I was designated as *"PRELIMINARY REPORT"*, and the Consultant thereunder, upon written Notice to proceed, was to supply certain exploratory technical information consisting of Aerial Mosaics for all corridors indicated on the Sketch Map attached to the Contract and covering an area of 241 square miles. Phase I also included securing data from Topographical Maps indicating grade lines showing locations of possible drainage structures, overhead and underpass structures and possible interchanges. For this work, the Respondent agreed to and did pay the Consultant a lump sum fee of $50,400.00.

Phase II of the Contract is entitled *"PRELIMINARY ENGINEERING REPORT"* and stated that *upon the completion and approval of all the work under Phase I,* and the selection by the Commission of corridors for additional study, the Consultant, upon written Notice to proceed, was to complete the study and prepare cost estimates and reports for the most feasible and economical location of a roadway within each corridor *designated and approved by the Respondent for further study.* For the work to be performed under Phase II, the Contract provided that a lump sum fee of $119,637.00 to be paid, which fee was based on a complete study for 160 miles of acceptable final study lines. The portion of the Contract which creates the issue in this case reads:

> "If, after completion and review of work on Phase I, it is agreed that more or less mileage than 160 miles are agreed to for final study, adjustments will be made to the final fee on a basis of Seven Hundred Forty-eight Dollars ($748.00) per mile".

The total estimated fee of $170,037.00 was stated to be the maximum amount payable under this Contract without a Supplemental Agreement for any additional work. Payments under both Phases of the Contract were to be made monthly, based on Progress Reports submitted by the Consultant, and the Commission was to retain 10% of the earned fee until the completion and acceptance of the work.

The grievance of the Claimant rests on a letter of the Commission dated November 29, 1965, to proceed with a designated portion of the work outlined in Phase II, *"PRELIMINARY ENGINEERING REPORT"*, which directed the Claimant to proceed with work on Phase II for a distance of only approximately 33.0 miles of study lines. The study lines were limited to a small area surrounding Williamson. No further work was authorized by the Respondent under Phase II of the Contract.

The Claimant was offered payment for the work performed on Phase II at the rate of $748.00 per mile, or an aggregate compensation of $24,684.00, for which there is no dispute but takes the position that it suffered damages in the amount of $11,774.81, representing a loss incurred in performing the work directed under Phase II as a result of the action of the Respondent in altering the scope and terms of the Contract by limiting the work to be performed under Phase II to 33.0 miles rather than 160 miles as contemplated by the Contract.

The Respondent answered admitting substantially all of the facts of the Complaint but denied any liability to pay the Claimant the sum of $11,774.81, alleged to be the damages sustained by the Claimant. Respondent further denied any deviation from the terms of the Contract or any alteration of its scope and terms.

The parties submitted their case on a Stipulation of Facts and Exhibits which were admitted into evidence without proof as to the authenticity of the documents, but subject to objection

by the parties as to admissibility or relevancy. No evidence was taken at the hearing.

The lengthy recital of the above facts is required for an understanding of the Court's Opinion in this matter.

The issue before the Court requires a construction and interpretation of the terms and provisions of the Contract between the Claimant and the Respondent. The intention of the parties must be ascertained from the language employed, and from the subject matter of the Contract. No rule can be laid down by which it may be determined whether the Contract is entire or severable. A Contract to do several things at several times, the parts not being necessarily dependent upon each other and particularly where the consideration is apportioned among various items, is ordinarily regarded as severable and divisible. The prime criterion is the intention of the parties, and the conduct of the parties in performing the Contract has a bearing on its proper interpretation. *American Chlorophyll v. Schertz,* 176 Va. 362, 11 S.E.(2d) 625, *Dixie Appliance v. Bourne,* 138 W.Va. 810, 77 S.E.(2d) 879. It is the opinion of the Court that the Contract in question, which was divided into two phases, Phase I, for supplying exploratory information and data, and Phase II, a complete Preliminary Engineering Report, using the information collected under Phase I as a basis for the report, constitutes a divisible Contract.

The Claimant was paid the sum of $50,400.00 upon the completion of Phase I which covered the total distance of approximately 77 miles from Williamson to Danville, West Virginia. Upon the completion and review of the work on Phase I, the Commission requested and required only a part of the additional work specified in Phase II by giving a Notice to proceed to the Consulting Engineers to complete their study, make cost estimates and report on approximately 33 miles of study lines from Belo to Williamson, from Delbarton to Williamson and from Belo to Delbarton. The Notice to proceed with this work was in a letter dated November 29, 1965, addressed to the Claimant by the State Road Commission. The Claimant proceeded with this work and was offered and paid compensation for the 33 miles at the rate of $748.00 per mile. Payments were made monthly based on Progress Re-

ports submitted by the Consultant after the usual retainage. As the Court interprets the Contract, the Respondent had no legal obligation to request a stipulated or minimum amount of work under Phase II. The Claimant undoubtedly anticipated more work under Phase II than it actually received, but their wishes and anticipations do not establish a legal right; nor do they establish an ambiguity in the Contract. As we interpret the Contract, upon the completion of Phase I and the payment of the stipulated lump sum, the Respondent reserved the legal right to abandon the project, disapprove it, or refuse to give the Notice to proceed with Phase II or any part of Phase II. The compensation for Phase II, although first stated in a lump sum of $119,637.00, based on a complete study for 160 miles, is qualified by an additional formula of adjustment, which states that more or less mileage than 160 miles will result in adjustments to the final fee on a basis of $748.00 per mile. It is the opinion of this Court that the Contract sum for Phase II was meant to be a maximum amount payable under the Contract without a Supplemental Agreement, and that no minimum payment is prescribed by the terms of the Contract.

The reduction of the work to 33 miles of study under Phase II does not constitute a material change in the scope and terms of the Contract as contended by Claimant, but on the contrary was contemplated by the terms and provisions of the Contract. The result admittedly works an inequity for the Claimant, but the Court is constrained to apply principles of law to its decisions rather than correct inequities or make a new agreement for the parties, in the absence of a showing of fraud, accident or mistake or other grounds which would justify the reformation of the agreement.

The State Road Commission had a legal right to prescribe the corridors and the number of miles to be studied under Phase II of the Agreement. This it did by the letter of November 29, 1965, directing the Consultants to proceed within a limited scope of 33 miles. The Commission stands ready to pay the balance owing for this work in the amount of $3,134.86, said amount not being involved in this controversy. Upon submission of an invoice by the Claimant, this amount will be processed and approved for payment.

The caveats in dealing with a public agency are well established in the law and where a contract is divisible and based on unit prices, we must assume that the contracting parties contemplate a partial performance and partial compensation under the contract. The Exhibits admitted by Stipulation, consisting of correspondence between the parties, attempt to bring into the Contract statements made during the period of negotiation which clearly are not admissible under the Parol Evidence Rule to vary or alter the terms of a written Agreement. The Agreement is clear and unambiguous and represents the final agreement of the parties and evidence may not be admitted to contradict, add to, alter, enlarge or explain a written Agreement or vary its legal effect. *Shaffer v. Calvert Fire Insurance Company,* 135 W.Va. 153. It is the further finding of this Court that a proper interpretation of the Contract made Phase II entirely optional with the Respondent and that Phase II was conditioned not only upon completion of the work under Phase I but the review and approval of the work under Phase I by the Commission. The failure of the Claimant to make any protest at the time it received the Notice to proceed with a small portion of the work under Phase II by letter of November 29, 1965, and the submission of monthly progress invoices, indicate acquiescence with our interpretation of the Contract. It was not until the letter of February 20, 1967, to the State Road Commission from the Claimant, almost 15 months later, that the Claimant raised the question of minimal project termini and reduction in fee based on a straight per mile basis. We find nothing in the Contract that commits the Respondent to a maximum mileage under Phase II.

The additional fee request, which is in the nature of losses sustained by the Claimant in the amount of $11,774.81 for the work actually done under Phase II, cannot be considered as a claim for damages when there is no showing that the Respondent breached any provisions of the Contract.

For the foregoing reasons, the Court is of opinion to and does hereby disallow the claim.

Claim disallowed.

Opinion issued January 14, 1970

KENNETH SPENCER, Claimant,

vs.

STATE OF WEST VIRGINIA, Respondent.

(No. D-165)

Claimant appeared in person without counsel.

George E. Lantz, Assistant Attorney General, for the Respondent.

PETROPLUS, JUDGE:

Claimant was the owner and operator of a 1962 Chevrolet, which was struck by a ¾ ton Dodge truck owned by the West Virginia National Guard and operated by Earl C. Banks, Jr., a member of the National Guard, engaged in his official duties. The truck was carrying a load of trash to a City dump on August 2, 1968, on an authorized mission, and was traveling North on State Route No. 20 to Hinton, West Virginia, when it skidded on a wet pavement on Bellepoint Bridge, struck the Claimant's motor vehicle which was traveling South on the Bridge, and then traveled approximately 225 feet before coming to a stop.

It appears quite clearly that the driver of the army truck was guilty of negligence in its operation, and that the Claimant was free of any contributory negligence at the time of the accident. The Attorney General at the hearing did not contest liability and confined his examination to inquiry on damages. The Claimant's motor vehicle was damaged beyond repair and was sold for salvage for the sum of $100.00 shortly before the trial. The testimony revealed that two out of three persons asked to estimate the damage reported that it would cost more to repair the car than it was worth.

The measure of damages in West Virginia is the difference in the market value of the vehicle immediately before the accident and immediately after the accident. The Claimant utterly failed to prove the fair market value of his 1962 Chevrolet before its was damaged, and the inquiry of the

Attorney General failed to elicit this information, although a number of questions were directed to the Claimant for that purpose.

This Court cannot make an award where damages are not proved, and if it did so, the damages would be conjectural and unsupported by the record. The estimate for repairing the car submitted by the City Body Shop of Milton, West Virginia, in the amount of $592.79, is not competent evidence in view of the testimony that the car was worth less than the cost of repair, and became a total loss as a result of the accident save for its salvage value.

On the present record, we have no alternative but to disallow the claim for failure to prove damages in the proper manner.

Claim disallowed.

Opinion issued January 19, 1970

JOHN L. ROLFE, and HARLEYSVILLE INSURANCE COMPANY, Subrogee, Claimants,

vs.

THE ADJUTANT GENERAL of the State of West Virginia, Respondent.

(No. D-237)

No appearance for the Claimants.

George E. Lantz, Deputy Attorney General for the Respondent.

PETROPLUS, JUDGE:

The facts were submitted to the Court by stipulation and admission in the Answer of the Respondent that damages in the amount of $275.67 to Claimant's motor vehicle were incurred as the result of the negligence of Joseph F. Blum who was operating a jeep classified as a Military vehicle assigned to the Fairmont Headquarters of the Adjutant General of

West Virginia, and that the accident occurred while the jeep was engaged in official business. The time and place of the accident do not appear in the record, neither are any facts presented to the Court from which a finding of negligence may be inferred. The estimate of damage submitted by the Mooers Motor Company is dated July 14, 1969, so we are assuming that the accident occurred some time in July, 1969.

Inasmuch as the Answer requests that the claim be allowed as one that the State in good conscience ought to pay, an award will be made to the Claimants in the amount of $275.67.

Claim allowed in the amount of $275.67.

Opinion issued January 20, 1970

S. P. DAVIDSON, H. H. DAVIDSON and A. L. DAVIDSON, doing business as DAVIDSON BROTHERS, Claimants,

vs.

STATE ROAD COMMISSION, Respondent.

(No. D-204)

Huston A. Smith, Esq., for the Claimants.

George E. Lantz, Assistant Attorney General, and *Robert R. Harpold,* Esq., for the Respondent.

PETROPLUS, JUDGE:

Claimants, the owners of a certain tract of bottom land lying between the Guyandotte River and W. Va. Route 10, in Lincoln County, near Branchland, West Virginia, instituted this claim for damages in the amount of $567.88, allegedly resulting from the acts of employees of the State Road Commission in casting rocks on their property while engaged in clearing the debris of a slide that occurred on the roadway between the property and a high rock cliff. A partially exposed gas line on the property was caused to break at a joint or collar, allowing gas to escape in large quantities. The leak was detected and repaired by the employees of United Fuel

Gas Company at no cost to the Claimants, but they were charged by the Gas Company with the metered quantity of escaping gas in the amount of the claim. The line served three or four buildings under an arrangement between the Company and the Claimants that a maximum amount of free gas would be furnished and any quantities in excess thereof were to be chargeable to the Claimants. The Answer of the Respondent states briefly that it did not have sufficient information upon which to form a belief as to the truth of the allegations.

Upon the trial of the case, evidence of a circumstantial nature was introduced to the effect that a slide had occurred on the road sometime in January, 1969, partially blocking the road with debris and rocks of various sizes, some quite large and heavy, and that heavy equipment was moved to the site by the Respondent to clear the road and haul away the debris and rocks with a truck but that some of the debris and rocks were thrown over an embankment on to the property of the Claimants. Some of the rocks had rolled into and beyond the area where the gas line was located, although they did not damage another gas line running near the Claimants' line. Some of the employees of the Respondent involved in the clearing procedures admitted that debris and rocks were thrown on the property without the consent of the owners. No one was aware of the damage to the gas line until the owners received a statement for the metered gas from the Company in the amount of $567.88. A thick growth of weeds and underbrush concealed the area where the rocks were thrown, and the sound of escaping gas could not be heard from the roadway. The claim was not brought to the attention of the Respondent until July, 1969, six months later, at which time photographs were taken and some investigation was made, and no explanation was offered why the Claimants waited so long to report and assert their claim although they were billed for the gas in February, 1969.

The only question before the Court upon this record is: Does the evidence support a finding that the Respondent's employees caused the damage to the line by disposal of the waste materials on the property of the Claimants? To push waste material over a hillside on to private property is a trespass and an

actionable tort, without proof of negligence. Whether this invasion of the Claimants' property rights caused the damage is a more difficult question where there is no direct evidence of the accident to the pipe.

In absence of any evidence to the contrary, we conclude that it is a reasonable inference from the circumstantial evidence presented that the damage occurred as a proximate result of the operations of the Respondent in clearing up the slide area on the road, and that casting debris on the Claimants' property without any thought of the consequences, was a trespass that imposes a liability on the Respondent. It is the opinion of the Court that the State has a moral obligation to compensate the Claimants for their loss, and that but for the constitutional immunity of the State this claim would be sustained in the regular Courts of the State on the evidence presented.

Claim allowed in the amount of $567.88.

Opinion issued January 20, 1970

ALLSTATE PLUMBING CO., Claimant,

vs.

STATE ROAD COMMISSION, Respondent.

(No. D-209)

No appearance for the Claimant.

George H. Samuels, Assistant Attorney General, and *Robert R. Harpold,* Esq., for the Respondent.

PETROPLUS, JUDGE:

This case was submitted on an agreed Stipulation of Facts, which was based on a complete investigation of the circumstances under which the claim arose. On or about July 15, 1968, an emergency situation arose at a building occupied by the Advance Planning Division of the State Road Commission situate at 1200 Airport Road, in Charleston, West Virginia. The septic sewer system backed up causing effluvium to over-

flow, flood and spill out underneath the building creating a serious health hazard and intolerable working conditions for the employees of the State Road Commission. The Claimant, called by an unknown employee of the Commission, came upon the scene promptly with two trucks and four men and, without a written authorization and after a total of fifteen hours of continuous work, satisfactorily corrected the condition, and removed 6000 gallons of effluvium in septic trucks. A charge of twenty cents a gallon for the removal of the sewage was made, but on being invoiced for the sum of $1200.00, the State refused to pay the work performed because standard purchasing and payment procedures were not followed in authorizing the work. The proper procedure for emergency work required the submission of the contract upon receiving two bids, and a written authorization as well as a written work order. The Procurement Supervisor of the State Road Commission stated there was no procedure under which he could authorize payment.

We are of the opinion that the emergency nature of this work did not afford sufficient time to follow the usual procedures of preparing a written order and written contracts after submission of bids, and the fact that no one knows who authorized the doing of the work should not prejudice the Claimant from being paid for a prompt and satisfactory performance of what he was called upon to do for the benefit of the State Government. The efflux of sewage in an area where a hundred State employees were working created a serious health hazard and a disruption of the Commission's activities on behalf of the State, as well as a possible danger to the general public. Time being of the essence, and the work having been done in a competent manner with the approval of the State, the Court is disposed to allow the claim in its entirety based on the reasonableness of the charge as determined by the investigation of the Respondent. It is clearly the moral obligation of the State to pay this claim, notwithstanding the technical procedures for awarding the work were not followed and the identity of the person who ordered the work cannot be established.

Claim allowed in the amount of $1200.00.

Opinion issued January 22, 1970

CREED SAMPLES, Administrator of the Estate of Fonda Ann Samples, deceased, Claimant,

vs.

STATE ROAD COMMISSION, Respondent.

(No. D-187)

CREED L. SAMPLES, Claimant,

vs.

STATE ROAD COMMISSION, Respondent.

(No. D-188)

JO ANNA SAMPLES, Claimant,

vs.

STATE ROAD COMMISSION, Respondent.

(No. D-189)

PENNY SAMPLES, a minor who sues by her father and next friend, Creed L. Samples, Claimant,

vs.

STATE ROAD COMMISSION, Respondent.

(No. D-190)

LETA SAMPLES, a minor who sues by her father and next friend, Creed L. Samples, Claimant,

vs.

STATE ROAD COMMISSION, Respondent.

(No. D-191)

George P. Sovick, for the Claimants.

George H. Samuels, Assistant Attorney General, and *Robert R. Harpold, Jr.,* for the Respondents.

JONES, JUDGE:

As the same facts apply to each of the above styled claims, the cases were consolidated and heard together and will be considered and decided together in this opinion.

Much of the evidence in this case is not subject to question or controversy. On May 30, 1968, at about 9:30 a.m. Jo Anna Samples, the owner of a 1964 Volkswagon, was driving the vehicle in a westerly direction along West Virginia State Route No. 4 from her home at Procious in Clay County to Clendenin in Kanawha County, accompanied by her daughters, Fonda Ann, twelve years of age, Penny, seventeen years of age, and Leta, fifteen years of age, and a young friend and schoolmate of the children, Consuelo Bedoya. As the vehicle proceeded along the highway in a lawful manner, at a point approximately 1.3 miles west of the Clay County line, a large tree, 24 inches in diameter, fell from the top of the embankment along the north side of the highway and struck the top of the Samples vehicle with great force, causing the death of Fonda Ann Samples, and injuries to Jo Anna Samples, Penny Samples and Leta Samples. The roots of the tree came to rest at the bottom of the slope and its trunk extended completely across the highway to the bank of the Elk River. When the Samples vehicle was struck it was thrown partially into the left traffic lane and into an automobile operated by James Burdette, who had observed the falling tree and was almost stopped a few feet short of the crash. For several weeks prior to the occurrence, the respondent had been engaged in dynamiting, excavating and removing large quantities of earth and rock from the steep embankment on the north side of the highway. Work had stopped for the May 30th holiday and no workmen were present. Photographs taken on the same day showed the exposed roots of trees and overhanging rocks at the top of the excavation. It was raining and the weather had been rainy for some time.

Both Burdette and his passenger saw the tree start to move from the hillside and then descend with great speed and force. They foresaw that the tree would strike the Volkswagon and Burdette, being somewhat farther from the falling tree, was barely able to avoid the same misfortune.

In most falling rock and falling tree cases, the State has been held not liable. The principal involved was well stated by Judge Petroplus in the claim of Etta A. Parsons versus the State Road Commission, Claim No. D-112, as follows: "This Court has many times held that the State is not a

guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. The case of *Adkins* v. *Simms,* 130 W.Va. 645, 46 S.E. (2d) 81, decided in 1947, holds that the user of the highway travels at his own risk, and that the State does not and cannot assure him a safe journey. The maintenance of highways is a governmental function and funds available for road improvements are necessarily limited." In the Adkins case, however, the Supreme Court of Appeals of West Virginia further said: "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."

In this case, practically no defense was put forward by the respondent; and the Court has no doubt that the excavation of the embankment had weakened the upper levels of the hillside, causing the tree to fall down and across the highway, and that this unsafe condition was carelessly permitted to exist over a holiday period without anyone on the job to inspect or supervise the area.

The several claims include items of damages substantially as follows:

Creed Samples, Administrator of the Estate of Fonda Ann Samples, deceased, claims $10,000.00 for the wrongful death of his daughter, together with necessary funeral expenses in the amount of $1,065.49, a total claim of $11,065.49;

Creed L. Samples, in his own right, claims damages in the amount of $10,000.00 for burial and medical expenses incurred, and for the loss of his wife's services;

Jo Anna Samples claims damages in the amount of $20,000.00 for her personal injuries, pain and suffering, medical expenses and automobile damages;

Penny Samples, a minor who sues by her father and next friend, Creed L. Samples, claims damages in the amount of $10,000.00 for her personal injuries, pain and suffering; and

Leta Samples, a minor who sues by her father and next friend, Creed L. Samples, claims damages in the amount of $2,500.00 for her personal injuries, pain and suffering.

This Court's duty is to decide what claims against the State in equity and good conscience should be paid from public funds; and in our opinion the claimants have clearly proved their right to recover. The Court has considered the evidence pertaining to damages and separate awards will be made to each of the claimants as follows:

Creed L. Samples, Administrator of the Estate of Fonda Ann Samples, deceased, is hereby awarded damages in the sum of $10,000.00 for the wrongful death of his daughter, Fonda Ann Samples, and for funeral expenses in the amount of $1,065.49, a total award of $11,065.49;

Creed L. Samples, in his own right, is awarded damages in the amount of $699.84 for out-of-pocket expenses for ambulance, hospital and doctor bills, this amount having been stipulated by the parties as correct, fair and reasonable. Funeral expenses having been awarded to Creed Samples as Administrator, that part of his claim is disallowed, along with his claim for the loss of his wife's services;

Jo Anna Sample's claim for damages to her car in the amount of $861.43 was stipulated by the parties as correct, fair and reasonable, and it is allowed. This claimant suffered contusions of both knees and of her chest and sternum, pain and suffering, and great emotional stress, and the Court allows her the sum of $3,000.00 for these injuries. Her claim for loss of wages is disallowed. Accordingly, we hereby award the claimant, Jo Anna Samples, the total sum of $3,861.43;

Penny Samples, now Penny Samples Malone, sustained a fracture of the upper jaw, the displacement of several teeth and damages to others, a comminuted fracture of her left little finger and bruises of both knees and her body. There remains a scar at the base of her left little finger and medical testimony indicates that this claimant will gradually

regain strength but will permanently retain some limitation of motion in the little finger. Based upon medical testimony, it was stipulated at the hearing that necessary future medical expenses for the treatment of this claimant's teeth would cost $1,434.00, and in addition to this sum, the Court allows the sum of $4,000.00 for her injuries, and hereby awards the claimant, Penny Samples Malone, the sum of $5,434.00; and

Leta Samples received a blow to the forehead and across the top of her head. She has a thin scar over the right side of her forehead and a deeper scar in the top of the head where there appears to be a foreign body underneath the skin, probably a piece of glass or wood, according to the examining physician, and the area is tender to the touch. The physician recommended that this foreign substance be removed. This claimant further testified that she suffered occasional headaches as a result of pressure on the scarred area in the top of her head and also some breaking-out at the point of the scar on her forhead. The Court hereby awards the claimant, Leta Samples, the sum of $1,250.00.

Opinion issued January 23, 1970

WILLIAM J. TWIGGER, doing business as
R. L. SWEARER COMPANY, Claimant,

vs.

STATE OF WEST VIRGINIA OFFICE OF
FEDERAL-STATE RELATIONS, Respondent.

(No. D-246)

Vito H. Catenaro, Esq., and *Donald L. Phillips,* Esq., for the Claimant.

George E. Lantz, Deputy Attorney General, for the Respondent.

PETROPLUS, JUDGE:

This claim was filed by Stipulation in the amount of $1,128.89 for customs duties paid by Claimant who was the Customs

Agent in handling a shipment of certain physiological testing equipment ordered from Switzerland by the Coordinator of Operation Head Start, an Agent of the State appointed by the Governor of West Virginia. The equipment was received in the summer of 1965 and was used by the State Agencies in the program styled Operation Head Start. The shipment originally was thought to be duty free, but in October, 1965, the Customs Officials of the United States elected to impose the duties and Claimant was obligated to make payment in the amount of the claim on behalf of the State of West Virginia. There are no existing appropriations in Operation Head Start from which Claimant may be reimbursed.

The Attorney General answered admitting all of the above facts, which are set forth in the Notice of Claim, and stated that it was a claim that the State in good conscience should pay. B. J. Coffindaffer, the present Director of Federal-State Relations, by letter dated December 9, 1969, stated the claim was correct insofar as he could ascertain from available files.

It is the finding of this Court that the claim in equity and good conscience should be paid, and an award is accordingly made in the amount of $1,128.89 to reimburse the Claimant for the custom duties so paid.

Claim allowed in the amount of $1,128.89.

Opinion issued January 26, 1970

FRED HENDRICKS and RUTH HENDRICKS, Claimants,

vs.

STATE ROAD COMMISSION, Respondent.

(No. D-111)

Joe N. Patton, Esq., for the Claimants.

George H. Samuels, Assistant Attorney General, and *Robert R. Harpold, Jr.,* Esq., for the Respondent.

PETROPLUS, JUDGE:

This claim arose from damage caused to the roof of the dwelling house of the Claimants situate near the Right of Way

of Interstate 64 in Cabell County, West Virginia, by a falling tree during a rainstorm and high wind on the night of December 21, 1967. The tree was a poplar about 60 feet high which was part of a clump of dead trees located on the State's right of way about five feet from the property line. At the hearing certain facts were either stipulated or admitted by counsel for the parties, such as the amount of the damage in the sum of $498.00, the death of Fred Hendricks after the filing of the claim, the ownership of the property by Ruth Hendricks and her two daughters, Rebecca and Carolyn Hendricks, and a partial subrogation of the claim in favor of Nationwide Insurance Company. In the interest of doing justice, the additional parties will be considered as claimants by agreement of the parties and stipulation, without requiring formal petitions to make them party claimants.

The evidence taken clearly disclosed that the undermining of the roots of the trees during the construction work of Interstate 64 in that area caused the trees to die, and become a hazard to adjoining property. A maintenance employee of the Respondent admitted that during his patrol of the Road he observed the dead trees, but since no complaints had been received no effort was made to remove them. He further admitted that he did not know how bad their condition was, but the trees were promptly removed after the accident. The failure of the Claimants to report the dangerous condition of the trees does not bar them from recovery when the condition is obvious from a routine patrolling of the road to the maintenance employees of the Respondent who are charged with the responsibility of removing hazards from the right of way.

It is the finding of the Court that the Respondent's employees failed to exercise ordinary care under the circumstances, and that their negligence was the proximate cause of the damage. The falling of a tree or trees on the dwelling house five feet away during a rainstorm or high wind was a foreseeable consequence, and we therefore hold the Respondent liable for the damages caused to the dwelling house, there being nothing in the record before us to indicate that the Claimants were guilty of any contributory negligence.

An award is accordingly made to the Claimants in the amount of $498.00 to be distributed as their interest may appear.

Claim allowed in the amount of $498.00.

Opinion issued January 29, 1970

ALLERGY REHABILITATION FOUNDATION, INC.,
a West Virginia Corporation, Claimant,

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-275)

Walter C. Price, Jr., Esq. and *Mrs. Lois B. Scherr,* Attorney at Law, for the Claimant.

George E. Lantz, Deputy Attorney General for the Respondent.

PETROPLUS, JUDGE:

The Claimant seeks damages in the amount of $1,703.87, resulting from the occupancy of the Claimant's property, known as Camp Bronco Junction, situate in Putnam County, West Virginia. The property was leased to the West Virginia Department of Health on September 30, 1968, for a term of eight months and consisted of approximately 150 acres of land with improvements thereon at a rental of $7,686.00 for the term. The lease provided that the demised premises were to be used only for the purpose of housing, maintenance, treatment and care of patients in any of the institutions of the Lessee, and that the Lessee shall be responsible for any and all damage to the property, ordinary wear and tear excepted, and further excepting damage by fire, vandalism and acts of God. The patients who occupied the Camp apparently committed extensive damage to a dishwasher, swimming pool, commode tanks, sewer line and lavatories, all of which was itemized and approved by Dr. M. Mitchell-Bateman, Director of the Department of Mental Health, in a letter dated January

8, 1970, conditioned of course upon the submission of proper invoices for the expenditures. The Attorney General in his Answer admitted the allegations, referred to the letter of Dr. Bateman, and agreed that the claim should be paid in good conscience. We must assume that he inspected and approved the invoices although the record does not so indicate.

Liability in this matter having been stipulated and the damages having been found to be correctly alleged, it is the opinion of the Court that the damages were caused by the neglect of the parties in charge of the mental patients to exercise proper supervision over the property and the patients. Liability for damage having also been assumed by the terms of the lease, an award is accordingly made to the Claimant.

Claim allowed in the amount of $1,703.87.

Opinion issued February 2, 1970

ELWOOD H. HEILMAN, M. D., RANDOLPH L. ANDERSON, M.D. AND ARTHUR A. ABPLANALP, M.D.

vs.

VOCATIONAL REHABILITATION DIVISION

(No. D-260)

No appearance for the claimants.

George E. Lantz, Assistant Attorney General, for the Respondent.

JONES, JUDGE:

This claim is for professional services rendered by the claimants, Doctors Heilman, Anderson and Abplanalp, to a client of the respondent Vocational Rehabilitation Division. The claimants were given an oral authorization, but due to an oversight of the respondent, a written authorization was not submitted and the claimants' invoice was not processed.

The answer of the respondent admits the allegations of the notice of claim, and, urging equity and good conscience, requests that the claim in the amount of $116.50 be paid.

Accordingly, we award the claimants, Elwood H. Heilman, M. D., Randolph L. Anderson, M.D., and Arthur A. Abplanalp, M.D., the sum of $116.50.

Opinion issued February 2, 1970

MOUNTAIN STATE CONSTRUCTION COMPANY

vs.

STATE ROAD COMMISSION

(No. D-99)

William T. Brotherton, Jr., for the Claimant.

Theodore L. Shreve and *Anthony G. Halkias* for the Respondent.

JONES, JUDGE:

This claim is for damages in the amount of $135,201.07 alleged by the claimant, Mountain State Construction Company, to have been caused by unreasonable delays and shutdowns by the respondent, State Road Commission, during the performance of a highway construction contract in Ohio County. The project was to be completed under the terms of the contract within 900 calendar days, but required 1226 days to complete.

In lieu of a hearing upon the issues, the parties have seen fit to stipulate in writing certain facts and to submit the claim for decision thereon. In said stipulation the parties agree substantially as follows: The claimant was required to pay increased prices for materials and labor because of shutdowns ordered by the respondent; the claimant was required to expend additional sums of money for removal of its equipment, supplies and materials from the project to accommodate other contractors working on and about the project, at the request of the respondent; the claimant was required to provide extra materials, supplies and labor over and above the items specified and bid in said contract; the claimant was required to expend money for materials, supplies and labor over and above the

bid items in said contract because of errors in the plans and specifications and because of change orders issued by the respondent; the claimant was required to provide management supervision during the shutdown and delay periods; the cost and expense by reason of the aforesaid is $53,966.95, aggregating thirteen separate items; and that said sum is due and owing from the respondent to the claimant.

Upon the record it appears to the Court that the claimant has established a valid claim against the State Road Commission which in equity and good conscience should be paid, and, accordingly, an award is hereby made to the claimant, Mountain State Construction Company, in the stipulated sum of $53,966.95.

Opinion issued February 2, 1970

J. N. CALDWELL AND A. M. CALDWELL
d/b/a CALDWELL'S HARDWARE

vs.

STATE ROAD COMMISSION

(No. D-196)

No appearance for the Claimant.

Robert R. Harpold, Jr., and *George H. Samuels,* Assistant Attorney General, for the Respondent.

JONES, JUDGE:

When this case was called for hearing upon the claimants' petition, counsel for the respondent, State Road Commission, filed a written statement, recited to be based upon a complete investigation of the facts and circumstances giving rise to the claim, and stipulating that the respondent purchased certain materials from the claimants on authorizations Nos. PM0730B and PM0749B for use in the construction of the State Road Commission District Materials lab in Pocahontas County; that the materials were delivered to the respondent on April 23, 1968; that the materials were used in the construction of the

respondent's building; that the materials so purchased, delivered and used were properly invoiced in the amount of $581.24; and that the claimants were not paid for the materials because of the failure of employees of the respondent to follow certain prescribed purchasing procedures.

The Court is of opinion that the petition and stipulation present a valid claim against the respondent, State Road Commission, which in equity and good conscience should be paid, and, therefore, an award is hereby made to the claimants, J. N. Caldwell and A. M. Caldwell, d/b/a Caldwell's Hardware, in the sum of $581.24.

Opinion issued February 2, 1970

MOUNTAINEER HIGHWAY ABRASIVES COMPANY, INC.

vs.

STATE ROAD COMMISSION

(No. D-28)

Leslie D. Price for the Claimant.

George H. Samuels, Assistant Attorney General, and *Robert R. Harpold, Jr.,* for the Respondent.

JONES, JUDGE:

This case was submitted upon the claimant's petition and an agreement in writing by counsel for the parties stipulating the facts and circumstances supporting the claim and the amount due and owing the claimant.

The facts as stipulated are substantially as follows: On November 30, 1965, the claimant submitted bids to the Department of Purchases on forms prescribed by the State of West Virginia, for cinders containing calcium chloride for snow and ice removal; purchase orders Nos. C-350 and C-357 were duly issued to the claimant on December 1, 1965; upon instructions received from the respondent, the claimant delivered materials in full compliance with specifications;

inspection of the materials was made by the respondent and its consultant, R. W. Hunt Company; the claimant submitted Invoice No. 1, dated February 1, 1966, on purchase order No. C-350, in the amount of $9,577.73, and Invoice No. 2, dated February 17, 1966, on purchase order No. C-357, in the amount of $7,398.55; on September 22, 1966, the claimant received a cancellation notice from the State Director of Purchases reading "To cancel any balance which might remain" on purchase orders Nos. C-350 and C-357; and there is due and owing to the claimant for materials delivered to the respondent, in accordance with the specifications set forth in the purchase orders and prior to the cancellation of the contracts, the sum of $16,976.28.

As this claim was submitted upon the record, which clearly supports every aspect of the claimant's case, only one conclusion may be reached. The claim is just and in equity and good conscience should be paid. Accordingly, the Court awards the claimant, Mountaineer Highway Abrasives Company, Inc., the sum of $16,976.28.

Judge Petroplus did not participate in this decision.

Opinion issued February 2, 1970

KING'S JEWELRY INC.

vs.

STATE ROAD COMMISSION

(No. D-216)

The claimant appearing by Charles Perelman, an officer and manager of the company.

George E. Lantz, Assistant Attorney General, and *Robert R. Harpold, Jr.,* for the Respondent.

JONES, JUDGE:

The claimant, King's Jewelry Inc., alleges that on December 28, 1968, its 1968 Dodge van truck was damaged through the negligence of the respondent, State Road Commission,

while it was being driven by an employee in a westerly direction along Interstate 70 near the easterly portal of the Wheeling Tunnel. The respondent had placed barricades along the entrance to a ramp on the north side of the highway, which had been paved but not opened to traffic. These barricades were made of wood, about six to eight feet wide and five to six feet high, they weighed approximately three hundred pounds each, and to stabilize and keep the barricades in place it was the practice of the respondent to place four, and sometimes six sandbags, weighing approximately fifty pounds each, over the base structure of each barricade. At the time and place in question, high, gusty winds were blowing and one of these barricades blew onto the traveled portion of the highway into the path of and against the claimant's truck. The main impact of the collision was at the right front of the vehicle, and the barricade was broken up and strewn over the highway.

While the respondent contends that it exercised due care in the maintenance of the barricades by making bi-weekly inspections and acting on all reports of the movement, damage or other disturbance of the barricades or the supporting sandbags, it appears to the Court that the barricade in question was not properly secured, and that as a direct result of the failure of the respondent to keep this structure in a safe condition, the claimant sustained damages, without any contributing fault on its part.

The claimant has proved damages to its truck in the sum of $437.24, and this is not disputed by the respondent. It is the opinion of the Court that the claim in said amount is just and in equity and good conscience should be paid. Therefore, an award is made to the claimant, King's Jewelry Inc., in the amount of $437.24.

Opinion issued February 2, 1970

THE KROGER COMPANY

vs.

STATE ROAD COMMISSION

(No. D-245)

Sebert Cooper, Store Manager, for the Claimant.

George H. Samuels, Assistant Attorney General, and *Robert R. Harpold, Jr.,* for the Respondent.

JONES, JUDGE:

The claimant, The Kroger Company, seeks damages in the amount of $226.33 for the cost of replacement of a large plate glass window in the front of its store, located on United States Route 60 at Gauley Bridge, which was shattered by a flying rock during the morning of May 2, 1969. Hearing the crash, the store manager immediately went outside, and saw an employee of the respondent, State Road Commission, mowing grass along the opposite side of the highway. He picked up a rock near the point of impact, about the size of a half dollar; and he discussed the incident with the lawn mower operator.

When the lawn mower is in operation, it throws grass cuttings and such stones or other objects as it may pick up out its right side, which at the time of this incident, was the side nearest the claimant's store. Only the claimant's store manager and the respondent's lawn mower operator testified and they both agreed that when the window was broken there were no other persons or vehicles in the area.

While the evidence is circumstantial, the Court is satisfied that there was a direct causal connection between the operation of the lawn mower and the breaking of the window. The respondent has a duty to operate its equipment so as not to endanger persons or property on or near a public highway; and, in our opinion, the respondent's employee did not exercise due care in this regard. Therefore, invoking equity and good conscience, we are constrained to allow this claim, and do hereby award the claimant, The Kroger Company, the sum of $226.33.

Opinion issued February 4, 1970

JOHNSON WELDERS SUPPLY, INC.

vs.

DEPARTMENT OF MENTAL HEALTH

(No. D-181)

Julius W. Singleton for the Claimant.

George H. Samuels, Assistant Attorney General, and *Robert R. Harpold, Jr.,* for the Respondent.

JONES, JUDGE:

This claim is for demurrage on gas cylinders furnished by the claimant, Johnson Welders Supply, Inc., to the respondent, Department of Mental Health, at the Weston State Hospital. Most of the claimant's records were destroyed in a fire in January 1968, and the only record produced by either party was a ledger sheet showing a starting balance of $264.51 prior to July 12, 1967, and a closing balance of $157.39, the amount of the claim, dated May 9, 1968. It is shown by the evidence that all invoices carried a statement in the lower left corner providing for a demurrage charge after thirty (30) days, but that in 1964 or 1965, an oral agreement was entered into under the terms of which no demurrage would be charged. The claimant testified that in the latter part of the year 1967, he mailed a letter to all state institutions with which he was dealing, stating that thereafter demurrage would be charged on all accounts, and that his copies of the letters were destroyed in the fire. The agents of the respondent employed at Weston State Hospital disclaimed any knowledge of such a letter. The claimant further contends that custom and usage in the gas cylinder business entitles him to charge for demurrage unless such charges are specifically waived.

It clearly appears that there was an agreement that no demurrage would be charged, and the claimant's proof of any change in that agreement by virtue of a written notice or custom and usage is insufficient to sustain his position. The claimant has not proved his case by a preponderance of the evidence.

The Court further points out that if the letter giving notice of a change in the agreement was mailed in the latter part of 1967, as testified by the claimant, it may not have applied to the demurrage charges shown on the claimant's ledger account, as all of the unpaid charges were dated prior to August 30, 1967, and more than one-half of said charges were billed prior to July 12, 1967.

For the reasons given, the claim is disallowed.

Opinion issued February 4, 1970

JOHNSON WELDERS SUPPLY, INC.

vs.

STATE ROAD COMMISSION

(No. D-182)

Julius W. Singleton for the Claimant.

George H. Samuels, Assistant Attorney General, and *Robert R. Harpold, Jr.,* for the Respondent.

JONES, JUDGE:

According to the petition filed herein, this claim in the total amount of $2,060.26 is for gases and cylinders furnished by the claimant, Johnson Welders Supply, Inc., to three separate offices of the respondent, State Road Commission, located at Clarksburg, Weston and Buckhannon; but as a practical matter, the only proof of disputed items relates to demurrage charges during the years 1966, 1967 and 1968, which were not paid by the respondent. Practically all of the claimant's records were destroyed in a fire in January 1968, but the respondent was able to supply certain records pertinent to these transactions, including purchase orders and some invoices. All of the invoices produced carried a statement in the lower left corner, providing for a demurrage charge after thirty (30) days, but in practice, so far as the subject accounts are concerned, demurrage was charged or not charged according to the agreement with the particular office. The claimant testified that in

the latter part of the year 1967, he mailed a letter to all state institutions with which he was dealing, stating that thenceforth, demurrage would be charged on all accounts, his copies of these letters having been destroyed in the fire. While each of the State Road Commission offices involved here had a separate and different agreement with the claimant, representatives from each office denied having received or having any knowledge of such a letter.

So far as the record shows, the original purchase order with the Clarksburg office, dated January 6, 1966, made no reference to demurrage. However, by purchase order dated January 18, 1966, the original was corrected to provide for demurrage charges after ninety (90) days. It sufficiently appears that all of the Clarksburg office demurrage charges in the amount of $616.68 accrued under this corrected contract and therefore should be allowed. $373.80 of this claim was not contested by the respondent.

The Weston office purchase agreement, dated March 10, 1964, provided for sixty (60) days free cylinder rental, with demurrage thereafter, and as these charges in the amount of $171.65 appear to be in accord with the terms of the purchase order, this portion of the claim also should be allowed. The respondent admitted owing $6.30 on this account.

The purchase order presented by the Buckhannon office, dated December 31, 1963, makes no reference to free rental or demurrage, and it appears that there was an oral agreement that no demurrage would be charged. The claimant contends that he rescinded the oral agreement by his letter in the latter part of 1967, and the respondent's agents disclaim knowledge of any such communication. The claimant further contends that custom and usage in the gas cylinder trade entitles him to charge demurrage where the contract is silent in that respect. As in the claims against the Clarksburg and Weston offices, the Court believes that the Buckhannon office purchase order is the best evidence produced as to the true agreement between the parties. There is insufficient proof that this contract was ever amended or rescinded or that custom and usage will serve to modify its terms. The claimant not having proved his case by satisfactory evidence, this item of the claim in the amount of $1,271.93 is disallowed.

The Court is of opinion that the claimant has substantiated the portions of his claim pertaining to the Clarksburg and Weston offices of respondent in the aggregate amount of $788.33, which in equity and good conscience should be paid, and, accordingly, we award the claimant, Johnson Welders Supply, Inc., the sum of $788.33.

Opinion issued February 9, 1970

M. C. HICKS, COMMITTEE FOR LUCY K. HICKS

vs.

DEPARTMENT OF MENTAL HEALTH

(No. D-144)

Claimant appearing in person.

George E. Lantz, Assistant Attorney General, for the State.

DUCKER, JUDGE:

The claimant, M. C. Hicks, as Committee for Lucy K. Hicks, alleges that due to negligence on the part of the employees of the Huntington State Hospital, operated by the Department of Mental Health, his ward, Lucy K. Hicks, while a patient in said hospital from November 17th until late December, 1967, lost clothing and personal property of the value of $201.00.

The claim was denied by the hospital authorities who knew nothing about the loss but relied chiefly on a written form signed by a daughter of Lucy K. Hicks which contained a provision stating that the patient or her agent assumed full responsibility for any loss of property and that the hospital would not be responsible for any such loss. The patient was feeble and later suffered a stroke and had to be removed to another hospital. She apparently was in no condition to see about the removal of her clothing from the quarters she first occupied to other quarters in the State Hospital and later to another hospital in Huntington. From the evidence we are of the opinion that there was negligence of such a character or

nature as public policy would not permit the hospital authorities to enforce a waiver by the patient of liability therefor, and, accordingly, we consider the claim just, and allow the claimant the sum of $201.00.

Award of $201.00.

Opinion issued February 9, 1970

S. J. NEATHAWK LUMBER, INC.

vs.

STATE ROAD COMMISSION

(No. D-180)

No one appeared in behalf of the Claimant.

George E. Lantz, Assistant Attorney General, and *Robert R. Harpold, Jr.,* Attorney at Law, for the State.

DUCKER, JUDGE:

S. J. Neathawk Lumber, Inc., a corporation with headquarters in Lewisburg, West Virginia, alleges that the State Road Commission ordered lumber and other building materials from it for use on a rush project for which the Road Commission would supply regular purchase orders at a later date, which the Commission did later supply on their purchase order form MS 3.

The claimant furnished the lumber and materials so ordered in the amount of $315.94, but the Commission was unable to provide payment therefor to the claimant because the budget for the fiscal year had been closed. The material so sold by claimant to the Road Commission was delivered to the Road Commission and used by the latter in its work. All these facts are stipulated as true by counsel for the claimant and by counsel for the State.

As there is no dispute as to the facts and as the state received the benefit of the purchase, we are of the opinion to and do hold that the claim is entirely just, and we award the claimant the sum of $315.94.

Award of $315.94.

Opinion issued February 9, 1970

EARL T. HANSON

vs.

STATE ROAD COMMISSION

(No. D-186)

Claimant appearing in person.

George E. Lantz, Assistant Attorney General, and *Robert R. Harpold, Jr.,* Attorney at Law, for the State.

DUCKER, JUDGE:

Earl T. Hanson claims damages in the amount of $363.38 as a result of a rock falling upon his automobile while the same was being driven by his wife on February 9, 1969, on Route 119 near Blue Creek, Kanawha County, West Virginia. Claimant's wife and three children were in the car at the time the car was struck by a rock which was described by the claimant as a boulder weighing 25 or 30 pounds and which he said disintegrated when it hit the car. The claim consists of $114.00 hospital and x-ray charges incurred for the son and daughter of claimant, which costs were paid by insurance, and the balance as damages to the automobile. The road contained "watch out for falling rock" signs. No report of the accident was made to the Road Commission until about two weeks after the accident. The State does not deny the allegation that a rock hit the car, but does deny liability in the matter.

As the rock had not previously fallen and was not in the road at the time of the accident, reliance can not be had on any theory that the driver of the car should have seen it and avoided the accident. However, as the State is not an insurer of the safety of those traveling on the public roads, any one who is injured or who sustains damages must prove that the State has been negligent in order to render the State liable. To blandly state that the Road Commission should have made it reasonably impossible for a rock to fall from a precipitious cliff adjacent or close to the highway is not sufficient for this Court to conclude negligence on the part of the State.

As we are of the opinion that the evidence introduced does not satisfactorily establish negligence, we are constrained to and do disallow the claim.

Claim disallowed.

Opinion issued February 9, 1970

ARCHIE AND FOSIE GREEN

VS.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-197)

Jerry Cook, Attorney at Law, for the Claimant.

George E. Lantz, Assistant Attorney General, for the State.

DUCKER, JUDGE:

The claimants, Archie Green and his wife, Fosie Green, allege they have suffered damages in the sum of $50,000 by Archie Green and $10,000 by Fosie Green, by reason of inadequate and negligent medical care and services rendered to Archie Green while the latter was a patient from September 15, 1966 until July 10, 1967 at Pinecrest Sanitarium, an agency of the West Virginia Department of Public Institutions. The principal basis of the claim is that on November 14, 1966 Archie Green got up out of bed about 7:30 in the evening to close the door to his room and blacked out and fell on the floor, broke his leg and was permanently injured. The claimant, Fosie Green, bases her claim on time required by her in caring for her husband who was thus disabled. The State denies all factual allegations upon which they base their claims as well as any liability in the matter.

The evidence adduced for the claimant consisted of the testimony of the claimant, their son and daughter, a brother, the occupant of an adjoining room in the hospital, and a friend, and for the respondent a nurse, the doctor in charge of and the records of the sanitarium. Except for a two line letter from David E. Wallace, M. D., claimant's doctor, to the effect

that Green "had an old fracture of the left femur with some displacement" no medical testimony in behalf of the claimant was introduced.

Respondent raised the question of the application of the statute of limitations in this case, and as it is not certain when the claimant discovered, or through due diligence should have discovered, the alleged cause of his injuries, and as the Court does not see that there is any cause of action on the merits, we need not decide such question.

The claimant, Archie Green, whose medical history showed he had suffered from rheumatoid arthritis since 1951, a back injury in 1950, and had had pneumonia fever and presently colitis, was admitted to Pinecrest Sanitarium upon a medical examination which showed that he had far-advanced pulmonary tuberculosis with emphysema. He had been taking cortisone for his arthritis which had to be discontinued because it aggravated his tuberculosis. The testimony of Dr. Y. N. Park, staff physician at the Pinecrest Sanitarium, who examined the claimant and supervised his treatment, is clear, persuasive and undisputed, except in comparative general terms by the claimant and his relatives.

There is no denial of the fact that claimant got up out of his bed and attempted to go to the door of his room and fell, but the claim that he broke his leg at that time is not supported by the evidence. Dr. Park testified that an x-ray was taken the next morning after the fall and that it did not show any bone broken or any reason to suspect such a fact, and no evidence was introduced to contradict the report of Dr. Park. Claimant says he was subject to "black-outs" and that such occurred and caused him to fall when he got up to close the room door in order for him to use the bed pan. The evidence shows that he was instructed to stay in bed or call for help because of his far-advanced tubercular condition and that he had a bell signal cord on his bed by which he could receive immediate assistance, but that he failed to abide by the doctor's directions and he did not call for help when he got up to close the room door. The evidence showed that the claimant was conscious after the fall when the nurse came and the occupant of the adjoining room helped put claimant back in

bed. The claim that the patient broke his leg and received inadequate medical care after that accident or at any time is simply not in the opinion of this Court sufficiently substantiated.

Then comes the question of the discharge of the patient from the sanitarium. As he wanted to obtain other medical services than were provided by the tuberculosis sanitarium, he asked for a ten-day leave which was granted with the understanding that he was to return for further care. When he was contacted by the Health Department, it was learned he would not return and he never returned, but now seeks to hold the State liable for injuries he claims he continues to suffer by reason of his fall while in the hospital.

Considering all the evidence in the case, we are of the opinion that the claimants have not proven by any preponderance of the evidence that the State failed to exercise reasonable care in the treatment of its patient, and accordingly the claims of both Archie Green and Fosie Green are disallowed.

Claim disallowed.

Opinion issued February 9, 1970

JOSEPH P. SECURRO

vs.

DEPARTMENT OF MINES

(No. D-202)

No appearance in behalf of the Claimant.

George E. Lantz, Assistant Attorney General, for the State.

DUCKER, JUDGE:

Joseph P. Securro claims the Department of Mines owes him $108.00 for three days attendance as a witness at a mine explosion hearing in Fairmont, West Virginia, he having been required by summons to so appear on December 5, 6, and 7, 1968. The claim was originally for four days at $36.00 per day

but the claim for the fourth day was withdrawn. Claimant says that his daily rate of pay as a mine foreman was $36.00, and that inasmuch as he lost wages at that rate he is entitled to be reimbursed in that amount. The State does not deny the facts pertaining to claimant's attendance as a witness, but does deny the obligation of the State to pay for such loss and says there is no provision in the law authorizing the Department of Mines to pay such a claim.

Of course, it is unfortunate that there is not some statutory or other legal provision fixing a witness fee for such service, but this Court cannot legislate in the matter. We can only determine the question of liability according to law, and if found legal we can make an award despite the question of constitutional immunity. Here we have no legal justification for a finding of liability, and hence we can impose no moral obligation on the part of the State. Nor can we establish a precedent in such matters.

Fees for witnesses in Court are in fixed positive and relatively small amounts per day, regardless of the loss which a witness may actually suffer in being away from his usual vocation. That is necessarily so, because litigation would be seriously handicapped and impaired if the State and eventually the litigants had to pay all losses which might be suffered by witnesses because of their attendance at trials and participation in the administration of justice.

By reason of the above, we must and do disallow the claim of the petitioner.

Claim disallowed.

Opinion issued February 9, 1970

WARREN N. CONNON

vs.

STATE ROAD COMMISSION

(No. D-207)

No appearance in behalf of the Claimant.

George H. Samuels, Assistant Attorney General, and *Robert R. Harpold, Jr.,* Attorney at Law, for the State.

DUCKER, JUDGE:

Claimant, Warren N. Connon, alleges damages in the amount of $8.24 resulting from the dropping of hot weld lead by employees of the State Road Commission on his boat while his boat was docked on May 22, 1969 at the Charleston Boat Club under or near the Kanawha City Bridge in Charleston. The weld lead burnt a hole in the canvas boat cover, and there is no dispute as to facts alleged, the same having been stipulated by the parties. As liability is apparent, this case being similar to that of Case No. D-248, Beranak v. State Road Commission, we consider the claim just, and award the claimant the sum of $8.24.

Award of $8.24.

Opinion issued February 9, 1970

LAWRENCE H. YOUNG, JR.

vs.

STATE ROAD COMMISSION

(No. D-208)

No appearance in behalf of the Claimant.

George H. Samuels, Assistant Attorney General, and *Robert R. Harpold, Jr.,* Attorney at Law, for the State.

DUCKER, JUDGE:

Claimant alleges damages in the amount of $249.26 caused by sparks and molten metal falling upon his boat moored at the Charleston Boat Club near the Kanawha City Bridge in Charleston, West Virginia, on June 30, 1969. The sparks and molten metal came from work being done by the employees of the State Road Commission in repairing said bridge. The claim consists of two instances when such facts occurred, the first causing $75.00 damage and the second $174.26, making the total $249.26. The parties have stipulated that the facts and the amount of the claim are true and correct.

As the damages were caused by the acts of the employees of the Road Commission, and as a finding that negligence on their part is inescapable, we conclude that the claimant is entitled to recover, and we award him the sum of $249.26.

Award of $249.26.

Opinion issued February 9, 1970

MICHAEL CATSOS AND EVANGELINE CATSOS

vs.

STATE ROAD COMMISSION

(No. D-223)

No appearance in behalf of the Claimant.

George H. Samuels, Assistant Attorney General, and *Robert R. Harpold, Jr.,* Attorney at Law, for the State.

DUCKER, JUDGE:

Claimants, Michael Catsos and Evangeline Catsos, allege damages in the amount of $101.41 to their 1967 Oldsmobile Cutlass sedan by reason of hot welding lead having fallen from the upper part of the Kanawha City Bridge in Charleston where State Road Commission employees were working on April 24, 1969, on claimants' automobile as claimants were driving across said bridge. The damage done was to the windshield of the automobile. The allegations of the claimant are stipulated as true by the respondent.

This case is basically the same as Case No. D-248, Beranak v. State Road Commission, and we see no reason to repeat the legal basis for an award.

As the claim is just, we award the claimants damages in the sum of $101.41.

Award of $101.41.

Opinion issued February 9, 1970

ROBERT L. BERANAK

vs.

STATE ROAD COMMISSION

(No. D-248)

No one appeared in behalf of the Claimant.

George H. Samuels, Assistant Attorney General, and *Robert R. Harpold, Jr.,* Attorney at Law, for the State.

DUCKER, JUDGE:

Claimant alleges damages in the amount of $149.51, which amount represents the cost of replacing the windshield of his automobile which was struck by a hot welding rod falling on it from the top of the Kanawha City Bridge in Charleston, where State Road Commission employees were working on July 29, 1969 when claimant drove his Cadillac sedan automobile across the bridge. While there were "men working" signs in place on both sides of the bridge, traffic was allowed to pass over the bridge. Counsel for both the claimant and the State have stipulated these facts as true.

That there was negligence on the part of the employees of the Road Commission is clearly evident. That the claimant was lawfully using the bridge is not questioned, nor does it appear in any way that he could have avoided the accident. Certainly he could not have reasonably expected to foresee what happened. Care on the claimant's part did not involve more than caution in driving through the roadway because of men working. Certainly it did not involve the possibility of something falling from above.

Because of the negligence of the Road Commission employees, we consider the claim to be just and, accordingly, award the claimant the sum of $149.51.

Award of $149.51.

Opinion issued February 9, 1970

HIBBARD, O'CONNOR & WEEKS

vs.

WEST VIRGINIA BOARD OF EDUCATION

(No. D-235)

Edward F. Butler, Attorney at Law, for the Claimant.

George E. Lantz, Assistant Attorney General, for the State.

DUCKER, JUDGE:

Claimant, Hibbard, O'Connor & Weeks, Inc., a Tennessee corporation, claims it is due the sum of $57,450.00 from the State of West Virginia, on account of a contract made by said claimant with the West Virginia Board of Education for claimant's services in finding a purchaser for $1,915,000.00, principal amount, revenue bonds for the West Virginia State College Student-Union Dining Hall, at Institute, West Virginia, for which services the claimant was to receive a commission of three per cent of the said amount of said bonds, namely, the sum of $57,450.00. The bond issue involved in this case was designated as "Series B", the issue previously sold as a part of the authorization being in the amount of $398,000.00 and designated as "Series A".

No question of the procedural steps for the issuance and sale of both series of these bonds is involved in this controversy, except that the State denies liability on the ground that the private sale made by claimant was not approved by the Attorney General and the Commissioner of Finance and Administration, and was made in contravention of an Executive Order promulgated by the Governor in January, 1969 prior to the sale in February, 1969. The claimant says that under the statutes relating to such a sale of this type of bond that the Governor's Executive Order can not be effective in the matter.

There is no material conflict in the facts, which are as hereinafter related.

The West Virginia Board of Education had sold the "Series A" Bonds to the Department of Housing & Urban Development in mid-January, 1969, but had not then received any bid on the "Series B" Bonds, and upon being advised so to do

entered into an agreement with Baker, Watts & Co., investment bankers of Baltimore, to place the Series B bonds on the open market. The latter agreement expired on February 8 without any success in selling the bonds. On February 11, the Board of Education was advised that the claimant had contacted the officers of the Board relative to acting as agents for the Board in the matter of the sale of the bonds and the Board was then advised that claimants had a buyer ready to purchase the Series B bond issue. And on said date of February 11, 1969 the Secretary of the Board polled all members to explore the proposal and advised them that, if feasible, the matter would be acted upon the next day, February 12. Claimant being a participant in the course of the negotiations and knowing all that was done and being done, had its client, Wilson White, Inc., a brokerage firm, make an offer dated February 11 to the Board for the purchase of the bond and accompanied said offer with a certified check for $38,000.00, the amount required as a deposit. The offer of Wilson White, Inc. was accepted by the Board on February 12, and then on February 24, 1969 in a regular meeting ratified and confirmed the sale, with one member voting in the negative.

During the negotiations and at the time of the conclusion of the sale contract on February 12, the officers of the Board and the representative of the claimant sought and obtained the opinion of Eugene G. Eason, attorney of Clarksburg, West Virginia, who had been designated by the Attorney General as bond counsel for the State in the West Virginia State College building projects. Mr. Eason approved as legal all the acts of the Board in making the bond sale and contracting for the commission to be paid to the claimant. His interpretation of the statutes relating to such a sale and contract, particularly Chapter 25, Article 1A, Section 1B of the Code, was that the law fully empowers and authorizes the sale of the bonds, that the payment of a commission for the sale is a proper item of cost, and that the approval by the Attorney General and Commissioner of Finance was not necessary.

The evidence shows that the Board had received a bid from the construction firm of Kenhill Construction Company for the construction of the Student-Union Dining Room building which would expire either on February 13th or February 14th,

and that if the bonds were not sold prior to such expiration date, there could and most probably would be a large increase in the construction costs of the building, amounting to as much as from four and one-half to ten percent of the estimated construction costs of $1,404,000.00. The evidence also shows that the market for the bonds was bad and the prospects were that it would get worse, which it did, and that a sale of bonds which had no greater interest rate than six percent was very difficult, if not impossible at that time. Furthermore, the cost of re-advertising the sale and other incidental expenses was a real factor. The bonds were sold and delivered but the State Auditor refused to pay the three percent commission to the claimant on the basis of, as evidenced by his letter, the lack of the approval of the Attorney General and the Commissioner of Finance and Administration.

There was adequate evidence that the fee of three percent for the finding of a purchaser was a reasonable charge for the service rendered in this class of bonds, and we think that issue was satisfactorily proven by the testimony of the bond counsel for the Board and by the other testimony in that regard. As to the applicability of the statutes, particularly 25-1A-1B of the Code, we are constrained to agree with the opinion rendered to the parties by Eugene G. Eason, and hold the action of the Board to be legal, and in doing so we can not see how the Governor's Executive Order can render an otherwise legal matter illegal.

Counsel for the State contend that this Court is without jurisdiction because claimant could have sought relief by a mandamus proceeding against the Auditor. Mandamus can only be maintained where there is a clear legal remedy. We cannot agree that there was a clear legal remedy, even though there may have been a clear legal contract existing between the State Board of Education and the claimant. As the Board of Education is an agency of the State and thus immune from suit under the Constitution, this Court is, we believe, the only forum for such a claimant.

As the State got the full benefit of the services rendered by claimant and would be unjustly enriched if claimant is not paid, and upon the theory of quantum meruit the claimant deserves to recover on its claim, we conclude that in equity

and good conscience the claimant is entitled to payment of its fee, and, accordingly, we award it the sum of $57,450.00.

Award of $57,450.00.

Opinion issued February 9, 1970

THOMAS COMPANY, A CORPORATION

vs.

STATE ROAD COMMISSION

(No. D-118)

Henry C. Bias, Jr., Attorney at Law, for the Claimant.

Theodore L. Shreve, Attorney at Law, for the State.

DUCKER, JUDGE:

Claimant, Thomas Company, a corporation, with principal office in Huntington, West Virginia, was on February 16, 1962 awarded by the State Road Commission a contract for the construction of Route 17 Interchange Bridge No. 2133, being Project I-64-1(30)142, on a schedule of prices lowest bid of $75,164.38. The construction under the contract was to begin not later than ten calendar days after the award and completed in 130 working days ending in August. The delays in the work amounted to approximately two months, and because of such delays, which petitioner claims were the fault of the Road Commission in not requiring the paving contractor to yield sufficiently in his work to allow claimant to perform its bridge construction work, claimant alleges damages as to that portion of its claim the sum of $17,565.42. In addition to the above specific claim as item (1), claimant also alleges damages specifically as follows: (2) Bridge pier excavation $1,245.78; (3) cleaning concrete and mud from structural steel $742.53; (4) correction of slope grades for slope paving $3,138.58; (5) bridge deck, unnecessary work due to improper inspection by S.R.C. $1,299.81; (6) wrongful retention of $6,399.00, $1,161.57; (7) expenses incurred by company's officers and agents in efforts to close projects $1,650.00; and (8) loss of business for one full year $29,000.00; making a grand total claim of $55,894.69.

The record in this case is quite lengthy as the transcript of the evidence embraces 240 typewritten pages with 32 exhibits, and in the evidence relating to the causes and the responsibility for the delays there is considerable conflict. The first principal question for decision involves the matter of the rights of the parties when two independent contractors are working at the same place on separate road construction contracts and the relative duties of each with respect to the other as well as the duty of the State Road Commission in such cases.

As to the first item of the claim amounting to $17,656.42, claimant says it bid the job on the basis of doing the work with a single crane placed in the center of Interstate Highway I-64, over which the bridge to be constructed was to pass, and the paving contractor did not yield or defer his paving work at such bridge construction site but continued to pave through the site, thus requiring claimant to move its crane and other equipment back and forth along the right of way to build the abutments and the piers for the bridge. The claimant alleges that it was required only to coordinate its work with that of the grade and drain contractor, not with the paving contractor, while the State maintains that under Sec. 1.5.5 of the Standard Specifications of the Road Commission, and which are a part of the contract, the claimant was required to "conduct its operations so as to interfere as little as possible with those of other contractors or the public on or near the work." We are of the opinion that the expression of the one requirement did not exclude the other, and that both were applicable to this case, but there must be reasonableness in their application. It seems apparent to us that the Road Commission could have anticipated the extra hardship to which the claimant was subjected in having to perform its contract by moving its equipment back and forth on the sides of the right of way instead of doing it in the better engineering way with a crane in the middle of the highway where it could serve both sides and the middle of the construction project; and that the paving contractor should have been required to suffer such inconvenience in its work, such contractor being also subject to the same Standard Specifications. In reviewing the evidence, we conclude that the claimant was unjustly denied

the right to proceed as it planned and that it should be compensated therefor, and that as to the amount which was not contradicted we accept the sworn evidence of claimant's witnesses to the effect that its damages amounted to $17,656.42.

As to items (2) and (4) designated above as parts of petitioner's claim, we are of the opinion that the work done should have been considered as within that contemplated by the contract, and that the claimant is not entitled to extra compensation, and as to item (3) the same was on force account and admittedly paid for, but, if not, it has the same status as items (2) and (4).

As to item (5) which is in the amount of $1,299.81 for unnecessary work on the bridge deck, due to improper inspection by the State Road Commission, in which the claimant was required months later to grind the concrete in order to be within the tolerance specifications of the work, and as to which the Road Commission admitted it was in error, we think the claimant is entitled to compensation for such work in the amount claimed.

As to item (6), we conclude that this is tantamount to a charge of interest on an unpaid account and damages for loss of the use of money can only be interest for which this Court has no authority to allow.

As to item (7), we conclude that this Court cannot recognize as a proper item of damages the costs or expenses of any party in trying to settle a controverted claim with a Department of the State.

And as to item (8), this part of the claim is totally conjectural and speculative, and we can make no allowance for it.

The evidence indicates there may be still owing a balance of $2,149.85 unpaid to claimant under its contract, which item this Court does not adjudicate, but assumes that the same will be paid otherwise than directed by this Court.

We are of the opinion that the claimant is entitled to be paid the sum of $17,656.42 specified in item (1) of its claim, and $1,299.81 specified in item (5) of its claim, and we hereby award claimant the total of said amounts, namely, $18,956.23.

Award of $18,956.23.

Opinion issued February 10, 1970

H. L. GILLIAM

vs.

STATE ROAD COMMISSION

(No. D-152)

The claimant appeared in person without counsel.

George E. Lantz, Assistant Attorney General, and *Robert R. Harpold, Jr.,* for the Respondent.

JONES, JUDGE:

The claimant, H. L. Gilliam, an employee of the United State Department of Agriculture, Consumer and Marketing Service, Federal Food Stamp Program, alleges that he was driving his personal car over Secondary State Route No. 11 in Jackson County at about 10:40 A.M. on August 8, 1968, when his 1967 Chevrolet Chevelle automobile was damaged as a result of the negligence of employees of the respondent, State Road Commission. The claimant's version of what occurred is substantially as follows: "I had traveled approximately seven or eight miles on Secondary Route No. 11 when I saw a number of 'Men Working' signs. Soon I encountered men and machines 'ditching' the road. There was a windrow of earth and rocks in the center of the road, approximately fifty yards long and two feet high. One of the highway crewmen waved me forward, and I proceeded on the right-hand side of the windrow at about one or two miles per hour. I kept my left wheels as close to the windrow as possible as there was very little clearance. About two-thirds of the way along the windrow, the clearance was so narrow that I scraped the right-hand side of my car against the heavy brush alongside the road. Considerable paint was damaged and my right rear door was also damaged, being dented in several places." It was a warm day and the windows of the claimant's car were rolled down. He further testified that "I didn't know I had damaged the car until I made my first stop which was about ten minutes after the damage", and that there were leaves, twigs and soft mud on the damaged side of the car.

The claimant obtained three estimates for repairing damage to the right front door and right front fender, repairing and refinishing the right rear door and quarter panel and repairing the rear door lock assembly, the lowest estimate of $144.66 being the amount of his claim.

Two witnesses for the respondent, a truck driver-foreman and a grader operator, testified that the gravel and stone road was fourteen to sixteen feet wide, the windrow of dirt and rock near the center of the road was approximately two feet wide and two feet high, that there was no heavy brush along the ditch line which had just been graded and cleared, and that they could see nothing to interfere with traffic proceeding carefully through the work area. They further testified that there was considerable traffic over the road during their ditching operation, and that they had no complaints from anyone, including the claimant.

The Court will concede the probability that claimant's car was damaged somewhere in the work area; but no specific act of negligence on the part of the respondent has been proved, and in view of the conflicting testimony, it is impossible to say which party may or may not have been negligent. The claimant's case leaves too much to speculation. An award may not be based on speculative evidence, but if the Court were to resort to the crystal ball, it would expect to see some negligence on the part of the claimant which would, in any event, preclude his recovery.

Accordingly, this claim is disallowed.

Opinion issued February 10, 1970

JONES ESSO SERVICE STATION

vs.

STATE ROAD COMMISSION

(No. D-198)

Frank T. Litton and *Arthur C. Litton II* for the Claimant.

George H. Samuels, Assistant Attorney General, and *Robert R. Harpold, Jr.,* for the Respondent.

JONES, JUDGE:

This claim was filed by Jones Esso Service Station against the State Road Commission, but at the hearing it appeared that by a subrogation agreement the claimant had assigned all but the "fifty dollar deductible" portion of the claim to its insurer, Nationwide Mutual Insurance Company. Accordingly, the Court permitted the insurance company to present its claim for $320.35 of the total damages of $370.35 set out in the petition.

The petition alleges that on July 14, 1968, at about 11:00 P.M., on United States Route 219 approximately twelve miles north of Marlinton in Pocahontas County, the claimant's automobile was damaged when it struck a sunken place or dip in the highway and that such damage was the direct proximate result of the respondent's negligence in failing to properly maintain the road and in failing to erect adequate warning signs.

The respondent had dug a ditch across the road about six feet wide for a tile culvert several weeks before the accident and had filled the ditch and tamped it. Witnesses for the respondent testified that the excavated area was inspected during every week day and when necessary, gravel was added to bring the filled strip up to road level, and that "Slow" signs were in place on each side of the culvert, as well as "Cattle Crossing" signs. The accident occurred on a Sunday night after a weekend of considerable rainfall, and the ditch area had sunk. The depth of the depression was the subject of

substantial conflict, the driver of the car, a partner in Jones Esso Service Station, estimating a dip of six to eight inches and the respondent's witnesses contending for a more conservative two to three inches at the lowest point.

The claimant's driver testified that at approximately 200 feet and driving at 50 miles per hour, he saw an approaching car bouncing over this culvert as indicated by its headlights. Still he did not see the culvert until he was within 20 feet of it and had only two or three seconds to brake his vehicle. He struck the culvert with great force and the car was severely damaged. The driver described the car as an Austin-Healey 3000, a British sportscar, with a road clearance of four to five inches to the rocker panel, only three to four inches to the exhaust system, and having "real stiff suspension" and "not much give". The damages included a stoved rear wheel, bent lower control arms and a ruined radiator and fan, a stoved transmission and two ruined wire wheels.

The claimant's driver testified that he and his wife looked for signs and found none, except for a "Cattle Crossing" sign. The respondent's witnesses strongly contend that "Slow" signs were in place throughout the existence of the rough culvert crossing. Route 219 is an important, heavily traveled highway, and according to respondent's witnesses, they received no other complaints during the entire time the culvert was under repair. The "bouncing lights" of the approaching vehicle 200 feet away should have conveyed some warning to the claimant's driver, particularly with his knowledge of the susceptibility of his sportscar to hazards which would not affect standard models.

The state is not the insurer of the safety of the roads and highways of the state, and if "Slow" signs were in place, it is the Court's opinion that the respondent had fulfilled its duty to the traveling public. Conversely, if such signs were not in place, such failure probably would constitute negligence. On this point, the evidence of the contesting parties is in direct conflict, and the Court sees fit to refrain from deciding this question of fact, for the reason that it finds that the claimant's driver, under all the circumstances, did not exercise due and reasonable care for his own safety. He thereby con-

tributed to the cause of the claimant's damages and barred recovery. Accordingly, the Court is of opinion to and does hereby disallow this claim.

Opinion issued February 10, 1970

JOHN C. VARNER, ADMINISTRATOR OF THE ESTATE OF JULIA M. VARNER, DECEASED

vs.

STATE ROAD COMMISSION

(No. D-185)

A. Blake Billingslea, Leo Catsonis and *John S. Sibray,* for the Claimant.

George H. Samuels, Assistant Attorney General and *Robert R. Harpold, Jr.,* for the Respondent.

JONES, JUDGE:

This claim was filed by John C. Varner, Administrator of the estate of Julia M. Varner, deceased, for the alleged wrongful death of the decedent under Chapter 55, Article 7, Section 6, of the Code of West Virginia, and the damages sought, including financial and pecuniary loss, are in the amount of $104,551.36. Mrs. Varner died as the result of a collision on United States Route 250 about ¼ mile south of Fairmont on May 12, 1967 at approximately 1:19 a.m. She was 32 years old and was an employee of Fairmont Lamp Works, a Westinghouse plant. Her husband, John C. Varner, is her sole distributee.

Mrs. Varner, Sandra Eddy and Jo Ann Smith quit work at Westinghouse at 12 o'clock midnight, joined Roy Hughes and John Serafine and were together at the Executive Club in Fairmont until it closed at 1 a.m. The group then decided to drive south on United States Route 250 to 3-Ways Inn, Mrs. Varner driving her 1966 Dodge Dart convertible with Eva Meconi, Joyce Droddy and John Serafine as passengers, and Sandra Eddy driving another car accompanied by Jo Ann Smith and Roy Hughes.

In a statement in his own handwriting and made and signed shortly after the accident, Roy Hughes gave this account: "We were going South on 250 Highway at approximately 1:10 a.m. at approximately 50-55 MPH and Mrs. Julie Varner, driver of the vehicle involved, passed us as we were slowing down to go around the boulder, we were approximately 150 feet from the boulder at that time, she seemed to see the boulder as her brake lights came on and she swerved, but caught the left front fender and careened into the ditch and bounced back on to the road. * * *" He further testified: "Yes, it appeared that she was directly in front of us and just before the impact there seemed to be a swerve to the left and then one back to the right just when she glanced off of it." Hughes and other witnesses for the claimant testified that Mrs. Varner passed in a passing zone and appeared to be executing a normal, careful passing of the Eddy car until she saw the boulder. According to Miss Eddy's testimony, "When she cut back in we saw her brake lights for just an instant. The car swerved, she hit the boulder and then went into the bank." Jo Ann Smith described the happening in these words: "As she passed, she may have been half a car length ahead of us and she threw her high beams up. This is when we saw that there was something in the road and it didn't look to me as though she saw the rock because it seemed like about an instant before she hit the rock, there was brake lights and she did swerve as though she didn't know which way to go to get out of the way of the rock."

The boulder was estimated to be 4 feet high, 14 feet long and 6 to 7 feet wide. The investigating Deputy Sheriff measured the location of the boulder to be 10 feet 5 inches from the edge of the pavement and 7 inches to the right of the center lane. Mrs. Varner's car traveled 84 feet from the point of collision, striking the right hand ditch and hillside.

It appears from the evidence that the road was straight, fairly level and dry, and although there is conflicting testimony regarding the area being a passing or no passing zone, it further appears from the evidence that the greater part of the passing operation was in a passing zone, although there were skid marks from left to right across a double line just a few feet after the broken line ended. The fact that after

passing the Eddy's car Mrs. Varner did cross a double line does not appear to have proximately contributed to the collision. There is some testimony referring to lights of an approaching vehicle, but there is no satisfactory proof that another vehicle was involved.

Route 250 in the area of this accident is rather typical of West Virginia highways, being located on a narrow, excavated shelf between the West Fork River and a high cliff. While there is conflicting evidence regarding the fact, the Court is satisfied that there was a "Falling Rocks" sign at each end of this stretch of road, the sign going south being approximately ¼ to ½ of a mile from the point of collision. Slides in this area appear to have occurred frequently, rocks and dirt falling to the ditch line and generally being removed in a routine manner. There is evidence that other large rocks previously had rolled on to the highway, one causing the wreck of a pickup truck and another large enough to wreck a car. An ex-maintenance superintendent for the respondent in Marion County described the area as "the most dangerous place on Route 250" and another witness who traveled the road frequently, testified that he had observed the big boulder on many occasions and it looked like it was "ready to come down". Several witnesses testified that physical markings on the ground clearly indicated that this boulder had broken loose at an earlier time and had fallen approximately 35 feet to a shelf and after resting there for some indefinite period of time had become dislodged and crashed down the steep slope to the highway, leaving a path plainly visible more than two years later. There was considerable testimony relating to complaints made to the respondent, some fairly direct and credible and others extremely vague, but, in any event, there is sufficient evidence to show that the respondent recognized or should have recognized a potential hazard, but never made any more than a cursory inspection of the area. The attitude of the respondent's agents may have been that maintenance funds were already short enough without looking for places to spend them. The respondent did maintain patrols of this highway and the road was patrolled by two of respondent's employees a short time before the accident. How-

ever, patrolling was for the purpose of finding and removing obstructions and had nothing to do with the prevention thereof.

The State is not the insurer of its highways and the State Road Commission cannot be held responsible for every rock or boulder that falls on them. "Falling Rocks" signs are practically indigenous to West Virginia roads and to eliminate every hazard contemplated by such signs would require expenditures so enormous as to be financially unsound and prohibitive. However, when the State Road Commission knows or should know that an unusually dangerous condition exists, there is a duty to inspect and to correct the condition within the limits of funds appropriated by the Legislature for maintenance purposes. There is substantial evidence in this case of a dangerous condition and no showing that the respondent did anything beyond the routine cleaning of ditches and the removal of rocks which previously had fallen on the highway.

The Court has given serious consideration to the contention of the respondent's counsel that the claimant's decedent was guilty of such contributory negligence as would bar recovery, and there is evidence that would support such a finding, except for the hard and obvious fact that this woman was confronted with a sudden emergency of considerable magnitude and not of her own making. She was in a position to pass the obstacle unharmed, but the Court takes into consideration the stress of the occasion, her natural apprehension and confusion, and concludes that any fault in her judgment must be excused.

After thorough and deliberate consideration of the many facets of this case, including a great deal of conflicting testimony, the Court has decided that the claimant has a valid claim which in equity and good conscience the State should pay. Counsel for the parties have stipulated the following allowable expenses: Funeral, $1,451.30; car damage, $1,740.00; and ambulance service, $10.00; a total of $3,201.30. The Court is not impressed by the testimony and argument attempting to show dependency of the decedent's husband, and, although the decedent was a wage earner and looked after the family finances, the Court does not find any financial or pecuniary loss to the husband as a dependent distributee. The Court is

of opinion that an additional allowance of $5,000.00 for the wrongful death is fair and just. And, therefore, a total award in the sum of $8,201.30 is hereby made to the claimant, John C. Varner, Administrator of the estate of Julia M. Varner, deceased.

Opinion issued March 16, 1970

HUNTINGTON STEEL AND SUPPLY COMPANY, Claimant,

vs.

WEST VIRGINIA STATE TAX COMMISSIONER, Respondent.

(No. D-159)

J. W. St. Clair, Esq., for the Claimant.

George E. Lantz, Assistant Attorney General for the Respondent.

PETROPLUS, JUDGE:

The Claimant, Huntington Steel and Supply Company, filed a claim in this Court on February 11, 1969, for a Refund of Business and Occupation taxes erroneously paid for the calendar year 1963 in the amount of $3890.46, and for the calendar year 1964 in the amount of $8325.19, or in the aggregate amount of $12,215.65 for both years. The facts of the case, which are not in dispute, are as follows:

Claimant is a corporation engaged in the business of manufacturing steel products in Huntington, West Virginia, and selling said products at wholesale and retail. Until the year 1949, Returns were filed with the State Tax Commissioner for Business and Occupation taxes classifying said business under the manufacturing and selling classifications, where the rates of taxation are substantially lower than the rate charged for the contracting business classification. Sometime in the year 1949, a field auditor from the office of the State Tax Commissioner called upon the claimant and after inspecting its business operations advised it that its business had been improperly classified and that claimant hereafter would

be required to report under the classification of "Contracting". Claimant's corporate officers objected to this ruling and met in Charleston at a conference with the state representatives in charge of the Business and Occupation Tax Division where the findings of the field auditor were confirmed. Thereafter claimant reported its gross receipts as a contractor until the fall of 1968 when another audit was made by the State, and it was determined and suggested by the State that the claimant's business was not in the nature of contracting but should have been classified as manufacturing and sales at retail and wholesale. Because of the difference in rates, the audit revealed that taxes had been over-paid for the years 1963 to 1967, inclusive, in a total amount of $30,218.09. Claimant was advised that it was entitled to a refund and in accordance with said advice, filed a Petition for Refund with the State Tax Commissioner under Chapter 11, Article 1, Section 2a of the Code of West Virginia, as amended, which reads as follows:

> "On and after the effective date of this section (June 8, 1951), any taxpayer claiming to be aggrieved through being required to pay any tax into the treasury of this State, may, within three years from the date of such payment, and not after, file with the official or department through which the tax was paid, a petition in writing to have refunded to him any such tax, or any part thereof, the payment whereof is claimed by him to have been required unlawfully; and if, on such petition, and the proofs filed in support thereof, the official collecting the same shall be of the opinion that the payment of the tax collected, or any part thereof was improperly required, he shall refund the same to the taxpayer * * *".

Following the administrative procedures, refund was made to the claimant in the amount of $18,002.44, in the aggregate for the years 1965, 1966 and 1967, but claimant was denied a refund for the years 1963 and 1964 on the ground that said refunds were barred by the Statute of Limitations of three years set forth in the foregoing Code Section.

The claimant then filed its claim in this Court to secure a refund for the years 1963 and 1964 on the ground that it had been misled in 1949 by the field auditor of the State to change the reporting classification, and had been induced to pay taxes in the wrong classification for the ensuing years, not with any

intent to deceive or defraud, but by wrongful interpretation of the law by a state agency. Claimant contends that it was not only unconscionable and inequitable for the State to collect the additional taxes, but that the State should be estopped from pleading the Statute of Limitations in this case because the representation was made by persons supposedly skilled in interpreting the law and regulations and because the claimant imposed trust and confidence in the judgment of the state agents.

The only issue before the Court is a matter of law, namely—Is the State of West Virginia estopped to plead the Statute of Limitations because of the mistake, negligence or misconduct of its agents.

Counsel for the claimant contends that Chapter 14, Article 2, Section 21 of the Code, which Chapter created the Court of Claims, reading as follows:

> "The court shall not take jurisdiction of any claim, whether accruing before or after the effective date of this article (July 1, 1967), unless notice of such claim be filed with the clerk within such period of limitation as would be applicable under article two (Sec. 55-2-1 et seq.), chapter fifty-five of the Code of West Virginia, one thousand nine hundred thirty-one, as amended, if the claim were against a private person, firm or corporation and the constitutional immunity of the State from suit were not involved * * *"

should be interpreted in such a manner as to allow the doctrine of estoppel to be asserted against the State in the same manner as it would be applied if the claim were against a private person, firm or corporation. To put such an interpretation on this provision of the Code, in our opinion, would be unwarranted. We do not think the section was intended to treat the State as a private person. The Section deals with the filing of Notice of Claim and states that unless the Notice of Claim is filed with the Clerk within such period of limitations as would be applicable, the Court shall not take jurisdiction of the claim. It would be improper to interpret said Section in a manner that would permit the claim to be treated in all respects as a claim against a private person, firm or corporation, and ignore the identity of the State as a defendant. Only

constitutional immunity has been removed in this State by the Act establishing the Court of Claims. A sovereign State has other defenses and immunities peculiar to itself, which it may assert and which cannot be destroyed by the wrongful conduct of its agents.

It is not necessary to set forth in this opinion the many cases which hold that a State is not subject to the laws of estoppel or waiver when acting in a governmental capacity and that the State is not bound by contracts which are beyond the scope of the powers of its agents. There are many *caveats* in dealing with a governmental agency, and the conduct of its officers cannot result in the application of the doctrine of estoppel.

It was stated in a former opinion of this Court in the case of *Bache & Co., Inc. v. State Tax Commissioner,* by Judge Jones, that while the foregoing provision (14-2-21 Code) refers only to limitations applicable under Article 2, Chapter 55 of the Code of West Virginia, the Court considered the intention of the Legislature to be that claims against the State should not be allowed in any case where the Legislature has decreed in other provisions of the Code that claims shall be barred after a specified time has elapsed. It was further stated in said opinion that "to allow this claim would constitute an invasion of the province of the Legislature and would, in effect, set aside the legislative will".

Inasmuch as the administrative procedure for aggrieved taxpayers seeking refund of Business and Occupation taxes unlawfully, erroneously or mistakenly paid into the Treasury of the State requires a Petition for Refund to be filed within three years from the date of payment, and the claimant having failed to do so for the years 1963 and 1964, the Court is of the opinion that relief cannot be granted in this case and, accordingly, the claim is disallowed.

Claim disallowed.

Opinion issued February 9, 1970

JOE L. SMITH, JR., INC. dba
BIGGS-JOHNSTON-WITHROW

vs.

WEST VIRGINIA ALCOHOL
BEVERAGE CONTROL COMMISSION

(No. D-218)

Sibley Weatherford, Attorney for Claimant.

George E. Lantz, Assistant Attorney General for the State.

DUCKER, JUDGE:

The claimant, Joe L. Smith, Jr., Inc., a corporation doing business as Biggs-Johnston-Withrow, alleges that the West Virginia Alcohol Beverage Control Commission owes it the sum of $4907.70 for work done by it in the printing of liquor price lists and record forms for use by the respondent during the months of May, June and July, 1969.

The claim is based upon a price of $3985.00 per month, totaling $11,955.00, of which the sum of $7047.30 was paid, leaving the sum of $4907.70 as the unpaid balance, which balance represents the amount of the monthly difference between the previously existing contract price for such work and the new lower price which claimant bid on a new contract, which difference amounted to approximately $1600.00 per month, and which sum when multiplied by three for the three months of May, June and July, 1969, totaled the amount of this claim. The principal issue is whether or not there was a valid agreement between the parties reducing the price for the work and thus eliminating any liability on the part of the respondent in the matter. There is no controversy as to the calculation of the several amounts involved. The respondent either owes the whole amount claimed or nothing.

Early in May, 1969 the Division of Purchases for the State asked for new bids on the printing work for the Alcohol Beverage Control Commission, which bids were to be opened on May 23rd. The printing work had to be done considerably in

advance of any new contract work, and the claimant, who having bid too high and not awarded the new contract, was asked to continue to do such printing work for the months of May, June and July, 1969. Respondent says, and it was not denied, that there were conversations between the parties in the Spring of 1969 through the bid period, in which respondent says that claimant agreed to "reduce", claimant saying that it only agreed to "discuss", the matter of the cost of such printing for said three month period. Claimant also said it would not specify how much a reduction it would make, because to do so would disclose the amount of its bid for the new contract. No price was ever agreed on between the parties. In support of respondent's position that it was entitled to a price reduction, it attempted to show that the claimant's costs in doing the work had been reduced by various changes in the forms of the sales lists and the materials used. Even if it is true that claimant's costs were reduced, such fact is not material since all charges for the work had been contemplated only on a price basis and not on a cost or quantum meruit basis. There is no proof which showed otherwise than the matter involved a total price deal without any question of cost or profit or loss.

Therefore, the question resolves itself into whether the evidence shows a sufficient meeting of the minds to justify the conclusion that the parties entered into a binding oral agreement. There was never any specific amount specified between them. The respondent relies upon the statement of the claimant's witnesses that it couldn't specify an amount because to do so would disclose its bid for the new contract, which reason seems plausible under the circumstances, because the disclosure of such bid amount would have very likely influenced other bidders if they learned about it. Then, too, we cannot understand what right the respondent had to make a unilateral decision as to what the reduction in price should be, and to conclude that the bid price of the claimant for the new contract was the amount of the reduction. Certainly there was no meeting of the minds as to such a figure as the basis for the reduction contemplated. Furthermore, the claimant's bid price for the new contract was for at least a full year's work and not for just three months. It can hardly be questioned

that there can be a substantially different cost and price for work over a period of four times longer than for one for the short period.

As we view the evidence, there was no binding agreement between the parties, and the claimant was much more warranted in charging for the three month period what it had previously charged, than respondent was in claiming it was entitled to have the work done at a price no greater than claimant's bid price for the new contract. Being without a mutual agreement, the matter of the price was one which the claimant had the right to fix for its work and so long as such price was not grossly unreasonable, it should be sustained.

We are of the opinion, therefore, that the claimant is entitled to recover the amount sued for, and we hereby award it the sum of $4907.70.

Award of $4907.70.

Opinion issued April 6, 1970

MATZ DEPARTMENT STORE, INC., Claimant,*

vs.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, Respondent.

(No. D-274)

No appearance for the Claimant (except by Stipulation).

Robert R. Harpold, Jr., Esq., and *George H. Samuels*, Assistant Attorney General, for Respondent.

PETROPLUS, JUDGE:

A Stipulation of Facts has been filed wherein it is stated in support of this claim that on or about the 22nd day of July, 1969 the State Road Commission construction crews were engaged in the painting of the Kanawha City Bridge in Kanawha County, West Virginia, and that Marie Matz, who was driving a 1969 Pontiac, owned by the Claimant, across the

*The style of this claim was amended to the name of the insurance carrier, Travelers Insurance Company, and an opinion was subsequently filed under the name of the carrier. See page 168.

bridge, received unexplained paint spots on her automobile. The cost of repairing the automobile is stipulated in the amount of $195.70 without any explanation of the items of repair or who did the work or when the work was performed.

From these facts we necessarily infer that the paint spots came from the brush, spray guns or the paint buckets of the employees of the State Road Commission, as the automobile did not make contact with the painted surface of the bridge. It appears that the Respondent was negligent in failing to take proper precautions to protect the property of passing motorists lawfully driving across the bridge.

The Court, however, is troubled in awarding damages in the amount of $195.70, notwithstanding that the amount has been agreed upon as the cost of repairing the automobile, without some showing that the Claimant was free from contributory negligence in correcting or mitigating the damages. It would be a reasonable assumption from the amount of the damage that either the automobile was repainted or some costly process was involved in removing the paint spots after they had dried or hardened. Reasonable care on the part of the motorist would require her to stop at the next service station and have the spots removed with turpentine or some proper solvent while they were still wet and fresh and susceptible of being cleaned off, a rather simple and inexpensive process.

Even though we assume that the Respondent was guilty of negligence in dropping a quantity of paint on the motor vehicle, we are also constrained to hold the Claimant had a responsibility and a duty to mitigate damages and remove the paint within a reasonable time after the damage occurred. It is not reasonable to find that the removal of a small quantity of wet paint from the finished and polished body of the car would entail an expenditure of $195.70. A reasonable conclusion would be that no effort was made to correct the condition until after the paint had hardened. The stipulation states that "Men Working" signs were installed on both ends of the bridge, so the Claimant was put on notice of the unusual conditions.

Unless there is some further explanation of circumstances causing damage in the amount stated, we are of opinion to

disallow the claim on the grounds that the Claimant was not free from fault and failed to mitigate damage by taking steps promptly to remove the paint when the injury occurred.

Claim disallowed.

Opinion issued April 6, 1970

EQUITABLE GAS COMPANY, a Pennsylvania corporation, Claimant,

vs.

STATE ROAD COMMISSION, Respondent.

(No. D-173)

No appearance for the Claimant (except by Stipulation).

George E. Lantz, Assistant Attorney General, and *Robert R. Harpold, Jr.,* Esq., for the Respondent.

PETROPLUS, JUDGE:

This claim was submitted on a Stipulation of Facts and was previously disallowed by the Court because of an incomplete Stipulation, and leave was granted to the parties to file a Supplemental Stipulation or present evidence setting forth material facts upon which the Court could make a decision. A Supplemental Stipulation was filed on the 25th day of November, 1969, furnishing the additional facts that the Respondent had no authority to conduct its operations on the property of the Claimant, and was in effect a trespasser when the injury or damage occurred. It is now further stipulated that the damage in the amount of $254.90 for gas lost, labor performed and miscellaneous expenses is reasonable and represents damages which were the direct and proximate result of the accident.

It now appearing to the Court that the agents and employees of the Respondent were operating the State's dredging equipment on private property without permission, and that certain damage was caused to the gas line by the equipment of the

Respondent, the Court is of the opinion to and does hereby allow the claim.

Claim allowed in the amount of $254.90.

Opinion issued April 6, 1970

MR. AND MRS. H. B. LEWIS, JR.
Claimants

vs.

THE STATE ROAD COMMISSION OF
WEST VIRGINIA, a corporation, Respondent.

(No. D-256)

No appearance for the Claimants (except by Stipulation).

Robert R. Harpold, Jr., Esq., and *George H. Samuels*, Assistant Attorney General, for the Respondent.

PETROPLUS, JUDGE:

By Stipulation it is disclosed that Claimants, while driving their automobile across the Kanawha Bridge near Kanawha City, Charleston, West Virginia, on September 4, 1969, sustained damages in the amount of $50.00 to the hood of their automobile, which were caused by a falling Coca Cola bottle negligently dropped or caused to fall by a member of a construction crew working overhead for the State Road Commission in some type of maintenance work. The bottle came from a direction of the superstructure of the bridge. It clearly appears that the State was at fault in this matter and that the Claimants should be compensated for their loss. An award is made to the Claimants in the amount of $50.00.

Claim allowed in the amount of $50.00.

Opinion issued April 6, 1970

SAM MELVIN, Claimant,

vs.

STATE ROAD COMMISSION, now WEST VIRGINIA DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-257)

No appearance for the Claimant (except by Stipulation).

Robert R. Harpold, Jr., Esq., and *George H. Samuels*, Assistant Attorney General, for the Respondent.

PETROPLUS, JUDGE:

The claim was submitted on a written stipulation, which sets forth the following facts: On October 28, 1969, while Claimant's daughter was driving a motor vehicle owned by the Claimant over U. S. Route 61 near Pratt, West Virginia, a construction crew working in the area on the installation of a traffic counter on behalf of the Respondent, tugged or pulled on a rubber hose across the highway causing a stabilizer nail used to tie down the rubber hose to the pavement to damage a tire of the motor vehicle passing over the traffic counter. The tire was damaged in the agreed amount of $11.00.

It appearing to the Court that the vehicle was damaged by the failure of the Respondent's agents to exercise proper care under the circumstances, and the driver being free from fault, the Court makes an award of $11.00 to compensate the Claimant for his loss.

Claim allowed in the amount of $11.00.

Opinion issued April 24, 1970

NANCY ANN PETTINGER

vs.

THE WEST VIRGINIA BOARD OF REGENTS

(No. C-6)

James W. St. Clair for the Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General and *George E. Lantz,* Assistant Attorney General, for the Respondent.

JONES, JUDGE:

The petition in this case which was filed before the Attorney General of West Virginia on February 6, 1967 and transferred to this Court after its creation on July 1, 1967, alleges that on or about October 16, 1963 (shown by the evidence to be an erroneous date), the claimant, Nancy Ann Pettinger, then an infant nineteen years of age, and a student at West Virginia State College, while participating as a member of a regularly constituted swimming class taught and supervised by the respondent, slipped, was tripped or pushed so as to fall on or about the pool area located in the premises of said College, striking the rear portion of her head with great force, and that as the result of negligence of the respondent "in designing, maintaining or supervising the pool", the claimant suffered a severe head injury, developed traumatic epilepsy and was totally disabled and damaged in the amount of $500,000.00.

The testimony of the claimant and her witnesses was taken by deposition in the State of New Jersey on November 6, 1968; and the respondent's witnesses were heard by the Court on November 3, 1969.

There was no witness to the alleged fall and injury except the claimant herself, and while her recollection appears to be clear as to her fall and circumstances immediately connected therewith, her account of conditions before and after her injury leave much to conjecture. Some things are acceptably certain: Claimant enrolled at West Virginia State College prior to the

beginning of classes on September 12, 1963, and moved into a college dormitory; soon thereafter she became ill, as evidenced by unnaturally long periods of deep sleep; she was treated as an outpatient at the College infirmary on September 25, 1963, again on October 3, 1963 and on October 6, 1963; she was admitted to St. Francis Hospital on September 16, 1963, discharged October twenty-fourth, 1963, and on the same day she was admitted at Charleston Memorial Hospital, from which she was discharged on November 1, 1963 and returned to her home in New Jersey with her mother; thereafter she was under the care of several neurosurgeons and psychiatrists and was a patient in sundry hospitals; according to medical evidence she suffered from traumatic epilepsy caused by subdural hemorrhage of the brain; she and her mother incurred doctor bills of $319.00 and hospital bills in the amount of $5,275.47; and there is no question as to the seriousness of her condition and disability, although happily she has recovered and at the time of the taking of her deposition, she had been accepted for service in the United States Air Force.

The claimant testified substantially as follows: She was enrolled in a swimming class which she had attended four or five times; the instructor blew a whistle for the end of a class; she and a friend, Donna Bradshaw, stayed for a "couple more swims"; the pool area was dry when the class started but was wet and slippery when the class ended; she got out of the pool and "Then she (Donna) was up, going up the steps then. I was trying to hurry to get to her and when I came around here, I started to run, but I didn't run too far. I remember my feet went out from underneath me"; she struck her head and she remembers nothing from that time until she was talking with Dr. Nelson at the College infirmary, apparently several days after the fall.

A nurse employed at the College infirmary testified that the claimant was treated at the infirmary three times but made no mention of a fall until the third visit. The dormitory housemother testified that the claimant seemed to have hallucinations, told fantastic stories and referred to long sleeping spells before she came to school. However, on cross-examination the housemother said that she had not observed the unusual behavior for approximately two weeks after school started.

A physical education instructor at the College testified that all swimming classes were instructed with regard to established rules and regulations governing the pool area, and printed rules were posted at the pool at the time of this occurrence, one of which was that no one was allowed in the pool unless an instructor or lifeguard was present.

Negligent acts charged by the claimant involve the slippery condition of the pool area, and the failure of the respondent to properly supervise the claimant after the swimming class had ended.

With regard to the slippery surface contention, there was no showing of any unusual condition or the violation of any duty to provide mats or other covering at the place where the claimant fell. Applicable to this situation is a statement in 48ALR 2d 166: "Recognizing that the walks around and near swimming pools are usually unavoidably wet and slippery, the Courts have generally exonerated the owners or operators of swimming pools from liability from injuries to patrons resulting from slipping and falling on such walks".

While the owner or operator of a swimming pool is under a duty to provide general supervision of the activities of the pool, he is not an insurer of the safety of his patrons, and a patron must exercise ordinary care for his own safety. "Furthermore, it has been stated or recognized that if the injured or deceased patron knew of the particular danger, or if he would have known of the danger by the exercise of ordinary care, but nevertheless placed himself in peril, or failed to use ordinary care to avoid the danger, and thereby caused, or contributed to, his injury or death, he was guilty of contributory negligence precluding recovery against the owner or operator of the bathing resort or swimming pool." 48ALR 2d 117.

The claimant, at the time of the alleged occurrence, was nineteen years of age and knew how to swim and dive. She was an intelligent college girl, capable of understanding the rules applicable to the use of the pool. She emerged from the pool without injury. She had observed, and therefore knew, that the pool deck was wet and slippery at the conclusion of the swimming class. Despite such knowledge, and in violation of the posted rules, she chose to run on the slippery surface.

Such conduct does not indicate reasonable care for her own safety, and, therefore we find that the claimant was guilty of contributory negligence as a matter of law.

It is doubtful that the evidence in this case was sufficient to show any negligence on the part of the respondent. However, the Court is of opinion that this question need not be decided because of our determination that the claimant was guilty of negligence proximately contributing to her injury.

Accordingly, this claim is disallowed.

Opinion issued July 20, 1970

WILLIAM GARLICK AND SONS, INC.

vs.

STATE AUDITOR

(No. D-224)

Robert W. Dinsmore, Esq., for the Claimant.

George E. Lantz, Assistant Attorney General for the State.

DUCKER, JUDGE:

The claimant, William Garlick and Sons, Inc., seeks to recover the sum of $1690.00, which it paid under protest to Vincent V. Chaney, Special Receiver for Delinquent Corporations, in a suit brought by the latter in the Circuit Court of Kanawha County by the Attorney General of West Virginia to collect corporation license taxes for the fiscal year 1962-1963, the said amount of $1690.00 being for the fiscal years from July 1, 1964, to June 30, 1969, as a prerequisite to a reinstatement of claimant of the right to do business as a foreign corporation in the State of West Virginia. The contention of the claimant is that it did not know of the suit and that its authority to do business in the State was revoked, and that being so revoked and having done no business from 1964 to 1969, it should not now be required to pay the license taxes for said years. Claimant paid the amount of the license tax for 1963-1964 and all costs without protest, but the amount claimed herein was paid by claimant under protest so that

it could again do business in the State. The claimant did not withdraw in 1962-1963 from doing business in West Virginia, but it simply left the State.

The position of the State is that as provided in Chapter 11, Article 1, Section 2A and Article 12, Section 86, and Chapter 31, Article 1, Section 84, of the Code, the claimant is bound by the service by publication, and the requirement of the payment by claimant of all corporate license taxes before it could be reinstated for doing business in the State as a foreign corporation, and that inasmuch as a remedy at law is provided for in the statute for the refunding of any improper assessment, this Court does not have jurisdiction in such a matter.

The provisions of said sections of the Code are clear, explicit and unambiguous. The claimant is charged with notice of what may develop if its taxes are not paid, and it cannot claim lack of any personal notice, summons or other notice of the impending suit other than the publications required. The claimant did not notify the State of its desire to withdraw from doing business as it should have done and which if done would have saved itself from liability for the taxes accruing thereafter.

As the statutes on the subject are most elaborate, comprehensive and unequivocal, we deem it unnecessary to set forth herein the several provisions of the law contained in the statutes referred to. The claimant is presumed to have known, and indeed should have known of its rights, among which are provisions for a refund through court proceedings if the taxes were improper and if application had been timely and properly made. Claimant has failed to avail itself of the remedy available to it. This Court by the provisions of Section 14, of Article 2, Chapter 14 of the Code, is without jurisdiction of any claim 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. Certainly this Court cannot base jurisdiction on a failure of a claimant to enforce rights given to the claimant in courts other than this Court.

We are, therefore, of the opinion to and do disallow the claim.

Claim disallowed.

Opinion issued July 20, 1970

HAROLD R. PRICE

vs.

STATE ROAD COMMISSION

(No. D-243)

No appearance for Claimant.

Robert R. Harpold, Jr., for State Road Commission.

DUCKER, JUDGE:

The claimant, Harold E. Price, who resides at 1322 Temple Street, Hinton, West Virginia, alleges and it is stipulated between the parties as true, that at about 4:00 P. M., August 26, 1969, a large piece of State Road equipment described as a 20 yard Michigan pan, driven by a Road Commission employe, Hubert Crimer, drove upon the sidewalk in front of claimant's house so as to avoid striking parked vehicles in the street, and by so doing the sidewalk which was approximately ten inches above the street level was plowed up for a distance of thirty-six feet. The cost of repairing the sidewalk amounted to $81.24, and the claimant now asks reimbursement for such costs.

As a strictly legal matter, the sidewalk which was damaged is a part of a public street and not owned by the claimant, but as we believe the claimant could have been compelled by the City of Hinton to rebuild or repair the sidewalk, it is only equitable for the State to pay for its negligence and not leave the claimant liable to the City.

Accordingly, we are of the opinion to, and do hereby award the claimant, Harold E. Price, the sum of $81.24.

Award of $81.24.

Opinion issued September 15, 1970

THE CHESAPEAKE & OHIO RAILWAY COMPANY

vs.

STATE ROAD COMMISSION

(No. D-150)

R. Kemp Morton, Esq., for the Claimant.

Robert R. Harpold, Jr., Esq., for the Respondent.

DUCKER, JUDGE:

Claimant, Chesapeake & Ohio Railway Company, alleges damages in the sum of $1297.20 by reason of a derailment of a car containing a load of gravel near Surveyor, West Virginia, on August 5, 1968, the car having been placed on a railroad siding for delivery of the gravel to the State Road Commission and having been derailed and overturned in an attempt on the part of a State Road Commission employee to move the car from the place it had been spotted on the siding to the place on the siding where it was to be unloaded. The amount of damages, which is undisputed, is based on the cost of the repairs to the car. The respondent claims the brakes on the car were faulty and did not function when applied.

The claimant had placed the car, which was coupled with another car on the siding, and the testimony is to the effect that someone, presumably one connected with the State Road Commission, uncoupled the cars with a Road Commission employee on the brake end of the car to manage the removal of the car to the place of unloading. The witness testified that after the car was uncoupled from the car to which it was coupled on the siding, it drifted about twelve feet and hit gravel on the track and stopped at a point about ten feet from the point for unloading; that when the car stopped someone with a pinch bar behind it started it to rolling again, and that when the Road Commission employee tried to apply the brakes, the brakes failed to check or stop the car which proceeded down the track until it derailed and overturned.

The claimant had no witness to the accident but offered evidence to describe the type of brake on the car and its normal functioning, and also as to the nature and cost of the repairs, that in repairing the car no defect was discovered in the brake mechanism.

The respondent's only witness testified that he had worked in and around coal mines for about twenty-three years and had had experience in unloading and "dropping" railroad cars. As to who uncoupled the car and who used the pinch bar, the evidence does not show. The defense depends solely on the evidence of the employee to the effect that when he attempted to apply the brake it didn't hold.

The result of this case depends on whether the claimant was guilty of negligence in leaving a car with faulty brakes for the respondent to move and unload, or whether the respondent was negligent in not discovering such faulty condition of the brakes before or during its attempt to move the car to its place of unloading.

The relationship of the parties is one of bailor and bailee, and it is fundamental in this type of bailment that a bailee must return to the bailor the bailment property in the condition it was in at the time of the bailment, usual wear and tear excepted. Proof of the delivery of possession of the car to the bailee constituted a prima facie case on the part of the bailor, whereupon the obligation to prove the damages to the car was not the fault of the bailee shifted to the bailee. *Prettyman* v. *Hopkins Motor Company,* 139 W. Va. 711, 81 S. E. 2d 78; 8 *Corpus Juris Secundum* 518.

From the evidence it appears that there was nothing done at the time the cars were uncoupled or as the car drifted to a stop on account of gravel on the track, and that the only attempt to apply the brake or see if it was in working order was after a pinch bar was used to start the car moving again. The witness testified that evidently a chemical car to which the gravel car was attached was the only thing holding the gravel car before the latter was uncoupled. If that were the case, then it appears to us that respondent's employee by an examination of the brake at the time of the uncoupling should have known or been able to determine the condition of the

brake on the gravel car. While the respondent's employee may have thought it unnecessary to apply the brake before the car reached the gravel it does not seem reasonable for one handling a loaded car on a down grade to wait to be stopped by gravel on the track. We think there was a greater burden on the respondent to take care of the bailment property than was done in this instance, and that the respondent has not borne the burden required of it according to law.

Accordingly, we are of the opinion that the claimant is entitled to recover its damages, and we hereby award the claimant, Chesapeake & Ohio Railway Company, the sum of $1297.20.

Award of $1297.20.

Opinion issued September 15, 1970

OLAF HUMPHREY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-277)

No appearance for Claimant.

George H. Samuels, Assistant Attorney General, and *Donald L. Hall, Esq.,* for the Respondent.

DUCKER, JUDGE:

Claimant, Olaf Humphrey, alleges that on August 14th, 1969, his ex-wife, Edith Bridges, was, with claimant's permission, driving claimant's 1966 Pontiac Catalina sedan automobile over the 35th Street Kanawha City Bridge in Charleston, West Virginia, the bridge being open for traffic, when a piece of hot welding slag fell from the overhead structure of the bridge where employees of the West Virginia Department of Highways were making repairs, and landed on the windshield of claimant's automobile, causing damages thereto in the amount of $128.24.

The facts in the case are stipulated both as to the cause and the reasonableness of the amount of the damages.

Inasmuch as it is clear that the damages resulted from the negligence of the employees of the Department of Highways, we sustain the claim and award the claimant, Olaf Humphrey, the sum of $128.24.

Award of $1297.20.

Opinion issued September 14, 1970

MONONGAHELA POWER COMPANY

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-252)

No appearance for the claimant.

George H. Samuels, Assistant Attorney General, and *Robert R. Harpold, Jr.,* for the respondent.

JONES, JUDGE:

This case was submitted upon the petition of the claimant, Monongahela Power Company, and a stipulation filed by the respondent, West Virginia Department of Highways (formerly State Road Commission of West Virginia).

The facts giving rise to this claim, according to both the petition and the stipulation, which recites that it was made after a complete investigation, are that on or about February 5, 1969, the respondent, in the course of clearing right of way on Route 24 near Pughtown, caused a tree to fall into power lines of the claimant, that the extent of damages consisted of a broken pole and five spans of secondary electric lines, and that the cost of repairing the damage amounted to $189.67.

The Court finds that the damages claimed resulted from the negligent conduct of the respondent; and, accordingly, the claimant, Monongahela Power Company, is awarded the sum of $189.67.

Opinion issued September 14, 1970

PITNEY-BOWES, INC.

vs.

OFFICE OF THE GOVERNOR

(No. D-255)

Claimant not represented by counsel.

George E. Lantz, Assistant Attorney General, for the respondent.

JONES, JUDGE:

This claim is on an open account for rental and maintenance of postage meter equipment furnished the Office of the Governor during the years 1966, 1967 and 1968. The amount of the claim is $90.05, being the balance of the account which shows sundry credits.

A representative of the claimant testified that the services were performed and were not paid for, and the account was introduced in evidence. Counsel for the respondent stated that no related invoices were found in the Governor's office and that present personnel had no knowledge of the transactions.

A case having been made by the claimant, and no defense being available, the Court will allow the claim, and an award hereby is made to the claimant, Pitney-Bowes, Inc., in the sum of $90.05.

Opinion issued September 14, 1970

M & M CONSTRUCTION COMPANY

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-299)

Rex Burford for the claimant.

George H. Samuels, Assistant Attorney General, and *Anthony G. Halkias* and Donald L. Hall for the respondent.

JONES, JUDGE:

The claimant, M & M Construction Company, and the respondent, West Virginia Department of Highways (formerly State Road Commission of West Virginia) entered into a contract under date of November 15, 1966, for the improvement of Division Street, from 6th Avenue to 10th Avenue, in the City of Parkersburg, Wood County. Under the contract documents a telephone conduit running the entire length of the project within the right of way was to remain in place. On or about May 4, 1967, it was determined that the presence of the telephone conduit would necessitate the redesign and relocation of several crossdrains included in the contract. The revised crossdrain design elevations were completed and the claimant was given notice to proceed with this work on or about July 25, 1967. By letter dated October 5, 1967, the respondent granted the claimant 57 days' extension of time for performance of the contract by reason of the delay. In the same letter the respondent acknowledged that the claimant had been further delayed for 11 days due to indecision over the size of the water line to be installed, which was complicated by the necessity of obtaining agreement of the City of Parkersburg, and this delay was added to the contract time, making a total extension of 68 days.

It appears that there never was any substantial disagreement between the parties as to the extent of the delays or the responsibility of the respondent for damages resulting therefrom. However, the amount of the claim totaling $83,244.96 was disputed.

By written stipulation filed in this Court on June 16, 1970, the parties have agreed that by reason of delay and shutdowns pursuant to orders issued by the respondent, the claimant incurred certain costs and expenses over and above those contemplated and taken into consideration when the claimant bid the contract. It was further stipulated that as a result of said delay and shutdowns, the claimant was damaged in the amount of $27,095.75, itemized as follows:

1. Increased cost and expense resulting from the loss of efficiency of employees	$ 3,299.45
2. Increased cost and expense resulting from utility exploration	583.80
3. Increased cost and expense for rental of paving equipment, bulldozer and crane	11,955.00
4. Increased cost and expense resulting from the maintenance of traffic for a longer period of time than contemplated and taken into account by the contract	8,400.00
5. Cost of maintaining contractor's field office and storage building	1,281.54
6. Extra expense to protect concrete reinforcing, joint assemblies and curing concrete pavement	750.00
7. Overhead and supervision during shutdown and delay periods	895.96
TOTAL	$27,095.75

It was also stipulated and agreed that all other claims set out in the claimant's petition were abandoned.

The Court perceiving that the petition and stipulation present a valid claim against the respondent, West Virginia Department of Highways, which in equity and good conscience should be paid, an award is hereby made to the claimant, M & M Construction Company, in the sum of $27,095.75.

Opinion issued September 23, 1970

MRS. JESSIE P. RANDALL, Claimant,

vs.

DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-151)

Claimant appeared in person.

Donald L. Hall, Esq., for the Respondent.

PETROPLUS, JUDGE:

Claimant sustained damages to the tires and the right side of her automobile as the result of striking a protruding wooden structure, constituting a part and extension of a walk-way on the Goff Plaza Bridge in Clarksburg, West Virginia. The bridge was under the care and supervision of the respondent, The West Virginia Department of Highways (formerly The State Road Commission).

The facts developed at the hearing established that the claimant was driving her automobile over the bridge at night on August 17, 1968, when another car turning onto the bridge slightly crowded her causing her to move to the extreme right of her lane of travel in order to avoid a collision. She struck an obstruction extending eight to ten inches beyond the normal curbing into the traveled lane, which obstruction was an unpainted wooden beam, crude in design and dark with age. The area was unlighted and no sign or warning indicated the presence of a hazard.

Photographs of the structure clearly reveal a hazardous condition which in the opinion of the Court the respondent knew or by the exercise of a casual inspection should have known, would expose a traveling motorist to unreasonable risk. On impact, the right front tire of the vehicle blew out, the right rear tire was damaged and the front alignment of the automobile had to be restored by repairs. The total amount of damage was $139.88.

Upon this evidence, the Court finds that the respondent's negligence in failing to remove the hazard or, at least, to give

notice that the hazard existed by warning light or sign was the proximate cause of the damage, and there being no evidence of contributory negligence on the part of the claimant, an award is made to her in the amount of $139.88, the claim being one which in the opinion of the Court, the State in equity and in good conscience should pay.

Claim allowed in the amount of $139.88.

Opinion issued September 23, 1970

DALE E. OLIVE, Claimant,

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-290)

Claimant appeared in person.

George H. Samuels, Assistant Attorney General, and *Donald L. Hall,* Esq. for Respondent.

PETROPLUS, JUDGE:

This case was presented on a stipulation of facts agreed to by both parties, including the amount of damages.

The Claimant's dwelling was located on a hillside adjacent to and below the level of West Virginia Route 14, South Hills area, in Charleston, West Virginia. On December 30, 1969, a landslide occurred above and behind Claimant's residence at 527 Ferry Street, in said City of Charleston.

From the investigation of the Respondent, it was determined that a drain and drainage line on the side of the above mentioned road became clogged and obstructed with debris and refuse. As the result of said clogging, surface water was flushed from the drainage line and overflowed across Route 14, draining through a large crack in the road surface and saturating the earth beneath the road surface. The earth losing its cohesiveness because of the water saturation, gave way under the paved portion of the road precipitating a landslide down

the hill, causing earth and debris to be thrown into the rear and against the Claimant's residence. The landslide damaged furniture and other personal property in the residence in the amount of $1071.27.

The crack in the road surface through which the water flowed had previously been patched by employees of the West Virginia Department of Highways, who apparently had done some work in this area and should have observed the condition of the drain as well as the roadway.

From the stipulated facts it appears that the blocked drain diverted surface water into a road defect that should have been observed or reasonably anticipated by the employees of the State at the time they performed their repair work on the road. The failure of the State to keep the drain open for proper drainage of the road constituted actionable negligence and the slide which occurred was a foreseeable event that due care might have avoided. The negligence of the Respondent was the proximate cause of the earth slide, which resulted in damage to the residence and personal property of the Claimant. Photographs taken at time of the slide indicate a substantial flow of mud and debris down the hillside into and against the rear wall of the Claimant's residence.

Under the circumstances, it is the opinion of the Court that the State has a moral obligation to compensate the Claimant for damages sustained, and that the Claimant could have successfully prosecuted a civil action for damages in the regular Courts of the State.

The damages having been agreed upon after a complete investigation by the Respondent, an award is accordingly made to the Claimant in the amount of $1071.27.

Claim allowed in the amount of $1071.27.

Opinion issued September 23, 1970

HERMAN D. AFFOLTER, Claimant,

vs.

STATE ROAD COMMISSION, Respondent.

(No. D-221)

Claimant appeared in person.

George H. Samuels, Assistant Attorney General, and *Donald L. Hall,* Esq. for Respondent.

PETROPLUS, JUDGE:

The Claimant in this case is Delbert Gene Affolter, who was substituted for the original Claimant, Herman D. Affolter, because title to the vehicle in question was registered in the name of Delbert Gene Affolter.

This claim which came on for hearing against the West Virginia Department of Highways (formerly the State Road Commission) arises from a windshield broken by a flying object, believed to have been a rock or gravel, coming from a State Road Commission truck which passed the Claimant's motor vehicle traveling in an opposite direction, while Claimant was returning to Charleston from Clendenin. A line of traffic was coming up the hill and the Claimant was going down the hill, also in a line of traffic. The driver of Claimant's automobile, Herman D. Affolter, who was unable to stop his motor vehicle because of the traffic congestion, could not identify the truck from which the rock or gravel came as a vehicle of the State Road Commission. He did know, however, that it was a yellow truck because he saw it approaching. His 13 year old granddaughter told him it was a State Road truck. The driver also was unable to describe the type of truck or definitely state that the missile came from the truck. He did see two men or boys in back of the yellow truck, who he stated might have thrown the rock.

The granddaughter who identified the truck as a State Road truck did not testify in the case.

From the above facts developed at the hearing which were vague and uncertain, this Court cannot determine responsibility for the accident. Although hearsay evidence is admissible under the Statute creating the Court of Claims, the Court is constrained to give such evidence only the weight that it deserves. Statements of a 13 year old girl to her grandfather and related by him on the stand, do not constitute satisfactory proof, particularly when the State does not have the opportunity to cross-examine. The claim is based on speculative assumptions as all yellow trucks on the highway are not State Road Commission trucks.

On the present state of the record, this claim will be disallowed.

Claim disallowed.

Opinion issued September 23, 1970

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Claimant,

vs.

THE STATE ROAD COMMISSION OF WEST VIRGINIA (NOW DEPARTMENT OF HIGHWAYS) AND HOWARD R. WHITE, Respondents.

(No. D-251)

Robert J. Louderback, Esq., for the Claimant.

Larry D. Taylor, Assistant Attorney General, and *Donald L. Hall,* Esq., for the Respondents.

PETROPLUS, JUDGE:

The Claimant, State Farm Mutual Automobile Insurance Company, after paying a collision loss in the amount of $740.00 to Roy Bourne and George Keczan, doing business as General Hydraulic Service, under coverage provided in its policy of insurance issued to General Hydraulic Service, said loss representing damages sustained by a pick-up truck in a collision with a vehicle of the State Road Commission of West Virginia, now seeks reimbursement from the State Road Commission (West Virginia Department of Highways) as subrogee.

All material facts were agreed upon by stipulation between counsel for the respective parties, and briefly are as follows:

1. The pick-up truck, owned by a partnership composed of Roy Bourne and George Keczan, doing business as General Hydraulic Service, was insured against collision damage by the State Farm Mutual Automobile Insurance Company, Claimant herein.

2. The truck was damaged by a collision caused by the negligent operation of a road grader owned by the State Road Commission and driven by one Howard R. White, as agent and employee of the State Road Commission.

3. The accident occurred on November 14, 1967, on West Virginia Route 7, north of Welch, McDowell County, West Virginia, and Howard R. White, who was acting within the scope of his employment by the State, admitted his faulty driving to the investigating officer. Liability is not disputed.

4. The Respondent, State Road Commission, at the time of the accident carried public liability insurance with the Buckeye Union Casualty Company on all of its vehicles, notwithstanding its constitutional immunity from liability or suit in the regular Courts of our State.

5. Roy Bourne and George Keczan had an adequate legal remedy in the Courts of record of our State for their property loss caused by the State's negligence, and likewise the Claimant had a remedy as subrogee in the event it paid for the loss under its coverage.

6. George Keczan, who was driving the vehicle involved in the accident with the State's road grader, received serious personal injuries in the accident and settled his claim in the amount of $3000.00, accepting said amount from the Buckeye Union Casualty Company in full settlement of his personal injuries. At the time of settlement, he delivered a Release to the Buckeye Union Casualty Company which released any and all claims that he had against the Respondents. He also received a check in the amount of $100.00 for property damage to the truck owned by the partnership (said amount representing the deductible portion of the collision loss which was not covered by the Claimant's insurance policy), the total property loss being in the amount of $840.00.

7. The check in the amount of $100.00, payable to the order of the partnership known as General Hydraulic Service is dated September 22, 1969, and carries the notation on the face thereof "In full and final payment of all claims arising from the accident of November 14, 1967".

8. Counsel were unable to inform the Court of the contents of the Release executed by George Keczan, and particularly whether the Release also covered property damages. It was agreed that a Release of some kind was signed by Mr. Keczan and exchanged for the checks at the time of settlement.

9. For some unexplained reason the Buckeye Union Casualty Company procrastinated and finally refused to reimburse the Claimant subrogee for the property damage, although it admitted liability for the accident and settled the personal injury claim in whole and the property damage claim in part by payments under the coverage of its insurance policy. Correspondence between the two insurance companies indicates that settlement of the property damage claim was being considered and delayed because negotiations involving the personal injury claim had not been completed. The ultimate refusal to pay for property damage was based on the lapse of the two year Statute of Limitations.

10. Claimant filed its Notice of Claim in the amount of $840.00 in this Court on November 12, 1969, two days before the Statute of Limitations was to expire. No civil action was instituted by the Claimant against Buckeye or the Respondents for the recovery of the subrogated amount of property damage in the regular Courts of the State.

On this stipulation of agreed facts this Court is petitioned to reimburse the Claimant on the portion of the collision loss it paid under its insurance policy with Bourne and Keczan, who are not parties in this Court. The Court of Claims was established to recommend to the Legislature payment of claims which the State in equity and in good conscience should pay, notwithstanding the sovereign immunity of the State, and provided that claims would be tenable in a Court of record but for the defense of constitutional immunity.

When the State carries public liability insurance to protect its citizens and others against the negligence or misconduct of

its agents and employees in the operation of State owned vehicles, the State in effect provides a means of compensation without resort to the legislative grace which gave rise to the Court of Claims. It is also an effectual waiver of the defense of constitutional immunity, otherwise the insurance coverage would be meaningless and unprotective of the rights of those who may be injured by the irresponsible acts of the State's agents and employees.

The Claimant had a full and complete remedy in a Court of record, and by neglecting to file a civil action against the insured driver of the State operated vehicle in a case where liability was not disputed, it now seeks after such neglect full reimbursement on its subrogated claim from the taxpayers of the State of West Virginia. Had it filed a civil action, the Claimant would have received full restitution. The Claimant not only knew the driver was insured but actually made efforts by correspondence to collect its claim from the State's insurer. Buckeye Union Casualty Company delayed and evaded payment of the full property claim until the tolling of the Statute of Limitations, although it did acknowledge and paid a part of the claim by issuing a check for the sum of $100.00. Buckeye's conduct in this matter was not only reprehensible but appears to have been designed to foist the payment of an admitted liability upon the taxpayers of West Virginia, although it had received a premium from the State for the insurance that it had issued.

The Claimant, as an innocent party, stands to lose and the wrong-doer has been unjustly enriched; this may give rise to some form of equitable relief for the Claimant elsewhere. This Court is of the opinion that to acknowledge and accept a subrogation claim under the circumstances here presented would not satisfy the mandate to this Court that only claims be paid from public revenues which constitute a moral obligation of the State.

For the foregoing reasons, the Court is of the opinion to and does hereby disallow the subrogation claim.

Claim disallowed.

Opinion issued October 14, 1970

HELEN I. WOTKIEWICZ

vs.

WEST VIRGINIA BOARD OF REGENTS

(No. D-294)

Robert B. Stone for the Claimant.

George E. Lantz, Assistant Attorney General for the Respondent.

DUCKER, JUDGE:

The claimant, Helen I. Wotkiewicz, a former student at West Virginia University, alleges that for the second semester 1967-1968, the first semester 1968-1969, second semester 1968-1969 and the summer session 1969, she was required to pay non-resident tuition fees while she was a full-time student at the University, which fees exceeded the resident fees in the total sum of $1258.00, and upon her contention that she was legally a resident of West Virginia during the period she was so required to pay said non-resident fees, she now claims she is entitled to be refunded the amount of such excess payment. The issue is whether the claimant was legally a resident of West Virginia who was obligated to pay only resident student tuition and fees.

The payment of the fees on a non-residency basis was made under protest and appeals were presented to the Residency Committee of the University and denied. However, claimant was awarded residency status for the first semester of 1969-1970 and excess tuition and fees for that semester were refunded. It would seem to appear that one reason the Residency Committee may have refused to order refund for previous semesters was because of fiscal year budgetary restrictions.

The Regulations of the University contain in Section 7-A-1 the following provision:

> "No person shall be considered eligible to register in the University as a resident student who has not been domiciled in the State of West Virginia for at least twelve consecutive months next preceding college registration.

> No non-resident student may establish domicile in this State, entitling him to reductions or exemptions of tuition, merely by his attendance as a full-time student at any institution of learning in the State. * * *"

The evidence discloses the following undisputed facts.

Claimant while a resident of Pittsburgh, Pennsylvania, was secretary to Dr. Ernest Vargas, director of a research project at the University of Pittsburgh, from June 1963 until August 1966 when the research project ended and claimant's employment then ceased. Dr. Vargas then accepted a position as a professor at West Virginia University, and as he and his wife and claimant had become close friends, he suggested to claimant that she seek employment at Morgantown where the Vargases were moving. Claimant thereupon applied for a position and was employed as a secretary to Dr. Bernard Scher, Director of the Division of Social Workers in Morgantown, on a full-time basis beginning in August 1966. Having taken a few courses of a general academic nature at the University of Pittsburgh, claimant was encouraged by her employer, Dr. Scher, to use her otherwise noon hour recess time to take part-time courses at West Virginia University. In the fall of 1967, Dr. Scher became seriously ill, after which he took a position at Florida State University, which meant to claimant a change in the personnel of her employer. Claimant concluded she was tired of being a secretary and decided then that it was a good time for her as she said "move out of the secretary slot and start wrapping up my education—and to begin taking classes on a full-time basis". She further said that as she was becoming interested in social work and social studies, she enrolled as a full-time student in January 1968, when she was over 22 years of age.

Other pertinent facts are that the claimant after beginning her employment in August 1966 as a secretary in Morgantown lived there the year round continuously thereafter, returning to see her parents in Pittsburgh only on occasional visits. For a month she lived with the Vargases until she found an apartment, and thereafter shared an apartment with another young girl who was teaching and a graduate student at the University. She got a West Virginia driver's license in the fall of 1966, and she filed resident returns and paid West Virginia income

taxes for the years 1967 and 1968, showing her residence to be Morgantown. Although the claimant testified that she had no future plans as to where she expected to live in the future or where she expected to be employed, there is nothing in her testimony to indicate any domicile or residence remaining in Pittsburgh. On the contrary, her residency in Pennsylvania appears to have been completely terminated when she moved to Morgantown and became Dr. Scher's secretary.

From the above facts it is necessary to see if the Residency Regulation heretofore quoted is sufficiently applicable to this case as to justify the non-residency tuition and fees charged against claimant for the semesters in question.

The regulation prohibits anyone who has not been a resident of the State for at least a year from being eligible for residency status and that such one year residency status cannot be obtained merely by being a full-time student. The facts clearly indicate that claimant became a bona fide resident of Morgantown when she accepted and entered upon full-time employment as a secretary at the University, taking only part-time courses in lieu of the time she would have had for her noon hour recess, and that she did not become a full-time student until she registered in December 1967 as such, a year and five months after she moved to Morgantown.

The provision in the Regulations is a necessary and valid one, and should be enforced where the facts are in accordance with its specified restrictions, but not where they are not within its terms, as in the case before us.

In view of all the facts, we are of the opinion that claimant having moved to Morgantown and engaged in full-time employment there with no purpose evident except to make her home there indefinitely, constituted an establishment by her of a legal domicile there and that her residency meets the requirements of the regulations of the Residency Committee, and that she should have been charged only resident tuitions and fees.

Accordingly, we are of the opinion that the claimant is entitled to the refund sought, and we hereby award her the sum of $1258.00.

Award of $1258.00.

Opinion issued November 16, 1970

PETERS FUEL CORPORATION and
FRANKLIN W. PETERS & ASSOCIATES

vs.

STATE TAX COMMISSIONER

(No. D-226)

Louis R. Tabit for the Claimant.

Larry D. Taylor, Assistant Attorney General for the Respondent.

DUCKER, JUDGE:

The Claimant, Peters Fuel Corporation, a corporation with principal office and headquarters in Oakland, Maryland, licensed to do business in West Virginia, sold gasoline and diesel fuel to Franklin W. Peters and Associates, an individual proprietorship, the latter being by amendment also made a claimant herein, for use by the latter in mine reclamation work at Elkins, West Virginia. Gasoline taxes at seven cents a gallon were assessed against claimants for the period, July 20, 1966 to December 29, 1966, amounting to $7,124.60, and for the period, January 1, 1967 to February 28, 1967, amounting to $1,575.07, making a total assessment of $8,699.67, from which total amount the sum of $403.15 was deducted as not properly chargeable. Claimants, who paid such taxes under protest, allege that they have been unlawfully and unjustly required to pay $8,296.52 and here ask that said amount be refunded to them because the gasoline and diesel fuel was used in work done by Franklin W. Peters and Associates under the latter's contract with the Federal Government, and, therefore, such sales were exempt from the payment of the gasoline tax.

One of the two questions here involved is whether the claimants complied with the legal requirements pertaining to the returns, payment and refunds of such taxes paid. The amount of gallonage involved is not in question. The claimants base their case principally on the claim that (1) the taxes paid are not legal and are refundable under Code Chapter 11, Article 1, Section 2A, (2) that Code Chapter 11, Article 14 (the Gasoline Tax statute) does not authorize any "assessment"

to be made by the Tax Commissioner, (3) that the latter section of the Code does not provide for a hearing or an appeal therefrom, and that the ninety day provision for applying for a refund is unreasonable and unconstitutional, and (4) that the State has been unjustly enriched and in equity and good conscience should refund the taxes so collected by it.

A recital of the facts in their chronological order is necessary to see what transpired in regard to the matter under consideration.

As has been shown, the taxes for which refunds are now claimed were for a period of a little over the last five months in 1966 and for the first two months in 1967. Taxes on these sales were not reported by claimants, who said they did not do so because they were orally advised that these sales were exempt from the tax. An audit by the Tax Commissioner was made for the said first period on February 15, 1967. Claimants petitioned the Tax Commissioner on March 1, 1967 for a reassessment for the said first period and on May 24, 1967 the Commissioner after a hearing held that the claimants were liable for the taxes, exclusive of penalties, of $7,124.60 for said period. The taxes were on August 16, 1967 paid under protest and no appeal was taken. On October 8, 1967 the Commissioner made a further and additional audit for the said second period resulting in the issuance of a statement of liability on the part of the claimants for $1,525.07, which taxes were paid on August 20, 1968, apparently under protest, with no appeal in either case within ninety days after payment. Claimants filed with the Tax Commissioner on January 4, 1969, their petition for a refund. On September 4, 1969 the Tax Commissioner made an Administrative Decision as provided in Code 11-14-20 denying petitioners' claim for a refund and so notified the claimants, which notice was received by the claimants on September 10, 1969, and within the thirty day period specified in the statute, namely October 7, 1969, claimants wrote the Tax Commissioner that claimants were not satisfied with the Commissioner's decision and requested the Commissioner to promptly institute a declaratory judgment suit to ascertain whether the tax has been lawfully or unlawfully collected. No further proceedings were had until the institution of this suit in this Court.

While it appears to this Court that under the provisions of Code 11-1-2A the claimants may have had and may still have the remedy of mandamus in the courts of the state to determine their rights under said code provisions, the determination of the right to such remedy being not within this Court's jurisdiction, we consider it our duty to first consider and adjudicate this claim as to the question of the applicability of Code 11-14-20, the gasoline statute, to the facts in this case.

The provisions of Code 11-14-20 provide that the Tax Commissioner shall cause a refund to be made only when an application for refund is filed with the Tax Commissioner, upon forms prepared and furnished by the Tax Commissioner, within ninety days from the date of purchase or delivery of the gasoline, and that any claim for refund not filed within ninety days from the date of purchase or delivery of the gasoline shall not be construed to be or constitute a moral obligation of the State of West Virginia for payment. These provisions give a claimant who has paid the taxes the right to apply for a refund within ninety days of the sale or delivery of the gasoline. This was not done as payment was made only after hearings were had upon the claimants' request for reassessment.

Claimants have evidently considered only the thirty day provision for appeal under Code 11-1A-2 as applicable to this claim, especially since they claim there was no basis for assessment, hearing, or appeal provided in the gasoline tax statute. The provisions of Code 11-14-20 are clear, unambiguous and reasonable, and have a very apparently definite purpose, and we are unable to interpret or construe them as authorizing anything other than strict compliance with them. Nor, in the absence of judicial or legislative pronouncement to such effect, do we consider it proper for this Court to determine the constitutionality of this legislative enactment. Here the legislature has prescribed a fair method for taxpayers to obtain refunds of taxes on sales which were exempt, but it has not allowed taxpayers to determine for themselves the matter of exemption. It first requires report of the sales and then gives ninety days for the filing of an application for refund. Here the taxpayers, relying on what they claim was

a verbal authorization by an employee of the State, did not pay the taxes. Such alleged authorization was not confirmed either in writing or by the testimony of the State employee, and, even if it were, the State cannot in tax matters be bound by unauthorized acts of its employees contrary to the statutes. There is no authority for such acts which could be the basis of loss of tax revenue and possible fraud, although in this case everything was done honestly and in good faith.

The legislature has here in advance declared a failure to follow the prescribed procedure as not to constitute a moral obligation on the State for payment. While this Court determines cases according to law and our findings are then considered by the legislature as moral obligations, our jurisdiction is thus limited by the Gasoline Act specifically denying such a claim a moral obligation status.

It is, indeed, unfortunate this situation deprived the claimants from recovering the amount of these taxes from the Federal Government as an expense in their performing their contractual work, but this is a consequence of the claimants' failure to comply with the requirements of the tax laws for which the State cannot be held responsible.

As to the question of the right of the Tax Commissioner to make assessments and for the taxpayer to have no right of appeal, we see no reason for specific provisions for assessment, as it is the inherent duty of the Tax Commissioner to audit, when requested, the tax returns and advise the taxpayers of any deficiencies or overpayments, otherwise he could hardly function in his duty to determine and collect taxes. Furthermore, we are of the opinion that the legislature has prescribed a method and a remedy which we consider as reasonable, and which having been so prescribed, we cannot disregard.

For these reasons we are of the opinion that the claimants have failed to show grounds for an allowance of their claim, and we, therefore, disallow the same.

As heretofore indicated, the remedy in this case may have been and may still be solely under the general refund statute (Code 11-1-2A). That section of the statute provides that:

> "any taxpayer claiming to be aggrieved through being required to pay any tax into the treasurer of this State,

> may, within three years from the date of such payment, and not after, file with the official or department through which the tax was paid, a petition in writing to have refunded to him any such tax, or any part thereof, the payment whereof is claimed by him to have been required unlawfully."

The procedure is specified for such determination. If, upon such determination, the Tax Commissioner shall determine the taxes collected to be lawful, he shall so notify the taxpayer who has thirty days to advise the Commissioner that he is not satisfied with the ruling and that he requests the Commissioner to institute a declaratory judgment suit to determine the validity of the question. If such notice is given to the Commissioner, the statute provides that the Commissioner *"shall* promptly institute against said taxpayer, in a court of competent jurisdiction, a declaratory judgment proceeding to determine the question". The claimants complied with this statute within the thirty day period provided, but, so far as this Court is advised, no declaratory judgment proceedings were instituted and nothing done to compel the Commissioner to so act. While under the statute the Tax Commissioner may, on his own initiative file suit, it was mandatory upon him to file a declaratory judgment suit when requested by the taxpayer to do so. It was not a discretionary matter. There, in the opinion of this Court, the claimants had and may still have the right to require the Commissioner to do his duty, namely institute the declaratory judgment suit.

The Act creating the Court of Claims, Code 14-2-14, provides as follows:

> "The jurisdiction of the Court shall not extend to any claim: . . . 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."

This Court has specifically held that where a writ of mandamus is obtainable, there is a proceeding which can be maintained against the State in the Courts of the State, such as compelling the State Road Commission to institute condemnation proceedings to determine damages to real estate and compensate property owners. *Johnson* v. *State Road Commission,* 7 Court of Claims Reports p. 186. We are of the opinion that inasmuch as it appears that the claimants may have had

and may still have the right under the general refund statute, Code 14-2-14, to require the Tax Commissioner to institute a declaratory judgment suit, this Court should disallow their claim herein for such additional reason.

Accordingly, the Claimants' petition herein is dismissed.

No award.

Opinion issued November 16, 1970

JOHN STANFORD BRADLEY, Claimant

vs.

DEPARTMENT OF HIGHWAYS, Respondent

(No. D-296)

CARL P. BOOTHE, Claimant

vs.

DEPARTMENT OF HIGHWAYS, Respondent

(No. D-297)

Claimants appeared in person and by *W. H. Ballard,* Esq.

Donald L. Hall, Esq., for Respondent.

PETROPLUS, JUDGE:

These cases involved the same set of facts, and were consolidated for the purpose of the hearing. The claims were filed for the loss of certain cattle by poisoning and for injuries to other cattle, attributing the sickness and death of the animals to eating wilted wild cherry leaves or shrubs which had been cut on the State's right of way by employees of the West Virginia Department of Highways, and allegedly permitted to lie on the right of way of the road where the leaves or shrubs could be reached and eaten by the livestock pastured on farms adjoining the road.

The damages are based on the alleged negligence of the employees of the State Road Commission either in the failure to pick up the debris from the right of way or leaving the

fragments in such a position where they would be accessible to cattle.

The evidence introduced at the hearing established that wild cherry leaves or shrubs are very toxic and high in prussic acid, especially for the first twenty-four hours after they have been cut, and will cause the death of field cattle if eaten.

Although, admittedly, prussic acid in vegetation is highly poisonous to cattle, the standard of care required of employees of the State Road Commission is that required of a person of ordinary prudence under the same circumstances.

It must be shown that the employees either have knowledge of the hazard, or as reasonably prudent persons, should have had such knowledge. The contention of the Claimants is that the Respondent failed to exercise ordinary care to prevent injury to their cattle, and that they knew or should have known that the cutting of wilted cherry trees and shrubs was a dangerous act and that the leaves being edible would cause the death or sickness of livestock. Claimants contend that the Respondent did not exercise ordinary care to avoid the consequences of this negligence and should have anticipated that the animals would consume the dangerous substance.

A requisite of proximate cause is an act or omission which a person of ordinary prudence could reasonably foresee might naturally produce an injury. The criterion of care is that of a reasonably prudent man, and not a reasonably prudent farmer. We cannot apply a higher standard of care to the Respondent's act than the circumstances warranted. Since it is not common knowledge that wild cherry leaves are toxic to cattle, particularly when in a wilted condition, we cannot hold the Respondent's employees should have anticipated the injury to the animals; leaving the vegetation on the right of way of the road after it was cut down does not constitute negligence, and even though we assume that it did, an ordinarily prudent person could not have anticipated that the omission would expose cattle in an adjoining field to danger.

For the foregoing reasons, it is the opinion of the Court that no negligence has been proved in this case and the claims are accordingly denied.

Claims disallowed.

Opinion issued November 16, 1979

EDWARD C. FREEMAN, Claimant

vs.

WEST VIRGINIA DEPARTMENT OF NATURAL RESOURCES, Respondent

(No. D-298)

Billy E. Burkett, Esq. for the Claimant.

George E. Lantz, Assistant Attorney General for the Respondent.

PETROPLUS, JUDGE:

The Claimant, Edward C. Freeman, Esq., a practicing attorney at law of Princeton, West Virginia, was employed by George E. Wise, Jr., Land Agent for the Department of Natural Resources, Respondent, to perform certain legal services for the State of West Virginia, namely, to examine title to and prepare abstracts for certain tracts of land adjacent to Pinnacle Rock State Park in Mercer County. The services were performed in a competent and satisfactory manner, and the abstracts and certificates of title were forwarded to the Respondent with an itemized invoice in the amount of $500.00, charging twenty hours at a rate of $25.00 per hour. Neither the quality of the services nor the reasonableness of the charge is in issue.

The Respondent admitted all of the allegations of the petition, but denied liability on the ground that the contract of employment was illegal and void under Chapter 5, Article 3, Section 1, of the West Virginia Code, which provides as follows:

> "The attorney general shall give his written opinion and advice upon questions of law, and shall prosecute and defend suits, actions, and other legal proceedings, and generally render and perform all other legal services, whenever required to do so, in writing, by the governor, the secretary of state, the auditor, the State superintendent of free schools, the treasurer, the commissioner of agriculture, the board of public works, the tax commissioner, the State archivist and historian, the commissioner of banking, the adjutant general, the chief of the department of mines,

the superintendent of public safety, the State commissioner of public institutions, the State road commission, the workmen's compensation commissioner, the public service commission, *or any other State officer, board or commission,* or the head of any State educational, correctional, penal or eleemosynary institution; and *it shall be unlawful from and after the time this section becomes effective* [*August 17, 1932*] *for any of the public officers, commissions, or other persons above mentioned to expend any public funds of the State of West Virginia, for the purpose of paying any person, firm, or corporation, for the performance of any legal services*: Provided, however, that nothing contained in this section shall impair or affect any existing valid contracts of employment for the performance of legal services heretofore made.

"It shall also be the duty of the attorney general to render to the president of the senate and/or the speaker of the house of delegates, a written opinion or advice, upon any questions submitted to him by them or either of them whenever he shall be requested in writing so to do."

(underscoring ours)

Citing said statute as a basis for its defense, Respondent takes the position it has no moral obligation to the Claimant and that this is not the type of claim that the State of West Virginia in good conscience should pay.

At the hearing Mr. Wise, the Land Agent, testified that his duties encompassed handling land transactions for the Department of Natural Resources and dealing generally with attorneys, providing information and assistance to them, and otherwise working with them in matters involving real estate. It was his practice to employ attorneys approved by the Attorney General's office. At the time Mr. Freeman was employed, several other attorneys were also employed throughout the State on different projects, all of the names being on an approved list which originally came from the Governor's office. There was no question in his mind that he had authority to employ Mr. Freeman as his name was on the approved list. Although the practice of the Department was to communicate with the Attorney General's office and request that private counsel be appointed to perform legal services for the State, as special assistants to the Attorney General, this procedure was not followed in the case of Mr. Freeman. The attorney origi-

nally designated by the Attorney General to do the work was removed from a revised list prepared in the office of the incoming Governor, Arch A. Moore, Jr., and Mr. Freeman was substituted for the attorney appointed by the Attorney General. The substitution of counsel was done without the approval or designation of the Attorney General's office. On cross examination Mr. Wise admitted that prior to the administration of Governor Moore, that he never employed private counsel to perform work for the State without the approval of the Attorney General. The State Auditor properly sought authorization from the Attorney General in October, 1969, to pay the invoice, and refused to do so when the approval was not forthcoming. Hence the claim came in this Court for a hearing and disposition.

The employment of private counsel for a State agency without the approval of the Attorney General is clearly a violation of the above cited statute, which undoubtedly was intended to curb the indiscriminate employment of attorneys to render legal services to the State when it is the function and duty of the Attorney General by law to perform all legal services. This prohibition applies to all State agencies, including the Governor's office. If because of insufficient personnel, or other reasons, the office of the Attorney General cannot serve the State's legal requirements, the device of appointing and designating special assistants is used by the Attorney General. That is to be the prerogative of his office or position, and all others mentioned in the statute, including the Governor, are precluded from expending public funds for the purpose of making payment for the performance of legal services rendered to the State.

The Claimant, being an attorney, is certainly chargeable with the knowledge of the statutory law of our State, and he probably more than a layman would be cognizant of the *caveats* attendant in dealing with public officers and government agencies, and the limitations upon their authority. Interdepartmental struggles or lack of communication between State officers is not the concern of this Court, but unless there is a legal basis for a claim this Court is without power to make an award, regardless of how sympathetic we may be to the cause of the claimant.

The contract of employment being in direct violation of a statute, we are constrained, for the reasons stated in this opinion to deny the claim.

Claim disallowed.

Opinion issued November 19, 1970

TRAVELERS INSURANCE CO., Claimant

vs.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, Respondent.

(No. D-274)

Charles Hurt, Esq., appeared for the Claimant.

Donald L. Hall, Esq., for the Respondent.

PETROPLUS, JUDGE:

The Court upon a prior hearing disallowed the claim of Matz Department Store, Inc., in the amount of $195.70, for alleged damage to the automobile of the Claimant resulting from paint being sprayed thereon while crossing the Kanawha City Bridge in Kanawha County, West Virginia. At the time the damage occurred, the State Road Commission construction crew was engaged in the painting of the Bridge and some days after the crossing, the Claimant's attention was called to certain unexplained paint spots on the automobile owned by the Claimant and driven by Marie Matz. The cost of repainting the automobile was stipulated in the amount of $195.70, although the Claimant did not incur this expense by having the automobile repainted.

The claim was denied on the ground that the Claimant had a responsibility and a duty to mitigate damages by removing the wet paint within a reasonable time after the damage occurred and that no effort was made to mitigate damages and correct the condition before the paint hardened by drying.

On Petition of the Claimant, the Court granted a rehearing. The automobile was produced at the rehearing for inspection

of the Court, and after taking a view the Court is of the opinion that the damage, if any, was so slight that it could not be observed by an ordinary inspection of the surface of the automobile. This may also explain why the Claimant did not discover the damage within a reasonable time after she crossed the bridge. The inspection of the automobile did not disclose any obvious damage from the paint spray, although on very close inspection certain very minute shaded spots barely discernible to the naked eye could be detected on the hood and top of the car.

Inasmuch as the Claimant incurred no expense in having the automobile repainted and the damage being so trivial, it is our opinion that the maxim of "de minimis non curat lex" should apply. The law does not take notice of small or trifling damage and our former ruling in this case is affirmed.

Claim disallowed on rehearing.

Opinion issued November 19, 1970

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, Assignee to
the rights of SARAH G. ROMANS,
its assured, Claimant

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS,
a corporation, Respondent.

(No. D-285)

No appearance for the Claimant.

Donald L. Hall, Esq. for the Respondent.

PETROPLUS, JUDGE:

This case was submitted upon Petition, Answer and Stipulation between the parties, setting forth the following undisputed facts:

On April 19, 1968, while the Respondent was operating a 1960 Ford Dump Truck on Riverside Drive, Route 52, in Welch, West Virginia, the outside section of the rim of the left rear

wheel of the Respondent's vehicle broke off and struck the side of the automobile of Sarah G. Romans while the vehicles were passing each other, thereby causing damage to the Romans' automobile in the agreed amount of $168.83.

The Answer of the Respondent denies any negligence but does admit that the Claimant's automobile was damaged as heretofore stated. The Answer further asserts a defense that this claim should not be allowed in equity and in good conscience because the real party in interest has been reimbursed by the Claimant for any and all damages incurred, and that the subrogee who has filed the claim should not be allowed to recover against the State as a matter of public policy.

It is the opinion of the Court that in the absence of any evidence that the flying object which struck the Claimant's car was an unavoidable accident or a latent defect in the construction of the wheel that would not be apparent by an ordinary inspection, the Court must infer that the State owned vehicle had a loose or broken rim which could have been discovered by proper inspection and maintenance of the vehicle. A failure to maintain and keep the vehicle in repair constitutes negligence and the resulting damage from broken parts is a foreseeable consequence. From the Stipulation, we infer negligence of the West Virginia Department of Highways in the maintenance of its truck, and the damage to the Claimant was the proximate and foreseeable result of said negligence.

We cannot agree with the contention of the State that a subrogation claim has no standing in this Court. The subrogee under the Insurance Policy has the same right of recovery as the insured and is entitled to the same relief, in the absence of some provision in the Statute conferring jurisdiction upon the Court of Claims which would deny the subrogee the remedy afforded to the insured. It is accordingly the opinion of the Court that this is a claim which in equity and in good conscience should be paid even though the real party in interest has been reimbursed.

Having found that the Respondent in the exercise of reasonable care could have avoided the damage to the Claimant, we are of the opinion to allow the claim.

Claim allowed in the amount of $168.83.

Opinion issued November 19, 1970

FRANK FEDORKA, Claimant

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-289)

No appearance for the Claimant.

Donald L. Hall, Esq., for the Respondent.

PETROPLUS, JUDGE:

This case was submitted on a Stipulation setting forth the following facts:

That on or about July 9, 1970, members of a crew of Neighborhood Youth Corps Workers, employed under the supervision and control of the West Virginia Department of Highways, while engaged in the clearing of brush from the north side of State Route 88, approximately one-half mile north of Clinton, Ohio County, West Virginia, did cut down, chop, hack or otherwise destroy a 3 inch caliper sugar maple and forsythia bush belonging to and situate upon the property owned by the Claimant and providing a part of the landscaping for the entrance into a housing development. The Claimant was free from any fault or negligence and it is agreed that the cost of replacing the sugar maple and the forsythia is in the amount of $76.00.

It appearing to the Court that the conduct of the workers under the supervision and control of the West Virginia Department of Highways constituted a trespass on private property, resulting in damage to said property and that the State is liable for the damage caused by its employees acting within the scope of their employment, an award is accordingly made to the Claimant in the amount of $76.00.

Claim allowed in the amount of $76.00.

Opinion issued November 30, 1970

SOUTHERN HARDWARE COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-206)

Leslie D. Price for the claimant.

George E. Lantz, Assistant Attorney General, and *Robert R. Harpold, Jr.,* for the respondent.

JONES, JUDGE:

The claim of Southern Hardware Company in this case against the respondent West Virginia Department of Highways (formerly State Road Commission) is alleged to be sustained by certain facts stipulated by the parties substantially as follows:

In 1967 the respondent constructed a parking lot on land which it owned on the south side of Smith Street in the City of Charleston, adjoining property on the east, the front portion of which was owned by William Pugh and Pugh Furniture Company and the rear or southerly portion of which was owned by Dickinson Company. The claimant owned the land adjoining the Pugh and Dickinson Company lots on the east. For many years prior to the matters complained of in this case surface water draining from a 48-inch concrete culvert under the Penn Central Railroad tracks approximately 70 feet east of the claimant's property was discharged into a ditch which led in a northwesterly direction through the claimant's property and the adjoining Pugh and Dickinson Company properties and into a 15-inch drain pipe which, according to a rough plat attached to the stipulation, opened on the Dickinson Company lot and extended westerly through the respondent's lot to a manhole on land known as the A & P Store property. Robert Agsten, contractor for the A & P Store building, removed the manhole and filled the same during the construction of the parking area for the A & P Store. Some time after the manhole was so eliminated, the respondent constructed its parking lot and in so doing raised the elevation

of the rear or southerly portion of the lot approximately five feet, sloping gradually to the level of Smith Street on the north. On January 24, 1968, a heavy rain storm caused water to accumulate on the claimant's parking lot west of its warehouse and building, covering almost the entire lot and running into the side door and down the elevator shaft of the building, causing damage thereto. On several occasions water standing on the parking lot during freezing conditions caused the black-top to crack and swell and resulted in severe damage to the paved surface of the entire lot. The claimant contends that the filling of the respondent's lot and the elimination of the manhole on the A & P Store lot are the causes of its damages, as it had experienced no major flooding until after the happening of both of those events. During the investigation of this claim, a test was conducted on the premises in the presence of representatives of all interested parties, which conclusively proved that the 15-inch drain pipe was unobstructed through the entire width of the respondent's property.

The stipulation further discloses extensive negotiations in an effort to compromise and settle the matters involved. As a result the City of Charleston agreed to and did construct a 10-inch drain from Smith Street to the rear of the claimant's lot and a catch basin connecting therewith, to catch surface waters running along the drain from the railroad property, at a cost of more than $2,000.00; and Robert Agsten paid the claimant $1,500.00 for one-half of the cost of re-surfacing the parking lot. The respondent persisted in its contention that it was in no way at fault, but did agree that if this Court should find in favor of the claimant, its fair share of the damages would be $1,500.00.

Upon careful consideration of the facts and circumstances set forth in the stipulation, we are unable to find any wrongful conduct on the part of the respondent which would be judicially recognized as negligence in a case such as this between private persons. Such a standard of proof has been set by our Supreme Court of Appeals. *State ex rel Vincent* v. *Gainer,* 151 W.Va. 1002 (1967). Further it seems clear to the Court that the direct and proximate cause of the damages sustained by the claimant was the filling and shutting off of

the manhole on the A & P property. Conversely, it is our opinion that any change in the flow of surface water by reason of the filling of the respondent's lot was not a direct and proximate cause of such damages. The 15-inch drain pipe through the respondent's property was shown not to have been obstructed and the filling of the respondent's lot in its preparation of the same for parking in no way affected the use of the drain pipe for the purpose for which it was installed and theretofore had been utilized.

Accordingly, the Court is of opinion that a moral obligation of the State has not been sufficiently established in this case, and the claim is disallowed.

Opinion issued November 30, 1970

LOWELL C. SHINN

vs.

DEPARTMENT OF HIGHWAYS

(No. D-254)

Carl Smithers for the Claimant.

George H. Samuels, Assistant Attorney General, and *Robert R. Harpold, Jr.,* for the Respondent.

JONES, JUDGE:

The facts and circumstances giving rise to this claim are the same that were alleged and proved in Lois and Dayton Shinn vs. State Road Commission, 7 Court of Claims (W.Va.) 162, and the opinion in that case is applicable here.

Briefly, on November 24, 1967, the Claimant's automobile was parked approximately seven feet off the paved portion of State Secondary Road 23 and U. S. Route 35 in Mason County, when it was struck and damaged by a State Road Commission (now Department of Highways) truck, operated by a State Road Commission employee. The Respondent admits that the truck's brakes were defective, and it is undisputed

that the cause of the collision was the failure of the driver to keep the vehicle under control.

The Claimant presented an estimate of the cost of repairs in the amount of $409.87, and the same has been stipulated to be fair and reasonable. Accordingly, the Court hereby awards the claimant, Lowell C. Shinn, the sum of $409.87.

Opinion issued December 1, 1970

PAUL CRISS AND PEARL CRISS

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-137)

Ernest V. Morton, Jr. for the Claimants.

Donald L. Hall, Attorney, Department of Highways, for the Respondent.

DUCKER, JUDGE:

The claimants, Pearl Criss and Paul Criss, who are wife and husband respectively, claim damages against the West Virginia Department of Highways in the amount of $150,000 for their personal injuries and medical and hospital expenses resulting from the sudden stopping of their automobile when a tree fell from a cliff in front of and on the front part of their automobile.

As there is no substantial conflict in the testimony, the question presented is a legal one as to whether the facts are sufficient to render the respondent liable.

It appears from the evidence that on April 22, 1967 the claimant, Paul Criss, with his wife, the claimant Pearl Criss as a passenger, was driving his car, a 1963 Chevrolet four door sedan, in a northerly or easterly direction, on the right hand side of State Route 20, near the intersection of Bennett Avenue in Webster Springs, West Virginia, about 1:30 p.m. on the said date, when suddenly a tree on the cliff on the left hand or other side of the road fell across the road striking the bumper or front part of claimant's car. The driver of the car when he saw a woman running away from something and then saw

a tree falling on his car, "stomped" on his brakes and stopped the car suddenly, thereby throwing his wife in such a manner as to cause injuries to her neck, back, ear, and ribs, for which she was confined in a hospital for approximately five weeks, and from which injuries she says she continues to suffer. The tree was a beech about 18 inches in diameter and one of twin beeches growing on a cliff estimated to be between 20 and 30 feet high adjacent to the road, the tree falling being the one nearest the road. It was estimated that the tree was about 55 to 65 feet in height and had some leaves on it.

There was testimony to the effect that it had been windy early that morning and as one witness said "a good pace of wind was blowing that day, average" and "windy day in April". The tree was not, according to the witness, Paul Criss, a "dead tree" but "the inside, the heart of any tree is dead—only just a little bit of the sap is all the life in any tree". The right of way cut for the State Route was made some forty to fifty years ago, leaving the cliff on the side of the road where the beech tree stood. The Highway Department's office for the maintenance of roads in that area showed that no reports of any dangerous condition at the place of this accident had been made by anyone, although there was testimony to the effect that there had been a fallen tree occurrence a month or two after the accident here involved.

After the fact, it could easily be said that if a thorough inspection had been made of the trees along the cliff adjacent to the road prior to the accident it would have been apparent that it was necessary for the work to be done to eliminate the cause of this accident, and the duty of the respondent to remedy the situation would have been obligatory. But hindsight is not the test. Anticipation of the danger in the reasonably foreseeable future is more properly the basis for the determination of liability. It is unfortunate indeed, when occasions like this arise, but misfortune is not determinative of liability. We must decide in this case on whether there was actionable negligence on the part of the respondent in failing to protect the highway from the falling of the tree. From the evidence it appears that no special consideration had been given by anyone to the effect that there was a hazardous condition existing by reason of the trees on the cliff adjoining the road.

It had been forty years or more since the cut leaving the cliff was made, and that no complaints of or occurrences of accidents on that account prior to this occasion had been made, and that constant checkings of the state route are made by the respondent's supervisor, assistant and foreman, and no report of hazard had been made. While the day of the accident was windy, that fact is hardly material except to indicate some weakness of the tree.

The respondent is not required to be infallible in its inspection of its highways and rights of way, nor is it an insurer of the safety to travelers on its roads, as the Courts have held and as has been previously held by this Court in the case of Parsons v. State Road Commission, Claim No. D-112, in which it is said:

> "This Court has many times held that the State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances".

For the State to guarantee the safety of the travelers upon its highways against the possibility of any tree falling from the many hills and cliffs adjoining the highways in this mountainous state when it has had no notice, or could have reasonably foreseen the probability of such an occurrence, would place liability on the State beyond all reason and expense.

While there was no negligence on the part of the claimants, we think that the respondent has used reasonable care and diligence under all the circumstances in the maintenance of this highway and that the claimants have not shown that it was clearly apparent that the road was hazardous or that the respondent should have made a greater and more detailed inspection to eliminate the condition as an impending hazard to travelers on that road.

Accordingly, we are of the opinion that the respondent has exercised such care as was incumbent upon it in such matters, the claimants are not entitled to recover the damages sustained by them, and we hereby dismiss their claim herein, and make no award.

No award.

Opinion issued December 7, 1970

VELMA COOPER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-166)

James H. Ware for the Claimant.

Donald L. Hall for the Respondent.

JONES, JUDGE:

This claim is for damages to the claimant's automobile and for personal injuries sustained when the claimant was driving along old State Route No. 38 near Nestorville in Barbour County. Damages to the automobile are stipulated to be $644.77 and $1,000.00 is claimed for personal injuries, including stipulated medical bills of $84.00.

The claimant was enroute from her home in Frederick, Maryland, to Philippi, West Virginia, a distance of about 188 miles. She had learned that a sister was critically ill and after an eight-hour shift as an electronics worker she left her home at about 5:30 p.m. on July 19, 1967, and being delayed by hazardous, foggy weather she reached the place of the accident at about 3:00 a.m. on July 20, 1967. She approached the Nestorville intersection traveling south on State Route 92 and turned west on old State Route No. 38 as she had done on several prior trips to Philippi. According to the claimant there were no signs at the intersection to indicate that by traveling about one-fourth mile further on Route No. 92 she would be able to drive over a newly opened Route No. 38 which was constructed to take the place of old Route No. 38, and she testified that she checked the non-existence of such signs in daylight the following morning. It appears that the new road had been opened for traffic for about a month and the construction was finally approved by the State Road Commission (now Department of Highways) about September 1, 1967.

The plaintiff's witness, Carl S. Nestor, who operated a filling station at the intersection in question and lived close to the

place where the wreck occurred, was uncertain as to what signs were in place except that old Route No. 38 was still marked as leading to Philippi; and Gerald B. Hall, Project Supervisor for the respondent, testified definitely that there was a sign at the southwest corner of the intersection with an arrow pointing to new Route No. 38.

As she had done before, the claimant did take the old route and proceeded to the point of the wreck near the Nestor home, a short distance from and within sight of new Route No. 38. At this point the course of old Route No. 38 had been changed, taking a rather sharp turn to the left in order to join new Route No. 38 at right angles as required by Federal specifications. The new portion of the road was in the process of being paved and had already received an asphalt base course and was in good condition. Barricades had been erected by the contractor but had been knocked down by errant motorists and were not in place. There was evidence that several other accidents had occurred at this location.

The claimant testified that the road had been very foggy and that she had been traveling at about 20 miles per hour, but that the fog lifted as she passed the Nestor home and that she could see "two lengths of a car, if not more". At this point the claimant says "the road disappeared and I slammed on the brakes". At another time in her testimony the claimant said: "The berm was about six inches high and my front wheels went off and when I slammed on the brake, I just went on into the ditch".

Counsel for the claimant rests his case primarily on the alleged failure of the respondent to have proper signs at the Route No. 92 old Route No. 38 intersection so out-of-state motorists traveling south on Route No. 92 would continue on to the new highway. Assuming that the claimant proved the absence of such signs by a preponderance of the evidence, liability would be very doubtful under the decisions of our Supreme Court of Appeals. The cases consistently hold that every user of our highways travels thereon at his own risk and that the State does not insure him a safe journey. The mere failure to provide road markers has been held not to be such negligence as would create a moral obligation on the

part of the State to pay damages assumed to have arisen through such failure and as the proximate cause thereof. *Adkins, et al. v. Sims,* 130 W.Va. 646.

If we should find that the respondent was negligent in this case the Court still could not allow recovery by the claimant. Our view of all the testimony is that it clearly shows contributory negligence on the part of the claimant. The road did not end or disappear; it was there and in good repair and if the claimant's automobile had been under proper control under the conditions existing, she would not have needed to "slam on her brakes" causing her to slip off the edge of the highway into a culvert. In our opinion this is not a case wherein the conscience of the State should be invoked, and this claim is disallowed.

Opinion issued January 19, 1971

IN THE WEST VIRGINIA COURT OF CLAIMS

AIRKEM SALES AND SERVICE, Claimant,

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-333)

ODORITE SERVICE AND SUPPLY CO., Claimant,

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-334)

McCORMICK OFFICE SUPPLIES, INC., Claimant,

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-335)

RIVERSIDE PAPER COMPANY, INC., Claimant,

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-336)

LAIRD OFFICE EQUIPMENT COMPANY, Claimant,

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-337)

GUTHRIE-MORRIS-CAMBELL COMPANY, Claimant,

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-338)

SOUTHERN CHEMICAL COMPANY, Claimant,

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-339)

TRI-STATE DRUG COMPANY, Claimant,

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-340)

COPCO PAPERS, INC., Claimant

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-341)

COPCO PAPERS, INC., Claimant,

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-342)

FRY BROTHERS COMPANY, Claimant,

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-343)

FRY BROTHERS COMPANY, Claimant,

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-344)

UNION 76-PURE OIL DIVISION, Claimant,

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-345)

VAUGHAN'S TERMITE CONTROL COMPANY, Claimant,

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-346)

S. B. WALLACE AND COMPANY, Claimant,

vs.

DEPARTMENT OF MENTAL HEALTH, Respondent.

(No. D-347)

No one appeared for the Claimants.

George E. Lantz, Deputy Attorney General for the Respondent.

PETROPLUS, JUDGE:

For purpose of submission, the above claims were consolidated and represent an aggregate claim of $7,982.96, against the Department of Mental Health of the State of West Virginia, and represent supplies, expendable commodities and services furnished to an Agency of the State for which an appropriation was made by the State Legislature during the preceding fiscal year. The Respondent on October 7, 1970, answered admitting all of the allegations pertaining to each of the claims and requested that the claims be allowed in the amount claimed as the State in equity and in good conscience should pay them. An Amended Answer was filed by the Respondent on December 1, 1970, admitting that the Claimants furnished goods and services as alleged in their Petition and that the charges were reasonable, and setting forth that the Respondent did not have sufficient funds remaining in its budgeted account for the payment of said claims during the fiscal year 1969-1970.

The Amended Answer states further that the overcommitment of budgeted funds occurred inadvertently and as the result of negligence or mismanagement rather than any in-

tentional plan or design on the part of any Agent or Agency of the State of West Virginia. The responsible State Agency believed in good faith that it had sufficient funds remaining in its budgeted account to satisfy said obligations and that since the overcommitment resulted from negligence or mismanagement, and since the State of West Virginia has received the benefit of the goods and services, counsel for the Respondent is of the opinion that said claims constitute a moral obligation on the part of the State of West Virginia and should be allowed. The Answer concludes that to do otherwise would result in irreparable harm to the credit of the State of West Virginia.

Paragraph 7 of the Amended Answer further adds the following suggestion:

> "Notwithstanding that counsel for the respondent believes that a moral obligation does exist as hereinabove indicated, it is our strong suggestion that the appropriate individuals and agencies of State government directly charged with the responsibility of expending state funds take adequate and proper steps to insure that such overcommitment of budgeted funds does not again occur. Clearly the laws of West Virginia provide satisfactory safeguards and procedures in the administration of fiscal matters so that when all of the individuals and agencies of State government involved in any way with the expenditure of state funds properly, efficiently and knowledgably perform their functions and carry out their responsibilities, overspending of budgeted public funds should not occur, and the budget as adopted by the Legislature will be complied with in all respects."

The claims were submitted on Petition, Answer and Stipulation as to their accuracy.

A letter from the State Auditor's Office dated August 5, 1970, addressed to M. Mitchell Bateman, M.D., Director of the Department of Mental Health, from Denzil L. Gainer, State Auditor, copies of which were furnished to the Governor, the Commissioner of the Department of Finance & Administration, Colin Anderson Center and the Legislative Auditor, was filed with the Court pointing out that the invoices were more than six months old and suggesting that immediate steps be taken to determine the responsibility for this condition and that

corrective measures be taken to prevent a recurrence of the same. The letter further states:

"A considerable amount of state money has been expended for consultants and system analysis to prevent this very situation. Such a condition does have a bad effect on the state's credit and does not conform to the statutes which were enacted to safeguard the state and creditors as well.

I should like to point out that the statute is very clear concerning expenditures in excess of appropriations.

Chapter 12, Article 3, Section 14 reads as follows:

'It shall be unlawful for the superintendent, manager, any officer, or any person or persons, board or body, acting or assuming to act for and on behalf of any institution, kept or maintained in whole or in part by this State, to expend for any fiscal year any greater sum for the maintenance or on account of such institution than shall have been appropriated by the legislature therefor for such year except as provided in section thirteen, article one, chapter twenty-five of this Code.'

Also, Chapter 12, Article 3, Section 15 provides:

'It shall be unlawful for any such officer, board, body or person to expend for the erection, improvement or repair of any building or structure, or for the purchase of any real estate or other property, or upon any contract or undertaking whatsoever to be performed in whole or in part by the State, any sum exceeding that which shall have been appropriated or authorized therefor by the legislature, nor shall they incur any debt or obligation on any such account not expressly authorized by the legislature, nor use in part payment only upon the purchase or construction of any land or structure any sum which shall have been appropriated or authorized by the legislature in full payment for such object.'

The statute further provides in Section 16 of the chapter and article above cited:

'Any such officer or person who, in violation of any of the provisions of the two preceding sections, shall expend any sum of money, or incur any debt or obligation, or make or participate in the making of any such contract, or shall be a party to any such transaction in any official capacity, shall be personally liable therefor, both jointly and severally, and an action may be maintained therefor by the State, or any person prejudiced thereby, in any court of

competent jurisdiction, and such official shall further be guilty of a misdemeanor, and, upon conviction thereof, be fined not less than ten nor more than five hundred dollars, and may be confined in jail not less than ten days nor more than one year, and, in addition to the penalties hereinbefore provided, shall forfeit his office. And there shall be no liability upon the State, or the funds thereof, on account of any such debt, obligation or contract.'

While the Court of Claims may feel in its wisdom that there is a moral obligation on the part of the state to pay these unpaid bills, there is also a moral obligation on the part of those in administrative positions to correct such situations which are far too numerous to be condoned."

In addition to the statutory provisions pointed out by the State Auditor, Chapter 12, Article 3, Section 17 of the West Virginia Code provides:

"Except as provided in this section, it shall be unlawful for any state board, commission, officer or employee: (1) To incur any liability during any fiscal year which cannot be paid out of the then current appropriation for such year or out of funds received from an emergency appropriation; or (2) to authorize or to pay any account or bill incurred during any fiscal year out of the appropriation for the following year, unless a sufficient amount of the appropriation for the fiscal year during which the liability was incurred was cancelled by expiration or a sufficient amount of the appropriation remained unexpended at the end of the year . . . "

It is the opinion of this Court that to allow the payment of an illegal claim as a moral obligation of the State, when it is admitted that the spending unit clearly violated the Statute by incurring liabilities which could not be paid out of the current appropriation, clearly exceeds the jurisdiction of the Court. The fact that the parties were mistaken as to the law, and may have acted without any corrupt or criminal intent does not confer jurisdiction or give this Court authority to allow the payment. The general statutory law of the State of West Virginia is binding upon this Court and under the general powers given to the Court in Chapter 14, Article 2, Section 12 of the Code, the Court is authorized to consider claims which, but for the constitutional immunity of the State from suit, could be maintained in the regular Courts of the State.

This Court has no existing appropriation for the payment of accrued claims and is constrained to follow the statutory law of our State.

A similar question was decided adversely to the claimants in the case of *State ex rel. Point Towing Company, a corporation, v. Robert P. McDonough, Director of the West Virginia Department of Natural Resources, et al,* 150 W.Va. 724, decided July 12, 1966, 149 S.E.2d 302. In an Opinion written by Judge Caplan, reference is made to Code 1931, 12-3-17, hereinbefore mentioned, and the claim of the plaintiff for a Writ of Mandamus to require the State Auditor to issue a requisition for the payment of a towboat illegally purchased in violation of the Statute was denied. The Opinion stated:

> "The obvious purpose of the above statute is to prevent a spending unit of the state government from creating a liability which cannot be paid from *then existing* funds. It expressly precludes the creation of an obligation during a fiscal year which is to be satisfied in the next fiscal year . . . " (underscoring ours)

Judge Caplan further quoted with approval the case of *Shonk Land Co. et al. v. Joachim, et al.,* 96 W.Va. 708, 123 S.E. 444, considering a like statute, stating:

> "The legislative policy is clear, and the statute must not be warped by construction to defeat it. The phrases 'funds legally at the disposal of the fiscal body,' and 'which cannot be paid out of the levy for the current fiscal year,' refer to the time when the contract is made, and not in futuro. No contract is valid which will bind the levies of future years . . ."

Following Judge Caplan's Opinion, we must also hold that these contracts are controlled by the Statute and the contention that the Legislature had made an appropriation for the fiscal year 1969-1970, out of which the liability could have been paid is without merit. An officer of a State spending unit must necessarily plan the operations of his Department in such a manner as not to spend funds unless they are actually available in his appropriation. The spending policies of the State are limited by law and anyone dealing with a State Agency must know its powers and limitations. Any contract in viola-

tion of the Statute is void and cannot be enforced in any Court.

Judge Caplan further stated:

> "To declare this contract valid by permitting a strained construction, or a justification, to change the plain provisions of Code, 1931, 12-3-17, would be tantamount to opening the proverbial 'Pandora's Box', and before it could again be secured the fiscal affairs of the State might well decline to a chaotic level, a situation which the above statute was designed to prevent."

Consequently, we are of the opinion that the contracts before the Court are invalid and that the allowance of any claims based thereon by this Court would be unwarranted and unlawful, not withstanding that both the Claimants and the Attorney General's Office join in a request that the claims be allowed as lawful obligations of the State of West Virginia. It is true that the commodities and services were furnished and the State has received the benefit thereof, but that in itself is insufficient to establish a legal obligation to make payment when the above quoted Statutes prohibit such conduct. Otherwise, this Court would be condoning the neglect and mismanagement set forth in the Attorney General's Amended Answer and would be ignoring completely Chapter 5A, Article 3, Section 19 of the West Virginia Code which places a limitation on expenditures, which states:

PURCHASES OR CONTRACTS VIOLATING ARTICLE VOID; PERSONAL LIABILITY.

> "If a department purchases or contracts for commodities contrary to the provisions of this article or the rules and regulations made thereunder, such purchase or contract shall be void and of no effect. The head of such department shall be personally liable for the costs of such purchase or contract, and, if already paid out of State funds, the amount thereof may be recovered in the name of the State in an appropriate action instituted therefor."

The law must be administered as it is written and to do otherwise would be an effort on the part of this Court to control the policy of Government and change the plain provisions of statutory law.

For the foregoing reasons, the claims are denied.

Claims disallowed.

The Airkem decision was applied to the following claims through Per Curiae:

No.	Name of Claimant	Name of Respondent
D-397	A. B. Dick Products Co.	Dept. of Mental Health
D-406	A. B. Dick Products Co.	Dept. of Mental Health
D-367j	Accounting Supplies and Systems, Inc.	Dept. of Mental Health
D-391e	Ace Exterminators, Inc.	Dept. of Mental Health
D-371	Acme Cotton Products Co., Inc.	Dept. of Mental Health
D-333	Airkem Sales and Service	Dept. of Mental Health
D-369	Appalachian Power Company	Board of Regents
D-367c	Appalantic Corporation	Dept. of Mental Health
D-379	Armour and Company	Dept. of Mental Health
D-367k	Bell Lines, Inc.	Dept. of Mental Health
D-415	Capitol Paper Supply, Inc.	Dept. of Mental Health
D-341	Copco Papers, Inc.	Dept. of Mental Health
D-342	Copco Papers, Inc.	Dept. of Mental Health
D-367s	Crocker-Fels Co., The	Dept. of Mental Health
D-381	Crook's Wholesale Food Co.	Dept. of Public Institutions
D-422	Dowling Pool Company	Dept. of Mental Health
D-367p	DuBois Chemicals	Dept. of Mental Health
D-367q	Eaton Laboratories	Dept. of Mental Health
D-367l	Economic Laboratories	Dept. of Mental Health
D-386	Empire Foods, Inc.	Dept. of Mental Health
D-391b	Fairmont Foods Co.	Dept. of Mental Health
D-343	Fry Brothers Company	Dept. of Mental Health
D-344	Fry Brothers Company	Dept. of Mental Health
D-387	General Electric Company	Dept. of Mental Health
D-435	Genuine Parts Company of West Virginia	Dept. of Mental Health
D-359	Goldsmit-Black, Inc.	Dept. of Mental Health
D-360	Goldsmit-Black, Inc.	Dept. of Mental Health
D-361	Goldsmit-Black, Inc.	Dept. of Mental Health
D-338	Guthrie-Morris-Campbell Co.	Dept. of Mental Health
D-367m	Harry W. Higgins General Store	Dept. of Mental Health
D-367b	Industrious Blind Enterprise	Dept. of Mental Health
D-391a	James Produce Company	Dept. of Mental Health
D-410	Karoll's, Inc.	Dept. of Mental Health
D-389	Kellogg Sales Company	Dept. of Mental Health
D-337	Laird Office Equipment Co.	Dept. of Mental Health
D-419	Lance, Granville H.	Dept. of Mental Health
D-373	Lederle Laboratories	Dept. of Mental Health
D-335	McCormick Office Supplies, Inc.	Dept. of Mental Health
D-358	McCormick Office Supplies, Inc.	Dept. of Mental Health
D-449	McGlothlin Printing Company	Dept. of Mental Health
D-367a	Mallinckrodt Chemical Works	Dept. of Mental Health
D-393	Martini Packing Co.	Dept. of Mental Health
D-367g	Medical Arts Supply Co., Inc., The	Dept. of Mental Health
D-367n	Merck Sharp & Dohme	Dept. of Mental Health
D-421	Mt. Clare Provision Company	Dept. of Mental Health
D-367f	Noe Office Equipment	Dept. of Mental Health
D-443	Noe Office Equipment	Dept. of Mental Health
D-334	Odorite Service and Supply Company	Dept. of Mental Health

No.	Name of Claimant	Name of Respondent
D-380	Odorite Service and Supply Company	Dept. of Mental Health
D-367d	Ohio Valley Office Equipment	Dept. of Mental Health
D-376	Oxford Chemicals	Dept. of Mental Health
D-420	K. V. Pathology, Inc.	Dept. of Mental Health
D-385	Picker X-Ray	Dept. of Mental Health
D-403	Potomac Edison Co. of W. Va.	Board of Regents
D-367i	Raybestos-Manhattan, Inc. Revolite Div.	Dept. of Mental Health
D-430	Red Head Oil Company, The	Dept. of Mental Health
D-336	Riverside Paper Company, Inc.	Dept. of Mental Health
D-367h	Roche Laboratories	Dept. of Mental Health
D-372	William H. Rorer, Inc.	Dept. of Mental Health
D-367e	Will Ross, Inc.	Dept. of Mental Health
D-367r	Sandoz-Wander, Inc.	Dept. of Mental Health
D-374	Scientific Products	Dept. of Mental Health
D-418	Selby, Charles V., Jr.	Dept. of Mental Health
D-367o	Shouldis Department Store	Dept. of Mental Health
D-394	Smith, Kline & French Co.	Dept. of Mental Health
D-339	Southern Chemical Co.	Dept. of Mental Health
D-377	Spencer Business Forms Co., Inc.	Dept. of Mental Health
D-423	St. Joseph's Hospital	Dept. of Mental Health
D-424	St. Joseph's Hospital	Dept. of Mental Health
D-425	St. Joseph's Hospital	Dept. of Mental Health
D-426	St. Joseph's Hospital	Dept. of Mental Health
D-427	St. Joseph's Hospital	Dept. of Mental Health
D-428	St. Joseph's Hospital	Dept. of Mental Health
D-429	St. Joseph's Hospital	Dept. of Mental Health
D-391d	Standard Brands Sales Co.	Dept. of Mental Health
D-383	Willard C. Starcher, Inc.	Dept. of Mental Health
D-401	Storck Baking Company	Dept. of Mental Health
D-417	Swearingen, Wm. J.	Dept. of Mental Health
D-340	Tri-State Drug Company	Dept. of Mental Health
D-345	Union 76-Pure Oil Division	Dept. of Mental Health
D-391c	Union Oil Co. of California	Dept. of Mental Health
D-447	Universal Supply Company, The	Dept. of Mental Health
D-364	Utilities, Inc.	Board of Regents
D-346	Vaughan's Termite Control Co.	Dept. of Mental Health
D-347	S. B. Wallace and Company	Dept. of Mental Health

Opinion issued January 19, 1971

LEMUEL L. WARDEN and ESTELLE WARDEN

vs.

DEPARTMENT OF HIGHWAYS

(No. D-195)

William Sanders, for the Claimants.

Donald L. Hall, for the Respondent.

JONES, JUDGE:

The claimants allege in their petition that during the months of October, November and December, 1967, the respondent conducted blasting operations upon its property situate near Princeton, in Mercer County, in the construction of a County garage and office complex known as the Mercer County Headquarters Building, and thereby negligently damaged the claimants' real estate, situate across the highway, consisting of lots upon which is located a wheelchair house built in 1962 under Veterans Administration specifications and supervision. Damages were claimed in the amount of $11,500.00, and the claimants filed two estimates of the cost of repairs in amounts of $11,210.85 and $10,885.00. Another estimate made in behalf of the respondent and filed herein fixed the cost of repairs at $2,807.40.

This claim was submitted by the parties upon a stipulation of facts which admits all of the allegations of the claimants' petition, except the amount of damages claimed, and lays a basis of liability. The stipulation further fixes the amount of damages which the claimants should reasonably recover at $3,000.00.

Having considered the allegations of the petition and the stipulation filed herein, the Court is of opinion that this is a valid claim which in equity and good conscience should be paid and, therefore, an award is hereby made to the claimants, Lemuel L. Warden and Estelle Warden, in the amount of $3,000.00.

Opinion issued January 19, 1971

EVERETT MILLER AND BETTY MILLER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-286)

Marshall J. West, Jr. for the Claimants.

Donald L. Hall for the Respondent.

JONES, JUDGE:

From the record in this case it appears that the claimants, Everett Miller and Betty Miller, operate a small utility under the name Betty Gas Company for the service of customers in the vicinity of Brenton in Wyoming County. They purchase gas from Consolidated Gas Supply Corporation and transport the same through a plastic pipeline along a private right-of-way leased by them from Georgia-Pacific Corporation. This claim is for damages in the amount of $936.25 for the loss of gas from the claimants' pipeline which the claimants allege resulted from the negligent puncturing of the pipeline by the respondent. A public highway runs parallel to the pipeline and the claimants allege that employees of the respondent carelessly dumped dirt and rock from the highway upon the pipeline right-of-way and that a large boulder weighing approximately 700 pounds came to rest on the pipeline, which was buried approximately 18 inches deep. A sharp corner of the boulder had cut through the earth cover and into the plastic pipe allowing gas to escape.

The loss of gas was discovered by the claimants when they received their bill from Consolidated Gas Supply Corporation for the month of October 1969. The bill was for $882.11 and they had charged their customers $293.06 for the gas used, showing a deficit of $589.05. For the month of November the Gas Company's bill for gas was $912.46 for which the claimants charged their customers $565.26, a deficit of $347.20, and a total loss for the two months of $936.25. When the October bill arrived about the middle of November the claimant Everett Miller walked the pipeline and discovered the puncture. He

testified that the respondent's employees had on several occasions dumped dirt and rock onto the slope in question and that he had notified them of the existence of his pipeline and had warned them not to damage it. This claimant specifically recalled and testified that the respondent's employees dumped large rocks at the place in question on or about October 16, 1969, and considering all of the facts and circumstances adduced in testimony it appears that the pipeline was damaged at that time.

There was no testimony taken on behalf of the respondent and therefore the claimants should be entitled to recover if they have made a prima facie case. We are of opinion that the claimants have made such a case and that the same would go to a jury in a court of law. There being no defense, we are of opinion that the claimants are entitled to recover and the amount of the loss being well established and not being questioned by the State, we do hereby award to the claimants, Everett Miller and Betty Miller, the sum of $936.25.

Opinion issued January 19, 1971

GEORGE S. SWIGER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-303)

No appearance for the Claimant.

Donald L. Hall for the Respondent.

JONES, JUDGE:

It appears from the petition and a stipulation of facts filed in this case that the claimant, Gerald S. Swiger, on February 4, 1970, and while an employee of the respondent, Department of Highways, was operating an endloader on the Harrison County maintenance lot in Clarksburg, Harrison County, when he became ill and lost control of the machine, resulting in a collision with and damage to a 1964 Chevrolet Impala automobile owned by the claimant and properly parked on the

respondent's lot. The claimant had passed out and had to be carried from the cab. He was taken to St. Mary's Hospital where he was examined by a physician, and his condition diagnosed as carbon monoxide intoxication. It further appears that the exhaust system of the endloader was not functioning properly and the defect was later repaired. Investigation revealed that another employee, who had driven the machine previously, also had become ill. Two estimates for the repair of claimant's vehicle were obtained, the lowest of which was $423.49, and this amount has been stipulated as fair and reasonable.

Based upon the verified petition and the stipulation of facts which was signed by the claimant and by counsel for the respondent, the Court is of opinion that the claimant has proved a valid claim which in equity and good conscience should be paid and, therefore, an award is hereby made to the claimant, Gerald S. Swiger, in the amount of $423.49.

Opinion issued January 25, 1971

C. J. LANGENFELDER & SON, INC., Petitioner

vs.

THE STATE OF WEST VIRGINIA and THE STATE ROAD COMMISSION OF WEST VIRGINIA, Respondents.

(No. D-120)

Philip J. Graziani, Esq., Robert D. Myers, Esq. and *Thomas P. O'Brien, Esq.* for the Petitioner.

Anthony G. Halkias, Esq. and *George H. Samuels,* Assistant Attorney General, for the Respondents.

William T. Marsh, Esq. appeared for Fort Pitt Bridge Works, in support of a portion of Petitioner's claim.

PETROPLUS, JUDGE:

This is a claim filed in this Court on October 21, 1968, in the amount of $224,768.11, and later amended by Petition seeking an additional amount of $366,829.56, or a total sum of $591,-

597.67, in which the petitioner, C. J. Langenfelder & Son, Inc., a corporation, seeks damages from the State Road Commission, now the West Virginia Department of Highways, in connection with a construction contract between the parties to construct a roadway and two bridges in the City of Wheeling, Ohio County, West Virginia.

The contractor claimant, C. J. Langenfelder & Son, Inc., a Maryland corporation, brought this action against the State Road Commission of West Virginia, respondent, to recover damages for alleged delays caused by the Commission in the construction of a highway and bridges near the east portal of Wheeling Tunnel on a section of Interstate Route No. 70, within the corporate limits of the City of Wheeling. The claimant-petitioner is a Company engaged in heavy highway and industrial construction work and has been so engaged for the past fifty years in the construction of dams, airports, power houses, highways, bridges and tunnels. Some of its projects have included the Andrews Air Force Base, the Dulles International Airport, the New York State Thruway, the Connecticut Turnpike, the New Jersey Turnpike and the Pennsylvania Turnpike and tunnels. There can be no doubt that the claimant was well qualified to undertake a complicated and expensive multi-million dollar project in a congested and highly urbanized area of the City of Wheeling, involving many variables, such as traffic flow, Acts of God, floods, slides, relocation of streets and utilities, and unforeseen conditions which required many change orders, extras, supplemental agreements and forced account agreements during the progress of the work.

In order to bring the project to completion in accordance with the voluminous plans and specifications prepared and furnished by the Commission, the contractor was required to coordinate his work with other projects in the area, maintain a traffic flow, and subcontract portions of the work to other contractors. The contract was awarded pursuant to bids on December 29, 1964, to the petitioner, on specified unit prices rather than on a lump sum agreement and the project was designated therein as "East Portal of Tunnel to DeChantal Road, I-70-1 (13) 2, Contract No. 2", covering an area of approximately 1657 feet in length. The project was to be completed in 550 working days. The work was satisfactorily performed and was accepted by the State Road Commission as

being in accordance with the plans and specifications. However, the work was not completed until the month of August, 1966, 110 working days beyond the planned and scheduled completion date.

Because of the complexity of the project, and the activity in other separate projects in the same area, which encompassed a winding creek, a heavily traveled City Street, railroad rights of way, sewer lines, water lines, gas and telephone lines, the contractor prepared a sequence of coordinated operations, which it intended to follow and which sequence was made a part of the specifications.

The contractor claims that many unreasonable delays, not contemplated by the parties and attributable to the inefficiency and incompetence of State Road Commission personnel, disrupted a critical and planned sequence of operations for the work, resulting in damages of great magnitude to the contractor. Two other contracts had been awarded to the petitioner in adjoining areas of operation which involved the construction of two tunnels through a hillside and the portals and approaches thereto.

According to the allegations of the Petition, the Company started to work soon after the contract was executed, when a defect in the plans and specifications was discovered which caused an enforced suspension of the work to provide time for the consulting engineers of the State to make subsurface explorations and studies. This delayed the progress of the work from June 3, 1965, to September 20, 1965, a period of approximately 110 days. The suspension of operations was ordered by the Chief Engineer of the respondent when pile driving for the construction of a pier designated as EB-2 revealed a hazard which required the consideration of the consulting engineers for the project, who had been independently employed by the Commission. The apprehension of the consulting engineers was evidenced by a long delay in studying the problem and eventually redesigning the bridge structure. The suspension of operations naturally delayed the planned relocation of the utilities, which delay in turn prevented the construction of other bridge piers in the area, and the erection of the structural steel which was on order and planned for delivery on specific dates, as well as the paving of a relocated

City Street. The bridge piers which were planned for construction in the summer and early fall of 1965 were not constructed and completed until the late winter of 1966. The maintenance of a detour was prolonged and piers constructed adjacent to the detour required sheeting protection. The relocation of McColloch Street was constructed under adverse winter weather rather than in the summer of 1965, as originally planned when the weather would be dry and the area would be workable. Muddy excavated material had to be replaced by suitable stockpiled materials. None of these factors were taken into consideration by the contractor in his bid proposal as they were not anticipated and within the contemplation of the parties.

The steel for the bridges which was planned for erection in September, 1965, under a schedule and sequence of shipments from the Fort Pitt Bridge Works was not erected until January, 1966, resulting in heavy costs for storing, rehandling and reconditioning the steel. Lighting facilities which were to be provided for the highway and bridges which required adjustments to the superstructure were not planned and specified by the Commission until one and one-half years after the work started on the project, thereby delaying the construction of the concrete superstructures on the bridges from November, 1965, until April, 1966.

When the contractor made his proposal, the bids were prepared on a plan to complete the project within 550 working days. The additional expenses incurred by the contractor in idle equipment and maintaining its plant, paying supervisory personnel and overhead items for the extra 110 days, not contemplated by the contract, is the basis for this action. The contractor claims a sustained loss in the aggregate of $591,-597.67, supported by numerous exhibits and cost calculations.

All of the above contentions were supported by evidence from reliable and trustworthy witnesses.

The Answer of the respondent sets forth that the expense in relocating the office trailer was the responsibility of the contractor, who should have known that the location thereof was detrimental to operations under other contracts awarded to the petitioner. The evidence clearly indicated that the trailer

was located on a site approved by the engineers of the respondent, who apparently have the last word on where the field offices should be located for the convenience of all parties concerned. Since the trailer had to be removed as an obstruction to other projects, we conclude that the cost of its removal must be borne by the State. If its original location was improper, the State should not have given its approval to the site selection; the contractor being subject to the supervision of the State engineers is required to obey the orders of the engineers and failure to do so is cause for the contractor's removal from the job site.

The Answer otherwise denies petitioner's allegations, and affirmatively states that the petitioner should have sought compensation under the "extra work" provisions of the Standard Specifications. Paragraph 1.5.11, which is applicable to cases where the contractor seeks extra compensation for work or materials not clearly covered by the contract. The claim before us is essentially a claim for damages resulting from a breach of contract, causing losses to the contractor sounding in tort. It is not a claim for work under the contract not clearly covered in the terms of the contract, and we rule the particular specification as being inapplicable to the case before us for decision. For the same reasons, we rule that Standard Specification 1.9.4 relating to compensation for extra work ordered and accepted by the contractor is inapplicable to the factual situation of this case. In all other respects the Answer charges the petitioner with inefficiency, overcharges, duplication of items and failure to use reusable materials, all of which allegations being in effect a general denial of the allegations in the Petition.

The Court has carefully considered the pleadings, exhibits and evidence in this case and has made certain findings of fact.

The contractor did encounter a number of delays, one being an error in the design of the bridge which enforced suspension of work for more than 100 days. Unanticipated sub-surface conditions created a serious problem during the pile driving operation for the foundation of the bridge. Pile driving operations were suspended on a critical pier designated as Bent EB-2. Anomalous sub-surface rock formations in Wheeling Creek, which were unforeseen and unanticipated by both the

State Road Commission and the contractor, as well as the consulting engineers, who designed the foundation for the bridge, puzzled the engineers of both parties, and caused a lengthy program of exploration, testing, core driving, analysis and ultimately a redesigning of the foundation for this pier, extending over a period of three months. Pile driving crews on the site had to be committed elsewhere and the troublesome pier site had to be de-watered and re-excavated as a result of the delay caused by the design error. The delay resulting from the error was very costly to the contractor who was required to turn his equipment on and off at the will of the State Road Commission and revise his planned sequence of operations from time to time to meet the changing conditions. Although the standard specifications of the State Road Commission, which are incorporated into and made a part of the contract, provide for suspension of work by the State Engineer (who is in control of the work) due to unsuitable weather or other conditions considered unfavorable for suitable prosecution of the work, we deem such a specification to be authority to suspend the work only temporarily for such time as may be necessary until conditions become favorable so that the work may be performed in accordance with the provisions of the contract. We cannot accept the contention of the respondent that the right to suspend the work on the project includes a right to disrupt substantially a planned sequence of operations in an area, where coordination, subcontracts, shipment of steel, storage of materials and planned relocation of utilities and maintenance of heavy traffic are critically involved, as disclosed by the evidence in this case. Future coordinated construction depended heavily on the timely construction of the foundation for the bridge. A sequence of operations planned in advance on a tight schedule of commitments with other contractors was severely disrupted. The orderly prosecution of the work was seriously handicapped by the delay required to correct the design defect and threw the contractor into confusion and construction under adverse winter weather conditions causing substantial damages and loss of efficiency, overtime, overhead charges and other expense. In no way was the contractor responsible for the design error and the failure of the State to take more prompt and efficient action to remedy the error aggravated the damages by preventing

the relocation of utilities already planned, the paving of a relocated McColloch Street, the construction of bridge abutments, the erection of structural steel, and the planned removal of a detour road which impeded construction of other bridge piers in the area.

The end result was an accordion effect on the entire project which created additional labor and material problems continuing over the winter into the following year and rendering the cost accounting standards on which the contractor made his bid proposal obsolete and meaningless. Costs were figured and allocated on the orderly procedure of the work under a planned schedule which involved not only this but two other projects on which the contractor was working, all of these facts being known to the officials of the State Road Commission. To require management flexibility to cope with the confusion and delay caused by the State, and reintegrate his work as a prime contractor would place an unreasonable and unnecessary hardship on the contractor which is not contemplated by the contract or the specifications which authorize a temporary suspension of the work for various reasons.

It appears from the evidence that the contractor had to adopt a wait-and-see attitude on the entire project after the first sweeping and costly change in the project because of the problems arising from the design failure. Under the circumstances of this case, it would be decidedly unfair to strait-jacket the claimant to a sequence of operations formulated by the State without consideration of overhead and other costs. The responsibility for performing the contract with reasonable change orders is undoubtedly that of the contractor, but when the State becomes so deeply involved in the subject that the contractor is caused expenses of the magnitude presented in this case, it is the opinion of the Court that the State has both a legal and a moral obligation to reimburse the contractor for the losses sustained as items of damage which are the direct and proximate result of a delay or delays caused by the respondent in furnishing defective plans.

A careful study of the items of damage reveals the following items of expense and damage:

	Claimed	Allowed	Disallowed
Expense in relocation of a trailer	$ 1,179.89	$ 1,179.89	
Winter protection of the concrete	6,001.40	6,001.40	
Providing sheeting for vents G-5 and EB-4	11,705.35	11,705.35	
Additional expense in grading and drainage of relocated McColloch Street	20,506.19	20,506.19	
Maintenance of a detour for a prolonged period	6,710.25	6,710.25	
Fort Pitt Bridge Company, additional costs incurred as a result of delay in having the job site substructures ready for the delivery and erection of fabricated structural steel	62,867.98	46,007.21	16,860.77
Electrical and aluminum work	4,270.63	4,270.63	
Employment of labor on an overtime basis	35,969.31	35,969.31	
Overhead:			
Labor	50,871.95	25,435.97	25,435.98
Equipment rental	9,620.00	9,620.00	
Utilities	4,295.22	4,295.22	
Miscellaneous damages	377,599.50	20,000.00	357,599.50
Total	$591,597.67	$191,701.42	$399,896.25

The aggregate claim filed by the petitioner is in the amount of $591,597.67, which is derived by deducting the gross income received from the project from the expenses of the project revealed by its cost accounting. The Court has reduced the loss from $591,597.67 to $191,701.42 by disallowing an alleged loss of profit on the job and many other irrelevant items, as well as reducing the alleged claims for damages to amounts clearly and indisputably supported by the evidence. All doubts have been resolved in favor of the respondent where the petitioner has not sustained its burden of proof.

Although the contractor has contended through counsel that it is entitled for loss of profits as a proper measure of damages, it is the opinion of the Court, after considerable research and study, that loss of profits is not a proper item of damage under the circumstances of this case. It is further the opinion of the Court that where a contract has been breached by the State by a substantial interference with the critical sequence of operations, requiring the contractor to pay his expenses on an "as built schedule" as distinguished from a "planned schedule", the contractor should be reimbursed for the actual extra expenses and damages sustained.

We feel that the Commission had a contractual duty not to impede the orderly prosecution of the work, wilfully or negligently, and not to drastically revise work schedules during the course of construction with the end result of forcing the prime and integrating contractor into another winter of uncontemplated construction and completion of the work 110 working days beyond the planned schedule. The contention of the State that the delays suffered by the contractor were attributed to the contractor's failure to properly plan its work schedule is untenable under the evidence of this case.

We conclude that the claimant has shown a causal connection between the breach of contract and the damages suffered and that it has sustained the burden of proof for the items hereinbefore mentioned. Although the petitioner contends that the difference between the reasonable costs of doing the work in the absence of delay, and the actual costs of doing the work is the proper measure of damages, we refuse to adopt the contractor's bid estimate as a basis for measuring the reasonable cost of doing the work in the absence of delay. We believe that under the evidence in this case, the "actual cost" of doing the work under adverse conditions entailed by the unreasonable delays to be a better method of measuring damages. The contractor is entitled to compensation and not to a profit on the damages sustained. The Courts have been in disagreement on whether loss of profits is a proper item in measuring damages.

The complexity of this claim makes it impractical to discuss in this Opinion each and every item of disallowed and allowed damage with particularity. Inasmuch as this Court has held

that the suspension of the work was definitely due to a design error, which gave the consulting engineers of the project considerable apprehension about the safety of a bridge design for a heavy flow of traffic, the entire project was critically affected by the State's efforts to remedy the error and the contractor in equity and in good conscience should be reimbursed for the damages resulting from the delay. The contractor had a right to rely on the integrity of the plans furnished by the State and if those plans required correction for the safety of the travelling public, they should have been corrected with proper compensation to the contractor for its extra expense incurred because of the enforced suspension of the work.

For the foregoing reasons, an award is made to the claimant in the amount of $191,701.42, with no allowance for interest.

Claim allowed in the amount of $191,701.42.

Opinion issued February 15, 1971

CECIL SMITH, JR., Claimant,

vs.

DEPARTMENT OF MENTAL HEALTH,
STATE OF WEST VIRGINIA, Respondent.

(No. D-300)

CECIL SMITH, JR., Claimant,

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS, Respondent.

(No. D-301)

Morton I. Taber, Esq., and *Thomas P. O'Brien, Jr., Esq.* for the Claimant.

George E. Lantz, Deputy Attorney General, for the Respondents.

PETROPLUS, JUDGE:

The above captioned cases were consolidated and heard together on October 13, 1970. The material facts of the first case, Claim No. D-300, are found to be substantially as follows:

Claimant, Cecil Smith, Jr., while legally committed and confined in Weston State Hospital, an Agency of the State of West Virginia under the supervision and control of the Respondent, Department of Mental Health of the State of West Virginia, was attacked and beaten by another inmate of Weston State Hospital in a brief fight on July 4, 1967. The other inmate, Jack Biggs, who had been confined periodically in the Penitentiary at Moundsville for various offenses, including homicide, was transferred from time to time to the Mental Hospital at Weston for psychiatric evaluation, treatment and restraint. He had an erratic history of mental disturbances and delusions. On July 29, 1965, about two years before the assault in question, a written psychiatric evaluation disclosed him to be a man of mental confusion, suffering from emotional and mental disturbances, anti-social reactions with delusions of all kinds. In his history, we find that he stabbed a Penitentiary Guard for interfering with his reading of the Bible, an attempt to commit suicide by jumping off the wall of a building and delusions of persecution. A later report dated August 22, 1966, found him in active psychosis, harboring feelings that outside people were against him, impaired judgment but physically in good condition. The latter report shows an improvement in his conduct. Further reports in the file indicate behavioral problems and anti-social conduct up to the time of the assault but no particular acts of violence during that time. The technical diagnosis of Biggs' condition was "schizophrenic reaction, paranoid chronic undifferentiated type". Biggs was discharged from the Hospital on August 11, 1967, and returned on April 13, 1970, after being re-arrested for breaking into and vandalizing a Church and his conduct thereafter has been very aggressive and hostile. We have gone into considerable detail on his history as it has a bearing on whether the Respondent's Agents, Officers and Employees have failed to use reasonable care to safeguard the Claimant from harm by another inmate in the Institution.

At the hearing, the evidence developed that the attack on the Claimant was unprovoked and resulted in a serious compound fracture of the Claimant's arm in the same place where it had previously been fractured in a baseball game and secured in place with screws. An 80% impairment of the normal use of the arm has resulted from the re-fracture.

Respondent is charged with negligence in supervising and safeguarding the Claimant while he was confined in Weston.

The second case, Claim No. D-301, has been filed against the Department of Public Institutions of the State of West Virginia and alleges that the Claimant did not receive proper medical care from the State for his injuries. The Claimant was x-rayed at Weston, given first aid and transferred to Fairmont Emergency Hospital shortly after the attack where his injury was diagnosed as a re-fracture of the distal humerus of the right arm. Claimant remained there with his arm in a cast until September, 1967, at which time he was returned to Weston State Hospital. The fracture was reduced by manual manipulation and Claimant's arm remained in a cast on a closed reduction until September, 1967, when the cast was removed, revealing excessive swelling in a crooked arm, and with much pain and suffering. The arm was disfigured and could not be used functionally. A further examination at Weston State Hospital disclosed that there was considerable overriding of the fragments at the fracture joint and that an open re-reduction would have to be performed on the arm through the medium of surgical incision. The bone had to be rebroken and reset to correct this condition and on September 23, 1967, Claimant was returned to Fairmont Emergency Hospital where Dr. Salazar performed an operation to bring the bones into alignment. Claimant's arm was again placed in a cast until on or about December 1, 1967, and now appears to be in proper alignment. He has less than 20% of the normal use of his arm. The condition is not improving and another operation may be needed. The second claim is based on the failure of Respondent's Agents and Employees to properly diagnose the fracture and the failure to use reasonable care in reducing the fracture, in accordance with the usual and ordinary standards of the medical profession. Damages in the amount of $10,500.00 are sought in each of the above cases.

At the hearing, by agreement of counsel, the National Bank of Commerce, Committee for Cecil Smith, Jr., Claimant, was substituted as the complaining party. Inasmuch as the Claimant was under a mental disability, the two-year Statute of Limitations has no application to the cause of action in each case.

After careful consideration of the evidence and the duties and obligations of the Department of Mental Health to protect an incompetent person in its care and custody from a violent attack by other inmates in the Institution, it is the opinion of the Court that under the circumstances of this case there is no showing of negligence on the part of the Hospital. In a Mental Institution where many persons are confined under various kinds of insanity, it must be necessarily assumed that deranged persons will deviate from normal conduct and will engage in irrational acts and fights. Biggs became incensed at Claimant for refusing to "hang it up" (meaning commit suicide) after Claimant had promised to do so. They had formerly been buddies for some months. This, of course, does not relieve the Institution from exercising ordinary and reasonable care to protect its inmates from the violent and unpredictable conduct of other disturbed persons. The medical history of Jack Biggs does reveal an incompetent person prone to violence, motivated towards suicide and with delusions of persecution. It appears to us that the Hospital was without notice of the imminent danger to the Claimant and should not be held liable for his mistreatment by another patient unless the Hospital failed to protect the Claimant from an obvious and certain danger. We find no evidence in the Record that the administrative conduct of the Hospital was such as to expose the Claimant unnecessarily to injuries through failure to use reasonable care under the circumstances. Three to six guards were on duty in this area of the Hospital where maximum security was provided because of the bad histories of the inmates confined in this particular wing. A constant surveillance to restrain insane, delirious or disabled patients is physically and economically impossible. In the opinion of the Court, the Hospital should only be held liable if the patient is unreasonably exposed to hazards other than those which would be considered ordinary and normal risks in any Mental Institution.

The Court is of the opinion to deny any award to the Claimant or impose any liability on the Hospital for failure to exercise reasonable care in guarding the Claimant, its patient, from violence inflicted by others. To hold otherwise, would require the Hospital to place each mental patient in solitary seclusion to alleviate quarrels, assaults and attacks. A Hospital

must operate within the budget furnished by the Legislature and its personnel is necessarily limited for employment of doctors, nurses, guards and other employees. No Institution can be an insurer of the safety of its occupants and this is particularly true of an insane asylum maintained by the State as a public institution. Certain physical hazards are inherent in the operation of a mental institution and cannot be controlled by the personnel or guards of the institution except by superhuman effort and constant observation of a patient's movements.

On the damages claimed for inadequate medical care, we are of the opinion that the Claimant has made a showing by a preponderance of the evidence that he did not receive competent and careful medical care from the State of West Virginia, and we find medical malpractice. We are of the opinion that the Department of Public Institutions is required by law to exercise reasonable care to protect the health and lives of those in its care and custody, human beings who are weak or unwary inmates, from careless, unskillful or negligent medical practitioners. It would appear from the evidence in this case that the general standards of the medical profession were not followed under the circumstances related to the Court. The Claimant had a serious fracture of the humerus of his right arm with overriding bone fragments and a manual manipulation and closed reduction of the fracture without orthopedic advice was a deviation from the exercise of reasonable skill and care for the safety and well-being of the patient, particularly when the same bone had previously been fractured. The failure to properly diagnose and reduce the fracture by open surgery at the outset is not a failure to exercise the best judgment in a medical diagnosis, which would be a tolerable error of doubtful judgment. The arm of the Claimant's was fixed in a crooked position in a cast so that it could not properly heal. It was disfigured and painful when removed from the cast and could not be used. A subsequent examination at Weston State Hospital two months later revealed an improper setting of the broken bones in the arm and the necessity of placing the bones in proper alignment by breaking the arm and inserting pins. It definitely appears that the bones were not properly aligned in the first instance at the Fairmont Emergency Hospital. It is our finding that the Respondent's

Agents and Employees were not only negligent in their original diagnosis and in the attempted closed reduction of the fracture from July 4, 1967 to September 21, 1967, but that the full nature and extent of the fracture was not understood or treated by the usual and ordinary standards of the medical profession. No effort was made to determine whether a proper alignment of the bones was made by adequate use of X-ray photography or visual inspection. Had the Hospital's personnel exercised the ordinary care required, there should have been a complete and satisfactory recovery from the fracture with a minimum residual disability. The loss of 80% of the normal use of the right arm in the absence of some explanation for the unsatisfactory result indicates that the requisite skill and care was not exercised, which ordinarily would be exercised by members of the medical profession. The skill of physicians and surgeons in populated communities is ordinarily of high standard. In applying this standard to the treatment received by the Claimant, we find negligence in the making of this examination and diagnosis.

The charitable immunity of public and private hospitals from tort liability, aside from the question of sovereign immunity, has been practically eliminated in our State by recent decided cases and we are of the opinion that the State had a legal as well as a moral responsibility to treat its patient with more medical skill in collecting all factual data essential to arriving at a judgment as to the proper course of treatment to minimize residual disability.

For the foregoing reasons, the Court is of the opinion to allow the Claimant the sum of $3,000.00 in damages to cover his medical treatment, pain and suffering and permanent impairment. We are not inclined to include loss of past or future earnings as an item of damage because of the erratic employment record of the Claimant prior to the injury.

Claim disallowed in Case No. D-300.

Claim allowed in the amount of $3,000.00 in case No. D-301.

Opinion issued February 15, 1971

WEST VIRGINIA BUSINESS FORMS, INC.

vs.

DEPARTMENT OF MOTOR VEHICLES

(D-382)

Homer Hanna, Jr., for the Claimant.

George E. Lantz, Deputy Attorney General, for the Respondent.

JONES, JUDGE:

The claimant's petition alleges that it is entitled to payment from the respondent in the amount of $249.97 for an over shipment of supplies, within accepted limitations, under a certain purchase order dated August 15, 1969. The order was for 100 rolls of Class A Application Forms for automobile licenses, and by mistake 107 rolls were delivered. The respondent paid for 100 rolls but retained and used the additional seven rolls. As the seven rolls were not returned to the claimant, an invoice was presented to the respondent for $249.97 under date of May 6, 1970.

The respondent has filed its answer admitting the allegations contained in the claimant's petition, further asserting that this is a claim which the State in good conscience ought to pay, and recommending an award in favor of the claimant in the amount of $249.97.

Having considered the petition and answer which clearly show that the State has been unjustly enriched and that good conscience and equity require payment for the supplies furnished and used, the Court is of opinion to and does hereby award to the claimant, West Virginia Business Forms, Inc., the sum of $249.97.

Opinion issued February 15, 1971

RHEA RAE McCOY

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-281)

John Slack, Attorney at Law, Jackson, Kelly, Holt & O'Farrell, for the Claimant.

George E. Lantz, Assistant Attorney General, for the Respondent.

JONES, JUDGE:

The only allegations in the notice of claim filed in this case are that the amount of the claim is $165.00; "The side of the house owned by Rhea Rae McCoy was damaged by a piece of steel from a tractor of the W. Va. State Penitentiary. Penitentiary has had worker look at damage."; and that claim forms were sent by the claimant to Insurance Company of North America. A sworn statement of proof of loss filed with the notice of claim describes the cause and origin of the loss as follows: "Side on house damaged by a tractor of West Virginia State Penitentiary which was mowing on adjoining lot." While no formal assignment of this claim was presented, it appears that the beneficial owner of the claim is Insurance Company of North America.

At the hearing of this case, counsel for claimant presented a recorded telephone conversation wherein the claimant answered questions concerning the damage to her property. Thereupon, counsel for the respondent stated that the employees of the respondent at the State Penitentiary had no knowledge of the matter, and the hearing was concluded.

The unsworn statement of the claimant will not be considered as evidence in this case, and nothing further having been offered in support of the claim, the same is hereby disallowed.

Opinion issued February 15, 1971

HAROLD D. LOWE and DAISY LOWE

vs.

DEPARTMENT OF HIGHWAYS

(No. C-19)

Rudolph L. DiTrapano and *Robert W. Lawson, III* for the Claimants.

Donald L. Hall for the Respondent.

JONES, JUDGE:

On February 11, 1967, the claimant, Harold D. Lowe, was driving his 1963 Chevrolet Pick-up Truck in an easterly direction along West Virginia Route No. 27, accompanied by his wife, the claimant Daisy Lowe, and her cousin, Clarence Jones. During the afternoon of that day, at a point approximately two miles east of Wellsburg, a collision giving rise to this action occurred. The highway at that point consists of two eastbound lanes and one westbound lane, and Mr. Lowe was driving in the outside or right-hand lane around a curve to his right. The claimants' version of what happened next is that they suddenly came upon a boulder about two feet in diameter in their lane of traffic and about thirty feet ahead of them; they could not swerve to the left because of a passing pick-up truck, and there was no room to the right as the hillside came down very close to the pavement; they struck the boulder, breaking it into small fragments, and their truck upset into the hillside. The parties have stipulated damages to the claimants' vehicle in the amount of $653.00 on a total loss basis; and there is ample medical evidence that Mrs. Lowe sustained severe injuries. The claimants seek damages in the total amount of $10,000.00.

William VanCamp, an employee of the respondent, who was patroling the highway and arrived at the scene of the collision a few minutes after its occurrence, testified that snow had blown onto the highway in the area of the curve, making travel at that point dangerous, and he further testified that tracks or skid marks on the highway showed that the claim-

ants' vehicle had veered across the highway to its left, a distance of approximately forty feet, and then had re-crossed the highway a distance of approximately forty feet more before it crashed into the side of the hill. This witness said that he saw no evidence of a boulder, but instead, only three or four small shovels full of shale.

The claimants testified that they did not see any fallen rock signs; but Mr. VanCamp testified that there was such a sign in the direction from which the claimants had come and within one-fourth mile of the place in question.

Before this Court can make an award in a case of this nature, it must appear that the State Agency or its employee has been negligent. We will turn our attention first to that question, and if we find that the respondent was not negligent, then it will not be necessary to decide such issues as contributory negligence or the amount of damages.

Claimants' counsel contends that the respondent was negligent in failing to construct a barrier at the bottom of the hillside in question to prevent falling rocks from rolling upon the highway. To show a need for such protective measures, the claimants presented certain photographs which were admitted into evidence. Some of these were taken by Mrs. Lowe and her son, perhaps ten days to two weeks after the mishap, and show at least one large rock and several smaller ones on the berm and ditch area along the highway. Other pictures, which were not identified as to the time they were taken, but obviously taken in the summertime, at least a few months after the accident, show at least one large rock on the hillside, which appears to be in a precarious position. No other evidence to show a hazardous condition was adduced by the claimants, except certain general statements to the effect that this area was susceptible to slides and therefore dangerous.

Mr. Lowe was well acquainted with this stretch of highway, as he had traveled it frequently over many years, and he testified that he had never observed fallen rocks or shale at the place where the collision occurred, but that he had observed such deposits in other cuts along the highway. At one point in his testimony, Mr. Lowe stated that he had traveled this highway "every night and every morning for going on six

years", and was familiar with the cut in question. He further testified that the curve he was rounding was a blind curve, and that he was traveling forty to forty-five miles per hour. The respondent's witness, Mr. VanCamp, testified that in the springtime the Department of Highways had some trouble with fallen rocks at the place in question, but no more so than at other places along this and other highways in the Panhandle area. There is no evidence that the claimants or any other person had ever complained or given notice to the respondent that a dangerous condition existed at this location.

From all of the evidence in this case, it seems to the Court that this highway cut and resultant hillside with its many layers of rock and shale is little different from the hundreds and hundreds of other cuts and hillsides along highways all around the State of West Virginia. The unhappy reality of the situation is that our Department of Highways cannot guarantee the traveling public that rocks or trees may not fall upon our highways and thereby cause injury and damage to persons and property. The claimants' counsel in his brief places great reliance on *State ex rel Vincent v. Gainer,* 151 W.Va., 1002, in which the Supreme Court of Appeals of West Virginia found the State Road Commission negligent in a fallen rock case and allowed recovery by the claimant. The opinion in that case quotes from *Adkins v. Sims,* 130 W.Va., 645, a case in which recovery was denied, as follows:

> "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 moral obligation against the State * * *".

In the Vincent case, the Court found that a huge boulder had fallen immediately in front of the claimant's moving automobile; that the State Road Commission had removed a boulder from almost the same place the day before; that other similar rocks on the hillside were visible; that complaints had been made to the State Road Commission concerning the danger of this particular portion of the road relative to large boulders falling in the road; that no warning signs were erected nor were any protective measures taken; and that the

claimant had proved a prima facie case of negligence which the State did not attempt to rebut.

In the case of *Parsons v. State Road Commission,* Claim No. D-112, this Court said:

> "This Court has many times held that the State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. The case of *Adkins v. Sims,* 130 W.Va., 645, 46 S.E. (2d) 81, decided in 1947, holds that the user of the highway travels at his own risk, and that the State does not and cannot assure him a safe journey. The maintenance of highways is a governmental function and funds available for road improvements are necessarily limited."

While credible testimony in behalf of the respondent would tend to refute certain important allegations of the claimants, even if we give full weight to the claimants' case, we are unable to say that the respondent should reasonably have foreseen the unfortunate happening here involved. The *Adkins* case holds that the failure of the State to provide guard rails does not constitute negligence, and we believe that the logic underlying that holding should apply to the erecting of barriers in this kind of a case, unless there is a clear showing that such a dangerous condition is permitted to exist as reasonably would be expected to cause injury or damage to users of the highway. Only reasonable care and diligence are required; and we are of opinion that the claimants in this case have not proved such a positive neglect of duty on the part of the respondent as to create a moral obligation against the State.

We have carefully considered all of the record in this case and the law applicable thereto, including the helpful briefs of counsel for both parties, and it is our conclusion that equity and good conscience do not require that an award be made, and, accordingly, these claims are disallowed.

Opinion issued February 16, 1971

VOGT-IVERS & ASSOCIATES

vs.

DEPARTMENT OF NATURAL RESOURCES

(No. D-192)

Walter W. Burton for the Claimant.

George E. Lantz, Assistant Attorney General, for the respondent.

DUCKER, JUDGE:

The claimant, Vogt-Ivers & Associates, an engineering partnership of Charleston, West Virginia, alleges it is due from the Department of Natural Resources of the State of West Virginia, the sum of $16,275.00 as additional compensation for services rendered in connection with the development of the Cass Scenic Railroad at Cass, West Virginia.

A contract for engineering services by the claimant was entered into between the Department of Natural Resources and the claimant on July 9, 1964, under the terms of which the claimant was to prepare all working drawings, specifications and cost estimates for all the work contemplated in the project, and to assist in the taking of bids and to provide field supervision of construction. The claimant estimated the cost of the project to be $509,050.00 and in Article IV of the contract the payment to the claimant was to be "for its services set out and required in the contract a total lump sum fee of Fifty Thousand and Nine Hundred Dollars ($50,900.00) for the Cass Scenic Railroad project as outlined in the Area Redevelopment Administration's offer to the West Virginia Department of Natural Resources, dated 27 June 1963."

Claimant now says the total cost of the project was $696,652.66 and that its offer of $50,900.00 was based on ten percent of the cost which was first calculated on a basis of $509,050.00, and that the ten percent on such part of said $696,652.66 in excess of $509,050.00 as is properly chargeable, amounts to an additional $16,275.00, which the claimant now

seeks to recover in this proceeding. No agreement as to compensation other than the $50,900.00 was ever made between the parties. Claimant was paid the $50,900.00 and respondent says it is not liable for the extra amount claimed, that the fee was a lump sum fee for the whole project.

Claimant contends that it figured its fee on a basis of ten percent of the estimated cost which was less than the amount of the bids received for performance of the contract. When it was seen that the cost would be higher the respondent in 1966 obtained from the Department of Housing and Urban Development an additional grant of approximately $220,000.00. After the original bids proved greater than the amount available, claimant says it was requested by respondent to see if the deductive alternates in the plans would not bring the bids within the available funds but such reduction in the estimate costs were not sufficient to do so, and consequently the additional funds were requested and obtained.

Claimant says that it was required to make changes in the plans and do extra work in connection with the completion of the work after the additional funds were received, but the evidence of the claimant fails to show that what was done and claimed as extra was not contemplated in the project. Deductive alternates, it appears to this Court, were in the original plans and when more funds were available the alternates were susceptible of use. It is difficult to conclude that additional plans had to be drawn for their use, and even if additional plans were necessary, paragraph 2 of Phase II of Article 1 of the contract provides that "if in the opinion of the Owner, any additions to said plans and specifications are necessary, the Engineer/Architect shall furnish such additional plans and specifications without additional compensation from the Owner."

From the evidence in this case it appears to this Court that when the plans were drawn by the claimant for the Cass Railroad Project it was considered that $509,500.00 would be sufficient funds for the purpose, and the claimant was willing to do all the engineering and supervisory work necessary for the project for $50,900.00, which no doubt was calculated on a ten percent basis, but claimant apparently wanted to be sure

it received $50,900.00, regardless of whether the cost was $509,050.00, or more than that amount or less than that amount, and accordingly so provided, instead of making the fee a contingent one of ten percent of the cost. Surely the respondent could not have said it owed claimant only $40,000.00 if the cost had been only $400,000.00.

The evidence of the respondent in our opinion sufficiently contradicts the claim that claimant has done work over and above that specified in or contemplated by the contract and we conclude that the claimant is not entitled to the extra compensation alleged, and accordingly, the claim is disallowed.

Claim disallowed.

Opinion issued December 29, 1970

JERRY K. & ANNE B. CALDWELL

vs.

DEPARTMENT OF HIGHWAYS

(No. D-194)

Jerry K. & Anne B. Caldwell, appearing only by Petition and Stipulation for the Claimants.

Donald L. Hall, of Department of Highways for the Respondent.

DUCKER, JUDGE:

Claimants, Jerry K. Caldwell and Anne B. Caldwell, allege that they were the joint owners of certain real estate and the dwelling house thereon situate about one-half mile west of Princeton, West Virginia, adjacent to Route 20, and that on or about September 1, 1967, the respondent purchased certain real estate on said highway across from the said property of claimants, for the purpose of constructing and operating a county garage and office complex. In September, October, November and December, 1967, respondent began and proceeded in excavating its property for its building, and in said excavation work used blasting operations with TNT, dynamite and other explosives, which resulted in damages to the claimants' dwelling house in the alleged amount of $2,000.00.

The facts in the case are admitted by stipulation of the parties, which stipulation shows the actual damages occasioned by the blasting to be $1,497.00.

As the damages were the result of the blasting which was not properly controlled and which presumably involved negligence on the part of the respondent, we are of the opinion to, and do hereby, award the claimants the sum of $1,497.00.

Award of $1,497.00.

Opinion issued February 15, 1971

JOYCE J. DRODDY AYERS

vs.

DEPARTMENT OF HIGHWAYS

(No. D-288)

John S. Sibray, Michael Tomasky, Mike Magro, Jr., for the Claimant.

Donald L. Hall, of Department of Highways for the Respondent.

DUCKER, JUDGE:

Claimant, Joyce J. Droddy Ayers, alleges damages in the amount of $50,000.00 for injuries and disabilities resulting from a collision of the automobile, in which she was a passenger, with a large boulder in the road designated as U. S. Route 250, about one-fourth of a mile south of Fairmont, West Virginia, on May 12, 1967, at approximately 1:15 a. m. This is the same accident in which Julia A. Varner was killed and the claim of her administrator for her death was heard and decided by this Court on February 10, 1970, in Claim No. 185, styled John C. Varner, Administrator of the Estate of Julia A. Varner, deceased, v. State Road Commission, and an award was made to the claimant in that case, pursuant to a finding by this Court of liability on the part of the respondent.

A full recital of the facts in that case upon which liability was determined and the award made are contained in the opinion of this Court, and it would only be repetitious to recite them here. Those facts and our conclusions thereon have not

been shown to have been changed or otherwise altered or varied and inasmuch as the claimant here was merely a passenger in the Varner car, we reach the same conclusion in this case as to the liability of the respondent.

The sole question here is one of damages, and in this respect, the evidence shows that the claimant, in addition to pain and suffering, has sustained hospital and medical expenses in excess of Fifteen Hundred Dollars and loss of wages in excess of Three Thousand Dollars, and that she has not fully recovered from her injuries. The report of Dr. C. M. Caudill, who examined claimant at the request of the respondent, reports that claimant cannot extend her left arm to a full normal degree, that his impression is that she is doing well as far as her basic neurologic condition is concerned, but he recommends future psychiatric evaluation and consultation with an otolaryngologist. So in view of the fact that claimant may still have physical difficulty and further medical expense, we are of the opinion that she should be compensated for such anticipated difficulty and costs.

We are of the opinion that Ten Thousand Dollars will be a fair amount of compensation and damages and, accordingly, we award the claimant the sum of $10,000.00.

Award of $10,000.00.

Opinion issued February 15, 1971

W. M. McCLINTIC

vs.

DEPARTMENT OF NATURAL RESOURCES, STATE OF WEST VIRGINIA

(No. D-353)

W. M. McClintic, for the Claimant.

George E. Lantz, Deputy Attorney General for the Respondent.

DUCKER, JUDGE:

The claimant, W. M. McClintic, of Romney, West Virginia, alleges damages in the amount of $46.77, the cost of replacing

on his automobile the windshield which was broken by a rock thrown by a grass mower operated by an employee of the respondent at the parking lot of the Department of Natural Resources located in Romney. Claimant's car was lawfully parked in the parking lot.

The case was submitted on affidavits and admission of the facts by the respondent, and it appears from the proof that there was negligence on the part of the operator of the grass mower, and that the respondent is therefore responsible for the damages.

We, therefore, allow the claim and award the claimant the sum of $46.77.

Claim allowed.

Opinion issued February 15, 1971

STATE FARM MUTUAL AUTOMOBILE

INSURANCE COMPANY
(William A. Riddle)

vs.

DEPARTMENT OF HIGHWAYS

(No. D-327)

Robert J. Louderback, for the Claimant.

Donald L. Hall, of Department of Highways for the Respondent.

DUCKER, JUDGE:

Claimant, State Farm Mutual Automobile Insurance Company as subrogee of William A. Riddle, alleges damages in the amount of $105.46, done to the car of said Riddle, who while driving his automobile north on Route 2, one mile south of New Cumberland, West Virginia, on July 2, 1970, was stopped by a flagman of the respondent which was engaged in blasting operations, and while so stopped a large rock from the blasting struck the hood of Riddle's automobile. Respondent admits the blasting and the stopping of Riddle's car and that the atten-

tion of respondent's employees of the occurrence was called by Riddle at the time, but that no employee saw the rock hit the car and respondent says it is without knowledge of the truth of the allegations. Respondent, however, agreed to submit the case for decision upon the pleadings and the affidavit of Riddle without other evidence or any proof denying the facts alleged.

As the evidence of the claimant is not contradicted, that Riddle was without fault, and that the damage has been caused by the wrongful act of the respondent which under the circumstances we presume to have been the result of negligence, we are of the opinion to, and do hereby award the claimant as subrogee of Riddle, the sum of $105.46.

Award of $105.46.

Opinion issued February 15, 1971

ESDEL B. and SYLVIA J. YOST

vs.

DEPARTMENT OF HIGHWAYS

(No. D-272)

Esdel B. Yost and *Sylvia J. Yost,* for the Claimants.

Donald L. Hall, of Department of Highways for the Respondent.

DUCKER, JUDGE:

Claimants, Esdel B. Yost and Sylvia J. Yost, owners of a tract of land containing "six to ten acres" on Tribble Road, Mason County, West Virginia, allege they have been damaged by the respondent in the amount of $825.00, of which sum $625.00 represents loss of a hay crop, $150.00 as compensation for the parking of a trailer on their land, and $50.00 for damages to a fence against which respondent had placed supplies.

The loss of the hay crop is based on the claim that the respondent with its supply trailer and heavy supplies against a fence had blocked the only access to claimants' meadow in

which they had a crop of hay. The value of the crop of hay presents the only real question in serious dispute as this Court considers the amounts claimed for rental space of the trailer and for damages to the fence as reasonable.

As to the question of the damages for the hay, the testimony of a qualified disinterested witness on behalf of the respondent affords a reasonable and fair basis for the determination of claimants' loss. Such evidence was to the effect that the land should produce nine tons of hay, which at a valuation of $50.00 per ton would produce a gross amount of $450.00, and that the cost of cutting it would be sixty percent of such gross sum and there would be left a net profit of forty percent, amounting to $180.00.

We are, therefore, of the opinion that the claimants are entitled to receive $180.00 for the hay, $150.00 trailer rental space, and $25.00 for the fence damage, the latter being only an estimated amount because proof was not definite or sufficiently satisfactory to allow more. Accordingly, we allow and award the claimants the total sum of $355.00.

Award of $355.00.

Opinion issued February 15, 1971

CHARLESTON CONCRETE FLOOR COMPANY, INC.

vs.

DEPARTMENT OF HIGHWAYS

(No. D-322)

Charles E. Hurt, for the Claimant.

Donald L. Hall, of Department of Highways for the Respondent.

DUCKER, JUDGE:

Claimant, Charleston Concrete Floor Company, Inc., claims the respondent owes it the sum of $299.93, with interest from June 7, 1965, by reason of a special sidewalk paving assessment made by the Town of Hurricane against the property of re-

spondent located in said town, and known as a parcel of land adjoining Lots 1 and 2, Taylor Series, and fronting 136.67 feet on Putnam Avenue, said Putnam Avenue being a part of State Route 34.

The facts which are undisputed are substantially as hereinafter stated, and the question presented is solely one of law.

The property against which the assessment was made was a land fill, owned by the respondent, consisting of an embankment as an approach to a bridge, and as such property was not otherwise used by respondent, respondent claimed that such special assessment against it offered no special benefit to the respondent, a contention which claimant denied. Upon the refusal of the respondent to pay the assessment the claimant brought suit in the Circuit Court of Putnam County against the respondent and the nearest individual property owners, namely, John W. Chapman and Evelyn Chapman, to have the Court determine whether the assessment should be against the respondent or said Chapmans, and whether or not there should be a reassessment in the matter against the Chapmans. The respondent was not a party to this suit, but it was notified of the assessment at the time the assessment was made and could have contested its legality before the town council at the meeting at which the assessment was confirmed. The Circuit Court held that the assessment against the respondent was proper and that there was no need for a reassessment against the Chapmans.

The respondent claims that the assessment against it is not valid because the sidewalk is on state property, does not "abut" the road, and does not afford any special benefit within the meaning of the law. While these contentions of respondent could have been presented to the Council and the latter's decision could have been subsequently appealed, they were not so presented, and this Court is of the opinion that the Council's decision of the questions of fact is binding and not subject to review by this Court. The respondent has had its opportunity to contest both the action of the Council and the decision of the Circuit Court, and has relied entirely upon this Court to determine the legality of all the proceedings, an act which we do not consider proper to do.

Accordingly, we are of the opinion to, and do award the claimant the sum of $299.93, but we are prohibited by the statute and we disallow any claim for interest.

Award of $299.93.

Opinion issued March 29, 1971

JAMES A. ESPOSITO

vs.

WEST VIRGINIA BOARD OF REGENTS

(No. D-329)

No appearance for the Claimant.

George E. Lantz, Deputy Attorney General for the Respondent.

DUCKER, JUDGE:

Claimant, James A. Esposito, a former student in the Law School of West Virginia University from September, 1966, until his graduation in June, 1969, was charged nonresident student tuition fees. The difference between resident student tuition fees and nonresident student tuition fees amounted to a total of $1,950.00, and claimant, contending that he should have been required to pay only resident tuition, now claims he should be awarded that sum as a refund. The facts in the case are stipulated as hereinafter related and the only issue is whether the facts constitute a valid claim.

Claimant, born December 2, 1938, in New Jersey, was reared and educated through high school while living with his parents in New Jersey, and after graduation from high school worked at various jobs in New Jersey until 1963 except for a period of six months while in the army. In January 1963, claimant enrolled at Salem College, in Salem, West Virginia, residing at various homes in Salem and returning to his parents' home in New Jersey during the summertime. On June 5, 1965, claimant married Charlotte J. Rauer, a life-long resident of Carolina, Marion County, West Virginia, who owned and operated a beauty salon in Monongah, Marion County, West Vir-

ginia, and immediately upon their marriage, claimant and his wife established their home at a rented house in Carolina, West Virginia, and claimant's wife continued her employment at Monongah, and they have continued to reside at said house until the present time. Claimant was graduated from Salem College in June, 1966, and in September 1966 he enrolled as a resident student in the College of Law at West Virginia University and then paid resident student fees, but three months later he was required, after rejection of his protest, to pay nonresident tuition fees for the whole period of his law school enrollment until his graduation in June 1969.

To substantiate claimant's allegation that he was entitled to be considered a resident and chargeable only with resident fee tuition, the stipulation shows claimant on February 1, 1966, registered to vote in West Virginia, was assessed in 1965 for capitation tax, automobile tax in 1965, and for 1966 a tax on his dog, paying all of them for each year thereafter, and in the fall of 1966 he acquired a driver's license, continuing his use of the same since that time. The records pertaining to claimant's child born in 1967, reflect the residence of the claimant to be Carolina, Marion County, West Virginia. Claimant filed joint federal and state income tax returns for 1967 and thereafter showing his residence as being in West Virginia. Claimant worked in the Marion County Assessor's office and as a law clerk between his second and third years in law school, and upon graduation he entered the private practice of law at Fairmont.

Claimant alleges that from the time of his marriage in 1965 which occurred more than a year before he enrolled in West Virginia University, he had no other plans but to make his home in Marion County, West Virginia, and since that time has treated Marion County as his home, severing all connections with his former residence in New Jersey.

While all the facts, self-serving as they are to indicate the claimant became domiciled in West Virginia in 1965, the question remains as to whether there has been compliance with the regulations of the University pertaining to such subject.

The regulation involved is as follows:

> "No person shall be considered eligible to register in the University as a resident student who has not been

> domiciled in the State of West Virginia for at least twelve consecutive months next preceding college registration. No nonresident student may establish domicile in the State, entitling him to reductions or exemptions of tuition, merely by his attendance as a full-time student at any institution of learning in the State."

In the case of *Detch v. Board of Education,* 145 W. Va. 722, 117 S. E. 2d 138, the Supreme Court of Appeals of West Virginia confirmed the right of the West Virginia Board of Education to determine education policies of public schools, if such policies are not unreasonable or arbitrary. Such undoubtedly applied to the Board of Governors of West Virginia University, and we consider the regulation here involved a reasonable policy.

As indicated, the claimant may have established his domicile in West Virginia and entitled to voting and other privileges by proof of facts shown and by proof of his intention in that regard, but as to his rights with respect to the institutions of learning in this State there is the additional requirement that he must not be in violation of the regulation which provides that he cannot establish the domicile which would entitle him to reductions or exemptions of tuition by his attendance as a full-time student at any institution of learning in the State.

Claimant says his marriage in 1965 definitely determined his status more than one year before he entered West Virginia University, and that fact, in addition to the other facts, rendered him eligible as a resident student. Such argument would probably prevail, were it not for the positive prohibition in the regulation which denies a student from another educational institution in the State to so establish residency rights by attending such other school in the State. Salem College is a college in the State and claimant's attendance there brings his claim within such prohibition. With claimant's domicile having been in New Jersey prior to his marriage in 1965, we are of the opinion that such fact and the other facts evidencing change of residency or domicile are not sufficient to overcome the prohibition contained in the regulation, even though claimant may have legally become a citizen the year before his last year of attendance at Salem College. While it may be argued that the claimant has not established his residence *merely* by his last year's attendance at Salem College before entering

West Virginia University, we think the facts do not satisfactorily negative an apparent attempt to circumvent the rule, and, so we conclude that the facts substantiate the application of the prohibitory provisions of the regulation.

The claimant, in support of his claim, relies upon the decision of this Court in the case of *Wotkiewicz v Board of Regents,* D-294, decided October 14, 1970. That case is distinguishable from this case in that the claimant in that case came to this State to accept a secretarial position with a member of the faculty of West Virginia University, with no thought or intention of attending school, not even as a part time student, although after she was here a while she was induced to take a part time course at the University during her noontime recess, and more than a year later when she was forced to change her employment she decided to enter the University on a full time basis. The facts in that case, in the opinion of this Court, clearly substantiated her right to be considered eligible as a resident student when she became a full time student. We do not consider that case as a precedent for the claim here made.

As we are of the opinion that the claimant did not qualify as eligible for resident status in the matter of his tuition fees, and that the action of the Board of Governors was within its authority, we hold the claimant is not entitled to recover, and, accordingly, we disallow his claim and make no award therein.

Claim disallowed.

Opinion issued March 29, 1971

CHARLES E. & LILLIE F. EVANS

vs.

DEPARTMENT OF HIGHWAYS

(No. D-310)

Mrs. Janice Trent, Daughter of Claimants for the Claimants.

Donald L. Hall, of Department of Highways for the Respondent.

DUCKER, JUDGE:

The claimants, Charles E. Evans and Lillie F. Evans, whose property located at 330½ Mary Street and 1602 O'Dell Avenue, Charleston, West Virginia, was subject to condemnation for highway purposes, herein ask damages in the amount of $1,201.54 because of loss of rent from their lessees or tenants for the period existing between the date the tenants were notified that the property was to be taken by the respondent and the date the property was purchased by the respondent pursuant to an option given by the claimants to the respondent.

The facts as testified to by the daughter of the claimants and as shown by the other testimony and exhibits are substantially as hereinafter stated. The respondent advised the claimants in July, 1969, that claimants' property would be taken for highway purposes, and in September, 1969, the tenants of the claimants were notified by the respondent that they would have to move. On March 9, 1970, the claimants executed and delivered to respondent an option whereby the respondent could purchase within six months the property for the sum of $17,500.00, which option was exercised by the respondent and the property was purchased by the respondent at said price, whereupon a deed therefor, dated March 30, 1970, was executed and delivered. Both the option and the deed contained provisions releasing the respondent from all claims for damages or compensation other than the purchase price, such provision in the deed being in the following language:

> "* * * it being agreed that the compensation herein provided for as purchase price is full compensation both for

the land herein described and for all rights and easements hereby released and all damages herein mentioned which Grantor has or may hereafter suffer."

It appears that there was some discussion by telephone between the claimants, who lived in Maryland, and the agents of the respondent, both as to the purchase and as to loss of rent, but the respondent's agents always told claimants that any rent claim in such a matter was a noncompensable item. There is no evidence of fraud or misrepresentation, and it was admitted the claimants were able to read.

The transaction was apparently closed by the respondent delivering the purchase price check to the sellers at a bank in Maryland and simultaneously receiving the executed deed, the claimants alleging that the respondent said the matter of rents could be claimed later, but respondent denied that any such statement was made. The statement alleged to have been made was only testified to in the form of hearsay by claimants' daughter.

While this Court has considerable sympathy for the claimants, it is forced to adhere to the law in such cases, and where the parties here executed formal options and deeds containing releases of the claims now asserted, this Court must abide by the provisions of such releases unless fraud or other illegality in regard thereto is shown.

For the reasons stated, we are of the opinion to, and do hereby, disallow the claim and make no award thereon.

Claim disallowed.

Opinion issued March 29, 1971

DOROTHY ELSWICK

vs.

DEPARTMENT OF HIGHWAYS

(No. C-32)

Warren R. McGraw, for the Claimant.

Donald L. Hall, Attorney for Department of Highways for the Respondent.

DUCKER, JUDGE:

Claimant, Dorothy Elswick, alleges that on August 4, 1965, she was driving a 1950 Ford Station Wagon on State Route 10 out of Pineville, West Virginia, down through the last curve of Jesse Mountain toward Oceana, when a rock from a cut on the side of the mountain came down and struck her car doing damage to the front of the car and causing personal injuries, for which she seeks damages in the amount of $50,000.00. As to the damages to the automobile she makes no claim, because she says she was compensated therefor by insurance.

As to the cause of the accident, claimant testified that the rock came from within 10 to 12 feet of the edge of the pavement of the road, that her car "came to a stop someway" and that she remembered jerking her feet and that the impact jerked her body "every which way." Claimant did not go to a doctor until a day or two after the accident although she said she had a severe headache and was nauseated and "shook all over" immediately after she got out of her car at that time, and that she thought that at the time of the accident her foot struck the pedals in the car. Claimant alleges injuries to her foot, her lower back, and that she has difficulty in bending.

At the instance of the respondent, M. M. Ralsten, M.D., on March 27, 1968 examined the claimant and his opinion and conclusion was that "she was afflicted merely by fright due to the impact of the surrounding circumstances and that apparently she is not aware that her body made any contact with any object so as to cause contusions or other objective evidence of injury."

The claimant testified that if there were any "falling rock" signs at the time of the accident she did not see any, but that she did see one after the accident. She said the rock fell suddenly; that she had traveled this road many times. The claimant produced no other witness to testify as to facts, although she had a passenger in the car with her at the time of the accident, which witness was now a resident of Florida.

A review of the testimony and the lack of evidence to substantiate the allegations, as well as nothing to indicate the condition of the road or the area adjoining the place of the accident, forces this Court to conclude that the claimant has not proved negligence on the part of the respondent. The fact that a rock fell is not alone sufficient to show such negligence. Damages cannot be awarded unless caused by negligence. Nor, in the light of the evidence of Dr. Ralsten, do we consider the evidence of injuries alleged as attributable to the accident satisfactory for an award.

For the reasons stated, we are of the opinion to, and do hereby disallow this claim, and make no award herein.

Claim disallowed.

Opinion issued March 29, 1971

MARTHA V. WHITTINGTON

vs.

DEPARTMENT OF HIGHWAYS

(No. D-311)

CHARLES G. WHITTINGTON

vs.

DEPARTMENT OF HIGHWAYS

(No. D-312)

Thomas P. O'Brien, Jr., Attorney at Law, for the Claimants.

Donald L. Hall, of Department of Highways, for the Respondent.

DUCKER, JUDGE:

Claimants, Martha V. Whittington and Charles G. Whittington, allege damages in the amounts of $5,000.00 and $1,500.00, respectively, by reason of injuries suffered by Martha V. Whittington, and medical expenses incurred by, and loss of services by Charles G. Whittington as husband of Martha V. Whittington, all occasioned by the alleged negligence of the respondent in leaving a hole in the paving of MacCorkle Avenue, Kanawha City, Charleston, West Virginia, a state highway, into which hole claimant Martha V. Whittington alleges she fell on August 20, 1968, while said claimant was crossing said avenue.

These claims being based on the same facts, pursuant to agreement of counsel, were heard together and submitted for decision.

Claimant, Martha V. Whittington, alleges that while crossing said MacCorkle Avenue on said date she tripped and fell in a large hole negligently opened and left in said boulevard, and that she was thrown to the ground breaking her right arm, to which claim respondent answered denying the claim and alleging that any injuries suffered by claimant were the re-

sult of her own negligence, and that consequently neither she nor her husband are entitled to recovery of any damages.

Claimant, Martha V. Whittington, testified that she was on her way to work at Heck's discount store in Kanawha City at about 9:20 a.m., August 20, 1968, and that when the traffic light changed she started across the street, did not see the hole in the street until she "started to fall and then when I (she) tripped and went down I (she) throwed my (her) elbow to catch myself (herself)," and fractured her right elbow. It does not appear that claimants made any subsequent examination of the hole in the street which they allege was the cause of the accident. A witness for the claimant who was with claimant at the time of the accident stated that the hole in the street was a "round circle" with smooth edges, "no jagged edges," and that as to the depth of the hole, in answer to a question as to whether she could state approximately how deep it was, she stated "I don't think I could but I think it was about an inch at least," and in answer to a further question as to the depth of the hole and the circumference of the hole, she replied that it was "about an inch deep" and "about the circumference of a grapefruit."

We are of the opinion that the evidence does not prove the street was sufficiently out of repair to justify a conclusion that there was actionable negligence on the part of the respondent, regardless of what may have caused the hole, or whether the respondent was required by law to repair the place as a hazard to pedestrians or to traffic.

As the claimant, Martha V. Whittington, is not entitled to recover, it follows that her husband is not entitled to recover for his expenses and the loss of the services of his wife.

Accordingly, we are of the opinion to, and do hereby, disallow both of the claims in these two cases.

Claims disallowed.

Opinion issued March 29, 1971

VOGT-IVERS & ASSOCIATES

vs.

STATE TAX COMMISSIONER

(No. D-193)

Walter W. Burton for the Claimant.

George E. Lantz and *Edward G. Atkins*, Assistant Attorneys General, for the Respondent.

JONES, JUDGE:

By a written stipulation filed in this case, counsel for the claimant, Vogt-Ivers & Associates, and counsel for the respondent, State Tax Commissioner, have agreed that the parties entered into three separate written contracts of like import for the preparation of tax maps for Webster, Lewis and Upshur Counties upon terms substantially as hereinafter set forth.

The estimated compensation of $36,733.92 for the tax mapping of Webster County was arrived at by assigning $2,500.00 of that figure for aerial photography, with the remainder of the total estimated compensation being based on 8,432 entries on the land books at $4.06 per parcel, 7,882 of which entries were included on the completed tax maps, leaving 550 entries which were not included. The amount paid the claimant for the preparation of the Webster County maps was $34,500.92, made up of $2,500.00 for aerial photography and $4.06 per parcel for the 7,882 parcels or $32,000.92. It is agreed that if the respondent owes the claimant any additional sum of money under the Webster County contract the amount owing would be for the 550 parcels not included on the completed tax map at $4.06 per parcel or $2,200.33.

The estimated compensation of $68,779.00 for Lewis County was based on 12,620 entries on the land books at $5.45 each, 10,811 separate parcels of which were included on the completed tax maps of Lewis County and 1,809 entries not being included. The amount paid to the claimant for the preparation of the Lewis County maps was $5.45 per parcel for 10,811 parcels, a total payment of $58,919.95, and it is agreed that if

the respondent owes the claimant any additional compensation, it would be for the 1,809 land book entries which were not included on the final tax maps at $5.45 per item or $9,859.05.

The estimated compensation in the amount of $61,377.30 for Upshur County was based on the number of parcels of land listed on the land books of said County, being 12,146 entries at $5.05 each. 11,409 of the total entries were included on the completed tax maps and 737 such entries were not included. The amount paid to the claimant for the preparation of the Upshur County maps was at the rate of $5.05 per parcel for 11,409 parcels or $57,615.45, and it is agreed that if the respondent owes the claimant any additional compensation it would be for 737 parcels at $5.05 per parcel or $3,721.85.

It further has been stipulated that in the case of each County the number of entries appearing on the land books but which were not included in the completed tax maps is accounted for by the following: (a) double assessments on the same piece of property; (b) recorded deeds for portions of land which could not be located; (c) numerous deeded portions which ended up in rights of way for railroads, highways, etc.; and (d) divided interests in the same piece of property.

The total amount of this claim is $15,813.90 and, according to the stipulation, if the claimant is entitled to recover under its interpretation of the terms of the three contracts, that amount is admitted to be due and owing.

Pertinent sections of the contracts, which are identical except for the compensation to be paid, are the following:

"ARTICLE I

* * *

6. Definition of a Parcel

A. For the purposes of this agreement, a "parcel" shall mean any portion of land described by a deed recorded in the official records of the county wherein the land is situate. Provided, however, where the owner of any such parcel has subdivided his land into separate lots and recorded a map or plat of such subdivision, the Engineer shall treat each separate lot of such subdivision as a separate parcel. However, where an owner of land has consolidated his contiguous real estate holdings into

one entry upon the assessor's land books, then such holdings shall be treated as one parcel in spite of the fact that ownership is evidenced by more than one deed.

B. Each parcel shall be numbered. Map parcel numbers shall be consecutive, beginning with number one on each map sheet. Parcel numbers shall begin in the upper left hand corner of map sheets and shall continue from left to right ending in the lower right hand corner of each sheet."

"ARTICLE VI

The party of the first part will pay to the Engineer, in consideration of and as compensation for, the Engineer's performance of its obligations under the terms of this agreement, the sum of (*$4.06 for Webster County, $5.45 for Lewis County and $5.05 for Upshur County*) for each separate parcel of land actually included in the completed tax maps to be provided for said (*Webster, Lewis, Upshur*) County under the terms of this agreement, the total estimated cost of which is (*$36,733.92 for Webster County, $68,779.00 for Lewis County and $61,377.30 for Upshur County*)." (Words and figures in parenthesis supplied from separate contracts.)

The claimant would have the decision in this case turn on the first sentence in Article I, Paragraph 6A, of each of the contracts, which reads: "For the purposes of this agreement, a 'parcel' shall mean any portion of land described by a deed recorded in the official records of the county wherein the land is situate." Claimant contends that it was to be paid for every portion of land described by a deed in the County Clerk's office whether such portion actually existed or not or was left off the final tax maps for one of the other reasons hereinabove set out. The claimant further says that there were as many or more tracts of land dealt with than were actually numbered and shown on the final maps, and that somehow each of these theoretical tracts or parcels are "included" in the completed tax maps.

However, the consideration and compensation for the engineer's services is specifically set out and described in Article VI as being a fixed sum for each separate parcel of land *actually included* in the completed tax maps to be provided for the respective County under the terms of the agreement. Each of these contracts calls for an *estimated* compensation based upon an *estimated* number of parcels to be paid for at a fixed rate

per parcel. It is obvious that neither party knew how many parcels would finally be shown on the tax maps but it was equally obvious to anyone having knowledge of our county land book records that many of the items listed on the land books and included in the estimates would prove to be non-existent or for other reasons would not be includable upon the maps for the purposes outlined in the contracts. It is also obvious that the pieces of land shown on the land books but found not to be includable upon the maps should entail greater work and investigation than the land book entries which were easily identifiable, but that must have been taken into account by the claimant and may not alter the plain language of the contracts. It seems very likely that the claimant underestimated the additional trouble these items would cause when it submitted its bid.

We think it may be assumed that the items of property appearing upon the land books, upon which the estimated compensation was based, were not recorded without some reason, and in practically all cases there would be some description, no matter how erroneous, in a deed "recorded in the official records of the County wherein the land is situate." One of the purposes of the mapping projects was to eliminate improper assessments and as accurately as possible to determine the number and descriptions of the taxable units of real estate in each of the counties. Under the contracts each separate parcel *included* in the completed maps was to be numbered, and upon consideration of the whole contract, it appears to the Court and the Court finds that the parties intended that the total of such numbered parcels should be paid for at the specified rate per parcel. The Court believes that the contracts are clear as to the amount of compensation to be paid and it appears from the record in this case that the claimant has been paid in full.

Accordingly, the claim for an award in this case is disallowed.

Opinion issued April 5, 1971

C & D EQUIPMENT COMPANY, A CORPORATION, FOR THE USE AND BENEFIT OF THE FIRST NATIONAL BANK OF SOUTH CHARLESTON,
Claimant,

vs.

THE STATE BUILDING COMMISSION OF WEST VIRGINIA, AN AGENCY OF THE STATE OF WEST VIRGINIA,
Respondent.

(No. D-324)

Robert H. C. Kay, Esq., and *Kay, Casto & Chaney,* for the Claimant.

Thomas P. O'Brien, Jr., and *George E. Lantz,* Deputy Attorney General, for the Respondent.

PETROPLUS, JUDGE:

The claimant, C & D Equipment Company, a corporation, filed its Notice of Contract claim against the respondent, the State Building Commission of West Virginia, a public corporation created under the laws of the State of West Virginia, with powers and duties conferred upon it by Chapter 5, Article 6 of the official Code of West Virginia, seeking to recover the sum of $48,340.36. The case was submitted on a Stipulation of Facts and only legal questions relating to the interpretation of the Contract are presented to this Court for determination.

The following is the factual situation as revealed by the Record. The State Building Commission was created for the construction of public buildings for specified purposes with powers to contract and acquire by purchase or otherwise real property necessary for its corporate purposes and to exercise the power of eminent domain to accomplish such purposes. The Commission is also authorized to construct buildings on real property which it may acquire in the City of Charleston, and issue State Building Revenue Bonds to finance the costs of its projects. Prior to the 29th day of December, 1967, the State Building Commission decided upon and did commence the acquisition of property for the erection and construction of

certain buildings, and on December 29, 1967, entered into a Contract with the claimant for the furnishing of all equipment, labor and performing all of the work necessary for the demolition of certain structures described in the Contract by street addresses and parcel numbers. The Contract stated that time was of the essence and the Commission would pay the amounts set forth with unit prices in the claimant's Proposal which was attached to and made a part of the Contract by reference. The Proposal covered approximately 63 structures with a specified bid price for each structure ranging from $45.00 to $4550.00, depending upon the size and condition of each structure. The Notice to bidders requesting sealed bids to be submitted stated that separate bids must be made for each building in the Capitol Complex Project, and possession of each building for demolition purposes will be awarded to the contractor on an individual basis. The contractor's bid proposal included detailed specifications for a complete demolition of the buildings, severance of utility services, grading and parking lot surfacing, rat control, as well as a time schedule for the completion of the demolition work for designated buildings not later than April 1, 1968, and other designated buildings not later than May 1, 1968. The project was not completed until June 30, 1968, because of the alleged failure of the respondent to release the properties to the claimant with proper order and timing to allow the contractor to schedule and complete its work in an orderly, efficient and economical manner as it had planned to do when it examined the Proposals and made its bid to demolish all structures for an aggregate sum of $41,717.00.

The delay of the State Building Commission to make available the structures is charged as a breach of its contract. The claimant was required to raze a structure in one area and move to an entirely different location to demolish another structure, completely disrupting its plans to execute the Contract according to a schedule of operations as contemplated by the parties, thereby causing the plaintiff to spend an additional sum of money for the rental of equipment, labor and for the idleness of its own equipment and other costs and expenses over and above the Contract price, making a total claim of $48,340.36.

The claim for damages and extra compensation, with supporting data and affidavits, was thoroughly investigated by the State

Building Commission and, as a result of such investigation, the losses were verified and the Commission recommended the payment to the claimant of the sum of $29,907.68. The respondent thereupon made its requisition for payment of said sum to Denzil L. Gainer, Auditor of the State of West Virginia, for the issuance of a Warrant to the Treasurer of the State for the payment of said sum. The State Auditor would not approve the payment of the requisition and thereupon the claimant filed a Petition for Mandamus in the Supreme Court of Appeals of the State of West Virginia to compel the payment of the sum of $29,907.68, the agreed amount of the settlement between the parties. The Supreme Court of Appeals, in its Opinion dated April 14, 1970, refused the Writ, holding that the State Office Building Commission was a State Agency and as such immune from suit and that the claim should be submitted to the State Court of Claims for determination. The Court further held that the Auditor had no authority to issue a Warrant for such a claim without authorization for payment by the Legislature after the claim had been considered favorably by the Court of Claims.

In order to finance the work, the claimant assigned the money it was to receive under the Contract to The First National Bank of South Charleston, which Assignment was accepted by the State Building Commission.

The claimant's contention is that it is entitled to recover damages for the delayed release of structures for demolition in violation of a contemplated sequence of operations which would have enabled the contractor to do its work efficiently and economically. The State's contention admits the authorized payment to the claimant of $29,907.68 as additional compensation for damages and extra work, but denies any legal obligation to the claimant.

An examination by this Court of all the contract documents, including the specifications, bid proposal and all the circumstances surrounding the project, reveals that the contractor relied upon an orderly, efficient and business-like release of the structures for demolition. In our opinion, it cannot be seriously contended by the respondent that when a completion date is specified for designated structures not

later than April 1, 1968, and other designated structures not later than May 1, 1968, that a proper interpretation of the Contract would permit the respondent to release the properties for demolition in a haphazard manner requiring the contractor to keep its equipment idle and causing him to move unnecessarily from one site to another to suit the convenience of the respondent. A reasonable performance of the Contract required the respondent to make the properties available in a sequence of operation which would allow the contractor to perform its work in a reasonably efficient manner. It is clear from this Record that the Building Commission after an investigation admitted its fault by recommending the payment to the contractor of the additional sum of $29,907.68, which amount is not entirely sufficient to compensate the contractor for its full loss.

In view of the foregoing, we are of the opinion that this is a legal claim which the State in good conscience should pay for failure to perform its part of the Contract in a reasonable and proper manner. If the State, for reasons beyond its control, was unable to make structures available for timely demolition, it should have exercised its right set forth in the Contract documents, to eliminate from the project such structures as were not available for demolition.

For the reasons stated herein, the Court is of opinion to award claimant the sum of $29,907.68.

Claim allowed in the amount of $29,907.68.

Opinion issued February 15, 1971

CHARLES E. TALBERT, Claimant,

vs.

DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-348)

No appearance for the Claimant.

Donald L. Hall, Esq., for the Respondent.

PETROPLUS, JUDGE:

The claim in the amount of $40.17, submitted on Notice of Claim and Answer without any evidence, arises from damage caused to the white canvas top of a boat passing under the Fort Henry Bridge in Wheeling, West Virginia, caused by tar being dropped and splattered from the bridge while the Respondent's employees were applying tar to the road surface of the bridge on July 8, 1970. The State confirms that the asphalt leaked into the river during its application and that no precautions were taken to warn persons passing under the bridge of its application. It is also admitted that one approaching the bridge by boat would not be able to observe that work was being performed on the bridge or the nature of the work.

The claim is, therefore, allowed.

Claim allowed in the amount of $40.17.

Opinion issued February 15, 1971

ROBERT LEE HOLLEY, Claimant,

vs.

DEPARTMENT OF HIGHWAYS, Respondent.

(No. D-351)

No appearance for the Claimant.

Donald L. Hall, Esq., for the Respondent.

PETROPLUS, JUDGE:

This claim in the amount of $56.14 is submitted on Petition and Answer admitting the facts.

The Claimant was driving his motor vehicle over a bridge near Barboursville, West Virginia, when a large metal plate covering a hole in the bridge became loose and detached. A bent up corner of the plate caused a cut in the wheel and tire of the motor vehicle, and damaged the wheel cover, as the car passed over the bridge, resulting in damage in the amount of $56.14.

The State has admitted liability because of its negligence in covering the hole with a large metal plate that was not securely fastened to the bridge surface by the crew of the Respondent which made recent repairs to the bridge. After the accident the State welded the metal to the bridge and placed bituminous concrete around it.

The negligence of the State being apparent, and the Claimant being free from fault, the claim is accordingly allowed.

Claim allowed in the amount of $56.14.

Opinion issued June 15, 1971

ESTATE OF L. M. GATES

vs.

DEPARTMENT OF HIGHWAYS

(No. D-453)

No appearance in behalf of Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Donald L. Hall*, of Department of Highways, for the Respondent.

DUCKER, JUDGE:

Claimant, Florence C. Gates, Executrix of the Estate of L. M. Gates, alleges that on January 13, 1971, the workmen of the Department of Highways cut down a tree adjacent to the Claimant's property located at 532 Ferry Street, Charleston, West Virginia, and allowed the tree to strike a high voltage electric power line leading into the home of Claimant resulting in a surge of approximately 7200 volts of electricity in the Claimant's household wiring, and that such surge of electricity damaged the service entrance box in Claimant's house requiring repair costs in the amount of $89.25.

Respondent admits the allegations of the Claimant and the consequent liability for the damage and the amount of the damage. As the question of negligence is clearly obvious, we are of the opinion to, and do hereby award the Claimant the sum of $89.25.

Award of $89.25.

Opinion issued June 15, 1971

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

vs.

WEST VIRGINIA BOARD OF REGENTS

(No. D-414)

No appearance in behalf of Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, for the Respondent.

DUCKER, JUDGE:

Claimant, State Farm Mutual Automobile Insurance Company, a corporation, as subrogee of Damaris O. Wilson, alleges damages in the amount of $97.56, the cost of necessary repairs to the automobile of said Damaris O. Wilson which was damaged by an act of an employee of the Respondent, while such employee was at work on the premises of Concord College at Athens, West Virginia.

The facts are stipulated by the Claimant and Respondent, and liability is admitted by counsel for the Respondent.

The facts appear to be that on September 12, 1970, Damaris O. Wilson, who was at that time Dean of Women at said College, had her automobile lawfully parked behind the west wing of the College's Administration Building, and while so parked an employee of the college was driving a stake in the ground with a hammer which evidently had a loose head, and the loose head flew off and struck the windshield of the Wilson car, damaging it so as to require replacement at a cost of the amount of this claim. That this was negligence in the employee using a tool which was defective is obvious, and because of said negligence we are of the opinion to, and do hereby award the Claimant the sum of $97.56.

Award of $97.56.

Opinion issued June 15, 1971

RETREADING RESEARCH ASSOCIATES, INC.

vs.

DEPARTMENT OF FINANCE & ADMINISTRATION

(No. D-356)

Calvin W. Cole, President, for the Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, for the Respondent.

DUCKER, JUDGE:

Claimant, Retreading Research Associates, Inc., a Virginia corporation, of McLean, Virginia, seeks payment of $5,400.00 for services rendered to the Department of Finance and Administration in giving tests for mileage, durability, wearing and strength of automobile tires so that Respondent could determine the best tires for the State to purchase.

The evidence introduced by the Claimant consisted of the testimony of the President of the claimant company as to the work done and there was no contradiction of the facts related by him, and the only question involved in this matter is the legality of the agreement, the State's position being that the contract was not approved by the Attorney General in accordance with the requirements of Chapter 5A, Article 3, Section 15 of the Code.

The evidence of the Claimant is that in the last few days of October, or the first few days of November, 1969, it received a call from the Director of the Division of Transportation of the State of West Virginia to the effect that there was a tire purchase contract in the process and the State would like to have test work done before November 20, 1969, the date for the acceptance of bids, to determine whether or not the tires involved in the bids submitted to the State were of equal quality and whether the low bid was, in fact, a good value. Following the conversation the Claimant was furnished with twelve tires, two tires from each of six companies that were bidding on a contract, and requested and directed Claimant to proceed with the testing contemplated. The tests showed the varying qualities of the tires and the Claimant so reported to

the State and the State was enabled to save money in its purchases. When the testing work was in process the Respondent assured the Claimant early in November that an order or written contract for the work would be forthcoming from the State and such an order dated November 14th was signed by both the Commissioner of the Department of Finance and Administration and by the Director of the Division of Purchasing, which order specified the sum of $5,400.00 as the contract price. When the work was completed, Claimant reported its findings before November 20th and the State had the benefit of the Claimant's work. Claimant at the time of making its report to the State requested payment and stated that although it was customary for it to receive a formal written contract before proceeding, it had proceeded nevertheless with the work because of the urgency of the matter. Upon completion Claimant was advised that a check for payment was in the mail. Such check was never received and about two months later Claimant was advised that it could not be paid because the contract had not been approved by the Attorney General.

With the facts undisputed, we must decide whether or not this claim which was without approval of the Attorney General should be allowed as a moral obligation of the State.

Code 5A-3-15 requires contracts of this nature to be approved as to form by the Attorney General. Code 5A-3-17 allows for purchases in the open market in cases of emergency by compliance with special provisions applicable thereto. While this latter section of the Code may be considered as not applicable, and we do not consider it strictly applicable, but it does evidence a certain spirit of the law in that 5A-3-15 refers only to the matter of form. In the instant case the emergency was created by the Respondent, but the State officers in charge evidently felt the work necessary immediately in order to avoid costs of re-advertising and other expenses and inconveniences to bidders. The work here involved was necessary to be done before November 20th, the day of the tire letting contracts. However, we are not holding that this was such an emergency as is contemplated by the statute but we believe that the statute should be liberally construed, when to do so is equitable and fair.

The statute requiring the approval by the Attorney General is as to *form* only. It was not intended for the Attorney General to pass upon the substance of the agreement, but only that the agreement was legally expressed. There seems to be no question that the form of the contract was correct because it was on the regular printed forms of the Department.

The requirement of the statute requiring the approval of such contracts by the Attorney General is a salutary one and this Court will not disregard it in any case which does not have special reason for not enforcing it. However, here there are, we think, special reasons why it should not be so strictly construed, when in all fairness and justice a strict application thereof would be unconscionable.

The Claimant has in all good faith performed the agreement upon the representations of high officers of the State, and being an out-of-state citizen or corporation should be allowed greater consideration in its dealings with the State where everything appears valid and all its conduct is unquestionably up and above board. According to the record the State has saved money by Claimant's work and if Claimant is not paid, the State will be unjustly enriched at Claimant's expense.

In view of all the facts this Court is of the opinion that this claim constitutes a moral obligation of the State, and we hereby award the Claimant the sum of $5,400.00.

Award of $5,400.00.

Opinion issued June 15, 1971

ROY VANDERGRIFT

vs.

DEPARTMENT OF HIGHWAYS

(No. D-354A)

STONEWALL CASUALTY COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-354B)

Stephen P. Meyer, Attorney at Law, for the Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Donald L. Hall,* of Department of Highways, for the Respondent.

DUCKER, JUDGE:

Roy Vandergrift, Claimant in case No. D-354A, and his subrogee, Stonewall Casualty Company, a corporation, Claimant in case No. D-354B, which cases are based on the same accident, were by agreement of all parties heard together, Claim No. 354A being for $4,178.45 and No. 354B being for $1,909.00 damages which Stonewall Casualty Company paid on account of its payment of insurance on the truck involved in the accident.

Vandergrift's employee was on January 5, 1970, driving a tractor-trailer truck owned by Claimant at about eleven o'clock in the morning on Interstate Route 77 going toward Parkersburg, West Virginia, when his truck struck a large boulder in the road with resultant damage in the amount claimed.

The driver testified that he had come to the top of the hill at Etna and "had dropped over the hill where this slip was, and there was only one-lane road"; that a State Road truck had pulled out on the road behind him and he looked through his mirror to see where the State Road truck was and as he turned around he hit a dip in the road and there was a rock in the one-lane travel portion of the road; that he tried to

miss the rock which he thought he had missed but hadn't. He described the rock as 18 inches high and 18 inches long, but from the photographs introduced in evidence the rock would seem to have been much larger.

Road work was being done at the place of the accident and the right lane was blocked off with barricades and the rock was in the middle of the left lane adjacent to the median. The speed of the truck was estimated at forty miles an hour although witness had previously stated fifty miles an hour which statement he later said he desired to correct.

Claimants base their claims on the contention that the rock had fallen from a Department of Highway's truck which had been hauling rocks from that vicinity. No one testified as to either seeing the rock fall or that it was in the road at any time prior to the time of the accident. As the State was doing work to correct a slip in the road at that place and time, we can only assume that the rock must have fallen from a truck or somehow left there in the work. A decision in this case does not depend upon the establishment of such fact.

The driver further said that the sun was shining and when he went into the "dip," there the rock was, and it was of the same color as the road, and consequently he did not see the rock until right on it and he tried not to hit it. The road signs showed there was a "dip" in the road.

From the evidence it appears that the driver had full warning of the work on the road and of the dip in the road, and should have known that driving at a speed of between forty and fifty miles under such conditions was unsafe for that part of road, and that he should have seen such a large rock in the single lane of travel, and that his failure to see and avoid the rock was conduct not of a reasonably careful driver. The proximate cause of the accident, in our opinion, was the negligence of the driver of Claimant's tractor-trailer truck which sufficiently contributed to the cause as to bar any recovery for the damages sustained.

We deny both claims and make no award herein.

Claims disallowed.

Opinion issued June 15, 1971

KEELEY BROTHERS, INC.

vs.

STATE TAX DEPARTMENT

(No. D-330)

Patrick J. Keeley, Vice-President, for the Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, for the State.

DUCKER, JUDGE:

Claimant, Keeley Brothers, Inc., of Clarksburg, West Virginia, seeks a refund of $420.00 from the State Tax Department, which amount Claimant paid as an excise tax on 6,000 gallons of Diesel fuel oil purchased by Claimant on March 26, 1970, from R. H. Bowman, Inc., of Rainelle, West Virginia, a distributor for Gulf Oil Corporation.

The tax paid at the rate of .07 cents per gallon was subject to refund if application were made in accordance with the provisions of Section 20, Article 14, Chapter 11 of the Code of West Virginia. The invoice for the purchase of the fuel oil shows that the fuel oil was delivered on March 26, 1970, and the payment therefor was made on June 29, 1970. The application of the Claimant to the Tax Commissioner for the refund was mailed at Rainelle on June 30, 1970, and received in Mail Division No. 2 of the Capitol at Charleston on July 1, 1970. Claimant's check in payment of the account was dated June 23rd, and the same evidently was not received in Rainelle until June 29th, six days later, which Claimant says was the fault or slowness of the mail service. However, when payment was mailed or received is not important in the decision in this case.

The statute providing for refunds, Code 11-14-20, specifically states that the Tax Commissioner shall cause a refund to be made only when an *application* for refund is filed with the Tax Commissioner, upon forms prepared and furnished by the Tax Commissioner, within *ninety* days from the *purchase* or *delivery* of the gasoline, and that any claim for refund not filed

within ninety days from the date of the purchase or delivery shall not be construed to be or constitute a moral obligation of the State of West Virginia for payment.

The date of payment is not material although the invoice which showed the payment was proof of the purchase and its introduction in the evidence was proper for that purpose. The only date on the invoice that is material to the application for refund is the date of purchase, namely March 26, 1970, which according to the invoice was evidently the date of delivery.

The real and only question is whether the *application* for refund was made in ninety days from the date of purchase or delivery of the fuel oil which would be within ninety days from March 26th. The application for refund was contained in an envelope with a postmark of Rainelle, West Virginia, dated June 30th and received in the Capitol mail division on July 1, 1970. There is no dispute in the record as to these dates.

Claimant contends that delay in the mail service was the cause of the lateness in the arrival of Claimant's application for refund. As the application was postmarked June 30th in Rainelle and received in Charleston on July 1st, such delay must have been entirely in the post office at Rainelle if the application was mailed prior to the postmarked date of June 30th, a period of three or four days after the ninety day period had expired.

A Tax Department witness testified that the Department always accepted the postmarked date of the place of mailing as controlling the matter of time, which in this instance was June 30th. This practice seems to this Court as the only safe and fair practice in such matters, although it is conceivable that there could be other means of determining such fact. In the absence of such other proof, and the fact that Claimant has not attempted to prove otherwise, we must accept the record that the application for refund was mailed at Rainelle on June 30th.

Statutes of the nature of that involved in this case must of necessity be strictly applied in order to protect the State against negligent, careless, and even fraudulent claims, although in many instances, such as this one, this Court knows

it is made in all good faith. Even though we may feel exceptions to applying the statute should in some cases be made, the statute expressly prohibits this Court from doing so by the provision that there shall not be a moral obligation of the State to pay such a claim.

For the reasons herein stated, this Court is constrained from making and does not make any award to the Claimant herein.

Claim disallowed.

Opinion issued June 15, 1971

LARRY AND EMMA LOU DOLIN

vs.

DEPARTMENT OF HIGHWAYS

(No. D-308)

P. W. Hendricks, Attorney at Law, for Claimants.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Donald L. Hall,* of Department of Highways, for the Respondent.

DUCKER, JUDGE:

Claimants, Larry Dolin and Emma Lou Dolin, husband and wife respectively, allege damages in the sum of $10,000.00 on account of injuries sustained and medical expenses incurred by reason of said Emma Lou Dolin falling from a bicycle she was riding, the front wheel of which hitting a large hole in a blacktop road on Camp Creek off of Route 3, in Boone County, West Virginia, between noon and one o'clock on April 28, 1969.

The evidence is substantially the following: Emma Lou Dolin, a resident of Mantua, Ohio, was visiting her husband's parents in Boone County, and that she rode a bicycle to a school where her brother, age 15, was, and as she was returning to her place of visit with the brother on the back seat or place behind her on the bicycle, the wheel of the bicycle hit and went into a large hole in the road, causing her to be thrown off of the bicycle onto the road and to suffer injuries to her

eye, face, and abrasions on her arms and knees and pains in her back. The hole in the road described as being round, a foot and a half wide, and a "little bigger" lengthwise. The day was bright and sunny and visibility was good. The depth of the hole was stated to be knee deep and one witness said it was waist deep.

One witness said he lived 150 yards from the place of the accident and that when he was sitting under an apple tree near his house he saw the accident; that the hole in the road could not be seen until a person was "right on it," and that it had been there for four or five months but the Road Commission had filled up the hole after the accident and had later blacktopped the road.

A witness for the Respondent testified that although there was a little bank or rise in the road shortly before one approaches the place of the hole, the hole was visible ahead some 50 to 55 feet and that one's vision of the hole was not obscured, and that the hole was partly in the traveled part of the highway and partly in the berm.

No evidence that notice of the hole was given to the Respondent. It appears that as it was early Spring there were other holes in and along the highway in that vicinity.

Claimant testified that she had passed over that part of the road on her way to the school to pick up her brother and she then had to go around some of the holes and that nothing prevented her from seeing the hole. She was not well acquainted with the road although she was in the area about two months before the accident. Claimant, the husband, testified that when he had driven an automobile over the hole he did not lose control of the car, but only that it "throwed me quite a bit."

The bicycle was ridden with Claimant on the seat and her brother behind her "on the seat or the metal," the latter referring to the "fender with the long extra piece that goes on the back" and "over the back so someone can sit on the back." Whether this bicycle can be classified as one which cannot be ridden legally by more than one person is difficult to determine, but in view of our finding as hereinafter contained, it is not necessary to determine such question in this case.

Considering all the facts in the case, particularly the fact that the hole was a large one as it appears from the picture exhibits as well as the testimony, the fact that it was plainly observable a distance of 50 to 55 feet, the fact that Claimant had previously observed many holes, though smaller, as she had traveled the road on her way to get her brother, and that the weather was clear and dry, we are of the opinion that Claimant could and should have seen the hole and avoided it, and that her failure to do so constitutes contributory negligence which deprives her of a valid claim for damages for her injuries, which by the exercise of proper care she could have avoided.

We, therefore, deny the claims of the two Claimants, and make no award herein.

Claim disallowed.

Opinion issued June 15, 1971

PETER P. CASSEL, by Ruth M. Cassel, his mother and next friend, and RUTH M. CASSEL, individually

vs.

DEPARTMENT OF HIGHWAYS

(No. D-108)

Galbraith, Seibert & Kasserman, and *Ronald W. Kasserman,* for the Claimants.

George H. Samuels, Assistant Attorney General, and *Donald L. Hall* for the Respondent.

JONES, JUDGE:

The claimant, Peter P. Cassel, individually, and by Ruth M. Cassel, his mother and next friend, claims damages in this case against the Department of Highways, formerly State Road Commission, in the amount of Four Hundred Thousand Dollars ($400,000.00) for personal injuries, and Ruth M. Cassel, in her own right, claims damages in the amount of One Hundred Thousand Dollars ($100,000.00) for medical, hospital and rehabilitation expenses resulting from the wreck of an

Austin-Healey Sprite automobile, driven by Glenn R. Wenzel, along West Virginia Route No. 67, in Brooke County, on the 8th day of September, 1967, at about 11:50 p. m., at which time the claimant, Peter P. Cassel, was a passenger in said car. Cassel and Wenzel were students and fraternity brothers at Bethany College. Cassel was nineteen years old, just starting his sophomore year, and Wenzel, twenty, was in his junior year. The claimant as a freshman, had made the N.A.I.A. All-America Swimming Team and was an outstanding prospect for national and perhaps Olympic honors as a swimmer.

Earlier in the evening, both boys had gone, in separate cars, to Harry's Bar in Wellsburg for sandwiches and beer, and after returning to their fraternity house, again in separate cars, they went to a place on Route 67, near the Pennsylvania State Line known as Emily's or Buffalo Inn, apparently a favorite gathering place for Bethany students. After about two hours, Wenzel let it be known that he was going back to school and asked if anyone wanted to ride with him. The claimant accepted the invitation. As they took their places in the two bucket-seats, they fastened their seatbelts and rode away with the top of the car down. At a point approximately one mile east of Bethany, the Wenzel car failed to negotiate a dangerous horseshoe curve known in the area as "Gibson's Turn." The Wenzel car crossed the highway to its left, ran over about a ten-foot embankment and turned over, trapping both passengers under the vehicle. The claimant and Wenzel were extricated from the wreck by friends who were following in another car but did not witness the accident. The following day the driver, Wenzel, pleaded guilty before a Justice of the Peace to a charge of failure to have his vehicle under control.

The claimant suffered a broken neck and his spinal cord was injured between the sixth and seventh vertebrae resulting in paralysis from his chest down through and including his lower extremities and also paralysis in the extremities of his fingers and hands. He was taken by ambulance to North Wheeling Hospital where he remained until September 12, 1967, when he was transferred to a hospital in his home city, Buffalo, New York, where he was treated by Dr. George A. Cohn, who diagnosed his case as a fracture dislocation of the cervical spine. On October 31, 1967, the claimant was admitted to Rusk

Institute, the rehabilitation center of New York University in New York City and remained a patient there and in the New York University Medical Center Hospital until May 1969. The claimant is a quadriplegic; his lower extremities are completely paralyzed and he has partial paralysis of the upper extremities. He will require continued medical treatment so long as he lives and his life expectancy is nearly normal. Dr. Donald A. Covalt, Associate Director of the Institute of Rehabilitation Medicine of New York University Medical Center, comments on the permanency of the injuries as follows: "Peter is now completely disabled and as far as physical work is concerned, he must contemplate a wheelchair existence for the rest of his life."

The claimant charges that his injuries are the proximate result of acts or omissions of the respondent constituting negligence, substantially as follows:

(1) The curve in question at the time of the accident was completely and totally unmarked by signs or warning devices of any type or nature;

(2) The curve was completely and totally unprotected by guardrail around the same; and

(3) The paved portion of the road on said curve was in a defective condition and contained a rut variously described as approximately three to six inches deep and approximately twelve to fifteen feet long. The claimant further contends that the respondent had notice of these hazards and failed to do anything about them.

First we will dispose of the matter of signs and guardrails. There is conflicting evidence as to whether there was a curve sign at a proper location, or whether there was no sign, or a damaged sign. Years before, perhaps twenty or more, a guardrail had been constructed around this curve but apparently for reasons of economy or upon judgment that such guardrail was unnecessary, the same was allowed to deteriorate until only remnants remained—a few rotten posts and no cable. This curve was well known to the driver and his passenger, the claimant, and we do not believe that their conduct on entering the curve was affected in any way by the absence of warning

signs or guardrails. The driver testified that he was not misled by the absence of either. In any event, we will apply the law laid down in *Adkins v. Simms*, 130 W.Va. 645, 46 S.E. 2nd 81 (1947), as follows:

> "We do not think the failure of the state road commissioner to provide guardrails and roadmarkers, and to paint a center line on the highway, constitutes negligence of any character, and particularly no such negligence as would create a moral obligation on the part of the State to pay damages for injury or death, assumed to have occurred through such failure, and as the proximate cause thereof. The very nature of the obligation of the State, in respect to the construction and maintenance of its highways, precludes the idea that its failure to exercise discretion in favor of a particular location over another, or whether it should provide guardrails, center lines or danger signals at that point, is an act of negligence. Certainly, it must be known, as a matter of common information, that places of danger on our highways exist at innumerable points, particularly on our secondary roads, and in many instances on primary roads. This being a mountainous country, many of these roads are narrow, with steep grades and sharp curves. Considering the financial limitations placed upon the road commissioner, it would seem impossible to take care of all defects at one time, even in one year, assuming that labor and supplies could be made available. In the very nature of things the road commissioner must be permitted a discretion as to where the public money, entrusted to him for road purposes, should be expended, and at what point guardrails, danger signals and center lines should be provided, and the honest exercise of that discretion cannot be negligence."

The difficult crux of this case involves the claimant's charge that respondent was negligent in permitting a defect in the public road to exist and failing to repair the same after it knew or should have known that the defect was hazardous to the traveling public. The defect was described by the driver Wenzel as a "rut" three inches deep and ten to fifteen feet long. Wenzel referred to the "rut" in his testimony as follows: "* * * Something like grabbed the front end of the car and put me out of line where I was intended to go. I had no control. * * * I could not steer. My wheels were locked. I would say the righthand wheel was caught in a rut which was directing the control of the car." John Cruchiak, Jr., Mainte-

nance Superintendent of the West Virginia Department of Highways for Brooke County, would not call the defect a rut but described the condition as the result of an overlapping of the last laid asphalt over an old blacktop surface, the new layer of asphalt not having a proper base and consequently breaking down. This witness described the defective condition as "frayed." A photograph introduced in evidence lends some confirmation to both of these descriptions. While the picture shows a depression on the paved portion of the road, it appears that there is a stepped drop-off to the shoulder of the road, the so called rut being the first step and then another drop-off of three to four inches to the shoulder.

Drop-offs, frayed edges and ruts along the borders of our highways are a way of life in West Virginia. The traveling public contends with them every day in all parts of the State. In this case there was a defect in the highway, but the question is whether the break in the pavement was such a defect as would support a claim of negligence and a consequent moral obligation of the State to compensate the claimants for their injuries and expenses. The evidence discloses that Route 67 was patched from end to end each year, and the Maintenance Superintendent for Brooke County testified that unusual hazards were corrected upon discovery insofar as funds were available.

We are not impressed by the testimony of the Deputy Sheriff who said he had given notice of the hazardous condition of the curve to the State Road Office and to other State Road employees. This is the same Deputy Sheriff who investigated the accident and wrote in his report that no defect existed, then, after examining the road later in daylight, changed his report to show a defect. The other investigating officer testified that he did not notice any defect at the time of the accident. Both the Maintenance Superintendent and the State Road Office and Maintenance Secretary testified that no notice was ever given to them by anyone that a hazardous condition existed at Gibson's Turn. The Maintenance Superintendent further testified that he traveled the road frequently and had observed no condition at Gibson's Turn which he would consider out of the ordinary. All witnesses agreed and

confirmed the common knowledge that Gibson's Turn, in itself, is a hazardous curve, requiring extreme care by all who traverse it.

Apparently, the five to six-inch ground clearance of the Austin-Healey car and its small tires increased the danger of a drop-off and driving with the top down added to the chance of personal injuries. This in many ways was a "freak" accident insofar as the magnitude of the claimant's injuries is concerned, as the car turned over rather slowly, without great violence, and the driver was only slightly injured.

Following decisions of the Supreme Court of Appeals of West Virginia, this Court has consistently held that the State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of its highways under all the circumstances. The maintenance of highways is a governmental function and funds available for road repairs are necessarily limited. We do not believe there is a clear showing in this case that the respondent knew or should have known that such a dangerous condition existed as reasonably would be expected to cause injury or damage to users of the highway. In our opinion, the claimants have not proved such a positive neglect of duty by the respondent as would create a moral obligation on the part of the State to pay damages to the claimants.

Even though we assume arguendo that the respondent failed to exercise ordinary and reasonable care in the repair and maintenance of this highway, we are of the opinion that the rut or break complained of could only have been a remote and incidental cause of the injuries sustained by the claimant Peter Cassel and not the efficient proximate cause thereof. The physical facts and circumstances persuasively indicate that Wenzel's careless and improper driving was the proximate cause of the accident, and such finding is supported by the driver's plea of guilty to the charge of failing to have his vehicle under control.

The Court is not unmindful of the terrible tragedy involved in this case, nor of the inherent impulse for compassion. The courage of Peter Cassel commands respect, and his needs are of such magnitude that our decision becomes an extremely un-

happy one. We are further constrained to say that this case was ably tried, briefed and argued by counsel for the claimants. However, we believe that our findings of fact and our view of the law of the State of West Virginia governing this case require the disallowance of these claims and, accordingly, the same are hereby dismissed.

Opinion issued June 30, 1971

BETSY ROSS BAKERIES, INC.

vs.

DEPARTMENT OF MENTAL HEALTH

(No. D-404)

Stanley H. Sergent, Jr., for the Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, for the Respondent.

JONES, JUDGE:

During the months of May and June, 1968, the claimant, Betsy Ross Bakeries, Inc., of Ashland, Kentucky, furnished bakery products to Colin Anderson Center at St. Marys, in Pleasants County, under a valid State contract. Invoices totalling $841.10 were duly and timely submitted to the respondent, but the same were mislaid by an unknown employee of the respondent so that transmittals for payments were not received by the State Auditor until after July 31, 1968. By this time, funds appropriated for the fiscal year 1967-1968 had expired by operation of law and payment could not be made. The respondent specifically alleges in its answer that funds were available in the Colin Anderson Center budget to pay the claimant and, but for the mislaid invoices, the claimant would have been paid.

This case was submitted on the notice of claim and answer thereto, and based upon such record, it is clear that this is a valid claim which in equity and good conscience should be paid. Accordingly, an award is hereby made to the claimant, Betsy Ross Bakeries, Inc., in the sum of $841.10.

Opinion issued June 30, 1971

ANDY SHANABARGER and LORA SHANABARGER

vs.

THE ADJUTANT GENERAL OF WEST VIRGINIA

(No. D-440)

No appearance for the Claimants.

Thomas P. O'Brien, Jr., Assistant Attorney General for the Respondent.

JONES, JUDGE:

On August 9, 1970, a National Guard jeep driven by a member of the West Virginia National Guard in the course of his official duties collided with another National Guard vehicle, pushing it into the rear of the 1951 Chevrolet automobile owned and driven by the claimant, Andy Shanabarger. At the time of the collision this claimant's car was legally stopped on United States Route 250, near Philippi, in Barbour County, waiting for on-coming traffic to pass so that he could make a left turn into a church parking lot. The claimant, Lora Shanabarger, was examined and treated for injuries at The Myers Clinic at Philippi and her bill was $39.00.

The above stated facts have been stipulated by the respondent and, after investigation of the incident by an officer of the West Virginia National Guard, under pertinent military regulations and directives, the respondent further stipulates that the claimants sustained damages which were caused by the negligence of the military driver and agent of the respondent. The claim of $154.50 for damages to the claimant's car has been negotiated and compromised for the sum of $50.00.

Based on the record in this case, the Court finds that this is a valid claim in the agreed amount which in equity and good conscience should be paid, and an award is hereby made to the claimants, Andy Shanabarger and Lora Shanabarger, in the sum of $89.00.

Opinion issued June 30, 1971

SAFECO INSURANCE COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-441)

No appearance for the Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General and *Donald L. Hall,* for the Respondent.

JONES, JUDGE:

The claimant, Safeco Insurance Company, as subrogee of its insured, Marvin Cohen, claims the sum of $166.86 for damages to Cohen's 1969 Mark III Lincoln Continental Sedan automobile, when paint was dropped on it by employees of the Department of Highways who were engaged in painting the Elk River Bridge on Washington Street in Charleston. A tarpaulin was used by the workmen to catch any falling paint but the wind blew it to one side and drops of paint were permitted to fall upon the passing car.

An investigation of this claim was made by the Claims Division of the respondent and the facts were found to be as set out above. These facts are admitted by the State and, in our opinion, they show negligent conduct on the part of the respondent which proximately caused the damages sought. The amount of the claim is not disputed.

Accordingly, the claimant, Safeco Insurance Company, is awarded the sum of $166.86.

Opinion issued June 30, 1971

FRANK WHITEHAIR and ARNOLD WHITEHAIR

vs.

DEPARTMENT OF HIGHWAYS

(No. D-318)

No appearance for the Claimants.

Thomas P. O'Brien, Jr., Assistant Attorney General and *Donald L. Hall*, for the Respondent.

JONES, JUDGE:

By agreement signed by the claimants, Frank Whitehair and Arnold Whitehair, and the respondent, Department of Highways, by its counsel, the parties have stipulated the facts pertinent to this case substantially as follows:

The claimants are the owners of a farm upon which is situate a fence adjacent to State Route 7 approximately one mile west of Terra Alta. During the winter of 1969-1970, heavy snow fell in this area and accumulated on State Route 7, necessitating its removal by the respondent. While engaged in plowing and removing the snow from the highway, the respondent damaged the claimants' fence by forcing snow against it. The claim for damages to the fence in the amount of $107.08, which is the cost of four rolls of wire, is fair and equitable.

The Court accepts the stipulation and finds that the claimants are entitled to recover. Accordingly, an award is made to the claimants, Frank Whitehair and Arnold Whitehair, in the sum of $107.08.

Opinion issued June 30, 1971

DOUGLAS T. ELLISON

vs.

DEPARTMENT OF HIGHWAYS

(No. D-320)

E. BELDEN AGUILAR AND
NATIONWIDE INSURANCE COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-321)

Pauley, Curry & Sovick, and *George T. Sovick, Jr.,* for Claimant Douglas T. Ellison.

Arthur C. Litton II, for the Claimants E. Belden Aguilar and Nationwide Insurance Company.

Donald L. Hall, for the Respondent.

JONES, JUDGE:

These claims arose from a collision which occurred on July 11, 1968, at approximately 8:45 a.m., while the claimant, Douglas T. Ellison, was driving his 1961 Chevrolet automobile in an easterly direction on United States Route 60 in Fayette County, and the claimant Aguilar's 1966 Volkswagon automobile was stopped in a line of ten to twelve vehicles which had been flagged down by a Department of Highways employee. The Ellison automobile ran into the rear of the Aguilar automobile causing substantial damage to both vehicles, and the claimant Ellison sustained severe personal injuries. Claimant Ellison seeks damages in the amount of $100,000.00 and claimant Aguilar and his insurer, Nationwide Insurance Company, claim damages stipulated to be $1,360.66.

Upon agreement of the parties, these claims were consolidated for the purposes of hearing and while the legal principles involved are not identical, the facts are the same, and it appears to be proper and expedient further to consolidate the claims for the purposes of this opinion.

Most of the facts surrounding these claims are undisputed, some are subject to question but are quickly resolved, and others present substantial conflicts which the Court will deal with. At the time of the accident, the respondent's employees were pulling ditch lines on the north side of the highway, a process of grading and re-dressing shoulders to remove high or low places as well as to clean and re-open ditches. The grader used in the operation deposited substantial amounts of dirt and debris upon the highway in a sort of windrow and then would scrape the windrow back onto the shoulder, leveling and rebuilding the same. Quantities of dirt remained on the highway in the area of work, particularly in the north or westbound lane of traffic. A flagman was on duty and one-way traffic was maintained. The day was dry and clear and when the eastbound lane of traffic was stopped, there is little doubt that dust was raised from the road surface as westbound traffic proceeded along the highway. It appears that no sweeper, broom or sprinkling equipment was being used on the project. Except for such dust as may have been in the air there was no obstruction to claimant Ellison's view from 600 to 800 feet before he reached the point where he struck claimant Aguilar's vehicle.

Claimant Ellison contends that as he drove on the highway he was suddenly and completely enveloped in a cloud of dust which prevented his seeing anything, that he was unaware of the road work in progress, although he did testify at one point that "The only thing I could see was those road men working," and he further testified that "all I did was slow up on the car and jump back in low gear and proceeded very cautiously into this cloud of dust." Ellison saw no "men working" or other warning signs, and the several witnesses on both sides were about evenly divided as to whether such signs were in place. However, he did see "taillights", presumably brake lights, on cars in front of him, but did not know whether they were stopped or not.

There is great conflict as to how much, if any, dust was raised by westbound traffic at the time of the collision. Claimant Aguilar testified that as he approached the line of cars stopped by the flagman, he had an unobstructed view of 600 to 800 feet, and that he could see the road work at that distance.

When asked what happened after his vehicle was stopped in the line of traffic, he gave this answer: "Well, I was standing there and then in a split second I looked in the rearview mirror and I saw this car coming too fast. I heard the tires screeching and I began to lie down on the seat because I had the old-timey seats that did not have a back rest. It happened in a split second and then I was hit from the rear." He further testified that he saw the Ellison car when it was 60 to 80 feet behind him, that his foot was on the brake at the time he was hit, that his car was stopped on a slight up-grade and that, when struck, the vehicle was thrown forward approximately a car length.

The claimants' view of the case is that the respondent was negligent in failing to have in operation a highway broom, sweeper or watering truck, in failing to give proper warning, which is debatable, and in creating a sudden emergency by permitting such quantities of dust in the air that it diverted his attention and blurred his vision. However, some things are clear, and one is that Dr. Aguilar, against his own interest, testified that he could see the Ellison car coming too fast toward him when it was only 60 to 80 feet away, and that being true (and we have given full credit to Dr. Aguilar's testimony), the Aguilar car and the line of traffic must have been visible at that time to the claimant Ellison. In our opinion it must follow that if the Ellison car had been under proper control, the collision would not have occurred and no one would have been injured. If there was negligence on the part of the State, it was not the proximate cause of this collision and the resultant damages, because the negligence of claimant Ellison became the intervening, independent proximate cause of the damages sustained by both claimants. Accordingly, the Court holds that this is not such a case as in equity and in good conscience should require compensation by the State, and the claims of Douglas T. Ellison, E. Belden Aguilar, and Nationwide Insurance Company, as subrogee, are all disallowed.

REFERENCES

ADJOINING LANDOWNERS

The common-law rule that surface water is considered a common enemy, and that each landowner may fight it off as best he can prevails in Virginia and West Virginia, with the modification that an owner of higher ground may not inflict injury on the owner of lower ground beyond what is necessary. *Whiting* v. *Smith* (No. D-177)..... 45

Unless a landowner collects surface water into an artificial channel, and precipitates it with greatly increased or unnatural quantities upon his neighbor's land, causing damage, the law affords no redress. If no more water is collected on the property than would naturally have flowed upon it in a diffused manner, the dominant tenement cannot be held liable for damage to land subject to the servitude of flowing waters. *Whiting* v. *Smith* (No. D-177)..... 45

Land at lower levels is subject to the servitude of receiving waters that flow naturally upon it from adjoining higher land levels, and unless a property owner diverts the natural flow of surface water in such a manner as to damage the property of another, there is no liability on the owner of the higher property. *Whiting* v. *Smith* (No. D-177)..... 45

AGENCY

The spending policies of the State are limited by law and anyone dealing with a state agency must know its powers and limitations. *Airkem Sales & Serv.* v. *Department of Mental Health* (No. D-333)..... 180

The State of West Virginia is not estopped to plead the statute of limitations because of the mistake, negligence or misconduct of its agents. *Huntington Steel & Supply Co.* v. *West Virginia State Tax Comm'r* (No. D-159)..... 123

There are many caveats in dealing with a governmental agency, and the conduct of its officers cannot result in the application of the doctrine of estoppel. *Huntington Steel & Supply Co.* v. *West Virginia Tax Comm'r* (No. D-159)..... 123

The State is not bound by contracts which are beyond the scope of the powers of its agents. *Huntington Steel & Supply Co.* v. *West Virginia State Tax Comm'r* (No. D-159)..... 123

While it is true that the constitutional immunity of the State has been removed by the act establishing the Court of Claims, a sovereign State has other defenses and immunities peculiar to itself, which it may assert and which cannot be destroyed by the wrongful conduct of its agents. *Huntington Steel & Supply Co.* v. *West Virginia State Tax Comm'r* (No. D-159). 123

AMUSEMENTS AND RECREATION

A claim for damages for an injury sustained by claimant in slipping on a diving board while he was a guest at Cacapon State Park was disallowed, where the testimony showed that there were at least two lifeguards on duty at the time of the accident, that no complaint or report was made to either of them or to anyone else at the park, that the diving boards were regularly inspected at least once every ten days, and that there were no complaints of a slick board at any time during the year. *Dubisse* v. *Department of Natural Resources* (No. D-129). 21

An engineering firm's claim for additional compensation for services rendered in connection with the development of the Cass Scenic Railroad was disallowed, where there was sufficient evidence to contradict the contention that claimant had done work over and above that specified in or contemplated by the contract. *Vogt-Ivers & Associates* v. *Department of Natural Resources* (No. D-192)..... 214

APPEALS

Where respondent's contentions regarding the legality of a sidewalk assessment could have been presented below to a town council and the council's decision could have been subsequently appealed, but such contentions were not so presented, a town council's decisions of questions of fact were binding and not subject to review by the Court of Claims. *Charleston Concrete Floor Co.* v. *Department of Highways* (No. D-322)..... 221

ATTORNEY GENERAL

A claim for legal services performed in examining titles and preparing abstracts for the Department of Natural Resources was disallowed, where the contract of employment was in direct violation of § 5-3-1, W. Va. Code, which prohibits employment of private counsel for a state agency without the approval of the attorney general. *Freeman* v. *Department of Natural Resources* (No. D-298)..... 165

Claimant Virginia corporation was awarded the sum of $5,400 for services rendered to the Department of Finance and Administration in testing automobile tires, notwithstanding lack of approval of its contract by the attorney general, where claimant had in good faith performed the agreement upon the representations of high officers of the State, and, being an out-of-state citizen or corporation, should have been allowed greater consideration in its dealings with the State where everything appeared valid. *Retreading Research Associates, Inc.* v. *Department of Fin. & Administration* (No. D-356)..... 245

Section 5A-3-15, W. Va. Code, requires contracts involving purchases by the State to be approved as to form by the Attorney General. It was not intended for the Attorney General to pass upon the substance of the agreement, but only that the agreement was legally expressed. The requirement is a salutary one and the Court of Claims will not disregard it in any case which does not have special reason for not enforcing it. *Retreading Research Associates, Inc.* v. *Department of Fin. & Administration* (No. D-356)..... 245

ATTORNEYS

An attorney is certainly chargeable with knowledge of the statutory law of the State. *Freeman* v. *Department of Natural Resources* (No. D-298)..... 165

A claim for legal services performed in examining titles and preparing abstracts for the Department of Natural Resources was disallowed, where the contract of employment was in direct violation of § 5-3-1, W. Va. Code, which prohibits employment of private counsel for a state agency without the approval of the attorney general. *Freeman* v. *Department of Natural Resources* (No. D-298)..... 165

BAILMENTS

A bailee must return to the bailor the bailment property in the condition it was in at the time of the bailment, usual wear and tear excepted. *Chesapeake & O. Ry.* v. *State Road Comm'n* (No. D-150)..... 140

Proof of the delivery of possession of a bailed railroad car as a bailment to the bailee constitutes a prima facie case on the part of the bailor railroad, and the obligation to prove that damage to the car was not the fault of the bailee shifts to the bailee. *Chesapeake & O. Ry.* v. *State Road Comm'n* (No. D-150)..... 140

BAKERIES

Claimant was awarded the sum of $841.10 for bakery products furnished to Colin Anderson Center under a valid State contract, where invoices had been mislaid by an unknown employee of respondent so that transmittals for payments were not timely received by the State Auditor. *Betsy Ross Bakeries, Inc.* v. *Department of Mental Health* (No. D-404)..... 260

BICYCLES

A claim for damages, sustained when claimant fell from a bicycle after its front wheel hit a large hole on a blacktop road, was disallowed, where claimant was contributorily negligent in failing to see and avoid the hole. *Dolin* v. *Department of Highways* (No. D-308)..... 252

BLASTING

Claimants were awarded the sum of $1,497 for damages caused to their dwelling house as a result of blasting which was not properly controlled and which presumably involved negligence on the part of respondent Department of Highways. *Caldwell* v. *Department of Highways* (No. D-194)..... 216

Claimant subrogee insurer was awarded the sum of $105.46 for damages sustained by its insured's automobile as a result of blasting operations conducted by respondent. *State Farm Mut. Auto. Ins. Co.* v. *Department of Highways* (No. D-327)..... 219

Claimants were awarded the sum of $3,000 for damages to their real estate resulting from blasting operations conducted by respondent Department of Highways. *Warden* v. *Department of Highways* (No. D-195)..... 190

BONDS

Claimant was awarded the sum of $57,450 for services rendered in finding a purchaser for revenue bonds for the West Virginia State College student-union dining hall. *Hibbard, O'Connor & Weeks* v. *West Virginia Bd. of Educ.* (No. D-235). 109

BRIDGES

Claimant construction corporation was awarded the sum of $2,500 for damages occasioned by unreasonable delay on the part of the State Road Commission in directing work on a bridge construction project. *Bates & Rogers Constr. Corp.* v. *State Road Comm'n* (No. D-126) 17

Claimant was awarded the sum of $149.51 for damages sustained when a hot welding rod fell from the top of a bridge onto his automobile. *Beranak* v. *State Road Comm'n* (No. D-248). 108

Claimant was awarded the sum of $191,701.42 for damages resulting from unreasonable delays caused by respondent State Road Commission in connection with a highway and bridge construction contract. *C. J. Langenfelder & Son* v. *Department of Highways* (No. D-120) 193

In the case of a contractor's claim for damages resulting from unreasonable delays caused by respondent State Road Commission in connection with a highway and bridge construction contract, the contractor's bid estimate was rejected as a basis for measuring the reasonable cost of doing the work in the absence of delay, and the "actual cost" of doing extra work under adverse conditions entailed by the delays was deemed to be a better method of measuring damages. *C. J. Langenfelder & Son* v. *Department of Highways* (No. D-120). 193

Claimants were awarded the sum of $101.41 for damages sustained when hot welding lead fell from the upper part of a bridge onto their automobile. *Catsos* v. *State Road Comm'n* (No. D-223) 107

The State is not a guarantor of the safety of its travelers on its roads and bridges. *Criss* v. *Department of Highways* (No. D-137). 175

Claimant was awarded the sum of $56.14 for damages sustained when a bent metal plate cut the tire of his automobile as it passed over a bridge. *Holley* v. *Department of Highways* (No. D-351). 242

Claimant was awarded the sum of $128.24 for damages sustained when a piece of hot welding slag fell onto his automobile from the overhead structure of a bridge where employees of the West Virginia Department of Highways were making repairs. *Humphrey* v. *Department of Highways* (No. D-277). 142

Claimants were awarded the sum of $50 for damages sustained when a member of a State Road Commission construction crew negligently dropped (or caused to fall) a bottle onto claimants' automobile while the vehicle was crossing a bridge. *Lewis* v. *State Road Comm'n* (No. D-256) 132

The State is not a guarantor of the safety of its travelers on its roads and bridges. *Lowe* v. *Department of Highways* (No. C-19). 210

A claim for damages, sustained when paint was dropped on claimant's automobile while it was being driven across a bridge, was disallowed, where, even though negligence on the part of State Road Commission employees could be assumed from the facts, it was found that claimant, who sought $195.70 for the costs of repair, had failed to mitigate damages by taking steps promptly to remove the paint when the injury occurred. *Travelers Ins. Co.* v. *State Road Comm'n* (No. D-274). 129

Claimant was awarded the sum of $69.79 for damages sustained when, in crossing a state road bridge, the left rear wheel of his automobile dropped into a hole in the floor of the bridge. *Monk* v. *State Road Comm'n* (No. D-139). 32

The State is not a guarantor of the safety of its travelers on its roads and bridges. *Parsons* v. *State Road Comm'n* (No. D-112). 35

Claimant was awarded the sum of $139.88 for damages sustained when her automobile struck an obstruction on a bridge, where the evidence supported a finding that respondent's negligence in failing to remove the hazard or give notice of its existence was the proximate cause of the damage. *Randall* v. *Department of Highways* (No. D-151). 147

Claimant subrogee insurer was awarded the sum of $166.86 for damages sustained when paint was dropped on its insured's automobile by employees of the Department of Highways who were engaged in painting a bridge. *Safeco Ins. Co.* v. *Department of Highways* (No. D-441). 262

The State is not a guarantor of the safety of its travelers on its roads and bridges. *Samples* v. *State Road Comm'n* (No. D-187). 80

Claimant was awarded the sum of $40.17 for damages sustained when tar was dropped and splattered onto his boat from a bridge while the respondent's employees were applying tar to the road surface of the bridge. *Talbert* v. *Department of Highways* (No. D-348). 241

Claimant was awarded the sum of $18,956.23 for damages occasioned by delays and improper inspection on the part of the State Road Commission in connection with a bridge construction contract. *Thomas Co.* v. *State Road Comm'n* (No. D-118). 112

A claim for damages, sustained when paint was dropped on claimant's automobile while it was being driven across a bridge, was disallowed on rehearing, where the damage, if any, was so slight that it could not be observed by an ordinary inspection of the surface of the automobile. *Travelers Ins. Co.* v. *State Road Comm'n* (No. D-274). 168

CONFLICT OF LAWS

A claim for a refund of nonresident student tuition fees paid by a former New Jersey resident while attending the law school of West Virginia University was disallowed,

where, although claimant may have established his domicile in West Virginia, the facts did not satisfactorily negative an apparent attempt to circumvent a rule providing that no nonresident student could establish domicile which would entitle him to reductions or exemptions of tuition by his attendance as a full-time student at any institution of learning in the State. *Esposito* v. *West Virginia Bd. of Regents* (No. D-329). 223

Claimant was awarded the sum of $1258 as a refund of nonresident student tuition fees paid by her while attending West Virginia University, where her actions in having moved from Pennsylvania to Morgantown and engaged in full-time employment there constituted an establishment by her of a legal domicile in West Virginia. *Wotkiewicz* v. *West Virginia Bd. of Regents* (No. D-294). 155

CONTRACTS

Claimant construction corporation was awarded the sum of $2,500 for damages occasioned by unreasonable delay on the part of the State Road Commission in directing work on a bridge construction project. *Bates & Rogers Constr. Corp.* v. *State Road Comm'n* (No. D-126). 17

Claimant was awarded the sum of $29,907.68 for damages and extra compensation in connection with a demolition contract, where respondent had failed to make certain structures available for timely demolition, thereby preventing claimant from doing its work efficiently and economically. *C & D Equip. Co.* v. *State Bldg. Comm'n* (No. D-324). 237

Claimant was awarded the sum of $191,701.42 for damages resulting from unreasonable delays caused by respondent State Road Commission in connection with a highway and bridge construction contract. *C. J. Langenfelder & Son* v. *Department of Highways* (No. D-120). 193

Where a contract has been breached by the State by a substantial interference with a critical sequence of operations, requiring a contractor to pay his expenses on an "as built schedule" as distinguished from a "planned schedule", the contractor should be reimbursed for the actual extra expenses and damages sustained. *C. J. Langenfelder & Sons* v. *Department of Highways* (No. D-120). 193

In the case of a contractor's claim for damages resulting from unreasonable delays caused by respondent State Road Commission in connection with a highway and bridge construction contract, the contractor's bid estimate was rejected as a basis for measuring the reasonable cost of doing the work in the absence of delay, and the "actual cost" of doing extra work under adverse conditions entailed by the delays was deemed to be a better method of measuring damages. *C. J. Langenfelder & Son* v. *Department of Highways* (No. D-120). 193

A liquidated damage clause is a penalty provision and should not be enforced unless real damage is sustained or where there are no circumstances which give the contractor equitable reasons for his failure to complete his work. *Frederick Eng'r Co.* v. *State Road Comm'n* (No. D-130). 26

Claimant engineering company was awarded $21,720, a sum which had been withheld by the State Road Commission as liquidated damages for claimant's failure to complete work on a highway construction project within a specified time, where the evidence showed that certain delays (which were not attributable to claimant) furnished a reasonable basis for claimant's inability to complete the contract within the period required, and where it appeared that, in all equity, claimant should not have been assessed under the liquidated damage provision of the contract. *Frederick Eng'r Co.* v. *State Road Comm'n* (No. D-130). 26

The intention of the parties must be ascertained from the language employed, and from the subject matter of the contract. *Highway Eng'rs. Inc.* v. *State Road Comm'n* (No. D-154). 68

The conduct of the parties in performing a contract has a bearing on its proper interpretation. *Highway Eng'rs, Inc.* v. *State Road Comm'n* (No. D-154). 68

Where a written highway engineering contract was clear and unambiguous and represented the final agreement of the parties, evidence relating to statements made during the period of negotiation were clearly not admissible under the parol evidence rule to vary or alter the terms of the written agreement. *Highway Eng'rs, Inc.* v. *State Road Comm'n* (No. D-154). 68

A contract to do several things at several times, the parts not being necessarily dependent upon each other, and particularly where the consideration is apportioned among various items, is ordinarily regarded as severable and divisible. *Highway Eng'rs Inc.* v. *State Road Comm'n* (No. D-154). 68

A claim for losses sustained in connection with a highway engineering contract could not be considered as a claim for damages, where there was no showing that respondent had breached any provisions of the contract. *Highway Eng'rs. Inc.* v. *State Road Comm'n* (No. D-154). 68

Claimant was awarded the sum of $27,095.75 for damages sustained by reason of delay and shutdowns pursuant to orders issued by respondent Department of Highways in connection with a street improvement contract. *M & M Constr. Co.* v. *Department of Highways* (No. D-299). 145

Claimant was awarded the sum of $53,966.95 for damages caused by unreasonable delays and shutdowns by respondent State Road Commission during the performance of a highway construction contract. *Mountain State Constr. Co.* v. *State Road Comm'n* (No. D-99). 89

Claimant was awarded a total sum of $33,979.32 for removal of certain material and for extra work performed in connection with a highway construction contract. *Ralph Myers Contracting Corp.* v. *State Road Comm'n* (No. B-382). 56

Section 5A-3-15, W. Va. Code, requires contracts involving purchases by the State to be approved as to form by the Attorney General. It was not intended for the Attorney General to pass upon the substance of the agreement, but only that the agreement was legally expressed. The requirement is a salutary one and the Court of Claims will not disregard

it in any case which does not have special reason for not enforcing it. *Retreading Research Associates, Inc.* v. *Department of Fin. & Administration* (No. D-356)..... 245

Claimant Virginia corporation was awarded the sum of $5,400 for services rendered to the Department of Finance and Administration in testing automobile tires, notwithstanding lack of approval of its contract by the Attorney General, where claimant had in good faith performed the agreement upon the representations of high officers of the State, and, being an out-of-state citizen or corporation, should have been allowed greater consideration in its dealings with the State where everything appeared valid. *Retreading Research Associates, Inc.* v. *Department of Fin. & Administration* (No. D-356). 245

Claimant was awarded the sum of $4907.70 for printing liquor price lists for respondent Alcohol Beverage Control Commission, where, although there had been conversations between the parties as to a possible price reduction, the evidence did not show a sufficient meeting of the minds to justify a conclusion that the parties had entered into a subsequent binding oral agreement which would have eliminated any liability on the part of the respondent. *Smith* v. *West Virginia Alcohol Beverage Control Comm'n* (No. D-218)..... 127

Claimant was awarded the sum of $18,956.23 for damages occasioned by delays and improper inspection on the part of the State Road Commission in connection with a bridge construction contract. *Thomas Co.* v. *State Road Comm'n* (No. D-118). 112

A claim for additional compensation in connection with three separate contracts for the preparation of tax maps was disallowed, where the contracts were clear as to the amount of compensation to be paid and the record showed that claimant had been paid in full. *Vogt-Ivers & Associates* v. *State Tax Comm'r* (No. D-193)..... 233

An engineering firm's claim for additional compensation for services rendered in connection with the development of the Cass Scenic Railroad was disallowed, where the evidence was not sufficient to contradict the contention that claimant had done work over and above that specified in or contemplated by the contract. *Vogt-Ivers & Associates* v. *Department of Natural Resources* (No. D-192)..... 214

A contract is entire and not severable when, by its terms, nature and purposes, it contemplates and intends that each and all of its parts, material provisions and the consideration are common each to the other and interdependent. *Wetherall* v. *State Road Comm'n* (No. D-92)..... 1

A contract providing for highway and dam construction was severable, where such contract encompassed two divisible projects, payment for which was to be received on the basis of unit prices assigned to each project. *Wetherall* v. *State Road Comm'n* (No. D-92)..... 1

CUSTOMS AND DUTIES

Claimant was awarded the sum of $1,128.89 for customs duties paid by him as customs agent in handling a shipment of certain physiological testing equipment ordered from

Switzerland by the coordinator of Operation Head Start, an agent of the State. *Twigger* v. *State* (No. D-246)..... 84

DAMAGES

Proof of the delivery of possession of a bailed railroad car as a bailment to the bailee constitutes a prima facie case on the part of the bailor railroad, and the obligation to prove that damage to the car was not the fault of the bailee shifts to the bailee. *Chesapeake & O. Ry.* v. *State Road Comm'n* (No. D-150)..... 140

Where a contract has been breached by the State by a substantial interference with a critical sequence of operations, requiring a contractor to pay his expenses on an "as built schedule" as distinguished from a "planned schedule", the contractor should be reimbursed for the actual extra expenses and damages sustained. *C. J. Langenfelder & Son* v. *Department of Highways* (No. D-120)..... 193

In the case of a contractor's claim for damages resulting from delays caused by respondent State Road Commission in connection with a highway and bridge construction contract, the contractor's bid estimate was rejected as a basis for measuring the reasonable cost of doing the work in the absence of delay, and the "actual cost" of doing the work under adverse conditions entailed by the delays was deemed to be a better method of measuring damages. *C. J. Langenfelder & Son* v. *Department of Highways* (No. D-120)..... 193

The courts have been in disagreement on whether loss of profits is a proper item in measuring damages. *C. J. Langenfelder & Son* v. *Department of Highways* (No. D-120)..... 193

A liquidated damage clause is a penalty provision and should not be enforced unless real damage is sustained or where there are no circumstances which give the contractor equitable reasons for his failure to complete his work. *Frederick Eng'r Co.* v. *State Road Comm'n* (No. D-130)..... 26

Claimant engineering company was awarded $21,720, a sum which had been withheld by the State Road Commission as liquidated damages for claimant's failure to complete work on a highway construction project within a specified time, where the evidence showed that certain delays (which were not attributable to claimant) furnished a reasonable basis for claimant's inability to complete the contract within the period required, and where it appeared that, in all equity, claimant should not have been assessed under the liquidated damage provision of the contract. *Frederick Eng'r Co.* v. *State Road Comm'n* (No. D-130)..... 26

A claim for damages, sustained when paint was dropped on claimant's automobile while it was being driven across a bridge, was disallowed, where, even though negligence on the part of State Road Commission employees could be assumed from the facts, it was found that claimant, who sought $195.70 for the costs of repair, had failed to mitigate damages by taking steps promptly to remove the paint when the injury occurred. *Travelers Ins. Co.* v. *State Road Comm'n* (No. D-274)..... 168

The Court of Claims cannot make an award where damages are not proved. *Spencer* v. *Adjutant General* (No. D-165)..... 74

The measure of damages in the case of a damaged motor vehicle is the difference in the market value of the vehicle immediately before the accident and immediately after the accident. *Spencer* v. *Adjutant General* (No. D-165)..... 74

An estimate for repairing a damaged automobile was not competent evidence, in view of testimony showing that the vehicle was worth less than tne cost of repair and that it had become a total loss save for its salvage value. *Spencer* v. *Adjutant General* (No. D-165)..... 74

The law does not take notice of small or trifling damage. *Travelers Ins. Co.* v. *State Road Comm'n* (No. D-274)..... 168

A claim for damages, sustained when paint was dropped on claimant's automobile while it was being driven across a bridge, was disallowed on rehearing, where the damage, if any, was so slight that it could not be observed by an ordinary inspection of the surface of the automobile. *Travelers Ins. Co.* v. *State Road Comm'n* (No. D-274)..... 168

In awarding damages to a husband for the wrongful death of his wife, the Court of Claims was not impressed by testimony and argument attempting to show dependency of the husband, and, although decedent had been a wage earner and looked after the family finances, the Court found no financial or pecuniary loss to the husband as a dependent distributee. *Varner* v. *State Road Comm'n* (No. D-185)..... 119

Where claimant's wife was not entitled to recovery in the case of a claim based upon the alleged negligence of respondent, it followed that her husband could not recover for his expenses and the loss of the services of his wife. *Whittington* v. *Department of Highways* (No. D-311)..... 231

DAMS

Borrow material is ordinarily material brought on to a project site for the completion of the project, when material excavated from the project is insufficient to accomplish the purpose. *Wetherall* v. *State Road Comm'n* (No. D-92)..... 1

A contract providing for highway and dam construction was severable, where such contract encompassed two divisible projects, payment for which was to be received on the basis of unit prices assigned to each project. *Wetherall* v. *State Road Comm'n* (No. D-92)..... 1

Permitting a dam project subcontractor to be joined in a claim proceeding did not prejudice the respondent State Road Commission, where the prime contractor was a proper party claimant, and where the subcontractor, though not a recognized subcontractor by the State Road Commissioner, had a substantial beneficial interest in the claim by virtue of his contract of employment with the prime contractor and was the person who performed the work that benefitted the State, and to whom the State was "morally" obligated. *Wetherall* v. *State Road Comm'n* (No. D-92)..... 1

DEMOLITION

Claimant was awarded the sum of $29,907.68 for damages and extra compensation in connection with a demolition contract, where respondent had failed to make certain structures available for timely demolition, thereby preventing claimant from doing its work efficiently and economically. *C & D Equip. Co.* v. *State Bldg. Comm'n* (No. D-324). . . 237

DEMURRAGE

A claim for demurrage on gas cylinders furnished to the Department of Mental Health was disallowed, where the evidence showed an agreement that no demurrage would be charged, and there was insufficient proof to sustain claimant's contention that the agreement had subsequently been changed, either by written notice or by custom and usage. *Johnson Welders Supply, Inc.* v. *Department of Mental Health* (No. D-181). . . 95

Claimant was awarded the sum of $788.33 for demurrage on gas cylinders delivered to offices of the State Road Commission. *Johnson Welders Supply, Inc.* v. *State Road Comm'n* (No. D-182). . . 96

ELECTRICITY

Claimant was awarded the sum of $89.25 for damages sustained by reason of workmen of the Department of Highways cutting down a tree adjacent to claimant's property and allowing a tree to strike a high voltage electric power line, resulting in a surge of approximately 7200 volts of electricity in claimant's household wiring. Estate of *L. M. Gates* v. *Department of Highways* (No. D-453). . . 243

Claimant lumber company was awarded a sum of $2,011 for damages sustained when a parachutist member of the West Virginia National Guard made a regularly scheduled jump and, during the course of the drop, struck and broke a power line providing electrical service to claimant's sawmill, thereby causing a power failure which "burned out" twelve motors owned and operated by claimant. *Interstate Lumber Co.* v. *Adjutant General* (No. D-23). . . 12

An electric utility's claim for damages, sustained when the parachute of a West Virginia National Guard officer drifted across an open electric wire, must be dismissed for lack of jurisdiction, where such claim had been filed more than two years after the alleged cause of action arose. *Monongahela Power Co.* v. *Adjutant General* (No. D-225). . . 49

Claimant was awarded the sum of $189.67 for damages resulting from the negligent conduct of Department of Highways employees in causing a tree to fall into claimant's power lines. *Monongahela Power Co.* v. *Department of Highways* (No. D-252). . . 143

EMINENT DOMAIN

The State Building Commission was created for the construction of public buildings for specified purposes with powers to contract and acquire by purchase or otherwise

real property necessary for its corporate purposes and to exercise the power of eminent domain to accomplish such purposes. *C & D Equip. Co.* v. *State Bldg. Comm'n* (No. D-324). 237

A claim for loss of rent was disallowed, where claimants, whose property was subject to condemnation for highway purposes, had signed provisions releasing respondent from all claims for damages or compensation other than the purchase price. *Evans* v. *Department of Highways* (No. D-310)..... 227

ESTOPPEL

There are many caveats in dealing with a governmental agency, and the conduct of its officers cannot result in the application of the doctrine of estoppel. *Huntington Steel & Supply Co.* v. *West Virginia State Tax Comm'r* (No. D-159)..... 123

A state is not subject to the laws of estoppel or waiver when acting in a governmental capacity. *Huntington Steel & Supply Co.* v. *West Virginia State Tax Comm'r* (No. D-159)..... 123

The State of West Virginia is not estopped to plead the statute of limitations because of the mistake, negligence or misconduct of its agents. *Huntington Steel & Supply Co.* v. *West Virginia State Tax Comm'r* (No. D-159)..... 123

Equitable estoppel cannot be applied against the State. *Massey* v. *Department of Welfare* (No. D-142)..... 59

EVIDENCE—See also Witnesses

Although hearsay evidence is admissible under the statute creating the Court of Claims, the Court is constrained to give such evidence only the weight that it deserves. *Affolter* v. *State Road Comm'n* (No. D-221)..... 150

Statements of a thirteen year old girl to her grandfather and related by him on the stand, did not constitute satisfactory proof of the identity of a truck from which a rock had been thrown against the windshield of claimant's automobile. *Affolter* v. *State Road Comm'n* (No. D-221)..... 150

It is not common knowledge that wild cherry leaves are toxic to cattle. *Bradley* v. *Department of Highways* (No. D-296). 163

Claimants were awarded the sum of $567.88 for damages sustained when a partially exposed gas line on their property was broken, where there was a reasonable inference from the circumstantial evidence presented that the damage occurred as a proximate result of the operations of State Road Commission employees in clearing up debris from a slide that had occurred on a nearby roadway. *Davidson* v. *State Road Comm'n* (No. D-204)..... 76

An award may not be based on speculative evidence. *Gilliam* v. *State Road Comm'n* (No. D-152)..... 115

Where a written highway engineering contract was clear and unambiguous and represented the final agreement of the parties, evidence relating to statements made during the period of negotiation were clearly not admissible under the

parol evidence rule to vary or alter the terms of the written agreement. *Highway Eng'rs, Inc.* v. *State Road Comm'n* (No. D-154). 68

Claimant's unsworn statement could not be considered as evidence. *McCoy v. Department of Pub. Institutions* (No. D-281). 209

An estimate for repairing a damaged automobile was not competent evidence, in view of testimony showing that the vehicle was worth less than the cost of repair and that it had become a total loss save for its salvage value. *Spencer* v. *Adjutant General* (No. D-165). 74

The Court of Claims is not bound by the usual common-law or statutory rules of evidence. *Wetherall* v. *State Road Comm'n* (No. D-92). 1

FIRES AND FIRE PROTECTION

Claimant was awarded the sum of $300 for damages caused by the negligence of State Road Commission employees in setting fires in close proximity to his residence. *Arbogast* v. *State Road Comm'n* (No. D-101). 28

It is not equitable for the City of Morgantown to be charged entirely with the cost of fire protection, which would be the result if the University were held to be exempt or relieved of its share of the cost of such service. By requiring the State as a whole to bear the fire service fee, equity is better served regardless of any strict interpretation or application of the law. *City of Morgantown* v. *Board of Governors of West Virginia Univ.* (No. D-46). 41

An ordinance enacted by the city council of Morgantown and providing for a fire service charge could not be effectively repealed or rescinded by a simple resolution which attempted to give West Virginia University credit for certain charges and thereby release the University's liability to the extent of the credit given. *City of Morgantown* v. *Board of Governors of West Virginia Univ.* (No. D-46). 41

Claimant was awarded the sum of $40,886.22 for fire service fees assessed against buildings and property of West Virginia University. *City of Morgantown* v. *Board of Governors of West Virginia Univ.* (No. D-46). 41

GAS

Claimants were awarded the sum of $567.88 for damages sustained when a partially exposed gas line on their property was broken, where there was a reasonable inference from the circumstantial evidence presented that the damage occurred as a proximate result of the operations of State Road Commission employees in clearing up debris from a slide that had occurred on a nearby roadway. *Davidson* v. *State Road Comm'n* (No. D-204). 76

Claimant gas company was awarded the sum of $254.90 for damages caused to its gas line when State Road Commission employees committed a trespass by operating dredging equipment on claimant's property without permission. *Equitable Gas Co.* v. *State Road Comm'n* (No. D-173). 131

A gas company's claim for damages, sustained when a gas line was broken as a result of the operation of equipment employed by the State Road Commission, was disallowed with leave to the parties to file a supplemental stipulation or present further evidence, where the brevity and sketchy nature of the stipulation of facts made it difficult for the court to evaluate the merit of the claim. *Equitable Gas Co.* v. *State Road Comm'n* (No. D-173). 131

A claim for demurrage on gas cylinders furnished to the Department of Mental Health was disallowed, where the evidence showed an agreement that no demurrage would be charged, and there was insufficient proof to sustain claimant's contention that the agreement had subsequently been changed, either by written notice or by custom and usage. *Johnson Welders Supply, Inc.* v. *Department of Mental Health* (No. D-181). 95

Claimant was awarded the sum of $788.33 for demurrage on gas cylinders delivered to offices of the State Road Commission. *Johnson Welders Supply, Inc.* v. *State Road Comm'n* (No. D-182). 96

Claimants, operators of a small gas utility, were awarded the sum of $936.25 for the loss of gas caused by the negligent puncturing of their pipeline by employees of respondent Department of Highways. *Miller* v. *Department of Highways* (No. D-286). 191

GUARDIAN AND WARD

Claimant was awarded the sum of $201 for clothing and personal property lost by his ward while she was a patient in the Huntington State Hospital, such loss having occurred as a result of negligence on the part of hospital employees. *Hicks* v. *Department of Mental Health* (No. D-144). 98

HOSPITALS

A claim for damages for wrongful death, based upon an allegation of negligence on the part of the staff and employees of the Weston State Hospital in placing the intestate in the same room with another mental patient who apparently strangled the intestate to death, was disallowed, where although the evidence showed that the other patient had been admitted approximately eleven hours before the homicide and had been diagnosed "schizophrenic reaction-paranoid type" (a diagnosis described as "not any different than anyone with a similar classification"), there was no testimony or other evidence to show that the hospital authorities knew or should have known that such patient had any violent homicidal tendency. *Creamer* v. *Department of Mental Health* (No. D-40). 13

A claim for damages, allegedly caused by reason of inadequate and negligent medical care and services rendered to claimant while he was a patient at Pinecrest Sanitarium, was disallowed, where the evidence was insufficient to show that the State had failed to exercise reasonable care in the treatment of its patient. *Green* v. *Department of Pub. Institutions* (No. D-197). 101

Claimant was awarded the sum of $201 for clothing and personal property lost by his ward while she was a patient in the Huntington State Hospital, such loss having occurred as a result of negligence on the part of hospital employees. *Hicks* v. *Department of Mental Health* (No. D-144)..... 98

A claim for damages to claimant's ambulance, sustained when an electrically operated overhead door at the West Virginia University Medical Center crashed down onto the vehicle, was disallowed, and the doctrine of res ipsa loquitur was found inapplicable, where there was no evidence of negligence on the part of respondent, and, at the time of the accident, it could not be said that respondent had exclusive control of the instrumentality, since none of its agents was in the area and the door was, in fact, being operated by claimant's son. *Mullins* v. *Board of Governors of West Virginia Univ.* (No. D-107)..... 33

HUSBAND AND WIFE

In awarding damages to a husband for the wrongful death of his wife, the Court of Claims was not impressed by testimony and argument attempting to show dependency of the husband, and, although decedent had been a wage earner and looked after the family finances, the Court found no financial or pecuniary loss to the husband as a dependent distributee. *Varner* v. *State Road Comm'n* (No. D-185)..... 119

Where claimant's wife was not entitled to recovery in the case of a claim based upon the allenged negligence of respondent, it followed that her husband could not recover for his expenses and the loss of the services of his wife. *Whittington* v. *Department of Highways* (No. D-311)..... 231

INFANTS

Claimant was awarded the sum of $226 for expenses incurred in caring for a sixteen year old boy, where the evidence showed that an employee of the Logan County Welfare Department had told claimant that a circuit court had placed the boy in the custody of claimant and his wife and that claimant and his wife would be paid for their services. *Hall* v. *Department of Welfare* (No. D-106)..... 10

INSURANCE

Claimant's insurer was permitted to present its claim for a portion of the damages set out in claimant's petition, where it appeared that claimant had, by a subrogation agreement, assigned a portion of the claim to the insurer. *Jones Esso Serv. Station* v. *State Road Comm'n* (No. D-198)..... 117

Claimant and his subrogee insurer were awarded the sum of $275.67 for damages sustained as a result of an accident involving claimant's vehicle and a jeep assigned to the Fairmont headquarters of the Adjutant General. *Rolfe* v. *Adjutant General* (No. D-237)..... 75

Claimant subrogee insurer was awarded the sum of $166.86 for damages sustained when paint was dropped on its insured's automobile by employees of the Department of Highways who were engaged in painting a bridge. *Safeco Ins. Co.* v. *Department of Highways* (No. D-441)..... 262

A subrogee under an insurance policy has the same right of recovery as the insured and is entitled to the same relief. *State Farm Mut. Auto. Ins. Co.* v. *Department of Highways* (No. D-285). 169

Subrogee insurer was awarded the sum of $168.83 for damages sustained by its insured, where the evidence showed that the outside section of the rim of the left rear wheel of a Department of Highways truck broke off and struck the side of the insured's automobile. *State Farm Mut. Auto. Ins. Co.* v. *Department of Highways* (No. D-285). 169

Claimant subrogee insurer was awarded the sum of $105.46 for damages sustained by its insured's automobile as a result of blasting operations conducted by respondent. *State Farm Mut. Auto. Ins. Co.* v. *Department of Hghways* (No. D-327). 219

When the State carries public liability insurance to protect its citizens and others against the negligence or misconduct of its agents and employees in the operation of State owned vehicles, the State in effect provides a means of compensation without resort to the legislative grace which gave rise to the Court of Claims. It is also an effectual waiver of the defense of constitutional immunity, otherwise the insurance coverage would be meaningless and unprotective of the rights of those who may be injured by the irresponsible acts of the State's agents and employees. *State Farm Mut. Auto. Ins. Co.* v. *State Road Comm'n* (No. D-251). 151

Claimant insurer's subrogated claim, arising out of a collision between the insured's truck and a State Road Commission vehicle, was disallowed, where claimant had neglected to file a civil action against the driver of the State owned vehicle, although there was evidence showing that claimant had made efforts by correspondence to collect its claim from the State's public liability insurer, who managed to delay and evade payment of the full claim until the tolling of the statute of limitations. *State Farm Mut. Auto. Ins. Co.* v. *State Road Comm'n* (No. D-251). 151

Claimant subrogee insurer was awarded the sum of $97.56 for damages sustained when a loose head flew off of a hammer being used by respondent's employee and struck the windshield of a parked automobile owned by claimant's insured. *State Farm Mut. Auto. Ins. Co.* v. *West Virginia Bd. of Regents* (No. D-414). 244

Claims brought by a truck owner and his subrogee insurer, seeking compensation for damages sustained when the truck struck a large rock in the road, were disallowed, where, although it could be assumed that the rock had fallen from a Department of Highways truck which had been hauling rocks in the vicinity, the proximate cause of the accident was the contributory negligence of claimant's employee in driving at an unsafe speed and in failing to see and avoid the rock. *Vandergrift* v. *Department of Highways* (No. D-354A). 248

JURISDICTION

The general statutory law of the State of West Virginia is binding upon the Court of Claims. *Airkem Sales & Serv.* v. *Department of Mental Health* (No. D-333). 180

The Court of Claims is authorized to consider claims which, but for the constitutional immunity of the State from suit, could be maintained in the regular courts of the State. *Airkem Sales & Serv.* v. *Department of Mental Health* (No. D-333). 180

The Court of Claims has no existing appropriation for the payment of accrued claims and is constrained to follow the statutory law of the state. *Airkem Sales & Serv.* v. *Department of Mental Health* (No. D-333). 180

To allow the payment of an illegal claim as a moral obligation of the State, when it is admitted that the spending unit clearly violated the statute by incurring liabilities which could not be paid out of the current appropriation, clearly exceeds the jurisdiction of the Court of Claims; nor would the fact that the parties were mistaken as to the law, and may have acted without any corrupt or criminal intent, confer jurisdiction or give the Court authority to allow the payment under a contract declared unlawful, void or unenforceable by statute. *Airkem Sales & Serv.* v. *Department of Mental Health* (No. D-333). 180

Where respondent's contentions regarding the legality of a sidewalk assessment could have been presented below to a town council and the council's decision could have been subsequently appealed, but such contentions were not so presented, a town council's decisions of questions of fact were binding and not subject to review by the Court of Claims. *Charleston Concrete Floor Co.* v. *Department of Highways* (No. D-322). 221

The statute creating the Court of Claims waives on the part of the State the constitutional immunity of the State in cases where the claimant otherwise has a legal claim. *Creamer* v. *Department of Mental Health* (No. D-40). 13

Interdepartmental struggles or lack of communication between State officers are not the concern of the Court of Claims. *Freeman* v. *Department of Natural Resources* (No. D-298). 165

Unless there is a legal basis for a claim, the Court of Claims is without power to make an award, regardless of how sympathetic the Court may be to the cause of the claimant. *Freeman* v. *Department of Natural Resources* (No. D-298). 165

It is not all claims which the State should in equity and good conscience pay that the Court of Claims is required to consider, but only those that come within the purview of the Court's circumscribed jurisdiction. *Hughes Constr. Co.* v. *State Tax Comm'r* (No. D-123). 38

The Court of Claims is constrained to consider those claims which but for the constitutional immunity could be maintained in the regular courts of the State. *Hughes Constr. Co.* v. *State Tax Comm'r* (No. D-123). 38

The Court of Claims is not empowered to overrule a final judgment of a court of record based on findings or defenses other than sovereign immunity. *Hughes Constr. Co.* v. *State Tax Comm'r* (No. D-123). 38

The jurisdiction of the Court of Claims does not extend to any claim with respect to which there is an adequate remedy

at law and which may be maintained against the State, by or on behalf of the claimant, in the regular courts of the State. *Hughes Constr. Co.* v. *State Tax Comm'r* (No. D-123). ... 38

The Court of Claims is not established to make awards on a purely sympathy basis, but only to hear and determine the question of legal liability as though there was no constitutional immunity to the State. *Miller* v. *West Virginia Div. of Correction* (No. D-149). ... 62

The West Virginia Court of Claims is a fact-finding body created by the Legislature and is an instrumentality of the Legislature to determine which claims the State of West Virginia, as a sovereign commonwealth, should pay out of public funds because of equity and good conscience. Damages may be awarded which proximately result from wrongful conduct of the State or any of its agencies, which would be judicially recognized as damages resulting from wrongful conduct. *Parsons* v. *State Road Comm'n* (No. D-112). ... 35

Negligence of a state agency or any of its employees must be fully shown to justify an award by the Court of Claims; and it must be further shown that the claimant did not know the existence of a danger, or that the claimant, as a reasonable person under the conditions then existing, could not have foreseen or discovered the danger. *Parsons* v. *State Road Comm'n* (No. D-112). ... 35

The determination of claimants' right to the remedy of mandamus to adjudicate their rights under certain provisions of the tax law was not within the jurisdiction of the Court of Claims. *Peters Fuel Corp.* v. *State Tax Comm'r* (No. D-226). ... 158

While the Court of Claims determines cases according to law and the Court's findings are then considered by the legislature as moral obligations, the jurisdiction of the Court is nevertheless limited by the express statutory provision [§11-14-20, W. Va. Code] declaring that failure to follow the prescribed procedure in obtaining a gasoline tax refund does not constitute a moral obligation on the State for payment. *Peters Fuel Corp.* v. *State Tax Comm'r* (No. D-226). ... 158

Section 5A-3-15, W. Va. Code, requires contracts involving purchases by the State to be approved as to form by the Attorney General. It was not intended for the Attorney General to pass upon the substance of the agreement, but only that the agreement was legally expressed. The requirement is a salutary one and the Court of Claims will not disregard it in any case which does not have special reason for not enforcing it. *Retreading Research Associates, Inc.* v. *Department of Fin. & Administration* (No. D-356). ... 245

The Court of Claims has jurisdiction to hear a claim against the State Board of Education. *Smith* v. *State Bd. of Educ.* (No. D-125). ... 31

The Court of Claims cannot make an award where damages are not proved. *Spencer* v. *Adjutant General* (No. D-165). ... 74

The Court of Claims was established to recommend to the Legislature payment of claims which the State in equity and in good conscience should pay, notwithstanding the sovereign immunity of the State, and provided that claims would be

tenable in a Court of record but for the defense of constitutional immunity. *State Farm Mut. Auto. Ins. Co.* v. *State Road Comm'n* (No. D-251) 151

The Court of Claims was created by the Legislature to consider claims which, but for the constitutional immunity of the State from suit, could be maintained in the regular courts of the State. Jurisdiction is extended to claims which the State as a sovereign commonwealth should in equity and good conscience discharge and pay. *Wetherall* v. *State Road Comm'n* (No. D-92) 1

To constitute a moral obligation of the State justifying the appropriation of public funds, it is necessary that a legal obligation or duty be imposed on the State, by statute or contract, or that wrongful conduct be shown, which would be judicially recognized as such in cases between private persons. Whether such moral obligation exists is a judicial question. *Whiting* v. *Bd. of Education* (No. D-177) 45

The Court of Claims lacks jurisdiction over any claim 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. *William Garlick & Sons, Inc.* v. *State Auditor* (No. D-224). 137

A foreign corporation's claim for a refund of corporation license taxes, paid under protest for fiscal years from 1 July 1964 to 30 June 1969, was disallowed, notwithstanding claimant's contention that its authority to do business in the State had been revoked and that it had done no business in the State between 1964 and 1969, where claimant had failed to use an available remedy by seeking a refund through court proceedings. *William Garlick & Sons, Inc.* v. *State Auditor* (No. D-224). 137

LANDLORD AND TENANT

Claimant was awarded the sum of $1703.87 for damages to its premises resulting from the occupancy thereof by mental patients under the terms of a lease agreement between claimant and the Department of Mental Health. *Allergy Rehabilitation Foundation, Inc.* v. *Department of Mental Health* (No. D-275). 87

A claim for loss of rent was disallowed, where claimants, whose property was subject to condemnation for highway purposes, had signed provisions releasing respondent from all claims for damages or compensation other than the purchase price. *Evans* v. *Department of Highways* (No. D-310) 227

Claimants were awarded the total sum of $355 as damages as compensation for rental space furnished to the Department of Highways for the parking of a trailer, partial destruction of a fence on claimants' property, and loss of a hay crop. *Yost* v. *Department of Highways* (No. D-272) 220

LIMITATION OF ACTIONS

A claim for the refund of business and occupation taxes allegedly overpaid for the years 1960 and 1961 was disallowed, where a circuit court had previously disallowed recovery for

the taxes in question by stating they were barred by the statute of limitations, although it had allowed recovery on taxes paid during three subsequent years. *Hughes Constr. Co.* v. *State Tax Comm'r* (No. D-123)..... 38

The State of West Virginia is not estopped to plead the statute of limitations because of the mistake, negligence or misconduct of its agents. *Huntington Steel & Supply Co.* v. *West Virginia State Tax Comm'r* (No. D-159)..... 123

A claim for a refund of business and occupation taxes erroneously paid for calendar years 1963 and 1964 was disallowed, where claimant had failed to comply with the administrative procedure requiring aggrieved taxpayers seeking such refunds to file a petition therefor within three years from the date of payment. *Huntington Steel & Supply Co.* v. *West Virginia State Tax Comm'r* (No. D-159)..... 123

There is no express or implied right on the part of any department of the State through its agents or attorneys to waive the period of limitations set forth in § 14-2-21, W. Va. Code. *Monongahela Power Co.* v. *Adjutant General* (No. D-225)..... 49

An electric utility's claim for damages, sustained when the parachute of a West Virginia National Guard officer drifted across an open electric wire, must be dismissed for lack of jurisdiction, where such claim had been filed more than two years after the alleged cause of action arose. *Monongahela Power Co.* v. *Adjutant General* (No. D-225)..... 49

Claimant insurer's subrogated claim, arising out of a collision between the insured's truck and a State Road Commission vehicle, was disallowed, where claimant had neglected to file a civil action against the driver of the State owned vehicle, although there was evidence showing that claimant had made efforts by correspondence to collect its claim from the State's public liability insurer, who managed to delay and evade payment of the full claim until the tolling of the statute of limitations. *State Farm Mut. Auto. Ins. Co.* v. *State Road Comm'n* (No. D-251)..... 151

The statute of limitations does not run where there is a continual and intermittent trespass to real estate. *Whiting* v. *Bd. of Education* (No. D-177)..... 45

LIVESTOCK

It is not common knowledge that wild cherry leaves are toxic to cattle. *Bradley* v. *Department of Highways* (No. D-296)..... 163

In the case of claims brought by farmers for the loss of and injury to cattle poisoned by wild cherry tree cuttings left by respondent's employees, the applicable standard of care was that of a reasonably prudent man, and not that of a reasonably prudent farmer. *Bradley* v. *Department of Highways* (No. D-296)..... 163

Claims for the loss of and injury to cattle, poisoned by wild cherry tree cuttings left by respondent's employees, were disallowed, where the acts of such employees in leaving the cut vegetation on the right of way of a road did not constitute negligence, and even if it were assumed to constitute negligence an ordinarily prudent person could not have anticipated

that the omission would expose cattle in an adjoining field to danger. *Bradley* v. *Department of Highways* (No. D-296) 163

MANDAMUS

Mandamus can only be maintained where there is a clear legal remedy. *Hibbard, O'Connor & Weeks* v. *West Virginia Bd. of Educ.* (No. D-235) 109

The determination of claimants' right to the remedy of mandamus to adjudicate their rights under certain provisions of the tax law was not within the jurisdiction of the Court of Claims. *Peters Fuel Corp.* v. *State Tax Comm'r* (No. D-226) 158

MARSHALL UNIVERSITY

Claimant was awarded the sum of $727.30 for having shipped 590,000 data cards to respondent under a valid contract, following an order placed by authorized personnel of Marshall University. *Smith* v. *State Bd. of Educ.* (No. D-125) 31

MINES AND MINERALS

A claim for wages lost while claimant was attending a mine explosion hearing, to which he had been summoned as a witness, was not allowable without legal justification for a finding of liability on the part of the State. *Securro* v. *Department of Mines* (No. D-202) 103

The claims of four persons, for expenses incurred when they complied with a request of the Department of Mines to testify at a hearing concerning the Farmington mine disaster, were disallowed, where there was no legal basis for recovery. *Thomas* v. *Department of Mines* (No. D-164) 54

MISTAKE

To allow the payment of an illegal claim as a moral obligation of the State, when it is admitted that the spending unit clearly violated the statute by incurring liabilities which could not be paid out of the current appropriation, clearly exceeds the jurisdiction of the Court of Claims; nor would the fact that the parties were mistaken as to the law, and may have acted without any corrupt or criminal intent, confer jurisdiction or give the Court authority to allow the payment under a contract declared unlawful, void or unenforceable by statute. *Airkem Sales & Serv.* v. *Department of Mental Health* (No. D-333) 180

MOTOR VEHICLES

Statements of a thirteen year old girl to her grandfather and related by him on the stand, did not constitute satisfactory proof of the identity of a truck from which a rock had been thrown against the windshield of claimant's automobile. *Affolter* v. *State Road Comm'n* (No. D-221) 150

Claimant was awarded the sum of $10,000 for damages resulting from a collision of an automobile, in which she was a passenger, with a large boulder in the road, where there

was negligence on the part of the Department of Highways and no negligence attributable to the claimant. *Ayers* v. *Department of Highways* (No. D-288) 217

Claimant was awarded the sum of $149.51 for damages sustained when a hot welding rod fell from the top of a bridge onto his automobile. *Beranak* v. *State Road Comm'n* (No. D-248). 108

The State is not an insurer, and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of its highways under all the circumstances. *Cassel* v. *Department of Highways* (No. D-108). 254

The very nature of the obligation of the State, in respect to the construction and maintenance of its highways, precludes the idea that its failure to exercise discretion in favor of a particular location over another, or whether it should provide guard rails, center lines or danger signals at that point, is an act of negligence. *Cassel* v. *Department of Highways* (No. D-108). 254

An automobile passenger's claim for damages resulting from a highway accident was disallowed, where, even assuming arguendo that respondent had failed to exercise ordinary and reasonable care in the repair and maintenance of the highway, a rut found on the road surface could only have been a remote and incidental cause of claimant's injuries, while the physical facts and circumstances persuasively indicated that the driver's careless and improper driving was the proximate cause of the accident. *Cassell* v. *Department of Highways* (No. D-108). 254

Claimants were awarded the sum of $101.41 for damages sustained when hot welding lead fell from the upper part of a bridge onto their automobile. *Catsos* v. *State Road Comm'n* (No. D-223). 107

Every user of our highways travels thereon at his own risk and the State does not insure him a safe journey. *Cooper* v. *Department of Highways* (No. D-166). 178

The mere failure to provide road markers is not such negligence as would create a moral obligation on the part of the State to pay damages assumed to have arisen through such failure and as the proximate cause thereof. *Cooper* v. *Department of Highways* (No. D-166). 178

A claim for damages, based upon the alleged failure of respondent Department of Highways to have proper signs indicating a new highway route, was disallowed, where the road had been in good repair and claimant had been contributorily negligent in failing to have her automobile under proper control. *Cooper* v. *Department of Highways* (No. D-166). 178

The State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. *Criss* v. *Department of Highways* (No. D-137). 175

The Department of Highways is not required to be infallible in its inspection of its highways and rights of way, nor is it an insurer of the safety to travelers on its roads. *Criss* v. *Department of Highways* (No. D-137) 175

For the State to guarantee the safety of travelers upon its highways against the possibility of any tree falling from the many hills and cliffs adjoining the highways in this mountainous state, when it has had no notice nor could have reasonably foreseen the probability of such an occurrence, would place liability on the State beyond all reason and expense. *Criss* v. *Department of Highways* (No. D-137). 175

A claim for damages resulting from the sudden stopping of claimants' automobile when a tree fell across the road and struck the bumper or front part of the vehicle was disallowed, where respondent Department of Highways had used reasonable care and diligence under all the circumstances in the maintenance of the highway, and where claimants failed to show that it was clearly apparent that the road was hazardous or that respondent should have made a greater and more detailed inspection to eliminate the condition as an impending hazard to travelers on that road. *Criss* v. *Department of Highways* (No. D-137). 175

Claims for damages, sustained when claimant A's automobile collided with claimant B's automobile after the latter vehicle had been stopped by a Department of Highways flagman, were disallowed, where the negligence, if any, of respondent was not the proximate cause of the collision, since the negligence of claimant A in failing to keep his vehicle under proper control became the intervening, independent proximate cause of the damages sustained by both claimants. *Ellison* v. *Department of Highways* (No. D-320). 264

A claim for damages allegedly caused by a rock from a cut on the side of a mountain came down and struck claimant's automobile was disallowed, where claimant failed to show negligence on the part of respondent Department of Highways. *Elswick* v. *Department of Highways* (No. C-32). 229

A claim for damages, sustained when claimant's automobile was scraped and dented while proceeding past a road construction site, was disallowed, where there was no proof of any specific act of negligence on the part of the State Road Commission or its employees. *Gilliam* v. *State Road Comm'n* (No. D-152). 115

Claimant, an employee of the State Road Commission, was awarded the sum of $159.59 for damages sustained when a parking lot attendant (also employed by the Commission) negligently operated claimant's automobile while attempting to park it in the Commission motor pool parking lot. *Grubbs* v. *State Road Comm'n* (No. D-238). 50

A claim for damages resulting from a collision between claimant's automobile and a State Road Commission snow removal truck was disallowed, where the evidence showed that the driver of claimant's car was contributorily negligent in attempting to pass the truck on a snow-covered highway in a blizzard at a speed of 20 to 25 miles per hour, while the truck was proceeding at a rate of ten miles an hour. *Halstead* v. *State Road Comm'n* (No. D-140). 24

The State is not an insurer of the safety of those traveling on the public roads. *Hanson* v. *State Road Comm'n* (No. D-186). 100

Anyone who is injured or who sustains damages on a public road must prove that the State has been negligent in its

maintenance of the road in order to render the State liable. *Hanson* v. *State Road Comm'n* (No. D-186) 100

A claim for damages, sustained when a rock fell on claimant's automobile, was disallowed, where there was insufficient evidence to establish negligence on the part of the State. *Hanson* v. *State Road Comm'n* (No. D-186) 100

Claimant was awarded the sum of $56.14 for damages sustained when a bent metal plate cut the tire of his automobile as it passed over a bridge. *Holley* v. *Department of Highways* (No. D-351) 242

Claimant was awarded the sum of $128.24 for damages sustained when a piece of hot welding slag fell onto his automobile from the overhead structure of a bridge where employees of the West Virginia Department of Highways were making repairs. *Humphrey* v. *Department of Highways* (No. D-277). 142

The State is not the insurer of the safety of the roads and highways of the State. *Jones Esso Serv. Station* v. *State Road Comm'n* (No. D-198) 117

A claim for damages, sustained when claimant's automobile struck a culvert in the roadway, was disallowed, where, although there was conflicting evidence as to whether "slow" signs had been placed so as to warn motorists of the existing hazard, there was also evidence to sustain a finding that claimant's driver had failed to exercise due and reasonable care for his own safety. *Jones Esso Serv. Station* v. *State Road Comm'n* (No. D-198) 117

Claimants were awarded the sum of $50 for damages sustained when a member of a State Road Commission construction crew negligently dropped (or caused to fall) a bottle onto claimants' automobile while the vehicle was crossing a bridge. *Lewis* v. *State Road Comm'n* (No. D-256). 132

The user of a highway travels at his own risk. *Lowe* v. *Department of Highways* (No. C-19) 210

The State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. *Lowe* v. *Department of Highways* (No. C-19). 210

The Department of Highways cannot guarantee the traveling public that rocks or trees may not fall upon our highways and thereby cause injury and damage to persons and property. *Lowe* v. *Department of Highways* (No. C-19) 210

A claim for damages, sustained when paint was dropped on claimant's automobile while it was being driven across a bridge, was disallowed, where, even though negligence on the part of State Road Commission employees could be assumed from the facts, it was found that claimant, who sought $195.70 for the costs of repair, had failed to mitigate damages by taking steps promptly to remove the paint when the injury occurred. *Travelers Ins. Co.* v. *State Road Comm'n* (No. D-274). 129

Claimant was awarded the sum of $46.77 for the cost of replacing his automobile windshield, which was broken by a rock thrown by a grass mower operated by respondent's employee. *McClintic* v. *Department of Natural Resources* (No. D-353). 218

Claimant was awarded the sum of $11 for damages sustained when members of a State Road Commission construction crew, while installing a traffic counter, caused a nail to damage a tire on claimant's automobile while it was passing over the counter. *Melvin* v. *State Road Comm'n* (No. D-257). 133

Claimant was awarded the sum of $69.79 for damages sustained when, in crossing a state road bridge, the left rear wheel of his automobile dropped into a hole in the floor of the bridge. *Monk* v. *State Road Comm'n* (No. D-139)..... 32

The user of a highway travels at his own risk, and the State does not and cannot assure him a safe journey. *Parsons* v. *State Road Comm'n* (No. D-112)..... 35

The State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. *Parsons* v. *State Road Comm'n* (No. D-112)..... 35

A claim for damages sustained when claimant's automobile veered across a wet highway surface and struck two other vehicles was disallowed, where claimant's mere recital of a road defect was found insufficient to sustain a recovery in her favor. *Parsons* v. *State Road Comm'n* (No. D-112)..... 35

Claimant was awarded the sum of $139.88 for damages sustained when her automobile struck an obstruction on a bridge, where the evidence supported a finding that respondent's negligence in failing to remove the hazard or give notice of its existence was the proximate cause of the damage. *Randall* v. *Department of Highways* (No. D-151)..... 147

Claimant and his subrogee insurer were awarded the sum of $275.67 for damages sustained as a result of an accident involving claimant's vehicle and a jeep assigned to the Fairmont headquarters of the Adjutant General. *Rolfe* v. *Adjutant General* (No. D-237)..... 75

Claimant subrogee insurer was awarded the sum of $166.86 for damages sustained when paint was dropped on its insured's automobile by employees of the Department of Highways who were engaged in painting a bridge. *Safeco Ins. Co.* v. *Department of Highways* (No. D-441)..... 262

The user of a highway travels at his own risk, and the State does not and cannot assure him a safe journey. *Samples* v. *State Road Comm'n* (No. D-187)..... 80

The State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. *Samples* v. *State Road Comm'n* (No. D-187)..... 80

Claimants were awarded separate sums for damages sustained when a tree fell from the top of an embankment onto their automobile, where there was no doubt that excavation of the embankment by employees of the State Road Commission had weakened the upper levels of a hillside, causing the tree to fall, and that the unsafe condition resulting from the excavation had been carelessly permitted to exist over a holiday period without anyone to inspect or supervise the area. *Samples* v. *State Road Comm'n* (No. D-187)..... 80

Claimants were awarded the sum of $89 for damages sustained when a National Guard jeep collided with another National Guard vehicle, pushing it into the rear of claimants' automobile. *Shanabarger* v. *Adjutant General* (No. D-440)..... 261

Claimant was awarded the sum of $409.87 for damages sustained when his parked automobile was struck by a State Road Commission truck, where respondent admitted that the truck's brakes were defective, and it was undisputed that the cause of the collision was the failure of the driver to keep the vehicle under control. *Shinn* v. *Department of Highways* (No. D-254)..... 174

The measure of damages in the case of a damaged motor vehicle is the difference in the market value of the vehicle immediately before the accident and immediately after the accident. *Spencer* v. *Adjutant General* (No. D-165)..... 74

An estimate for repairing a damaged automobile was not competent evidence, in view of testimony showing that the vehicle was worth less than the cost of repair and that it had become a total loss save for its salvage value. *Spencer* v. *Adjutant General* (No. D-165)..... 74

Failure to maintain and keep a vehicle in repair constitutes negligence. *State Farm Mut. Auto. Ins. Co.* v. *Department of Highways* (No. D-285)..... 169

Subrogee insurer was awarded the sum of $168.83 for damages sustained by its insured, where the evidence showed that the outside section of the rim of the left rear wheel of a Department of Highways truck broke off and struck the side of the insured's automobile. *State Farm Mut. Auto. Ins. Co.* v. *Department of Highways* (No. D-285)..... 169

Claimant subrogee insurer was awarded the sum of $105.46 for damages sustained by its insured's automobile as a result of blasting operations conducted by respondent. *State Farm Mut. Auto. Ins. Co.* v. *Department of Highways* (No. D-327)..... 219

Claimant insurer's subrogated claim, arising out of a collision between the insured's truck and a State Road Commission vehicle, was disallowed, where claimant had neglected to file a civil action against the driver of the State owned vehicle, although there was evidence showing that claimant had made efforts by correspondence to collect its claim from the State's public liability insurer, who managed to delay and evade payment of the full claim until the tolling of the statute of limitations. *State Farm Mut. Auto. Ins. Co.* v. *State Road Comm'n* (No. D-251)..... 151

When the State carries public liability insurance to protect its citizens and others against the negligence or misconduct of its agents and employees in the operation of State owned

vehicles, the State in effect provides a means of compensation without resort to the legislative grace which gave rise to the Court of Claims. It is also an effectual waiver of the defense of constitutional immunity, otherwise the insurance coverage would be meaningless and unprotective of the rights of those who may be injured by the irresponsible acts of the State's agents and employees. *State Farm Mut. Auto. Ins. Co.* v. *State Road Comm'n* (No. D-251)..... 151

Claimant subrogee insurer was awarded the sum of $97.56 for damages sustained when a loose head flew off of a hammer being used by respondent's employee and struck the windshield of a parked automobile owned by claimant's insured. *State Farm Mut. Auto. Ins. Co.* v. *West Virginia Bd. of Regents* (No. D-414)..... 244

Claimant, an employee of respondent Department of Highways, was awarded the sum of $423.49 for damages sustained when an endloader he was operating collided with his parked automobile, where it appeared that the exhaust system of the endloader had not been functioning properly, and claimant's condition after the collision had been diagnosed as carbon monoxide intoxication. *Swiger* v. *Department of Highways* (No. D-303)..... 192

A claim for damages, sustained when paint was dropped on claimant's automobile while it was being driven across a bridge, was disallowed on rehearing, where the damage, if any, was so slight that it could not be observed by an ordinary inspection of the surface of the automobile. *Travelers Ins. Co.* v. *State Road Comm'n* (No. D-274)..... 168

Claims brought by a truck owner and his subrogee insurer, seeking compensation for damages sustained when the truck struck a large rock in the road, were disallowed, where, although it could be assumed that the rock had fallen from a Department of Highways truck which had been hauling rocks in the vicinity, the proximate cause of the accident was the contributory negligence of claimant's employee in driving at an unsafe speed and in failing to see and avoid the rock. *Vandergrift* v. *Department of Highways* (No. D-354A)..... 248

The State is not the insurer of its highways. *Varner* v. *State Road Comm'n* (No. D-185)..... 119

Claimant was awarded the sum of $8,201.30 for damages sustained when an automobile operated by claimant's decedent wife collided with a boulder on the roadway, where there was sufficient evidence to show that respondent State Road Commission had recognized or should have recognized a potential hazard but never made any more than a cursory inspection of the area. *Varner* v. *State Road Comm'n* (No. D-185)..... 119

MOVING EXPENSES

Claimant, a Department of Mental Health employee who was transferred from Huntington to Charleston, was awarded a sum of $247.50 for moving expenses, where there had been an apparent lack of knowledge on the part of the official who signed the requisition for moving services that such services would be considered a gratuity, and where, under the circumstances, it was determined by the Court that claimant

should not be penalized by a mistake which was more of his superiors' making than his own. *Mathison* v. *Department of Mental Health* (No. D-116) 9

MUNICIPAL CORPORATIONS

An ordinance of a municipal corporation may not be repealed by a mere motion or resolution, nor can the operation of the ordinance be suspended by a resolution or by the acts of municipal officers. *City of Morgantown* v. *Board of Governors of West Virginia Univ.* (No. D-46) 41

The act which repeals an ordinance must be of equal dignity with the act which establishes it, and must be enacted in the manner required for passing a valid ordinance. Accordingly, an ordinance or bylaw can be repealed only by another ordinance or bylaw, and not by a mere resolution, order, or motion, or by a void ordinance. *City of Morgantown* v. *Board of Governors of West Virginia Univ.* (No. D-46) 41

An ordinance enacted by the city council of Morgantown and providing for a fire service charge could not be effectively repealed or rescinded by a simple resolution which attempted to give West Virginia University credit for certain charges and thereby release the University's liability to the extent of the credit given. *City of Morgantown* v. *Board of Governors of West Virginia Univ.* (No. D-46) 41

West Virginia University is not simply property or assets within or of the City of Morgantown but is property and assets of the State as a whole. *City of Morgantown* v. *Board of Governors of West Virginia Univ.* (No. D-46) 41

It is not equitable for the City of Morgantown to be charged entirely with the cost of fire protection, which would be the result if the University were held to be exempt or relieved of its share of the cost of such service. By requiring the State as a whole to bear the fire service fee, equity is better served regardless of any strict interpretation or application of the law. *City of Morgantown* v. *Board of Governors of West Virginia Univ.* (No. D-46) 41

Claimant was awarded the sum of $40,886.22 for fire service fees assessed against buildings and property of West Virginia University. *City of Morgantown* v. *Board of Governors of West Virginia Univ.* (No. D-46) 41

NATIONAL GUARD

Claimant lumber company was awarded a sum of $2,011 for damages sustained when a parachutist member of the West Virginia National Guard made a regularly scheduled jump and, during the course of the drop, struck and broke a power line providing electrical service to claimant's sawmill, thereby causing a power failure which "burned out" twelve motors owned and operated by claimant. *Interstate Lumber Co.* v. *Adjutant General* (No. D-23) 12

An electric utility's claim for damages, sustained when the parachute of a West Virginia National Guard officer drifted across an open electric wire, must be dismissed for lack of jurisdiction, where such claim had been filed more than two years after the alleged cause of action arose. *Monongahela Power Co.* v. *Adjutant General* (No. D-225) 49

Claimant and his subrogee insurer were awarded the sum of $275.67 for damages sustained as a result of an accident involving claimant's vehicle and a jeep assigned to the Fairmont headquarters of the Adjutant General. *Rolfe* v. *Adjutant General* (No. D-237) 75

Claimants were awarded the sum of $89 for damages sustained when a National Guard jeep collided with another National Guard vehicle, pushing it into the rear of claimants' automobile. *Shanabarger* v. *Adjutant General* (No. D-440) 261

NEGLIGENCE — SEE also Blasting; Bridges; Damages; Motor Vehicles; Rock Slides; Streets and Highways

Claimant was awarded the sum of $300 for damages caused by the negligence of State Road Commission employees in setting fires in close proximity to his residence. *Arbogast* v. *State Road Comm'n* (No. D-101) 28

Claimant was awarded the sum of $149.51 for damages sustained when a hot welding rod fell from the top of a bridge onto his automobile. *Beranak* v. *State Road Comm'n* (No. D-248) 108

A requisite of proximate cause is an act or omission which a person of ordinary prudence could reasonably foresee might naturally produce an injury. *Bradley* v. *Department of Highways* (No. D-296) 163

In the case of claims brought by farmers for the loss of and injury to cattle poisoned by wild cherry tree cuttings left by respondent's employees, the applicable standard of care was that of a reasonably prudent man, and not that of a reasonably prudent farmer. *Bradley* v. *Department of Highways* (No. D-296) 163

Claims for the loss of and injury to cattle, poisoned by wild cherry tree cuttings left by respondent's employees, were disallowed, where the acts of such employees in leaving the cut vegetation on the right of way of a road did not constitute negligence, and even if it were assumed to constitute negligence an ordinarily prudent person could not have anticipated that the omission would expose cattle in an adjoining field to danger. *Bradley* v. *Department of Highways* (No. D-296) 163

Claimants were awarded the sum of $1,497 for damages caused to their dwelling house as a result of blasting which was not properly controlled and which presumably involved negligence on the part of respondent Department of Highways. *Caldwell* v. *Department of Highways* (No. D-194) 90

The very nature of the obligation of the State, in respect to the construction and maintenance of its highways, precludes the idea that its failure to exercise discretion in favor of a particular location over another, or whether it should provide guard rails, center lines or danger signals at that point, is an act of negligence. *Cassel* v. *Department of Highways* (No. D-108) 254

An automobile passenger's claim for damages resulting from a highway accident was disallowed, where, even assuming arguendo that respondent had failed to exercise ordinary and

reasonable care in the repair and maintenance of the highway, a rut found on the road surface could only have been a remote and incidental cause of claimant's injuries, while the physical facts and circumstances persuasively indicated that the driver's careless and improper driving was the proximate cause of the accident. *Cassel* v. *Department of Highways* (No. D-108). 254

Claimants were awarded the sum of $101.41 for damages sustained when hot welding lead fell from the upper part of a bridge onto their automobile. *Catsos* v. *State Road Comm'n* (No. D-223). 107

Claimant was awarded the sum of $1297.20 for damages resulting from the derailment of a car containing a load of gravel, where the car had been placed on a siding for delivery of the gravel to the State Road Commission and was derailed and overturned in an attempt on the part of a Commission employee to move it prior to unloading. *Chesapeake & O. Ry.* v. *State Road Comm'n* (No. D-150). 140

Claimant was awarded the sum of $8.24 for damages sustained when employees of the State Road Commission in the course of their work dropped hot weld lead on his boat. *Connon* v. *State Road Comm'n* (No. D-207). 105

The mere failure to provide road markers is not such negligence as would create a moral obligation on the part of the State to pay damages assumed to have arisen through such failure and as the proximate cause thereof. *Cooper* v. *Department of Highways* (No. D-166). 178

A claim for damages, based upon the alleged failure of respondent Department of Highways to have proper signs indicating a new highway route, was disallowed, where the road had been in good repair and claimant had been contributorily negligent in failing to have her automobile under proper control. *Cooper* v. *Department of Highways* (No. D-166). 178

A claim for damages for wrongful death, based upon an allegation of negligence on the part of the staff and employees of the Weston State Hospital in placing the intestate in the same room with another mental patient who apparently strangled the intestate to death, was disallowed, where although the evidence showed that the other patient had been admitted approximately eleven hours before the homicide and had been diagnosed "schizophrenic reaction-paranoid type" (a diagnosis described as "not any different than anyone with a similar classification"), there was no testimony or other evidence to show that the hospital authorities knew or should have known that such patient had any violent homicidal tendency. *Creamer* v. *Department of Mental Health* (No. D-40). 13

A claim for damages resulting from the sudden stopping of claimants' automobile when a tree fell across the road and struck the bumper or front part of the vehicle was disallowed, where respondent Department of Highways had used reasonable care and diligence under all the circumstances in the maintenance of the highway, and where claimants failed to show that it was clearly apparent that the road was hazardous or that respondent should have made a greater and more detailed inspection to eliminate the condition as an impending

hazard to travelers on that road. *Criss* v. *Department of Highways* (No. D-137). 175

A claim for damages, sustained when claimant fell from a bicycle after its front wheel hit a large hole on a blacktop road, was disallowed, where claimant was contributorily negligent in failing to see and avoid the hole. *Dolin* v. *Department of Highways* (No. D-308). 252

A claim for damages for an injury sustained by claimant in slipping on a diving board while he was a guest at Cacapon State Park was disallowed, where the testimony showed that there were at least two lifeguards on duty at the time of the accident, that no complaint or report was made to either of them or to anyone else at the park, that the diving boards were regularly inspected at least once every ten days, and that there were no complaints of a slick board at any time during the year. *Dubisse* v. *Department of Natural Resources* (No. D-129). 21

Claims for damages, sustained when claimant A's automobile collided with claimant B's automobile after the latter vehicle had been stopped by a Department of Highways flagman, were disallowed, where the negligence, if any, of respondent was not the proximate cause of the collision, since the negligence of claimant A in failing to keep his vehicle under proper control became the intervening, independent proximate cause of the damages sustained by both claimants. *Ellison* v. *Department of Highways* (No. D-320). 264

A claim for damages allegedly caused by a rock from a cut on the side of a mountain came down and struck claimant's automobile was disallowed, where claimant failed to show negligence on the part of respondent Department of Highways. *Elswick* v. *Department of Highways* (No. C-32). 229

Claimant was awarded the sum of $89.25 for damages sustained by reason of workmen of the Department of Highways cutting down a tree adjacent to claimant's property and allowing a tree to strike a high voltage electric power line, resulting in a surge of approximately 7200 volts of electricity in claimant's household wiring. *Estate of L. M. Gates* v. *Department of Highways* (No. D-453). 243

A claim for damages, sustained when claimant's automobile was scraped and dented while proceeding past a road construction site, was disallowed, where there was no proof of any specific act of negligence on the part of the State Road Commission or its employees. *Gilliam* v. *State Road Comm'n* (No. D-152). 115

A claim for damages, allegedly caused by reason of inadequate and negligent medical care and services rendered to claimant while he was a patient at Pinecrest Sanitarium, was disallowed, where the evidence was insufficient to show that the State had failed to exercise reasonable care in the treatment of its patient. *Green* v. *Department of Pub. Institutions* (No. D-197). 101

Claimant, an employee of the State Road Commission, was awarded the sum of $159.59 for damages sustained when a parking lot attendant (also employed by the Commission) negligently operated claimant's automobile while attempting to park it in the Commission motor pool parking lot. *Grubbs* v. *State Road Comm'n* (No. D-238). 50

A claim for damages resulting from a collision between claimant's automobile and a State Road Commission snow removal truck was disallowed, where the evidence showed that the driver of claimant's car was contributorily negligent in attempting to pass the truck on a snow-covered highway in a blizzard at a speed of 20 to 25 miles per hour, while the truck was proceeding at a rate of ten miles an hour. *Halstead* v. *State Road Comm'n* (No. D-140). 24

A claim for damages, sustained when a rock fell on claimant's automobile, was disallowed, where there was insufficient evidence to establish negligence on the part of the State. *Hanson* v. *State Road Comm'n* (No. D-186). 100

Claimant was awarded the sum of $201 for clothing and personal property lost by his ward while she was a patient in the Huntington State Hospital, such loss having occurred as a result of negligence on the part of hospital employees. *Hicks* v. *Department of Mental Health* (No. D-144). 98

Claimant was awarded the sum of $128.24 for damages sustained when a piece of hot welding slag fell onto his automobile from the overhead structure of a bridge where employees of the West Virginia Department of Highways were making repairs. *Humphrey* v. *Department of Highways* (No. D-277). 142

A claim for damages, sustained when claimant's automobile struck a culvert in the roadway, was disallowed, where, although there was conflicting evidence as to whether "slow" signs had been placed so as to warn motorists of the existing hazard, there was also evidence to sustain a finding that claimant's driver had failed to exercise due and reasonable care for his own safety. *Jones Esso Serv. Station* v. *State Road Comm'n* (No. D-198). 117

Claimant was awarded the sum of $437.24 for damages sustained when its truck collided with a wooden highway barricade which had not been properly secured in its position at the entrance to a tunnel. *King's Jewelry, Inc.* v. *State Road Comm'n* (No. D-216). 92

Claimant was awarded the sum of $226.33 for damages sustained when a large plate glass window on its premises was shattered by a rock thrown from a lawn mower operated by an employee of the State Road Commission. *Kroger Co.* v. *State Road Comm'n* (No. D-245). 94

Claimants were awarded the sum of $50 for damages sustained when a member of a State Road Commission construction crew negligently dropped (or caused to fall) a bottle onto claimants' automobile while the vehicle was crossing a bridge. *Lewis* v. *State Road Comm'n* (No. D-256). 132

The failure of the State to provide guard rails does not constitute negligence. *Lowe* v. *Department of Highways* (No. C-19). 210

The failure of the State to construct a barrier at the bottom of a hillside to prevent falling rocks from rolling upon the highway does not constitute negligence unless there is a clear showing that such a dangerous condition is permitted to exist as reasonably would be expected to cause injury or damage to users of the highway. *Lowe* v. *Department of Highways* (No. C-19). 210

A claim for damages, sustained when paint was dropped on claimant's automobile while it was being driven across a bridge, was disallowed, where, even though negligence on the part of State Road Commission employees could be assumed from the facts, it was found that claimant, who sought $195.70 for the costs of repair, had failed to mitigate damages by taking steps promptly to remove the paint when the injury occurred. *Travelers Ins. Co.* v. *State Road Comm'n* (No. D-274). 129

Claimant was awarded the sum of $46.77 for the cost of replacing his automobile windshield, which was broken by a rock thrown by a grass mower operated by respondent's employee. *McClintic* v. *Department of Natural Resources* (No. D-353). 218

Claimant was awarded the sum of $11 for damages sustained when members of a State Road Commission construction crew, while installing a traffic counter, caused a nail to damage a tire on claimant's automobile while it was passing over the counter. *Melvin* v. *State Road Comm'n* (No. D-257). 133

Claimants, operators of a small gas utility, were awarded the sum of $936.25 for the loss of gas caused by the negligent puncturing of their pipeline by employees of respondent Department of Highways. *Miller* v. *Department of Highways* (No. D-286). 191

Negligence, to be actionable, must be such as might have been reasonably expected to produce an injury. *Miller* v. *West Virginia Div. of Correction* (No. D-149). 62

Negligence, no matter of what it consists, cannot create a cause of action unless it is the proximate cause of the injury complained of. *Miller* v. *West Virginia Div. of Correction* (No. D-149). 62

A claim by the administratrix of a deceased infant, seeking damages from the Division of Correction on account of the murder of such infant by a parolee, was disallowed, where, not withstanding claimant's allegations of negligence on the part of state correction and parole officers in having allowed the parolee to remain on parole before the murder was committed, there was no evidence that the action or inaction of such officers was the cause, much less the proximate cause, of the murder. *Miller* v. *West Virginia Div. of Correction* (No. D-149). 62

Claimant was awarded the sum of $189.67 for damages resulting from the negligent conduct of Department of Highways employees in causing a tree to fall into claimant's power lines. *Monongahela Power Co.* v. *Department of Highways* (No. D-252). 143

The doctrine of res ipsa loquitur applies when a person, who is without fault, is injured by an instrumentality at the time within the exclusive control of another person, and the injury is such as in the ordinary course of events does not occur if the person who has such control uses due care. *Mullins* v. *Board of Governors of West Virginia Univ.* (No. D-107). 33

The doctrine of res ipsa loquitur will not be invoked when the existence of negligence is wholly a matter of conjecture. *Mullins* v. *Board of Governors of West Virginia Univ.* (No. D-107). 33

A claim for damages to claimant's ambulance, sustained when an electrically operated overhead door at the West Virginia University Medical Center crashed down onto the vehicle, was disallowed, and the doctrine of res ipsa loquitur was found inapplicable, where there was no evidence of negligence on the part of respondent, and, at the time of the accident, it could not be said that respondent had exclusive control of the instrumentality, since none of its agents was in the area and the door was, in fact, being operated by claimant's son. *Mullins* v. *Board of Governors of West Virginia Univ.* (No. D-107). 33

Negligence of a state agency or any of its employees must be fully shown to justify an award by the Court of Claims; and it must be further shown that the claimant did not know the existence of a danger, or that claimant, as a reasonable person under the conditions then existing, the claimant could not have foreseen or discovered the danger. *Parsons* v. *State Road Comm'n* (No. D-112). 35

A claim for damages sustained when claimant's automobile veered across a wet highway surface and struck two other vehicles was disallowed, where claimant's mere recital of a road defect was found insufficient to sustain a recovery in her favor. *Parsons* v. *State Road Comm'n* (No. D-112). 35

While the owner or operator of a swimming pool is under a duty to provide general supervision of the activities of the pool, he is not an insurer of the safety of his patrons, and a patron must exercise ordinary care for his own safety. *Pettinger* v. *West Virginia State Bd. of Educ.* (No. C-6). 134

A claim for damages, occasioned by claimant's fall on the deck of a swimming pool located at West Virginia State College, was disallowed, where claimant, a nineteen year old college student, was found to have been contributorily negligent in running on a wet and slippery surface in violation of posted rules. *Pettinger* v. *West Virginia State Bd. of Educ.* (No. C-6). 134

Claimant was awarded the sum of $81.24 for damages sustained by reason of the sidewalk in front of his house was plowed up by a machine operated by a State Road Commission employee, and where although the sidewalk was part of a public street and not owned by claimant, it may have been such claimant could have been compelled by the city to rebuild or repair it. *Price* v. *State Road Comm'n* (No. D-243). 139

Claimant was awarded the sum of $139.88 for damages sustained when her automobile struck an obstruction on a bridge, where the evidence supported a finding that respondent's negligence in failing to remove the hazard or give notice of its existence was the proximate cause of the damage. *Randall* v. *Department of Highways* (No. D-151). 147

Claimant and his subrogee insurer were awarded the sum of $275.67 for damages sustained as a result of an accident involving claimant's vehicle and a jeep assigned to the Fairmont headquarters of the Adjutant General. *Rolfe* v. *Adjutant General* (No. D-237). 75

Claimant was awarded the sum of $409.87 for damages sustained when his parked automobile was struck by a State Road Commission truck, where respondent admitted that the truck's brakes were defective, and it was undisputed that the cause of the collision was the failure of the driver to keep the vehicle under control. *Shinn* v. *Department of Highways* (No. D-254). 174

A claim for damages caused to claimant's property by the flow and accumulation of surface water was disallowed, where any change in the flow of surface water by reason of respondent Department of Highways having constructed a parking lot was not a direct and proximate cause of such damages, and there was no wrongful conduct on the part of respondent which would be judicially recognized as negligence in a similar case between private persons. *Southern Hardware Co.* v. *Department of Highways* (No. D-206). 172

Failure to maintain and keep a vehicle in repair constitutes negligence. *State Farm Mut. Auto. Ins. Co.* v. *Department of Highways* (No. D-285). 169

Subrogee insurer was awarded the sum of $168.83 for damages sustained by its insured, where the evidence showed that the outside section of the rim of the left rear wheel of a Department of Highways truck broke off and struck the side of the insured's automobile. *State Farm Mut. Auto. Ins. Co.* v. *Department of Highways* (No. D-285). 169

Claimant subrogee insurer was awarded the sum of $105.46 for damages sustained by its insured's automobile as a result of blasting operations conducted by respondent. *State Farm Mut. Auto Ins. Co.* v. *Department of Highways* (No. D-327). 219

Claimant subrogee insurer was awarded the sum of $97.56 for damages sustained when a loose head flew off of a hammer being used by respondent's employee and struck the windshield of a parked automobile owned by claimant's insured. *State Farm Mut. Auto. Ins. Co.* v. *West Virginia Bd. of Regents* (No. D-414). 244

Claimant was awarded the sum of $40.17 for damages sustained when tar was dropped and splattered onto his boat from a bridge while the respondent's employees were applying tar to the road surface of the bridge. *Talbert* v. *Department of Highways* (No. D-348). 241

Claims brought by a truck owner and his subrogee insurer, seeking compensation for damages sustained when the truck struck a large rock in the road, were disallowed, where although it could be assumed that the rock had fallen from a Department of Highways truck which had been hauling rocks in the vicinity, the proximate cause of the accident was the contributory negligence of claimant's employee in driving at an unsafe speed and in failing to see and avoid the rock. *Vandergrift* v. *Department of Highways* (No. D-354A). 248

While there was evidence to support a finding of contributory negligence on the part of a decedent driver whose vehicle collided with a boulder on the roadway, the Court of Claims, in awarding damages to decedent's administrator, took note of the fact that decedent had been confronted with a sudden emergency of considerable magnitude and not

of her own making, and the Court took into consideration the stress of the occasion and her natural apprehension and confusion, concluding that any fault in her judgment must be excused. *Varner* v. *State Road Comm'n* (No. D-185). 119

A claim for damages occasioned by the alleged negligence of respondent in leaving a hole in the paving of a state highway, thereby allegedly causing claimant to trip and fall, was disallowed, where the evidence did not prove that the street was sufficiently out of repair to justify a conclusion that there was actionable negligence on the part of respondent. *Whittington* v. *Department of Highways* (No. D-311). 231

Claimant was awarded the sum of $249.26 for damages sustained as a result of negligence on the part of State Road Commission employees in the course of their work in having allowed sparks and molten metal to fall upon his boat. *Young* v. *State Road Comm'n* (No. D-208). 106

OFFICE EQUIPMENT AND SUPPLIES

Claimant was awarded the sum of $90.05 for rental and maintenance of postage meter equipment furnished the office of the Governor during the years 1966, 1967 and 1968. *Pitney-Bowes, Inc.* v. *Office of the Governor* (No. D-255)..... 144

Claimant was awarded the sum of $249.97 for an overshipment of automobile license application forms delivered to the Department of Motor Vehicles. *West Virginia Business Forms, Inc.* v. *Department of Motor Vehicles* (No. D-382). 208

OPERATION HEAD START

Claimant was awarded the sum of $1,128.89 for customs duties paid by him as customs agent in handling a shipment of certain physiological testing equipment ordered from Switzerland by the coordinator of Operation Head Start, an agent of the State. *Twigger* v. *State* (No. D-246). 84

PARKS

A claim for damages for an injury sustained by claimant in slipping on a diving board while he was a guest at Cacapon State Park was disallowed, where the testimony showed that there were at least two lifeguards on duty at the time of the accident, that no complaint or report was made to either of them or to anyone else at the park, that the diving boards were regularly inspected at least once every ten days, and that there were no complaints of a slick board at any time during the year. *Dubisse* v. *Department of Natural Resources* (No. D-129). 21

PAROLE AND PROBATION

A claim by the administratrix of a deceased infant, seeking damages from the Division of Correction on account of the murder of such infant by a parolee, was disallowed, where, not withstanding claimant's allegations of negligence on the part of state correction and parole officers in having allowed

the parolee to remain on parole before the murder was committed, there was no evidence that the action or inaction of such officers was the cause, much less the proximate cause, of the murder. *Miller* v. *West Virginia Div. of Correction* (No. D-149). 62

PARTIES

Claimant's insurer was permitted to present its claim for a portion of the damages set out in claimant's petition, where it appeared that claimant had, by a subrogation agreement, assigned a portion of the claim to the insurer. *Jones Esso Serv. Station* v. *State Road Comm'n* (No. D-198). 117

A subrogee under an insurance policy has the same right of recovery as the insured and is entitled to the same relief. *State Farm Mut. Auto. Ins. Co.* v. *Department of Highways* (No. D-285). 169

Permitting a dam project subcontractor to be joined in a claim proceeding did not prejudice the respondent State Road Commission, where the prime contractor was a proper party claimant, and where the subcontractor, though not a recognized subcontractor by the State Road Commissioner, had a substantial beneficial interest in the claim by virtue of his contract of employment with the prime contractor and was the person who performed the work that benefitted the State, and to whom the State was "morally" obligated. *Wetherall* v. *State Road Comm'n* (No. D-92). 1

PHYSICIANS AND SURGEONS

Claimants were awarded the sum of $116.50 for professional services rendered to a client of the respondent Vocational Rehabilitation Division. *Heilman* v. *Vocational Rehabilitation Div.* (No. D-260). 88

Claimants were awarded a sum of $134.50 for certain medical services, where their claim had been presented under the statutory provision authorizing a shortened procedure for certain claims under one thousand dollars in amount. *Squire* v. *West Virginia Vocational Rehabilitation Div.* (No. D-148). 44

PLEADING

A gas company's claim for damages, sustained when a gas line was broken as a result of the operation of equipment employed by the State Road Commission, was disallowed with leave to the parties to file a supplemental stipulation or present further evidence, where the brevity and sketchy nature of the stipulation of facts made it difficult for the court to evaluate the merit of the claim. *Equitable Gas Co.* v. *State Road Comm'n* (No. D-173). 131

Claimant's motion for a rehearing was denied, where no purpose could be served by reargument of matters already considered and passed upon by the court. *Highway Eng'rs, Inc.* v. *State Road Comm'n* (No. D-154). 68

A claim for damages sustained when claimant's automobile veered across a wet highway surface and struck two other

vehicles was disallowed, where claimant's mere recital of a road defect was found insufficient to sustain a recovery in her favor. *Parsons* v. *State Road Comm'n* (No. D-112)..... 35

POISONS

It is not common knowledge that wild cherry leaves are toxic to cattle. *Bradley* v. *Department of Highways* (No. D-296). 163

In the case of claims brought by farmers for the loss of and injury to cattle poisoned by wild cherry tree cuttings left by respondent's employees, the applicable standard of care was that of a reasonably prudent man, and not that of a reasonably prudent farmer. *Bradley* v. *Department of Highways* (No. D-296). 163

Claims for the loss of and injury to cattle, poisoned by wild cherry tree cuttings left by respondent's employees, were disallowed, where the acts of such employees in leaving the cut vegetation on the right of way of a road did not constitute negligence, and even if it were assumed to constitute negligence an ordinarily prudent person could not have anticipated that the omission would expose cattle in an adjoining field to danger. *Bradley* v. *Department of Highways* (No. D-296). 163

PRINTING

Claimant was awarded the sum of $922.50 for printing 4500 copies of a campus newspaper published by Shepherd College (which is under the control, supervision and management of the State Board of Education), where it was admitted that a valid contract had been entered into by the college president and claimant for such printing, and no reason had been assigned for the failure of the State to make payment of the invoices submitted. *Shepherdstown Register, Inc.* v. *State Bd. of Educ.* (No. D-102)..... 30

Claimant was awarded the sum of $4907.70 for printing liquor price lists for respondent Alcohol Beverage Control Commission, where, although there had been conversations between the parties as to a possible price reduction, the evidence did not show a sufficient meeting of the minds to justify a conclusion that the parties had entered into a subsequent binding oral agreement which would have eliminated any liability on the part of the respondent. *Smith* v. *West Virginia Alcohol Beverage Control Comm'n* (No. D-218)..... 127

PUBLIC OFFICERS

An officer of a State spending unit must necessarily plan the operations of his department in such a manner as not to spend funds unless they are actually available in his appropriation. *Airkem Sales & Serv.* v. *Department of Mental Health* (No. D-333)..... 180

The spending policies of the State are limited by law and anyone dealing with a state agency must know its powers and limitations. *Airkem Sales & Serv.* v. *Department of Mental Health* (No. D-333)..... 180

The State is not bound by contracts which are beyond the scope of the powers of its agents. *Huntington Steel & Supply Co.* v. *West Virginia State Tax Comm'r* (No. D-159)..... 123

There are many caveats in dealing with a governmental agency, and the conduct of its officers cannot result in the application of the doctrine of estoppel. *Huntington Steel & Supply Co.* v. *West Virginia State Tax Comm'r* (No. D-159)..... 123

While it is true that the constitutional immunity of the State has been removed by the act establishing the Court of Claims, a sovereign State has other defenses and immunities peculiar to itself, which it may assert and which cannot be destroyed by the wrongful conduct of its agents. *Huntington Steel & Supply Co.* v. *West Virginia State Tax Comm'r* (No. D-159)..... 123

A State or one of its political subdivisions is not bound by the legally unauthorized acts of its officers, and all persons must take note of the legal limitations upon their power and authority. *Massey* v. *Dept. of Welfare* (No. D-142)..... 59

The State cannot in tax matters be bound by unauthorized acts of its employees contrary to the statutes. *Peters Fuel Corp.* v. *State Tax Comm'r* (No. D-226)..... 158

RAILROADS

Proof of the delivery of possession of a bailed railroad car as a bailment to the bailee constitutes a prima facie case on the part of the bailor railroad, whereupon the obligation to prove that damage to the car was not the fault of the bailee shifts to the bailee. *Chesapeake & O. Ry.* v. *State Road Comm'n* (No. D-150)..... 140

Claimant was awarded the sum of $1297.20 for damages resulting from the derailment of a car containing a load of gravel, where the car had been placed on a siding for delivery of the gravel to the State Road Commission and was derailed and overturned in an attempt on the part of a Commission employee to move it prior to unloading. *Chesapeake & O. Ry.* v. *State Road Comm'n* (No. D-150)..... 140

An engineering firm's claim for additional compensation for services rendered in connection with the development of the Cass Scenic Railroad was disallowed, where the evidence was not sufficient to contradict the contention that claimant had done work over and above that specified in or contemplated by the contract. *Vogt-Ivers & Associates* v. *Department of Natural Resources* (No. D-192)..... 214

RELEASE

A claim for loss of rent was disallowed, where claimants, whose property was subject to condemnation for highway purposes, had signed provisions releasing respondent from all claims for damages or compensation other than the purchase price. *Evans* v. *Department of Highways* (No. D-310)..... 227

RES JUDICATA

Where respondent's contentions regarding the legality of a sidewalk assessment could have been presented below to a town council and the council's decision could have been subsequently appealed, but such contentions were not so presented, a town council's decisions of questions of fact were binding and not subject to review by the Court of Claims. *Charleston Concrete Floor Co.* v. *Department of Highways* (No. D-322). 221

ROCKSLIDES

Claimant was awarded the sum of $10,000 for damages resulting from a collision of an automobile, in which she was a passenger, with a large boulder in the road, where there was negligence on the part of the Department of Highways and no negligence attributable to the claimant. *Ayers* v. *Department of Highways* (No. D-288). 217

Claimants were awarded the sum of $567.88 for damages sustained when a partially exposed gas line on their property was broken, where there was a reasonable inference from the circumstantial evidence presented that the damage occurred as a proximate result of the operations of State Road Commission employees in clearing up debris from a slide that had occurred on a nearby roadway. *Davidson* v. *State Road Comm'n* (No. D-204). 76

A claim for damages allegedly caused by a rock from a cut on the side of a mountain came down and struck claimant's automobile was disallowed, where claimant failed to show negligence on the part of respondent Department of Highways. *Elswick* v. *Department of Highways* (No. C-32). 229

A claim for damages, sustained when a rock fell on claimant's automobile, was disallowed, where there was insufficient evidence to establish negligence on the part of the State. *Hanson* v. *State Road Comm'n* (No. D-186). 100

The Department of Highways cannot guarantee the traveling public that rocks or trees may not fall upon our highways and thereby cause injury and damage to persons and property. *Lowe* v. *Department of Highways* (No. C-19). 210

The failure of the State to construct a barrier at the bottom of a hillside to prevent falling rocks from rolling upon the highway does not constitute negligence unless there is a clear showing that such a dangerous condition is permitted to exist as reasonably would be expected to cause injury or damage to users of the highway. *Lowe* v. *Department of Highways* (No. C-19). 210

The State Road Commission cannot be held responsible for every rock or boulder that falls on the state highways. *Varner* v. *State Road Comm'n* (No. D-185). 119

"Falling Rocks" signs are practically indigenous to West Virginia roads, and to eliminate every hazard contemplated by such signs would require expenditures so enormous as to be financially unsound and prohibitive. However, when the State Road Commission knows or should know that an unusually dangerous condition exists, there is a duty to inspect

and to correct the condition within the limits of funds appropriated by the Legislature for maintenance purposes. *Varner* v. *State Road Comm'n* (No. D-185)..... 119

While there was evidence to support a finding of contributory negligence on the part of a decedent driver whose vehicle collided with a boulder on the roadway, the Court of Claims, in awarding damages to decedent's administrator, took note of the fact that decedent had been confronted with a sudden emergency of considerable magnitude and not of her own making, and the Court took into consideration the stress of the occasion and her natural apprehension and confusion, concluding that any fault in her judgment must be excused. *Varner* v. *State Road Comm'n* (No. D-185)..... 119

Claimant was awarded the sum of $8,201.30 for damages sustained when an automobile operated by claimant's decedent wife collided with a boulder on the roadway, where there was sufficient evidence to show that respondent State Road Commission had recognized or should have recognized a potential hazard but never made any more than a cursory inspection of the area. *Varner* v. *State Road Comm'n* (No. D-185)..... 119

SANITATION

Claimant was awarded the sum of $1200 for work performed (without written authorization) in correcting conditions caused by an overflow from a septic sewer system located at a building occupied by employees of the State Road Commission, where the work was of an emergency nature and did not afford sufficient time to follow the usual procedures of preparing a written order and written contracts after the submission of bids. *Allstate Plumbing Co.* v. *State Road Comm'n* (No. D-209)..... 78

SHEPHERD COLLEGE

Claimant was awarded the sum of $922.50 for printing 4500 copies of a campus newspaper published by Shepherd College (which is under the control, supervision and management of the State Board of Education), where it was admitted that a valid contract had been entered into by the college president and claimant for such printing, and no reason had been assigned for the failure of the State to make payment of the invoices submitted. *Shepherdstown Register, Inc.* v. *State Bd. of Educ.* (No. D-102)..... 30

STATE

The State Building Commission was created for the construction of public buildings for specified purposes with powers to contract and acquire by purchase or otherwise real property necessary for its corporate purposes and to exercise the power of eminent domain to accomplish such purposes. *C & D Equip. Co.* v. *State Bldg. Comm'n* (No. D-324)..... 237

The State is not an insurer, and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of its highways under all the circumstances. *Cassel* v. *Department of Highways* (No. D-108)..... 254

The very nature of the obligation of the State, in respect to the construction and maintenance of its highways, precludes the idea that its failure to exercise discretion in favor of a particular location over another, or whether it should provide guard rails, center lines or danger signals at that point, is an act of negligence. *Cassel* v. *Department of Highways* (No. D-108). 254

The maintenance of highways is a governmental function, and funds available for road repairs are necessarily limited. *Cassel* v. *Department of Highways* (No. D-108). 254

West Virginia University is not simply property or assets within or of the City of Morgantown but is property and assets of the State as a whole. *City of Morgantown* v. *Board of Governors of West Virginia Univ.* (No. D-46). 41

Every user of our highways travels thereon at his own risk and the State does not insure him a safe journey. *Cooper* v. *Department of Highways* (No. D-166). 178

The mere failure to provide road markers is not such negligence as would create a moral obligation on the part of the State to pay damages assumed to have arisen through such failure and as the proximate cause thereof. *Cooper* v. *Department of Highways* (No. D-166). 178

The State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. *Criss* v. *Department of Highways* (No. D-137). 175

For the State to guarantee the safety of travelers upon its highways against the possibility of any tree falling from the many hills and cliffs adjoining the highways in this mountainous state, when it has had no notice nor could have reasonably foreseen the probability of such an occurrence, would place liability on the State beyond all reason and expense. *Criss* v. *Department of Highways* (No. D-137). 175

A claim for legal services performed in examining titles and preparing abstracts for the Department of Natural Resources was disallowed, where the contract of employment was in direct violation of § 5-3-1, W. Va. Code, which prohibits employment of private counsel for a state agency without the approval of the attorney general. *Freeman* v. *Department of Natural Resources* (No. D-298). 165

The State is not an insurer of the safety of those traveling on the public roads. *Hanson* v. *State Road Comm'n* (No. D-186). 100

Anyone who is injured or who sustains damages on a public road must prove that the State has been negligent in its maintenance of the road in order to render the State liable. *Hanson* v. *State Road Comm'n* (No. D-186). 100

A state is not subject to the laws of estoppel or waiver when acting in a governmental capacity. *Huntington Steel & Supply Co.* v. *West Virginia State Tax Comm'r* (No. D-159). 123

While it is true that the constitutional immunity of the State has been removed by the act establishing the Court of Claims, a sovereign State has other defenses and immunities peculiar to itself, which it may assert and which cannot be destroyed by the wrongful conduct of its agents. *Huntington Steel & Supply Co.* v. *West Virginia State Tax Comm'r* (No. D-159). 123

The State of West Virginia is not estopped to plead the statute of limitations because of the mistake, negligence or misconduct of its agents. *Huntington Steel & Supply Co.* v. *West Virginia State Tax Comm'r* (No. D-159). 123

The State is not bound by contracts which are beyond the scope of the powers of it agents. *Huntington Steel & Supply Co.* v. *West Virginia State Tax Comm'r* (No. D-159). 123

There are many caveats in dealing with a governmental agency, and the conduct of its officers cannot result in the application of the doctrine of estoppel. *Huntington Steel & Supply Co.* v. *West Virginia State Tax Comm'r* (No. D-159). 123

The State is not the insurer of the safety of the roads and highways of the State. *Jones Esso Serv. Station* v. *State Road Comm'n* (No. D-198). 117

The State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. *Lowe* v. *Department of Highways* (No. C-19). 210

The maintenance of highways is a governmental function and funds available for road improvements are necessarily limited. *Lowe* v. *Department of Highways* (No. C-19). 210

The failure of the State to provide guard rails does not constitute negligence. *Lowe* v. *Department of Highways* (No. C-19). 210

The failure of the State to construct a barrier at the bottom of a hillside to prevent falling rocks from rolling upon the highway does not constitute negligence unless there is a clear showing that such a dangerous condition is permitted to exist as reasonably would be expected to cause injury or damage to users of the highway. *Lowe* v. *Department of Highways* (No. C-19). 210

Equitable estoppel cannot be applied against the State. *Massey* v. *Dept. of Welfare* (No. D-142). 59

A State or one of its political subdivisions is not bound by the legally unauthorized acts of its officers, and all persons must take note of the legal limitations upon their power and authority. *Massey* v. *Dept. of Welfare* (No. D-142). 59

There is no express or implied right on the part of any department of the State through its agents or attorneys to waive the period of limitations set forth in § 14-2-21, W. Va. Code. *Monongahela Power Co.* v. *Adjutant General* (No. D-225). 49

The user of a highway travels at his own risk, and the State does not and cannot assure him a safe journey. *Parsons* v. *State Road Comm'n* (No. D-112). 35

The State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. *Parsons* v. *State Road Comm'n* (No. D-112)..... 35

The maintenance of highways is a governmental function, and funds available for road improvements are necessarily limited. *Parsons* v. *State Road Comm'n* (No. D-112)..... 35

The State cannot in tax matters be bound by unauthorized acts of its employees contrary to the statutes. *Peters Fuel Corp.* v. *State Tax Comm'r* (No. D-226)..... 158

Section 5A-3-15, W. Va. Code, requires contracts involving purchases by the State to be approved as to form by the Attorney General. It was not intended for the Attorney General to pass upon the substance of the agreement, but only that the agreement was legally expressed. The requirement is a salutary one and the Court of Claims will not disregard it in any case which does not have special reason for not enforcing it. *Retreading Research Associates, Inc.* v. *Department of Fin. & Administration* (No. D-356)..... 245

Claimant Virginia corporation was awarded the sum of $5,400 for services rendered to the Department of Finance and Administration in testing automobile tires, notwithstanding lack of approval of its contract by the Attorney General, where claimant had in good faith performed the agreement upon the representations of high officers of the State, and, being an out-of-state citizen or corporation, should have been allowed greater consideration in its dealings with the State where everything appeared valid. *Retreading Research Associates, Inc.* v. *Department of Fin. & Administration* (No. D-356)..... 245

The maintenance of highways is a governmental function. *Samples* v. *State Road Comm'n* (No. D-187)..... 80

The user of a highway travels at his own risk, and the State does not and cannot assure him a safe journey. *Samples* v. *State Road Comm'n* (No. D-187)..... 80

The State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. *Samples* v. *State Road Comm'n* (No. D-187)..... 80

When the State carries public liability insurance to protect its citizens and others against the negligence or misconduct of its agents and employees in the operation of State owned vehicles, the State in effect provides a means of compensation without resort to the legislative grace which gave rise to the Court of Claims. It is also an effectual waiver of the defense of constitutional immunity, otherwise the insurance coverage would be meaningless and unprotective of the rights of those who may be injured by the irresponsible acts of the State's agents and employees. *State Farm Mut. Auto. Ins. Co.* v. *State Road Comm'n* (No. D-251)..... 151

Claimant insurer's subrogated claim, arising out of a collision between the insured's truck and a State Road Commission vehicle, was disallowed, where claimant had neglected to file

a civil action against the driver of the State owned vehicle, although there was evidence showing that claimant had made efforts by correspondence to collect its claim from the State's public liability insurer, who managed to delay and evade payment of the full claim until the tolling of the statute of limitations. *State Farm Mut. Auto. Ins. Co.* v. *State Road Comm'n* (No. D-251) 151

The State is not the insurer of its highways. *Varner* v. *State Road Comm'n* (No. D-185). 119

STREETS AND HIGHWAYS

In the case of a contractor's claim for damages resulting from unreasonable delays caused by respondent State Road Commission in connection with a highway and bridge construction contract, the contractor's bid estimate was rejected as a basis for measuring the reasonable cost of doing the work in the absence of delay, and the "actual cost" of doing extra work under adverse conditions entailed by the delays was deemed to be a better method of measuring damages. *C. J. Langenfelder & Son* v. *Dept. of Highways* (No. D-120). 193

Claimant was awarded the sum of $191,701.42 for damages resulting from unreasonable delays caused by respondent State Road Commission in connection with a highway and bridge construction contract. *C. J. Langenfelder & Son* v. *Dept. of Highways* (No. D-120). 193

Claimant was awarded the sum of $581.24 for materials used in the construction of the State Road Commission district materials lab in Pocahontas County. *Caldwell* v. *State Road Comm'n* (No. D-196). 216

The State is not an insurer, and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of its highways under all the circumstances. *Cassel* v. *Department of Highways* (No. D-108). 254

The maintenance of highways is a governmental function, and funds available for road repairs are necessarily limited. *Cassell* v. *Department of Highways* (No. D-108). 254

The very nature of the obligation of the State, in respect to the construction and maintenance of its highways, precludes the idea that its failure to exercise discretion in favor of a particular location over another, or whether it should provide guard rails, center lines or danger signals at that point, is an act of negligence. *Cassel* v. *Department of Highways* (No. D-108). 254

Drop-offs, frayed edges and ruts along the borders of our highways are a way of life in West Virginia. *Cassel* v. *Department of Highways* (No. D-108) 254

An automobile passenger's claim for damages resulting from a highway accident was disallowed, where, even assuming arguendo that respondent had failed to exercise ordinary and reasonable care in the repair and maintenance of the highway, a rut found on the road surface could only have been a remote and incidental cause of claimant's injuries, while the physical facts and circumstances persuasively indicated that the driver's careless and improper driving was the proximate cause of the accident. *Cassel* v. *Department of Highways* (No. D-108) 254

Where respondent's contentions regarding the legality of a sidewalk assessment could have been presented below to a town council and the council's decision could have been subsequently appealed, but such contentions were not so presented, a town council's decisions of questions of fact were binding and not subject to review by the Court of Claims. *Charleston Concrete Floor Co.* v. *Department of Highways* (No. D-322). 221

Every user of our highways travels thereon at his own risk and the State does not insure him a safe journey. *Cooper* v. *Department of Highways* (No. D-166). 178

The mere failure to provide road markers is not such negligence as would create a moral obligation on the part of the State to pay damages assumed to have arisen through such failure and as the proximate cause thereof. *Cooper* v. *Department of Highways* (No. D-166). 178

A claim for damages, based upon the alleged failure of respondent Department of Highways to have proper signs indicating a new highway route, was disallowed, where the road had been in good repair and claimant had been contributorily negligent in failing to have her automobile under proper control. *Cooper* v. *Department of Highways* (No. D-166). 178

The State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. *Criss* v. *Department of Highways* (No. D-137). 175

The Department of Highways is not required to be infallible in its inspection of its highways and rights of way, nor is it an insurer of the safety to travelers on its roads. *Criss* v. *Department of Highways* (No. D-137). 175

For the State to guarantee the safety of travelers upon its highways against the possibility of any tree falling from the many hills and cliffs adjoining the highways in this mountainous state, when it has had no notice nor could have reasonably foreseen the probability of such an occurrence, would place liability on the State beyond all reason and expense. *Criss* v. *Department of Highways* (No. D-137). 175

A claim for damages resulting from the sudden stopping of claimants' automobile when a tree fell across the road and struck the bumper or front part of the vehicle was disallowed, where respondent Department of Highways has used reasonable care and diligence under all the circumstances in the maintenance of the highway, and where claimants failed to show that it was clearly apparent that the road was hazardous or that respondent should have made a greater and more detailed inspection to eliminate the condition as an impending hazard to travelers on that road. *Criss* v. *Department of Highways* (No. D-137). 175

A claim for damages, sustained when claimant fell from a bicycle after its front wheel hit a large hole on a blacktop road, was disallowed, where claimant was contributorily negligent in failing to see and avoid the hole. *Dolin* v. *Department of Highways* (No. D-308). 252

Claims for damages, sustained when claimant A's automobile collided with claimant B's automobile after the latter vehicle had been stopped by a Department of Highways flagman, were disallowed, where the negligence, if any, of respondent was not the proximate cause of the collision, since the negligence of claimant A in failing to keep his vehicle under proper control became the intervening, independent proximate cause of the damages sustained by both claimants. *Ellison* v. *Department of Highways* (No. D-320).. 264

Claimant was awarded the sum of $76 to cover the cost of replacing a sugar maple tree and a forsythia bush destroyed by members of a crew of neighborhood Youth Corps workers, employed under the supervision and control of the Department of Highways, where it appeared that the conduct of such workers in clearing brush along a roadside had constituted a trespass on claimant's property. *Fedorka* v. *Department of Highways* (No. D-289). 171

Claimant engineering company was awarded $21,720, a sum which had been withheld by the State Road Commission as liquidated damages for claimant's failure to complete work on a highway construction project within a specified time, where the evidence showed that certain delays (which were not attributable to claimant) furnished a reasonable basis for claimant's inability to complete the contract within the period required, and where it appeared that, in all equity, claimant should not have been assessed under the liquidated damage provision of the contract. *Frederick Eng'r Co.* v. *State Road Comm'n* (No. D-130). 26

A claim for damages, sustained when claimant's automobile was scraped and dented while proceeding past a road construction site, was disallowed, where there was no proof of any specific act of negligence on the part of the State Road Commission or its employees. *Gilliam* v. *State Road Comm'n* (No. D-152). 115

The State is not an insurer of the safety of those traveling on the public roads. *Hanson* v. *State Road Comm'n* (No. D-186). 100

Anyone who is injured or who sustains damages on a public road must prove that the State has been negligent in its maintenance of the road in order to render the State liable. *Hanson* v. *State Road Comm'n* (No. D-186). 100

Claimants were awarded the sum of $498 for damages sustained when a tree fell on their house, where the evidence disclosed that the tree had been part of a clump of trees located on the State's right of way on an interstate highway and that the undermining of the roots of the trees during highway construction work had caused the trees to die and become a hazard to adjoining property. *Hendricks* v. *State Road Comm'n* (No. D-111). 85

A claim for losses sustained in connection with a highway engineering contract could not be considered as a claim for damages, where there was no showing that respondent had breached any provisions of the contract. *Highway Eng'rs, Inc.* v. *State Road Comm'n* (No. D-154). 68

The State is not the insurer of the safety of the roads and highways of the State. *Jones Esso Serv. Station* v. *State Road Comm'n* (No. D-198). 117

A claim for damages, sustained when claimant's automobile struck a culvert in the roadway, was disallowed, where, although there was conflicting evidence as to whether "slow" signs had been placed so as to warn motorists of the existing hazard, there was also evidence to sustain a finding that claimant's driver had failed to exercise due and reasonable care for his own safety. *Jones Esso Serv. Station* v. *State Road Comm'n* (No. D-198) 117

Claimant was awarded the sum of $437.24 for damages sustained when its truck collided with a wooden highway barricade which had not been properly secured in its position at the entrance to a tunnel. *King's Jewelry, Inc.* v. *State Road Comm'n* (No. D-216) 92

Claimant was awarded the sum of $226.33 for damages sustained when a large plate glass window on its premises was shattered by a rock thrown from a lawn mower operated by an employee of the State Road Commission. *Kroger Co.* v. *State Road Comm'n* (No. D-245) 94

The maintenance of highways is a governmental function and funds available for road improvements are necessarily limited. *Lowe* v. *Department of Highways* (No. C-19) 210

The State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. *Lowe* v. *Department of Highways* (No. C-19). 210

The user of a highway travels at his own risk. *Lowe* v. *Department of Highways* (No. C-19) 210

The Department of Highways cannot guarantee the traveling public that rocks or trees may not fall upon our highways and thereby cause injury and damage to persons and property. *Lowe* v. *Department of Highways* (No. C-19) 210

The failure of the State to provide guard rails does not constitute negligence. *Lowe* v. *Department of Highways* (No. C-19). 210

The failure of the State to construct a barrier at the bottom of a hillside to prevent falling rocks from rolling upon the highway does not constitute negligence unless there is a clear showing that such a dangerous condition is permitted to exist as reasonably would be expected to cause injury or damage to users of the highway. *Lowe* v. *Department of Highways* (No. C-19) 210

Claimant was awarded the sum of $27,095.75 for damages sustained by reason of delay and shutdowns pursuant to orders issued by respondent Department of Highways in connection with a street improvement contract. *M & M Constr. Co.* v. *Department of Highways* (No. D-299) 145

Claimant was awarded the sum of $11 for damages sustained when members of a State Road Commission construction crew, while installing a traffic counter, caused a nail to damage a tire on claimant's automobile while it was passing over the counter. *Melvin* v. *State Road Comm'n* (No. D-257). 133

Claimant was awarded the sum of $53,966.95 for damages caused by unreasonable delays and shutdowns by respondent

State Road Commission during the performance of a highway construction contract. *Mountain State Constr. Co.* v. *State Road Comm'n* (No. D-99) 89

Claimant was awarded the sum of $16,976.28 for materials delivered to respondent State Road Commission. *Mountaineer Highway Abrasives Co.* v. *State Road Comm'n* (No. D-28) 91

Claimant was awarded the sum of $1071.27 for damages caused to his dwelling as a result of a landslide, where the negligence of respondent Department of Highways in failing to keep a drain open permitted the overflow of surface water and was the proximate cause of the slide. *Olive* v. *Department of Highways* (No. D-290) 148

The maintenance of highways is a governmental function, and funds available for road improvements are necessarily limited. *Parsons* v. *State Road Comm'n* (No. D-112) 35

The user of a highway travels at his own risk, and the State does not and cannot assure him a safe journey. *Parsons* v. *State Road Comm'n* (No. D-112) 35

The State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. *Parsons* v. *State Road Comm'n* (No. D-112) 35

A claim for damages sustained when claimant's automobile veered across a wet highway surface and struck two other vehicles was disallowed, where claimant's mere recital of a road defect was found insufficient to sustain a recovery in her favor. *Parsons* v. *State Road Comm'n* (No. D-112) 35

Claimant was awarded the sum of $81.24 for damages sustained when the sidewalk in front of his house was plowed up by a machine operated by a State Road Commission employee, and where although the sidewalk was part of a public street and not owned by claimant, it may have been such that claimant could have been compelled by the city to rebuild or repair it. *Price* v. *State Road Comm'n* (No. D-243) 139

Claimant was awarded a total sum of $33,979.32 for removal of certain material and for extra work performed in connection with a highway construction contract. *Ralph Myers Contracting Corp.* v. *State Road Comm'n* (No. B-382) 56

Claimant was awarded the sum of $315.94 for lumber and other building materials ordered by and delivered to the State Road Commission. *S. J. Neathawk Lumber, Inc.* v. *State Road Comm'n* (No. D-180) 99

The maintenance of highways is a governmental function. *Samples* v. *State Road Comm'n* (No. D-187) 80

The State is not a guarantor of the safety of its travelers on its roads and bridges. The State is not an insurer and its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. *Samples* v. *State Road Comm'n* (No. D-187) 80

The user of a highway travels at his own risk, and the State does not and cannot assure him a safe journey. *Samples* v. *State Road Comm'n* (No. D-187) 80

Claimants were awarded separate sums for damages sustained when a tree fell from the top of an embankment onto their automobile, where there was no doubt that excavation of the embankment by employees of the State Road Commission had weakened the upper levels of a hillside, causing the tree to fall, and that the unsafe condition resulting from the excavation had been carelessly permitted to exist over a holiday period without anyone to inspect or supervise the area. *Samples* v. *State Road Comm'n* (No. D-187). 80

Claimant, an employee of respondent Department of Highways, was awarded the sum of $423.49 for damages sustained when an endloader he was operating collided with his parked automobile, where it appeared that the exhaust system of the endloader had not been functioning properly, and claimant's condition after the collision had been diagnosed as carbon monoxide intoxication. *Swiger* v. *Department of Highways* (No. D-303). 192

Claims brought by a truck owner and his subrogee insurer, seeking compensation for damages sustained when the truck struck a large rock in the road, were disallowed, where, although it could be assumed that the rock had fallen from a Department of Highways truck which had been hauling rocks in the vicinity, the proximate cause of the accident was the contributory negligence of claimant's employee in driving at an unsafe speed and in failing to see and avoid the rock. *Vandergrift* v. *Department of Highways* (No. D-354A). 248

The State is not the insurer of its highways. *Varner* v. *State Road Comm'n* (No. D-185). 119

The State Road Commission cannot be held responsible for every rock or boulder that falls on the state highways. *Varner* v. *State Road Comm'n* (No. D-185). 119

"Falling Rocks" signs are practically indigenous to West Virginia roads, and to eliminate every hazard contemplated by such signs would require expenditures so enormous as to be financially unsound and prohibitive. However, when the State Road Commission knows or should know that an unusually dangerous condition exists, there is a duty to inspect and to correct the condition within the limits of funds appropriated by the Legislature for maintenance purposes. *Varner* v. *State Road Comm'n* (No. D-185). 119

Claimant was awarded the sum of $8,201.30 for damages sustained when an automobile operated by claimant's decedent wife collided with a boulder on the roadway, where there was sufficient evidence to show that respondent State Road Commission had recognized or should have recognized a potential hazard but never made any more than a cursory inspection of the area. *Varner* v. *State Road Comm'n* (No. D-185). 119

Borrow material is ordinarily material brought onto a project site for the completion of the project, when material excavated from the project is insufficient to accomplish the purpose. *Wetherall* v. *State Road Comm'n* (No. D-92). 1

A contract providing for highway and dam construction was severable, where such contract encompassed two divisible projects, payment for which was to be received on the basis of unit prices assigned to each project. *Wetherall* v. *State Road Comm'n* (No. D-92). 1

Claimants were awarded the sum of $107.08 for damages caused to their fence as a result of snow removal operations conducted by the Department of Highways. *Whitehair* v. *Department of Highways* (No. D-318)..... 263

A claim for damages occasioned by the alleged negligence of respondent in leaving a hole in the paving of a state highway, thereby allegedly causing claimant to trip and fall, was disallowed, where the evidence did not prove that the street was sufficiently out of repair to justify a conclusion that there was actionable negligence on the part of respondent. *Whittington* v. *Department of Highways* (No. D-311)..... 231

SWIMMING POOLS

A claim for damages for an injury sustained by claimant in slipping on a diving board while he was a guest at Cacapon State Park was disallowed, where the testimony showed that there were at least two lifeguards on duty at the time of the accident, that no complaint or report was made to either of them or to anyone else at the park, that the diving boards were regularly inspected at least once every ten days, and that there were no complaints of a slick board at any time during the year. *Dubisse* v. *Department of Natural Resources* (No. D-129)..... 21

While the owner or operator of a swimming pool is under a duty to provide general supervision of the activities of the pool, he is not an insurer of the safety of his patrons, and a patron must exercise ordinary care for his own safety. *Pettinger* v. *West Virginia State Bd. of Educ.* (No. C-6)..... 134

A claim for damages, occasioned by claimant's fall on the deck of a swimming pool located at West Virginia State College, was disallowed, where claimant, a nineteen year old college student, was found to have been contributorily negligent in running on a wet and slippery surface in violation of posted rules. *Pettinger* v. *West Virginia State Bd. of Educ.* (No. C-6)..... 134

TAXATION

A claim for the refund of business and occupation taxes allegedly overpaid for the years 1960 and 1961 was disallowed, where a circuit court had previously disallowed recovery for the taxes in question by stating they were barred by the statute of limitations, although it had allowed recovery on taxes paid during three subsequent years. *Hughes Constr. Co.* v. *State Tax Comm'r* (No. D-123)..... 38

A claim for a refund of business and occupation taxes erroneously paid for calendar years 1963 and 1964 was disallowed, where claimant had failed to comply with the administrative procedure requiring aggrieved taxpayers seeking such refunds to file a petition therefor within three years from the date of payment. *Huntington Steel & Supply Co.* v. *West Virginia State Tax Comm'r* (No. D-159)..... 123

A claim for a refund of a gasoline excise tax payment was disallowed, where claimant's application for a refund had not been filed with the tax commissioner within ninety days

from the date of purchase or delivery. *Keeley Bros.* v. *State Tax Dep't* (No. D-330)..... 250

The State cannot in tax matters be bound by unauthorized acts of its employees contrary to the statutes. *Peters Fuel Corp.* v. *State Tax Comm'r* (No. D-226)..... 158

It is the inherent duty of the Tax Commissioner to audit, when requested, tax returns and advise taxpayers of any deficiencies or overpayments. *Peters Fuel Corp.* v. *State Tax Comm'r* (No. D-226)..... 158

The determination of claimants' right to the remedy of mandamus to adjudicate their rights under certain provisions of the tax law was not within the jurisdiction of the Court of Claims. *Peters Fuel Corp.* v. *State Tax Comm'r* (No. D-226)..... 158

While the Court of Claims determines cases according to law and the Court's findings are then considered by the legislature as moral obligations, the jurisdiction of the Court is nevertheless limited by the express statutory provision [§ 11-14-20, W. Va. Code] declaring that failure to follow the prescribed procedure in obtaining a gasoline tax refund does not constitute a moral obligation on the State for payment. *Peters Fuel Corp.* v. *State Tax Comm'r* (No. D-226)..... 158

A claim for a gasoline tax refund was disallowed, where claimants not only failed to comply with the refund provisions of the gasoline tax law but might also have had the right under the general tax refund statute to require the tax commissioner to institute a declaratory judgment proceeding to ascertain whether the tax had been lawfully collected. *Peters Fuel Corp.* v. *State Tax Comm'r* (No. D-226)..... 158

A claim for additional compensation in connection with three separate contracts for the preparation of tax maps was disallowed, where the contracts were clear as to the amount of compensation to be paid and the record showed that claimant had been paid in full. *Vogt-Ivers & Associates* v. *State Tax Comm'r* (No. D-193)..... 233

A foreign corporation's claim for a refund of corporation license taxes, paid under protest for fiscal years from 1 July 1964 to 30 June 1969, was disallowed, notwithstanding claimant's contention that its authority to do business in the State had been revoked and that it had done no business in the State between 1964 and 1969, where claimant had failed to use an available remedy by seeking a refund through court proceedings. *William Garlick & Sons, Inc.* v. *State Auditor* (No. D-224)..... 137

TRESPASS

To wilfully push waste material over a hillside onto private property is a trespass and an actionable tort, without proof of negligence. *Davidson* v. *State Road Comm'n* (No. D-204)..... 76

Claimants were awarded the sum of $567.88 for damages sustained when a partially exposed gas line on their property was broken, where there was a reasonable inference from the circumstantial evidence presented that the damage occurred as a proximate result of the operations of State Road Commis-

sion employees in clearing up debris from a slide that had occurred on a nearby roadway. *Davidson* v. *State Road Comm'n* (No. D-204)..... 76

Claimant gas company was awarded the sum of $254.90 for damages caused to its gas line when State Road Commission employees committed a trespass by operating dredging equipment on claimant's property without permission. *Equitable Gas Co.* v. *State Road Comm'n* (No. D-173)..... 131

Claimant was awarded the sum of $76 to cover the cost of replacing a sugar maple tree and a forsythia bush destroyed by members of a crew of neighborhood Youth Corps workers, employed under the supervision and control of the Department of Highways, where it appeared that the conduct of such workers in clearing brush along a roadside had constituted a trespass on claimant's property. *Fedorka* v. *Department of Highways* (No. D-289)..... 171

The statute of limitations does not run where there is a continual and intermittent trespass to real estate. *Whiting* v. *Bd. of Education* (No. D-177)..... 45

VESSELS AND BOATS

Claimant was awarded the sum of $8.24 for damages sustained when employees of the State Road Commission in the course of their work dropped hot weld lead on his boat. *Connon* v. *State Road Comm'n* (No. D-207)..... 105

Claimant was awarded the sum of $40.17 for damages sustained when tar was dropped and splattered onto his boat from a bridge while the respondent's employees were applying tar to the road surface of the bridge. *Talbert* v. *Department of Highways* (No. D-348)..... 241

Claimant was awarded the sum of $249.26 for damages sustained as a result of negligence on the part of State Road Commission employees in the course of their work in having allowed sparks and molten metal to fall upon his boat. *Young* v. *State Road Comm'n* (No. D-208)..... 106

VOCATIONAL REHABILITATION

Claimant rehabilitation center was awarded the sum of $411 for services rendered to the division of vocational rehabilitation over a period of ten days. *Harmarville Rehabilitation Center* v. *Division of Vocational Rehabilitation* (No. D-175)..... 53

Claimants were awarded the sum of $116.50 for professional services rendered to a client of the respondent Vocational Rehabilitation Division. *Heilman* v. *Vocational Rehabilitation Div.* (No. D-260)..... 88

WAGES

Claimant, a retired employee of the State Road Commission, was awarded the sum of $760.29 for prior services rendered to the State beyond his regular working hours pursuant to a requirement of the Commission, notwithstanding the fact that certain payroll procedural problems created by the

Compulsory Retirement Act had earlier prevented the State Auditor from issuing a warrant for payment. *Bice* v. *State Road Comm'n* (No. D-214)..... 51

A claim for wages lost while claimant was attending a mine explosion hearing, to which he had been summoned as a witness, was not allowable without legal justification for a finding of liability on the part of the State. *Securro* v. *Department of Mines* (No. D-202)..... 103

The claims of four persons, for expenses incurred when they complied with a request of the Department of Mines to testify at a hearing concerning the Farmington mine disaster, were disallowed, where there was no legal basis for recovery. *Thomas* v. *Department of Mines* (No. D-164)..... 54

WAIVER

A state is not subject to the laws of estoppel or waiver when acting in a governmental capacity. *Huntington Steel & Supply Co.* v. *West Virginia State Tax Comm'r* (No. D-159)..... 123

WATERS AND WATERCOURSES

Claimant was awarded the sum of $1071.27 for damages caused to his dwelling as a result of a landslide, where the negligence of respondent Department of Highways in failing to keep a drain open permitted the overflow of surface water and was the proximate cause of the slide. *Olive* v. *Department of Highways* (No. D-290)..... 148

A claim for damages caused to claimant's property by the flow and accumulation of surface water was disallowed, where any change in the flow of surface water by reason of respondent Department of Highways having constructed a parking lot was not a direct and proximate cause of such damages, and there was no wrongful conduct on the part of respondent which would be judicially recognized as negligence in a similar case between private persons. *Southern Hardware Co.* v. *Department of Highways* (No. D-206)..... 172

The common-law rule that surface water is considered a common enemy, and that each landowner may fight it off as best he can prevails in Virginia and West Virginia, with the modification that an owner of higher ground may not inflict injury on the owner of lower ground beyond what is necessary. *Whiting* v. *Bd. of Education* (No. D-177)..... 45

Land at lower levels is subject to the servitude of receiving waters that flow naturally upon it from adjoining higher land levels, and unless a property owner diverts the natural flow of surface water in such a manner as to damage the property of another, there is no liability on the owner of the higher property. *Whiting* v. *Bd. of Education* (No. D-177)..... 45

Unless a landowner collects surface water into an artificial channel, and precipitates it with greatly increased or unnatural quantities upon his neighbor's land, causing damage, the law affords no redress. If no more water is collected on the property than would naturally have flowed upon it in a diffused manner, the dominant tenement cannot be held liable

for damage to land subject to the servitude of flowing waters. *Whiting* v. *Bd. of Education* (No. D-177)..... 45

WELFARE

Claimant was awarded the sum of $226 for expenses incurred in caring for a sixteen year old boy, where the evidence showed that an employee of the Logan County welfare department had told claimant that a circuit court had placed the boy in the custody of claimant and his wife and that claimant and his wife would be paid for their services. *Hall* v. *Department of Welfare* (No. D-106)..... 10

The Department of Welfare has no legal authority to underwrite loans or make guarantees for their repayment on behalf of welfare recipients. All parties concerned are charged with notice that benefits which are payable directly to a recipient may be terminated at any time that the recipient becomes ineligible for assistance. *Massey* v. *Dept. of Welfare* (No. D-142)..... 59

A welfare recipient's claim for funds sufficient to cover the amount of a home improvement loan was disallowed, where the evidence showed that, while credit had been extended to her on the basis of an assurance by the Department of Welfare to give her a special grant, claimant had, by her own conduct in refusing to give up possession of an automobile, voluntarily made herself ineligible for public assistance. *Massey* v. *Dept. of Welfare* (No. D-142)..... 59

WEST VIRGINIA STATE COLLEGE

Claimant was awarded the sum of $57,450 for services rendered in finding a purchaser for revenue bonds for the West Virginia State College student-union dining hall. *Hibbard, O'Connor & Weeks* v. *West Virginia Bd. of Educ.* (No. D-235)..... 109

A claim for damages, occasioned by claimant's fall on the deck of a swimming pool located at West Virginia State College, was disallowed, where claimant, a nineteen year old college student, was found to have been contributorily negligent in running on a wet and slippery surface in violation of posted rules. *Pettinger* v. *West Virginia State Bd. of Educ.* (No. C-6)..... 134

WEST VIRGINIA UNIVERSITY

West Virginia University is not simply property or assets within or of the City of Morgantown but is property and assets of the State as a whole. *City of Morgantown* v. *Board of Governors of West Virginia Univ.* (No. D-46)..... 41

It is not equitable for the City of Morgantown to be charged entirely with the cost of fire protection, which would be the result if the University were held to be exempt or relieved of its share of the cost of such service. By requiring the State as a whole to bear the fire service fee, equity is better served regardless of any strict interpretation or application of the law. *City of Morgantown* v. *Board of Governors of West Virginia Univ.* (No. D-46)..... 41

An ordinance enacted by the city council of Morgantown and providing for a fire service charge could not be effectively repealed or rescinded by a simple resolution which attempted to give West Virginia University credit for certain charges and thereby release the University's liability to the extent of the credit given. *City of Morgantown* v. *Board of Governors of West Virginia Univ.* (No. D-46) 41

Claimant was awarded the sum of $40,886.22 for fire service fees assessed against buildings and property of West Virginia University. *City of Morgantown* v. *Board of Governors of West Virginia Univ.* (No. D-46) 41

A claim for a refund of nonresident student tuition fees paid by a former New Jersey resident while attending the law school of West Virginia University was disallowed, where, although claimant may have established his domicile in West Virginia, the facts did not satisfactorily negative an apparent attempt to circumvent a rule providing that no nonresident student could establish domicile which would entitle him to reductions or exemptions of tuition by his attendance as a full-time student at any institution of learning in the State. *Esposito* v. *West Virginia Bd. of Regents* (No. D-329) 223

A claim for damages to claimant's ambulance, sustained when an electrically operated overhead door at the West Virginia University Medical Center crashed down onto the vehicle, was disallowed, and the doctrine of res ipsa loquitur was found inapplicable, where there was no evidence of negligence on the part of respondent, and, at the time of the accident, it could not be said that respondent had exclusive control of the instrumentality, since none of its agents was in the area and the door was, in fact, being operated by claimant's son. *Mullins* v. *Board of Governors of West Virginia Univ.* (No. D-107) 33

Claimant was awarded the sum of $1258 as a refund of nonresident student tuition fees paid by her while attending West Virginia University, where her actions in having moved from Pennsylvania to Morgantown and engaged in full-time employment there constituted an establishment by her of a legal domicile in West Virginia. *Wotkiewicz* v. *West Virginia Bd. of Regents* (No. D-294) 155

WITNESSES

Fees for witnesses in court are in fixed, positive and relatively small amounts per day, regardless of the loss which a witness may actually suffer in being away from his usual vocation. *Securro* v. *Department of Mines* (No. D-202) 103

A claim for wages lost while claimant was attending a mine explosion hearing, to which he had been summoned as a witness, was not allowable without legal justification for a finding of liability on the part of the State. *Securro* v. *Department of Mines* (No. D-202) 103

YOUTH CORPS

Claimant was awarded the sum of $76 to cover the cost of replacing a sugar maple tree and a forsythia bush destroyed

by members of a crew of neighborhood Youth Corps workers, employed under the supervision and control of the Department of Highways, where it appeared that the conduct of such workers in clearing brush along a roadside had constituted a trespass on claimant's property. *Fedorka* v. *Department of Highways* (No. D-289)..... 171